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THOU SHALT NOT PUT A STUMBLING BLOCK BEFORE THE BLIND": THE AMERICANS WITH DISABILITIES ACT AND PUBLIC TRANSIT FOR THE DISABLED

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“Thou Shalt Not Put a Stumbling Block Before the Blind”: The Americans with Disabilities Act and Public Transit for the Disabled

by
MICHAEL LEWYN*

The Bible states: “Thou shalt not . . . put a stumbling block before the blind.”¹ Yet American governments at all levels have done exactly that, by making jobs and other opportunities unavailable to the 24 million² disabled Americans dependent on public transit, including 1.1 million blind Americans,³ and some of the 3.2 million

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1. *Leviticus* 19:14.

2. According to the Federal Transit Administration, 24 million disabled Americans are dependent on public transit. See William W. Millar, *Testimony of the American Public Transit Association Before the Labor, Health & Human Servs., Educ. & Related Agencies Subcomm. of the House Appropriations Comm.*, Feb. 5, 1998, available at 1998 WL 8991781. Disabled Americans are by no means the only transit-dependent Americans. Most of the very poor cannot afford cars, 62 million Americans are too young to drive, and 5.4 million elderly Americans do not drive. See Anne Simmons, *A Ride to Work: TEA-21 and PRWDRA*, 18 LAW & INEQ. 243, 260 (2000) (94% of welfare recipients do not own automobiles); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1999 at 22 (119th ed. 1999) (62 million Americans under age 16) (hereinafter 1999 ABSTRACT); Charles T. Dubin, *American Association of Retired Persons Public Policy Statements on the Americans with Disabilities Act*, FED. LAW., Mar./Apr. 1997, at 28, 29 (5.4 million seniors do not drive). Cf. Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 180 (1994) (noting likely explosion of elderly population over next few decades).

3. See Nancy Lawler Dickhute, *Jury Duty for the Blind in a Time of Reasonable Accommodations: The ADA's Interface with a Litigant's Right to a Fair Trial*, 32 CREIGHTON L. REV. 849, 881 n.4 (1999) (1.1 million Americans legally blind).

Americans⁴ who are severely visually impaired.⁵ Specifically, the state and federal governments have, by building highways to suburbs with minimal or nonexistent public transportation and through a variety of other policies encouraging migration to suburbs, redistributed jobs and other civic opportunities to those suburbs.⁶ By redistributing development to areas without effective public transit, government has systematically excluded the blind and other transit-dependent Americans from employment, shopping, and other opportunities.⁷

The federal government has sought to better the lot of the disabled through the Americans with Disabilities Act (ADA),⁸ which, inter alia, ordered local governments to make bus and train systems more accessible to the disabled.⁹ But in fact, the ADA has not met its goal of "welcom[ing] individuals with disabilities fully into the mainstream of American society."¹⁰

The ADA imposed costly requirements upon local public transit systems but did not give local governments funds with which to satisfy this mandate.¹¹ By reducing the funds available to transit systems, the

4. *Id.*

5. This figure is based on Millar's estimate that 24 million disabled Americans are transit-dependent, *supra* note 2, and Dickhute's statement that just over 4 million Americans are blind or severely visually impaired, *see* Dickhute, *supra* note 3, at 881 n.4.

6. *See infra* notes 86-102, 123-63 and accompanying text (describing government policies that favored suburban growth).

7. *See infra* notes 24-54 and accompanying text (describing second-class status of transit-dependent Americans).

8. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12001-12213).

9. *See, e.g.*, 42 U.S.C. § 12132 (no disabled person may be excluded from public services); 42 U.S.C. § 12142 (public transit systems may not purchase or lease a new bus unless it is readily accessible to individuals with disabilities, including individuals who use wheelchairs); 42 U.S.C. § 12143 (such agencies must provide on-demand "paratransit" service to disabled persons unable to use traditional public transit). *See generally* Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 931-32 (briefly summarizing ADA provisions most relevant to public transit).

10. H.R. REP. NO. 101-485, pt. I (1990), reprinted in 1990 U.S.C.C.A.N. 267, 268.

11. *See* Millar, *supra* note 2; Brigid Hynes-Cherin, *Testimony of the American Public Transit Association, Before the Subcomm. on Surface Transp. of the House Comm. on Transp. & Infrastructure*, Sept. 26, 1996, available at 1996 WL 10831544 (pointing out that the ADA "is being implemented at the same time that federal financial support is declining" and explaining that "ADA costs to transit operators will exceed \$1.4 billion annually... more than twice the \$400 million annual amount of transit operating assistance since FY 1996"); Brian Doherty, *Disabilities Act: Source of Unreasonable Accommodations*, SAN DIEGO UNION-TRIB., July 16, 1995, at G1 ("The American Public Transit Association claims \$1.1 billion per year just for the paratransit provisions of the ADA."). While the federal government was raising transit systems' costs, it was also reducing grants to transit systems; as a result, ADA costs canceled out over 1/3 of federal

ADA has sometimes forced cutbacks in transit service for everyone¹² (including, ironically, the disabled to the extent that disabled people were able to use public transit before the ADA's enactment).¹³

The ADA does not forbid such cutbacks, because it "does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service."¹⁴ In other words, the ADA does not require that disabled transit users be made equal to the auto-using majority. Instead, that statute requires merely that disabled transit users be made equal to other transit-dependent Americans. It follows that if a state or local government is not interested in aiding the transit-dependent disabled, it can freeze the disabled out of the transportation system by slashing service for all users of public transit¹⁵—even if it increases spending on highways and other driver-related services.¹⁶ Thus, government can and does make the transit-dependent disabled second-class citizens by making all nondrivers second-class citizens.

grants to state and local transit systems during the late 1990s. See AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 52 (1998) (federal support for transit operating expenses decreased by over 40% between 1990 and 1996, and local support decreased by over 20%); Hynes-Cherin, *supra* (ADA cost transit operators \$1.4 billion per year); 1999 ABSTRACT, *supra* note 2, at 314 (federal government granted state and local governments \$3.9 billion for mass transit in fiscal year 1999, down from \$4.3 billion in fiscal year 1995).

12. See James Rana, *Trying to Keep Transit's Head Above Water*, PROVIDENCE J.-BULL., Nov. 24, 1996, at 11 (Providence, Rhode Island bus agency reduced service because "like every other transit agency in the nation, [it] had been hurt by reductions in federal operating assistance At the same time . . . Uncle Sam is demanding cleaner-running buses and more service to handicapped riders."); Jerry Crimmins, *Pace Expands Van Pool, Service to Disabled*, CHI. TRIB., Nov. 18, 1996, at 1 (Chicago suburban bus company reduced overall bus service in order to increase spending on special vans for disabled.); Associated Press, *Transit Cuts "Too Much"—So Say Local Officials Who'll Protest in Washington*, WIS. ST. J., Feb. 24, 1996, at 3B (Municipal transit officials urged federal government to modify ADA because "federal mass transit cuts, costly regulations, and unfunded mandates are forcing cities across Wisconsin to reduce service.").

13. For example, 35% of all buses were accessible to the disabled before the ADA was enacted, and most visually impaired riders were able to use public transit before the passage of the ADA. See H.R. REP. NO. 101-485, pt. I, at 24; Jennifer Orsi, *Bus System Catches Protests From Blind Passengers*, ST. PETERSBURG TIMES, Nov. 18, 1989, at 1 ("No one depends on public transportation more than the blind" according to president of Tampa Bay chapter of National Federation for the Blind.).

14. *Midgett v. Tri-County Transp. Dist.*, 74 F. Supp. 2d 1008, 1012 (D. Or. 1999).

15. See *supra* note 12 (describing nationwide mid-1990s cutbacks in transit service, caused by ADA costs and reductions in federal aid to transit providers); Hassan v. Slater, 41 F. Supp. 2d 343, 351 (E.D.N.Y.), *aff'd*, 199 F.3d 1322 (2d Cir. 1999) (allowing closure of commuter train station because, *inter alia*, "[i]t does not appear that the ADA requires the MTA defendants to keep all of its stations open").

16. See 1999 ABSTRACT, *supra* note 2, at 314 (highway spending increased between fiscal years 1995 and 1999, while federal aid to transit decreased).

Part I of this Article describes how federal, state and local transportation policies (and to a lesser extent, a variety of other public policies) disable the transit-dependent disabled. Part II describes the evolution of black-letter law governing public transit for the disabled: the first pre-ADA attempts to make public transit accessible to the disabled, and then the ADA itself and case law thereunder. Part III explains why the ADA is inadequate and sometimes even counterproductive, and Part IV suggests a variety of reforms to end government's exclusionary transportation policies.

I. How Big Brother Disables the Disabled

It has been suggested that employment and social opportunities for the disabled have improved in recent decades¹⁷—and in some respects this may be so.¹⁸ But for most¹⁹ of the 24 million transit-dependent disabled Americans,²⁰ life has become harder as America has become more auto-dependent. This Part explains how life has become more difficult for transit-dependent Americans in recent decades, and shows how government created this problem by driving people and jobs away from transit hubs and into auto-dominated suburbs.

A. Transit-Dependent Americans as Second-Class Citizens

Once upon a time, almost every metropolitan American could go anywhere with streetcar fare and his or her feet; in the first decades of the 20th century, developable urban real estate was typically within walking distance of streetcar lines.²¹ Even today, one can comfortably survive without a car in a few American cities.²² But in some smaller

17. See Sharon Rennert, *All Aboard: Accessible Public Transportation for Disabled Persons*, 63 N.Y.U. L. REV. 360, 360 (1988) ("Over the past twenty years, society has begun to confront and remove many of the physical and attitudinal barriers that have segregated disabled people.").

18. *Id.* (To increase the mobility of the disabled, "our communities have begun to adapt their landscapes by adding curb cuts, ramps, wider doorways, and braille signs.").

19. Excepting the 1.4 million persons so severely disabled that they are unable to use a regular bus or rail system. *Id.* at 399.

20. See Millar, *supra* note 2 (24 million figure given).

21. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 189 (1985).

22. See Lowell Cohn, *'Stick Made Chilly First Impression*, PRESS DEMOCRAT, June 7, 1999 ("You really don't need a car in New York City."); JAMES TAYLOR ET AL., *CAR-FREE IN BOSTON: THE GUIDE TO PUBLIC TRANSIT IN GREATER BOSTON AND NEW ENGLAND* (2000).

cities²³ and in even more suburbs, auto ownership is virtually mandatory for a normal life.²⁴ Because two-thirds of all new jobs are now created in suburbs, many workers need a car just to get to work.²⁵ In fact, a survey by the U.S. Commerce Department shows that only 54.4% of American households have any public transit at all available to them, and that only 28.8% claim to have satisfactory public transit.²⁶

Even in metropolitan areas with extensive transit systems, the majority of entry-level jobs are not transit-accessible.²⁷ For example, the Boston region has a central city with a well-developed transit system and a commuter train system that serves many of its suburbs.²⁸ But even in Greater Boston, just 32% of entry-level employers are within one-quarter mile of transit, 43% are within one-half mile, and 58% are within one mile.²⁹ Only 14% of entry-level jobs can be reached by transit within an hour from Boston's poorer

23. See, e.g., *infra* notes 37-47 (describing virtually nonexistent public transit in Macon, Ga.)

24. See *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) ("For the urban poor, in particular, remoteness from the thriving suburban segment of the industrial economy and a deteriorating public transportation system often make use of an automobile the only practical alternative to welfare."); *People v. Coutard*, 454 N.Y.S. 2d 639, 642 (Dist. Ct. 1982) ("In a suburban county such as ours, the use of an automobile by most of its citizens is often as necessary as placing bread upon their tables."); *Cent. Towers Co. v. Borough of Fort Lee*, 390 A.2d 677, 680 (N.J. Super. Ct. 1978) ("Automobiles are a necessity and not a luxury in the suburbs where mass transit facilities are not as readily available to residents as they are to city dwellers"); JOHN NORQUIST, *THE WEALTH OF CITIES* 172 (1998) ("As in the rest of the advanced industrial world, driving a car in Canadian cities is a travel choice, not a necessity. Only the U.S. government denies this choice to its citizens."); Charles Belfoure, *Neighborhood Profile: Woodlawn*, *BALT. SUN*, Feb. 7, 1999, at 1M ("[T]he suburban sprawl that started after World War II forced Americans to go everywhere by car.").

25. See Anne Gearan, *Clinton to Loosen Car Restriction for Food Stamp Recipients*, *CHARLESTON GAZETTE & DAILY MAIL*, Feb. 24, 2000, at P7A.

26. See Paul M. Weyrich & William S. Lind, *Does Transit Work? A Conservative Reappraisal*, at <http://www.apta.com/info/online/weyrich2new.htm> (last visited July 7, 1999) (citing survey). These statistics may actually overestimate Americans' access to public transit, because some Americans whose public transit is in some sense "satisfactory" may not be able to use it to reach key destinations such as their jobs—for example, "reverse commuters" who live in transit-friendly cities but work in auto-dependent suburbs.

27. See Gearan, *supra* note 25 ("[E]ven in metropolitan areas with extensive transit systems, fewer than half the entry-level jobs are accessible by that means.").

28. See CONSERVATION LAW FOUNDATION, *CITY ROUTES, CITY RIGHTS* 20 (1998) [hereinafter *CITY ROUTES*].

29. *Id.*

neighborhoods.³⁰ Similarly, more than one-third of all entry-level jobs in the Baltimore region cannot be reached at all by bus or train.³¹

The situation is even worse in Sun Belt cities. For example, Atlanta's second largest suburban county (Gwinnett County, which had 522,000 people in 1998) has no public transportation whatsoever,³² and even some neighborhoods within the Atlanta city limits have virtually no bus service.³³ Not surprisingly, less than half of Atlanta-area entry-level jobs are located within a quarter-mile of a public transit route.³⁴ And Atlantans know their public transit system is unsatisfactory: a recent survey revealed that only 22% of metro Atlantans regard their region's public transit system as good or excellent—a percentage that nosedived to as low as 7% in some counties.³⁵

And in smaller cities, a nondriver's life is more desperate still. For example, in Macon, Georgia (a city of 114,000 people),³⁶ 16% of city households³⁷ (and 14% of households in the county that includes Macon)³⁸ lack cars, yet city buses only operate until 6:45 PM in the evening on weekdays, Saturday service is limited, and there is no service on Sundays or holidays.³⁹ Because many entry-level employers require their newest employees to work evening and weekend shifts, this system virtually shuts many of Macon's carless

30. *Id.*

31. See Marcia Myers, *Jobs out of Reach for the Carless*, BALT. SUN, Nov. 16, 1999, at 10.

32. See Stacy Shelton, *Transit Chief Faces Hurdles in Gwinnett*, ATLANTA J. & CONST., Feb. 11, 2000, at C1 (noting that Gwinnett is nation's largest county without public transit).

33. For example, my parents live within the city of Atlanta about 10 miles from downtown Atlanta, but (except for a "maid bus" that comes from downtown once in the morning and returns downtown in the afternoon), they have no bus service. See Michael E. Lewyn, *Are Spread out Cities Really Safer? (Or, Is Atlanta Safer Than New York?)*, 41 CLEVE. ST. L. REV. 279, 295 n.63 (1993); MARTA Web Site, at http://www.itsmarta.com/riding/busroutes/bus_sch.htm (last visited Feb. 17, 2000) (listing buses 701-17, a group of once-a-day "maid buses").

34. See F. KAID BENFIELD ET AL., *ONCE THERE WERE GREENFIELDS* 125 (1999).

35. Jerome Thompson, *Public Transit: Can You Get Around*, ATLANTA J. & CONST., July 10, 2000, at G3.

36. See 1999 ABSTRACT, *supra* note 2, at 48.

37. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING CHARACTERISTICS FOR CENSUS TRACTS AND BLOCK NUMBERING AREAS: MACON-WARNER ROBINS, GA MSA at 177 (1993). Cf. *Alewine v. City Council*, 699 F.2d 1060, 1069 (11th Cir. 1983) ("[A] small percentage of Macon's population require [sic] public transit . . .").

38. See David G. Oedel, *The Legacy of Jim Crow in Macon, Georgia*, in JUST TRANSPORTATION 97, 102 (Robert D. Bullard & Glenn S. Johnson, eds., 1997).

39. *Id.*

residents out of the job market.⁴⁰ And many of Macon's employers are not transit-accessible at all, because they are located on the area's periphery, far from any bus line.⁴¹ As a result, Macon's employers of unskilled labor often ask would-be employees whether they have a car—and if the answer is no, the applicant won't be hired.⁴²

Macon's transportation system limits a wide variety of other activities as well. The two largest Kroger supermarkets in Macon are not on bus lines, nor is a large discount supermarket, FoodMax, or a new Publix supermarket.⁴³ Conversely, a largely abandoned shopping center where anchor tenant K-Mart closed in 1991 is served by the system—but a new K-Mart is not.⁴⁴ Churches are not served by the system at all, because churches tend to be most active on Sundays and weekday evenings, when the bus system is shut down.⁴⁵ Even on the bus system's limited routes, the frequency of service is so minimal as to discourage use. For example, students who use public transit to attend Macon College must devote the entire day to the ordeal. After rising before 6 AM to catch the first bus from their homes to the downtown transfer station, students must catch a morning bus from downtown to the college at 7:30 AM. Later in the day, they have only one opportunity to return home.⁴⁶ Needless to say, drivers suffer from none of these limitations: government has built a toll-free, 24-hour system to serve them, and by building highways further and further away from downtown Macon, has encouraged employers to relocate to areas not served by bus routes.⁴⁷ So in Macon, as in most of America, the transit-dependent disabled are more isolated than ever.

40. *Id.* at 103.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 100 ("In theory, Macon's extensive road network may be used (or at least indirectly enjoyed) by the entire population. In fact, however, the roads operate as instruments of isolation for many residents without cars, [by] facilitating white flight to the periphery [of the area]."). See also Alex Wayne, *City Tries To Make Jobs Reachable*, GREENSBORO NEWS & REC., July 25, 1999, at B1 (7 of High Point, North Carolina's 20 largest employers located along North Carolina Highway 68, which is not served by public transportation; Chamber of Commerce official describes absence of transit as "a prime reason that women are not able to work" based on survey showing that 75% of area public housing residents viewed transportation as barrier to employment); *infra* notes 84-102 and accompanying text (discussing impact of highways upon suburban development).

Not surprisingly, the disabled have become poorer as suburbia has sprawled beyond the reach of public transportation. For example, in 1988, at the eve of the ADA's passage, men with disabilities earned 36% less than their non-disabled counterparts, as opposed to only 23% less in 1980.⁴⁸ Similarly, in 1988 women with disabilities earned 38% less than their non-disabled counterparts, as opposed to only 30% in 1980.⁴⁹ Since the passage of the ADA, employment levels among the disabled have continued to stagnate.⁵⁰ There is no way of knowing to what extent inadequate transportation (as opposed to other factors)⁵¹ caused this problem—but transportation problems undoubtedly render the disabled less employable.⁵² According to one pre-ADA poll, 28% of unemployed Americans with disabilities blamed lack of transportation for their unemployment.⁵³ For example, Jay Rochlin, then the Executive Director of the President's Committee on Employment of Disabilities, informed Congress in 1988:

48. See H.R. REP. NO. 101-485, pt. II, at 32 (1990).

49. *Id.* A more recent Harris poll survey for the National Organization on Disability found that among people of working age (ages 18-64) only 32% of disabled persons held full- or part-time jobs, compared to 81% of those without disabilities. See *Survey Program on Participation and Attitudes*, available at <http://www.nod.org/hs2000.html#execsum> [hereinafter *Survey Program*]. See also William Neikirk, *Clinton Orders U.S. Agencies to Hire More Disabled People*, CHI. TRIB., July 27, 2000, at 16 (reporting testimony by Department of Justice official that of the 30 million adults with significant disabilities, 75% are unemployed or underemployed).

50. See Murray Weidenbaum, *Why the Disabilities Act Is Missing Its Mark*, CHRISTIAN SCI. MONITOR, Jan. 16, 1997, at 19 ("One survey reported that the portion of men with disabilities who are working dropped from 33 percent in 1991 to 31 percent in 1995. Using a different definition of disability, another study showed no change."); Liz Spayd, *Poll Finds Harsh Life for Disabled*, WASH. POST, July 22, 1994, at A21 (Harris poll revealed that "jobless levels for the disabled . . . show virtually no improvement over those revealed in a Harris poll conducted eight years ago."); Pat Lee, *Fence Post*, CHI. DAILY HERALD, Aug. 29, 1998, at 10 (1998 Harris poll revealed that "29 percent of those with disabilities reported being employed full or part time. This rate is down 5 percentage points from the 1986 Harris poll in spite of the passage of the Americans with Disabilities Act in 1990.").

51. See Weidenbaum, *supra* note 50 (blaming unemployment among the disabled on overly generous government disability payments that discourage labor force participation); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants?*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (suggesting that courts interpreting ADA have narrowed its scope by favoring defendants).

52. See H.R. REP. NO. 101-485, pt. II, at 37 (Numerous witnesses in Congressional hearings pointed out that transportation is a major obstacle to the disabled.).

53. See Seth J. Elin, *Curb Cuts Under Title II of the Americans with Disabilities Act: Are They Bringing Justice or Bankruptcy to Our Municipalities?*, 28 URB. LAW. 293, 297 (1996). The article cited a 1990 article referencing the poll; thus, the poll must have been conducted before that date. *Id.* at 326 n.26.

It makes little sense to protect an individual from discrimination in employment if, for example, they have less than adequate accessible public transportation services. We have conducted surveys in 45 communities over the last seven years, and, consistently, inaccessible transportation has been identified the major barrier, second only to discriminatory attitudes.⁵⁴

If inaccessible transportation keeps the disabled unemployed, it logically follows that the decay of public transit in recent decades has had something to do with the growth of poverty and unemployment among the disabled.

(1) *How Government Has Sabotaged Public Transit*

It could be argued that America's auto dependency is a natural result of affluence⁵⁵ or of "America's romance with the automobile."⁵⁶ But in fact, government has, in a wide variety of ways, eliminated nondrivers' access to jobs and community facilities.

For most of the 20th century, government has funneled billions of dollars into highway construction.⁵⁷ Highway construction immobilizes the disabled by shifting development from areas accessible to the transit-dependent disabled to areas inaccessible except by automobile.⁵⁸ In addition, government at all levels has reduced transit system revenues through unfunded mandates,⁵⁹ has adopted education and housing policies that indirectly shifted development to suburbs,⁶⁰ and has enacted zoning laws that made those suburbs as auto-dependent as possible (thereby reducing transit ridership and transit system revenues).⁶¹ All of these policies have immobilized the transit-dependent disabled, either by shifting development to areas with minimal or nonexistent public transit or by starving transit systems of revenue that they could have used to expand service to such areas.

54. *Id.* (citation omitted).

55. See Kenneth A. Small, *Transportation and Urban Change*, in *THE NEW URBAN REALITY* 197, 205 (Paul E. Peterson ed., 1985) (asserting that increased auto use is a natural result of higher incomes.).

56. Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 *DENV. U. L. REV.* 625, 636 (1997) (using phrase to explain auto traffic in national parks).

57. See *infra* notes 62-83 and accompanying text.

58. See *infra* notes 84-102 and accompanying text.

59. See *infra* notes 115-21 and accompanying text.

60. See *infra* notes 122-28, 138-57 and accompanying text.

61. See *infra* notes 129-38 and accompanying text.

(2) *Highway Policy*

(a) How Government Put Highways in the Driver's Seat

Early in the 20th century, state and federal governments began to build new roads. State and local governments could have levied user fees to force drivers to reimburse local treasuries for the costs of streets, traffic maintenance, and police services—but instead frequently chose to subsidize drivers by relying on general taxation.⁶² Thus, government essentially taxed the general public (including railroads, transit users, and rail users) to support drivers.⁶³ By contrast, streetcar services were typically private and unsubsidized.⁶⁴ To make matters worse, streetcar fares were often controlled by government and, despite World War I-era inflation, were not allowed to rise.⁶⁵ Because government regulated streetcars while subsidizing drivers, one-third of American streetcar companies were bankrupt by 1919.⁶⁶

Between 1919 and 1929, every state adopted a motor fuel tax and earmarked the revenue therefrom to fund highway construction projects.⁶⁷ By 1927, highways were second only to education as recipients of state and local expenditure, and one-third of state assistance to local government was for highway construction.⁶⁸

In 1921, the federal government began to support highway building, by enacting a Federal Road Act⁶⁹ that designated 200,000 miles of road as eligible for federal matching funds, and by creating a Bureau of Public Roads to plan an interstate highway system.⁷⁰ By

62. See JACKSON, *supra* note 21, at 163; Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 425 (1935) (Motor vehicle-related fees “will not pay for one-half of the usual expenditure in Tennessee for highways. The balance is being paid in part by general property taxes.”).

63. Walters, 294 U.S. at 425, 428 (noting that state taxed railroads to support highway construction).

64. See PAUL WEYRICH & WILLIAM S. LIND, CONSERVATIVES AND MASS TRANSIT: IS IT TIME FOR A NEW LOOK? 10 (1996); Alewine v. City Council, 699 F.2d 1060, 1068 (11th Cir. 1983) (until 1960, most transit systems privately owned).

65. WEYRICH & LIND, *supra* note 64, at 10.

66. *Id.*

67. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 380 n.149 (1990).

68. *Id.* By this time, the states were also providing suburbs with sewers and water service. By contrast, the states were less generous to cities because by the 1920s, cities had already built similar facilities for their own citizens. *Id.*

69. 42 Stat. 212 (1921). Cf. State v. Smith, 295 P. 986, 997 (Kan. 1931) (referencing the Road Act, and noting that it required state governments to build highways themselves rather than relying on counties to do so).

70. JACKSON, *supra* note 21, at 167.

that date, government at all levels (federal, state, and local) was pouring \$1.4 billion into highways.⁷¹ By contrast, most transit systems were privately owned, received no government assistance, and paid taxes to support the highway system and other government functions.⁷²

During the 1920s and 1930s, government's highway empire continued to grow. By 1940, government spent \$2.7 billion on highways.⁷³ By contrast, at that time the total operating costs of all intracity bus and rail systems (except commuter rail) were \$661 million, and most of that sum was financed by private spending.⁷⁴

In the postwar years, government intervention on behalf of highways accelerated. In 1950, government funneled \$4.6 billion into highways, and virtually nothing into transit.⁷⁵ And in 1954, President Eisenhower appointed a committee on highways chaired by Lucius Clay, a member of the General Motors board of directors.⁷⁶ Not surprisingly, the committee endorsed a massive highway spending plan. That scheme was enacted into law as the Interstate Highway Act,⁷⁷ which created a 41,000 mile Interstate Highway System.⁷⁸ Under the Act, the federal government paid for 90% of the system's construction and maintenance costs, states paid 10%, and municipalities paid nothing.⁷⁹ By contrast, the federal government did not begin to subsidize public transit until the 1960s.⁸⁰ In fact, between 1950 and 1970 vehicle miles of transit service declined nationally by 37%.⁸¹ Today, federal road spending exceeds transit

71. WEYRICH & LIND, *supra* note 64, at 10.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 106 (1993).

77. See Pub. L. No. 85-767, 72 Stat. 885.

78. See KUNSTLER, *supra* note 76, at 106-07.

79. See *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1367 (D. Md. 1973); NORQUIST, *supra* note 24, at 153.

80. OFFICE OF MANAGEMENT AND BUDGET, *BUDGET OF THE U.S. GOV'T: HISTORICAL TABLES, FISCAL YEAR 1996* (1995) (first federal mass transit spending listed in 1962). See also *Town of Secaucus v. United States*, 889 F. Supp. 779, 783-84 (D.N.J. 1995).

81. See Norman Krumholz & Janice Cogger, *Urban Transportation Equity in Cleveland*, in *METROPOLITAN MIDWEST: POLICY PROBLEMS AND PROSPECTS FOR CHANGE* 211, 211 (Barry Checkoway & Carl V. Patton eds., 1985) [hereinafter *Checkoway*]. Cf. 49 U.S.C. § 5301(b)(4) (legislative finding that "in the early 1970's continuing even minimal mass transportation service in urban areas was threatened because maintaining that transportation service was financially burdensome").

spending by a margin of more than 5-1.⁸² Moreover, state governments are often even more pro-road and anti-transit than the federal government; for example, some states require fuel tax revenues to be spent exclusively on roads.⁸³

(b) How Highway Spending Harms the Transit-Dependent

As noted above, many American suburbs have minimal (or even nonexistent) public transit.⁸⁴ Highways caused jobs and community activities to move to these auto-dependent suburbs, thus depriving the transit-dependent of jobs and other opportunities.

At first, highways merely enabled commuters to live farther away from downtown jobs, thus giving commuters easy access to central business districts from once-distant suburbs.⁸⁵ But where highway-driven residential development came, commercial development inevitably followed, as retail businesses moved to suburbs in order to

82. See Liam A. McCann, *TEA-21: Paving over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 857, 859 (1999) ("[M]ore than eighty percent of the money in TEA-21 [the 1998 transportation funding bill] will go toward highway funding."); Jeff Plungis, *Auto Research Faces Cutbacks*, DETROIT NEWS, March 1, 2001 (Bush administration proposed highway spending of \$32.3 billion and transit spending of \$6.7 billion, increases from \$30.2 billion and \$6.2 billion respectively); 1999 ABSTRACT, *supra* note 2, at 636. A similar gap exists at other levels of government. See 1999 ABSTRACT, *supra* note 2, at 635, 652; Electronic correspondence from Daniel Duff, American Public Transit Association (Feb. 9, 2000) (on file with author) (stating that government highway spending 5.4 times as high as transit spending). And to the extent government has invested in transit, those investments have sometimes redistributed money from bus service to more expensive train service rather than expanding riders' transit options. See Peter Gordon & Harry W. Richardson, *Defending Suburban Sprawl*, PUB. INT., Spring 2000, at 65, 69 (Some cities' "bus systems have been cannibalized to pay for rail."); Eric Mann, *Confronting Transit Racism in Los Angeles*, in JUST TRANSPORTATION 68, 71 (Robert D. Bullard & Glenn S. Johnson eds., 1996) (Los Angeles reduced bus mileage by 16% between 1988 and 1997 while building subway).

83. See *State ex. rel. O'Connell*, 452 P.2d 943, 948 (Wash. 1969) (state not allowed to spend gasoline tax revenue on public transportation, based on provision in state Constitution requiring such revenue to be spent for highway-related purposes); *Michigan Road Builders Ass'n v. Dep't of Mgmt. & Budget*, 495 N.W.2d 843, 847 (Mich. App. 1992) (Under Michigan law, 90% of gas and license tax revenue must be used for roads.).

84. See *supra* notes 29-35 and accompanying text.

85. See Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 159 (1994) ("Highways made land outside cities accessible, which in turn made the land attractive for development."); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 44 (1993) ("In making this transition from urban to suburban life, middle-class whites demanded and got massive federal investments in highway construction that permitted rapid movement to and from central cities by car."). Cf. *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975) (noting possible "urban sprawl" caused by new highway interchange).

serve those suburbs' new residents and other businesses followed their employees to suburbia.⁸⁶ As one federal court has pointed out, "[h]ighways create demand for travel and [suburban] expansion by their very existence."⁸⁷

For example, Washington's Capital Beltway, a 66-mile long highway surrounding the city, was designed to allow East Coast motorists to bypass the city.⁸⁸ But instead, the Beltway became a magnet for office and retail centers that sprouted near Beltway exits, such as Tyson's Corner, a satellite downtown in Fairfax County, Virginia.⁸⁹ And as suburbs grew more populated, they grew more congested, which caused politicians to build even more suburban roads (ostensibly to relieve congestion) thus spurring development in even more suburbs.⁹⁰ A study by the Surface Transportation Policy Project showed that each of the 50 largest metro areas in America added new road capacity in the 1980s and 1990s.⁹¹

86. See Gordon & Richardson, *supra* note 82, at 70 ("[F]irms now follow the labor force to the suburbs where their employees live."); Earl Daniels, *Building Boom: Area's Residential, Commercial Growth Spurt*, FLA. TIMES-UNION, Jan. 13, 2000, at E1 (quoting Jacksonville realtor Barry Goldstein's statement that "[w]e have population growth in the suburban area, and when you have the growth of residential, you have a demand for other services"); WOLFGANG ZUCKERMANN, *END OF THE ROAD: THE WORLD CAR CRISIS AND HOW WE CAN SOLVE IT* 240 (1991) ("[T]he new road system had drawn many of the former city-center shoppers to new homes in the suburbs. Many retail firms consequently abandoned downtowns to develop new stores on the periphery of urban areas where motorists could easily reach them using the freeway system. In many cases, offices followed suit, and some suburban downtowns developed around freeway intersections.").

87. *Sierra Club, v. United States Dep't of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997) (citing *Swann v. Brinegar*, 517 F.2d 766, 777 (7th Cir. 1975)).

88. See Glen Frankel & Stephen C. Fehr, *As the Economy Grows, The Trees Fall*, WASH. POST, Mar. 23, 1997, at A1.

89. *Id.* See also JACKSON, *supra* note 21, at 165 (pointing out that many of Detroit's suburbs have risen along major roads).

90. See, e.g., Alan Sipress, *Widen the Roads, Drivers Will Come*, WASH. POST, Jan. 4, 1999, at B1 (discussing Maryland's widening of I-270 near Washington, which spurred suburban development but failed to reduce congestion); Stephen Fehr, *Montgomery's Line of Defense Against the Suburban Invasion*, WASH. POST, Mar. 25, 1997, at A1 (discussing developers' support for a new highway linking Washington's Maryland suburbs with its Virginia suburbs, ostensibly in order to reduce congestion on Washington's Beltway); Glenn Frankel & Peter Pae, *In Loudoun, Two Worlds Collide*, WASH. POST, Mar. 24, 1997, at A1 (In Loudoun County, a suburb of Washington, the "four-lane Dulles Greenway, a toll road designed to ease the commute for eastern residents, has opened up the west for further growth."). Loudoun County, like most newer suburbs, has minimal bus service. See Jennifer Lenhart, *A Needed Lift*, WASH. POST Nov. 8, 1999, at B1 (describing isolation of elderly nondrivers who moved to Loudoun County to live near adult children).

91. See Surface Transportation Policy Project, *Why Are the Roads so Congested?*, at <http://www.transact.org/constr99/default.htm> (last visited Jan. 22, 2000) [hereinafter *Roads*]. Frequently, the new and widened highways have been located in the newest, most

As a consequence of (among other factors)⁹² government's road-building sprees,⁹³ many older American cities had suffered enormous population losses by the end of the 20th century. At the end of World War II, roughly 70% of metropolitan Americans lived in central cities.⁹⁴ But by 1990, only about 40% of metropolitan Americans, and only 31.3% of all Americans, lived in central cities.⁹⁵ Some central

affluent outer suburbs, thus increasing the inequality in tax bases and services between those suburbs and central cities or less politically favored suburbs. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1099 (1996); Myron Orfield, *Talk Radio Called Him a Commie and Put Him on Hold*, MINN. STAR TRIB., May 23, 1995, at 13A (In Minneapolis/St. Paul, "the southern and western outer-ring suburbs have gotten all of the new freeways and sewer systems—billions of dollars in improvements—and therefore virtually all of the region's new tax base.").

92. See *infra* notes 122-29, 139-64 and accompanying text (describing other government policies causing middle-class flight to suburbia); Jonathan Simon, *From a Tight Place: Crime, Punishment and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 856 (1999) (noting that urban crime another factor causing middle-class flight to suburbs).

93. It has been argued that highways do not cause migration to suburbia because "[s]uburbanization was well underway in 1960, when the federal interstate highway program had been in existence for just four years." Ronald Utt, *Cities and Suburbs*, at <http://www.heritage.org/issues/chap13.htm> (last visited Jan. 20, 2000). See also Peter Gordon & Harry W. Richardson, *Critiquing Sprawl's Critics*, CATO INST. POL'Y ANALYSIS NO. 365, at 6 (Jan. 24, 2000) (Interstate highway program was not a cause of suburban migration because "there was significant suburbanization before 1956."). This argument lacks merit for three reasons. First, the state and federal governments had begun to support highway building long before the interstate highway system was built. See *supra* notes 62-75 and accompanying text. Thus, highway-building may have caused suburban growth before the enactment of interstate highway legislation. Second, other antiurban government policies (such as the Federal Housing Administration's policy of providing mortgage insurance to suburbanites but not to city-dwellers) had also been in effect for decades before 1960. See Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J. L. & POL'Y 513, 546-49 (1996) (describing FHA policies in more detail); *infra* notes 122-28 and accompanying text. Third, American cities' most stunning setbacks occurred *after* the creation of the interstate highway program. Of the 18 American cities which had more than 500,000 people in 1950, every single one gained population between 1930 and 1950. See INFORMATION PLEASE ALMANAC 1955, at 215-18 (Dan Golepaul ed., 1954). By contrast, in the 1950s, 13 of the cities lost population, and 2 lost over 10% of their population. See THE WORLD ALMANAC AND BOOK OF FACTS 1976, at 210 (George E. DeLury ed., 1975) [hereinafter WORLD ALMANAC 1976]. In the 1960s, 15 lost population, and 6 lost over 10%. *Id.* And in the disastrous 1970s, 16 lost population and 14 lost over 10%. See THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 390 (Robert Famighetti ed., 1999) [hereinafter WORLD ALMANAC 2000]. In other words, the redistribution of people from city to suburb snowballed as interstates were built during the 1960s and 1970s.

94. See DAVID RUSK, *CITIES WITHOUT SUBURBS* 5 (2d ed. 1995); BENFIELD ET AL., *supra* note 34, at 120.

95. See Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 73 (1998) (citing 1990 census statistics). Cf. *Dixon v. Hassler*, 412 F. Supp. 1036, 1045 (W.D. Tenn. 1976), *aff'd*, 429 U.S. 934 (1976) (by 1960s, "most cities in the United States lost population . . . except for gains in the suburban surrounding areas by way of annexation").

cities have been devastated by sprawl: for example, St. Louis has lost 60% of its population since 1950, while Buffalo and Cleveland have lost over 45% of their population.⁹⁶ The cities that have gained population have grown either by being hubs for immigration from other countries (like New York and Los Angeles) or by annexing newly developed areas that would be considered suburbs in other cities (like Little Rock, Indianapolis, and Albuquerque).⁹⁷ Jobs, as well as people, have fled to suburbia:⁹⁸ about 95% of the 15 million new office jobs created in the 1980s were in suburbs,⁹⁹ and suburbs captured 120% of net job growth in manufacturing.¹⁰⁰

Indeed, even organizations generally regarded as supportive of new roads and suburban expansion implicitly concede that highways affect the location of development. For example, in 1999 the National Association of Home Builders (which favors increased road spending)¹⁰¹ conducted a survey that asked respondents what amenities would encourage them to move to a new area, and their top choice (endorsed by 55% of respondents) was "highway access."¹⁰² If highway access makes a suburb more desirable, it follows when the government builds a suburban highway, people and jobs move to locations near highway exits.

96. See WORLD ALMANAC 2000, *supra* note 93, at 390.

97. See *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 412 (8th Cir. 1985) (white population of city of Little Rock declined from 1950 to 1980 if annexed territory excluded, but increased by over 30% if annexed territory included); *RUSK*, *supra* note 94, at 4.

98. See *Parents Assoc. v. Ambach*, 451 F. Supp. 1056, 1060 (E.D.N.Y. 1978) ("Businesses have left the City, sometimes to the suburbs to which their middle-income 'white collar' workers have preceded them.").

99. See BENFIELD ET AL., *supra* note 34, at 14.

100. *Id.* This number exceeds 100% because cities were losing manufacturing jobs while suburbs were gaining such jobs. *Id.* See also *NAACP v. Mt. Laurel*, 336 A.2d 713, 742 (N.J. 1975) (noting shift of industrial jobs to suburbs).

101. See *NAHB's Policy on Smart Growth*, at http://www.nahb.com/main_features/smartpolicy.html (last visited Feb. 20, 2000) ("Ensuring that the construction of schools, roads and other infrastructure keeps pace with the anticipated growth in population and economic activity is one of the biggest challenges facing [suburban] communities today.") [hereinafter *NAHB Policy Statement*].

102. See *National Association of Home Builders, Consumer Survey on Growth*, at http://www.nahb.com/main_features/smart_survey/summary.htm Issues (last visited Feb. 8, 2000) [hereinafter *NAHB Growth Survey*]. Similarly, Gordon and Richardson, in an article entitled "Defending Suburban Sprawl" (which seeks to do exactly that) admit in passing that "[g]ood highways and other communications reversed [the migration of jobs to cities] in the late twentieth century." Gordon & Richardson, *supra* note 82, at 70.

(c) Throwing the Disabled (and Everyone Else) Off the Bus

The state and federal governments' highway spending spree would not have harmed the disabled if those governments had built buses and trains to bring the transit-dependent to suburban jobs and civic centers. But instead, government effectively decreased service for nondrivers while increasing service for drivers: that is, government drove private transit companies out of business by funding competition from highways, took over what was left of transit service, and actually reduced transit service while it was doing so.¹⁰³

During the first half of the 20th century, governments at all levels poured billions into highways while buses, trains and streetcars were privately owned and had to make do without government subsidy.¹⁰⁴ In fact, governments actually taxed streetcar companies to support highway spending,¹⁰⁵ and starved streetcar companies of revenue by limiting fares.¹⁰⁶

While the federal government was funding the interstate highway system in the 1950s and 1960s, local governments began to take over failing transit systems.¹⁰⁷ But local governments did not increase transit service so that riders could reach auto-oriented suburbs. Instead, government reduced transit service in two ways: first by building highways to places unserved by public transit¹⁰⁸ (thus causing opportunities to migrate to those areas)¹⁰⁹ and second by reducing service to places that already had public transit. Between 1950 and 1970, vehicle miles of public transit service declined nationally by 37%.¹¹⁰ According to a legislative finding contained in the Urban Mass Transportation Act, "in the early 1970's continuing even minimal mass transportation service in urban areas was threatened."¹¹¹

103. See *supra* notes 62-81 and accompanying text.

104. See *supra* notes 62-80 and accompanying text.

105. See *supra* note 63 and accompanying text.

106. See *supra* note 65 and accompanying text.

107. See *Alewine v. City Council*, 699 F.2d 1060, 1068 (11th Cir. 1983) (until 1960, most transit systems were privately owned).

108. See *supra* notes 24-35 and accompanying text (noting that many American suburbs have minimal transit service).

109. See *supra* notes 85-102 and accompanying text.

110. See *supra* note 81 and accompanying text. Cf. Larry Sandler, *How Buses Fare*, MILWAUKEE J.-SENTINEL, Aug. 21, 1996, at 1 (Milwaukee County's average daily bus service decreased by 29% between 1963 to 1990.).

111. 49 U.S.C. § 5301(b)(4).

The federal government began to support public transit in the early 1960s,¹¹² but today federal road spending exceeds transit spending by about a 5-1 margin.¹¹³ And some suggest that even this sum is too much, because transit systems receive 15-20% of all federal spending even though transit users comprise about 5% of all commuters.¹¹⁴ This argument overlooks the fact that federal transit spending is canceled out by a variety of federal mandates, including (1) the ADA itself, which alone cost transit providers \$1.4 billion per year in the mid-1990s, about 1/3 of federal transit spending,¹¹⁵ (2) labor laws that limit transit operators' ability to reduce labor costs¹¹⁶ (which alone may cost transit providers \$2-3 billion per year,¹¹⁷ about half of all federal transit spending),¹¹⁸ (3) imposition of federally mandated wage rates for federally funded construction,¹¹⁹ (4) limitations upon transit systems' use of parts manufactured in foreign countries,¹²⁰ and (5) limitations on charter and school bus service in competition with the private sector.¹²¹ Every dollar that transit

112. See *supra* note 80 and accompanying text.

113. See McCann, *supra* note 82, at 859; Duff, *supra* note 82, Plungis, *supra* note 82.

114. See Utt, *supra* note 93 (making argument); Larry Sandler, *Views on Transit Funds Diverge*, MILWAUKEE JOURNAL-SENTINEL, Apr. 24, 1995, at B2 (quoting similar views by Wisconsin transit official); 1999 ABSTRACT, *supra* note 2, at 641 (5.3% of all Americans use public transit to get to work).

115. See Hynes-Cherin, *supra* note 11 (ADA cost transit providers \$1.4 billion annually); Doherty, *supra* note 11 (ADA paratransit provisions alone cost transit operators \$1.1 billion annually); 1999 ABSTRACT, *supra* note 2, at 314 (Federal transit spending ranged between \$3.9 billion and \$4.3 billion between fiscal years 1995 and 1999.); *but cf.* Plungis, *supra* note 82 (transit spending increased to just over \$6 billion in early 2000s). As explained below, transit operators have often been forced to reduce service in order to meet ADA-related expenses. See *infra* notes 369, 394-97, 402-05 and accompanying text.

116. See 49 U.S.C. § 5333 (Laborers on transit-related construction projects must be paid "wages not less than those prevailing on similar construction in the locality" and transit employees must be protected against diminution of collective bargaining rights or "worsening of their positions related to employment."); *Greenfield & Montague Transp. Area v. Donovan*, 758 F.2d 22, 23 (1st Cir. 1985) (describing statute); John Walters, *Bus-Jacking the Revolution*, POL'Y REV., Jan./Feb. 1996, at 8 (same).

117. *Id.*

118. See 1999 ABSTRACT, *supra* note 2, at 636 (federal government granted state and local government \$4.56 billion for public transit in 1997).

119. See 49 U.S.C. § 5333(a); *N. Ga. Bldg. & Trades Constr. Council v. Metro Atlanta Rapid Transit Auth.*, 1982 U.S. Dist. LEXIS 9862, at *3-4 (N.D. Ga. Aug. 4, 1982) (describing requirement).

120. See 49 U.S.C. § 5323(j); *Seal & Co. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150 (E.D. Va. 1991) (describing requirement).

121. See 49 U.S.C. §§ 5323(d) & (f); *Chi. Transit Auth. v. Adams*, 607 F.2d 1284, 1293 (7th Cir. 1979) (discussing protection of school bus companies); *Blue Bird Coach Lines v. Linton*, 48 F. Supp. 2d 47, 49 (D.D.C. 1999) (discussing protection of charter bus companies).

systems spend or forego in order to comply with these federal rules and regulations is a dollar that they cannot use to expand or preserve service.

(3) *Other Anti-Transit Policies*

Moreover, highway spending is hardly the only government expenditure that has reduced transit use or moved jobs away from transit users. Over the past several decades, a wide variety of government policies have indirectly encouraged Americans to move to areas unserved by public transit, including:

- *Federal Housing Administration mortgage insurance.* Since 1934, the Federal Housing Administration (FHA) has insured long-term, low down-payment mortgages against default.¹²² By 1986, the federal government backed 2/3 of the single-family mortgages in the United States.¹²³ For many years, FHA guaranteed home loans only in "low-risk" areas.¹²⁴ Specifically, FHA manuals taught that the FHA should favor newer, lower-density areas because "crowded neighborhoods lessen desirability [and] older properties in a neighborhood have a tendency to accelerate the transition to lower class occupancy."¹²⁵ Public transit is less feasible in lower-density areas, because as houses and apartments are spread farther apart, fewer people can conveniently walk to bus and train stops.¹²⁶ So by

122. See *United States v. City of Parma*, 494 F. Supp. 1049, 1057 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980); Michael H. Schill & Susan Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1308 (1995).

123. See GERALD E. FRUG, *CITY MAKING* 132-33 (1999).

124. See JACKSON, *supra* note 21, at 207. In fact, the overwhelming majority of FHA loans went to suburban home buyers. See MASSEY & DENTON, *supra* note 85, at 54 (describing FHA favoritism towards suburbs in St. Louis, Washington, and New York City metropolitan areas); George Steven Swan, *The Political Economy of American Apartheid: Shaw v. Reno*, 11 T.M. COOLEY L. REV. 1, 21 (1994) (FHA did not insure one mortgage in Camden or Paterson, New Jersey, until 1966.). The FHA became less biased against cities in the late 1960s, but by that time the damage had already been done; America's older cities had already skidded into a cycle of decay and decline. See JACKSON, *supra* note 21, at 214-15 (describing more recent FHA policies); WORLD ALMANAC 1976, *supra* note 93, at 210 (older cities had begun to decline in 1950s and 1960s); MASSEY & DENTON, *supra* note 85, at 53 (describing long term damage to cities caused by loss of middle class).

125. See JACKSON, *supra* note 21, at 207.

126. See JAMES J. MACKENZIE ET AL., *THE GOING RATE: WHAT IT REALLY COSTS TO DRIVE* 26 (1992) ("Densities above 7 housing units per acre are needed for cost-effective bus service while densities of over 9 housing units per acre are needed for cost-effective light rail service."); PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE* 15-16 (1999) ("The abandonment of public transportation is primarily a consequence of lower per capita incomes and low urban density. The clustered populations and workplaces of European and Japanese cities offer the critical mass needed to maintain comparatively

bribing homeowners to move to low-density suburbs, the FHA inadvertently reduced transit ridership by causing population to shift to areas where public transit was inconvenient or nonexistent. Such population shifts caused reductions in transit service, both because declining ridership arguably justifies reductions in service¹²⁷ and because jobs eventually followed people to the suburbs¹²⁸ (thus reducing the number of jobs accessible to transit-dependent urbanites).

• *Zoning policies that made suburbs as auto-dominated as possible.* In the 1920s, the federal Department of Commerce drafted the Standard State Zoning Enabling Act (SZEA).¹²⁹ SZEA, which was quickly enacted by the majority of states,¹³⁰ granted municipalities power to regulate the location and use of buildings.¹³¹ The SZEA declared that such legislation would be designed to “prevent the overcrowding of land [and] to avoid undue concentration of population”¹³²—in other words, to reduce population density. SZEA-inspired zoning ordinances have reduced densities by limiting apartment construction¹³³ or by forcing all homes in a neighborhood to be the same size.¹³⁴ For example, in 1970 more than 99% of vacant land in New Jersey was zoned to exclude

high levels of transit ridership, whereas the decentralized urban conurbations of the United States are more efficiently served by automotive transportation.”).

127. See, e.g., Thomas J. DiLorenzo, *The Myth of Suburban Sprawl*, USA TODAY, May 1, 2000, (Magazine), at 5456, available at 2000 WL 9014855 (attacking public transit spending on the grounds that ridership has declined since 1945).

128. See *supra* note 86 and accompanying text.

129. See Department of Commerce, Standard State Zoning Enabling Act (1926) (final version).

130. See *Ex Parte City of Huntsville*, 684 So. 2d 123, 125 (Ala. 1996) (SZEA used as a “model for zoning legislation in the majority of states”); 1 ANDERSON’S AMERICAN LAW OF ZONING § 2.21 at 67-69 (Kenneth H. Young ed., 4th ed. 1995) (describing history of SZEA and pointing out that as early as 1930, 35 states had adopted that statute in whole or in part, and that “[a]ll of the states finally adopted zoning enabling legislation and most reflect the thinking of the draftsmen of the Standard Act”).

131. See *Chapman v. City of Troy*, 45 So. 2d 1, 8, 241 Ala. 637, 639 (1941) (SZEA gives cities power to “divide the city into districts, and regulate the erection and use of the buildings in the several districts for trade, industry, residence or other purposes.”); Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 345, 357-58 (1997).

132. SZEA, § 3, quoted by Epstein, *supra* note 131, at 379 n.50.

133. See, e.g., *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding ordinance limiting land use to single family homes).

134. See, e.g., *Simone v. Worcester County Inst. for Savings*, 1995 U.S. App. LEXIS 9081, at *6 (1st Cir. Apr. 20, 1995) (Worcester zoning law required 8000 square foot lot for 2 family home). See also Paul S. Weiland, *Environment in Context*, 18 UCLA J. ENVTL. L. & POL’Y 131, 138 (1999/2000) (“[C]urrent zoning practices often forbid high density development and mixed-use development.”).

multifamily housing, and in Connecticut's Fairfield County 89% of vacant land was subject to minimum lot requirements of one acre or more.¹³⁵ Such anti-density zoning reduces transit use because, as noted above,¹³⁶ public transit is less feasible in low-density areas: as residences are spread farther apart, fewer people can walk short distances to bus and train stops. So by using highway spending to create suburbs while zoning those suburbs to be auto-dependent, government reduced transit providers' revenues in two ways: first by reducing transit providers' urban ridership, and second by making it difficult for transit providers to serve suburbanites. And by reducing transit providers' revenues, government forced them to cut back service to transit-dependent individuals.¹³⁷

• *Public housing policies that, by concentrating poverty and crime in cities, drove middle-class families out of cities.* New Deal-era federal housing legislation provided that any municipality desiring public housing had to create a municipal housing authority or to cooperate with another city's housing authority.¹³⁸ Thus, economically homogenous suburbs were able to avoid public housing by refusing to create or cooperate with housing authorities.¹³⁹ Moreover, the federal government's "equivalent elimination requirement" kept public housing out of suburbs by mandating that one unit of substandard housing be eliminated for each unit of public housing built.¹⁴⁰ Because most suburbs had little substandard housing, even suburbs that wished to participate in the public housing

135. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990). The purpose of such zoning is usually to exclude lower-income persons. See JACKSON, *supra* note 21, at 242 (Zoning "served the general purpose of preserving residential class segregation and property values."). In one Chicago-area suburban neighborhood, city planners seek to fix a minimum price of \$275,000. See Kara Spak, *Elgin, Hoffman Seen as Ripe for Senior Housing*, CHICAGO DAILY HERALD, Jan. 26, 2001 ("Elgin's Far West Area plan dictates the average home price in the area will be \$325,000, with a minimum home price of \$275,000.").

136. See *supra* note 126 and accompanying text.

137. See *infra* note 392 and accompanying text (describing reductions in transit service due to 1990s revenue reductions).

138. See *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1091 n.11 (6th Cir. 1985); JACKSON, *supra* note 21, at 224.

139. See Briffault, *supra* note 135, at 41 ("[I]n all areas suburban localities sought to exclude public or publicly subsidized housing."); *Jaimes*, 758 F.2d at 1096 n.23, 1097-98 (noting Toledo suburbs' refusal to allow public housing, which caused nearly all public housing units to be in city of Toledo); *United States v. City of Parma*, 661 F.2d 562, 566-67 (6th Cir. 1981) (describing similar obstructionism in Cleveland suburb); JACKSON, *supra* note 21, at 224.

140. See Schill & Wachter, *supra* note 122, at 1293.

program were excluded.¹⁴¹ As a result of these limitations, many suburbs have little or no public housing.¹⁴² Public housing projects are by law packed with poverty: 60% of all occupants of existing public housing must earn less than 30% of their metro area's median income.¹⁴³ Because homogeneously poor areas tend, other factors being equal, to be more crime-ridden than more affluent areas,¹⁴⁴ public housing projects are "havens for crime."¹⁴⁵ Nationally, public housing residents are two and a half times as likely as other Americans to be victimized by gun-related crimes—and some projects are even more horrendous.¹⁴⁶ For example, Chicago's Robert Taylor Homes housing projects contain only one-half of 1 percent of that city's population, but account for 11% of the city's murders.¹⁴⁷ Similarly, a 1993 study found that crime in the Los Angeles housing projects was three times greater than crime rates in surrounding high-crime neighborhoods.¹⁴⁸ So by concentrating public housing in central cities, the federal government has concentrated poverty and crime in cities, thus accelerating the flight of the middle class and their employers to suburbia,¹⁴⁹ which in turn (as noted above) both reduces the share of people and jobs served by transit and, by reducing ridership, justifies reductions in transit service.¹⁵⁰

141. *Id.*

142. See *Evans v. Buchanan*, 393 F. Supp. 428, 435 (D. Del.), *aff'd per curiam*, 423 U.S. 963 (1975) (Wilmington housing authority operated 2000 public housing units in city but fewer than 40 in suburbs.); Robert E. Mendelson & Michael A. Quinn, *Residential Patterns in a Midwestern City: The St. Louis Experience*, in Checkoway, *supra* note 81, at 151, 163 (In 1970 St. Louis had 10,000 units of public housing while suburban St. Louis County, with a larger population, had only 50.).

143. See 42 U.S.C. § 1437n(a). See also Schill & Wachter, *supra* note 122, at 1294-95 n.43 (law was even more restrictive in 1980s).

144. See *Patrolmen's Benevolent Ass'n v. City of N.Y.*, 74 F. Supp. 2d 321, 335 (S.D.N.Y. 1999) (equating "high-crime" areas with "low-income" areas) (citation omitted); Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1215 (1995) ("Using least squares regression, I estimate the relationship between crime and poverty to be: Major Crime Rate = 36.55 + .02 (percentage white) + .79 (poverty rate), where the units are census tracts and crime rates are expressed per 1000 inhabitants.").

145. *Rucker v. Davis*, 2000 U.S. LEXIS App. 1966, at *3 (9th Cir. Feb. 13, 2000).

146. See Gary Fields, *Gun Risk Double in Public Housing*, USA TODAY, Feb. 17, 2000, at 3A.

147. See Utt, *supra* note 93. See also *U.S. v. Thompson*, 1992 U.S. Dist. LEXIS 1420, at *1 (N.D. Ill. 1992) (describing project as "notorious" for crime); NICHOLAS LEMANN, *THE PROMISED LAND* 295 (1991) (Robert Taylor Homes "quite possibly the worst place in the country in which to raise a family").

148. See Utt, *supra* note 93.

149. See Simon, *supra* note 92, at 856 (noting that crime a factor in middle-class flight to suburbs).

150. See *supra* note 127 and accompanying text.

• *Prestigious schools for suburbs and "bad" schools for cities.*

Over the past several decades, many American parents have moved to suburbia in order to keep their children out of urban public schools.¹⁵¹ This problem is a consequence of state governments' school assignment policies. In most of America, students are assigned to public schools based on their home addresses:¹⁵² urban students must generally attend school within an urban school district, while suburban children attend suburban schools. Thus, a public school's student body typically reflects the city or neighborhood in which the students reside. Because cities tend to be more socially diverse than suburbs,¹⁵³ the average city school will nearly always have more low-income children than the average suburban school. Other factors being equal, low-income children are harder to educate and achieve less than middle-income children, because "socioeconomic status (SES) and family background influence a student's achievement in school."¹⁵⁴ This is so because "children reared in low socioeconomic status [households] tend to be less intellectually stimulated and, consequently, tend to be less prepared for school which ultimately impacts on a child's achievements."¹⁵⁵ It logically follows that as long as state and local laws require urban children to attend schools packed with low-income children, urban schools will drive away middle-class parents. And as noted above, when middle-class families flee to auto-dominated suburbs, the businesses that cater to them and

151. See, e.g., Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1110 (1996) ("When I talk to the mothers and fathers of my children's friends about their inevitably impending move to the suburbs, they talk about the higher standard of living they will enjoy there . . . [including] the savings of writing one check for property taxes rather than one for property taxes and another for the private school tuition."); Kristin Kovacic, *New Century, Same Place*, PITTSBURGH POST-GAZETTE, Jan. 1, 2000, at A19 ("[O]ur children were fast approaching school age. The rational response appeared to be moving to a suburban area with a good school district. Many city families we know were starting to move to these [suburbs] for the schools alone.").

152. See KERN ALEXANDER & M. DAVID ALEXANDER, *THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL* 9 (1995) ("[M]ost state laws require children to attend school in the district in which the student resides.").

153. See BENFIELD ET AL., *supra* note 34, at 123 (central cities contain half of America's poor, though they contain only 30% of total population).

154. *Reed v. Rhodes*, 1 F. Supp. 2d 705, 738 (N.D. Ohio 1998). In fact, the "quality" of schooling may influence as little as 2-3% of differences in students' educational achievement. See CHRISTOPHER JENCKS ET AL., *INEQUALITY* 109, 159 (1972) (differences among elementary schools account for 3% of inequalities in educational achievement, and differences among high schools account for 2% of such inequalities).

155. *Reed*, 1 F. Supp. 2d at 739.

employ them eventually do so as well,¹⁵⁶ thus reducing opportunities for transit-dependent Americans.¹⁵⁷

• *A tax code that favors driving and suburban life.* Employers may provide parking to their employees as a tax-free fringe benefit worth up to \$170 a month, while the tax-free ceiling on transit passes is only \$65 per month.¹⁵⁸ To a much greater extent than European countries, America taxes income and savings rather than consumption.¹⁵⁹ Thus, the tax code encourages Americans to purchase space-consuming items and the large suburban houses necessary to house those items.¹⁶⁰

These policies have combined to place older cities in a vicious spiral of decay: as middle-class families fled to the suburbs, urban tax bases diminished, causing politicians to raise taxes or reduce services, further accelerating middle-class flight, creating additional pressures for tax increases, and so on.¹⁶¹ And as urban neighborhoods emptied out, middle-class families were replaced by poor ones,¹⁶² thus causing crime to increase,¹⁶³ thus accelerating middle-class flight.

In turn, the middle-class exodus from older cities and neighborhoods has adversely affected transit-dependent Americans (including, of course, the disabled) in two ways.¹⁶⁴ First, as employers fled cities, they relocated to places with minimal public transit, thus reducing the number of jobs accessible to transit-dependent Americans.¹⁶⁵ Second, as middle-class families left the city, they also

156. See *supra* note 86 and accompanying text (noting that jobs follow middle class to suburbs).

157. See *supra* notes 24-32 and accompanying text (noting that transit service in suburbs often quite limited).

158. See NIVOLA, *supra* note 126, at 25.

159. *Id.* at 25-26.

160. *Id.* at 26.

161. See MASSEY & DENTON, *supra* note 85, at 55; Arnold W. Reitze, *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1574 (1991).

162. See PAUL A. JARGOWSKY, POVERTY AND PLACE 50-57, 223-26 (1997) (in 1970s and 1980s, number of high-poverty census tracts increased in most American cities; for example, in 1980, Milwaukee had only 9 census tracts where over 40% of residents had incomes below federal poverty rate, but by 1990 number had increased to 42).

163. See *supra* note 144 and accompanying text (crime higher in poverty-packed neighborhoods).

164. And to the extent transit-dependent Americans are disproportionately city dwellers, they, like other urbanites, suffered from higher taxes and higher crime due to middle-class flight to suburbia, as city neighborhoods became poorer and city tax bases declined. See MASSEY & DENTON, *supra* note 85, at 55; Lewyn, *supra* note 93, at 521.

165. See *supra* notes 24-32 and accompanying text (noting that most suburban jobsites not transit-accessible).

abandoned urban transit systems, pushing public transit into a vicious spiral: reduced ridership could be used to justify reductions in service,¹⁶⁶ which in turn reduced ridership, which decreased transit system revenues, causing additional service reductions and fare increases *ad infinitum*.¹⁶⁷

II. Disability Law and Transit-Dependent Americans

A. Historical Background: Before the ADA

As early as the 1970s, the federal government sought to expand disabled Americans' access to public transportation.

Section 16(a) of the Urban Mass Transportation Act (UMTA),¹⁶⁸ enacted in 1970,¹⁶⁹ provided that:

elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation services so that the availability to elderly and handicapped persons of mass transportation that they can effectively utilize will be assured¹⁷⁰

Section 504 of the Rehabilitation Act of 1973 similarly provided that:

[n]o otherwise qualified person with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to

166. See, e.g., DiLorenzo, *supra* note 127 (describing transit spending as "wasteful" because ridership has declined since 1945); Editorial, *Continuing Ridership Decline is Everyone's Concern*, PITTSBURGH POST-GAZETTE, Feb. 27, 1994, at D2 (When ridership declines, "operating costs must be reduced, service cut, fares increase or . . . subsidies raised.").

167. See *Fitchik v. N.J. Transit Rail Operations*, 873 F.2d 655, 665 (3d Cir. 1989) ("[I]ncreases in fares or reductions in the quality or availability of service have the tendency of reducing ridership, and the reduction in ridership in turn diminishes revenue.") (Rosenn, J., dissenting); Frank Donze, *Riders Oppose Higher RTA Fares*, NEW ORLEANS TIMES-PICAYUNE, Feb. 20, 1999, at B1 (quoting rider's suggestion that New Orleans transit agency in "death spiral"); Gary Washburn, *New Roads Won't Ease Traffic Jams, Report Says*, CHI. TRIB., Apr. 2, 1992, at 4 (expressing similar concerns about public transit in Chicago).

168. 49 U.S.C. § 5301(d).

169. See *Ams. Disabled for Accessible Pub. Transp. ("ADAPT") v. Skinner*, 881 F.2d 1184, 1187 (3d Cir. 1989). The statute was originally at 49 U.S.C. § 1612(a).

170. *ADAPT*, 881 F.2d at 1187 (quoting 49 U.S.C. § 1612(a)). Today, the statute is almost identically worded, except that it substitutes "individuals with disabilities" for "handicapped persons" and makes several other grammatical corrections. See Historical and Statutory Notes to 49 U.S.C. § 5301 (changes made "to eliminate unnecessary words").

discrimination in any program or activity receiving Federal financial assistance.¹⁷¹

Congress then enacted section 165(b) of the Federal-Aid Highway Act of 1973 (FAHA), which directed that:

projects receiving Federal financial assistance . . . shall be planned, designed, constructed, and operated to allow effective utilization by elderly and handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability . . . are unable without special facilities or special planning or design to utilize such facilities and services effectively The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons.¹⁷²

To implement these statutory mandates, the federal Department of Transportation (DOT) promulgated regulations in 1976 requiring transit systems to make "special efforts in planning public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons."¹⁷³

Two days before the DOT regulations were published,¹⁷⁴ President Ford issued Executive Order 11,914,¹⁷⁵ which required the Department of Health, Education and Welfare (HEW) (now the Department of Health and Human Services)¹⁷⁶ to coordinate implementation of the policy of nondiscrimination announced in the Rehabilitation Act.

HEW's guidelines, issued in 1978, required all recipients of federal funds to make public transportation "readily accessible to and usable by handicapped persons."¹⁷⁷ Specifically, HEW required retrofitting of subways and buses to make those modes of transportation fully accessible to the disabled.¹⁷⁸

HEW guidelines also discussed the role of paratransit—that is, transportation provided upon request by a disabled individual rather

171. *ADAPT*, 881 F.2d at 1187 (quoting 29 U.S.C. § 794(a)). Today, the statute is almost identically worded, except that it substitutes the word "disability" for the word "handicap". See Historical and Statutory Notes to 29 U.S.C. § 794.

172. *ADAPT*, 881 F.2d at 1187-88 (quoting 23 U.S.C. § 142).

173. 41 Fed. Reg. 18,234 (1976).

174. See *ADAPT*, 881 F.2d at 1188.

175. 41 Fed. Reg. 17,871 (1976).

176. See 20 U.S.C. § 3508.

177. *ADAPT*, 881 F.2d at 1188.

178. *Id.*

than on fixed routes.¹⁷⁹ HEW stressed that transit systems should offer the disabled access to public transit "in the most integrated setting appropriate"¹⁸⁰ but added that HEW did not construe the guidelines "to preclude in all circumstances the provision of specialized services [targeted to the disabled] as a substitute for, or supplement to, totally accessible services."¹⁸¹

In 1979, DOT promulgated regulations in compliance with the HEW guidelines. Those regulations mandated across-the-board alterations to ensure that all transportation facilities were made accessible to handicapped persons.¹⁸² For example, the DOT mandated that every bus purchased after July 2, 1979 have a wheelchair lift, and that at the end of ten years half of all transit system buses be wheelchair-accessible.¹⁸³ The 1979 regulations were immediately challenged by the American Public Transit Association, a trade association of public transit systems.¹⁸⁴ In *American Public Transit Association (APTA) v. Lewis*,¹⁸⁵ the U.S. Court of Appeals for the District of Columbia Circuit invalidated the regulations. The court interpreted the Rehabilitation Act's nondiscrimination requirement to mean that transit systems must take "modest, affirmative steps to accommodate handicapped persons"¹⁸⁶ and held that DOT's regulations were not authorized by the statute because they "require extensive modifications of existing systems and impose extremely heavy burdens on local transit authorities."¹⁸⁷ The court remanded the case to DOT so the agency could determine whether its regulations were authorized by UMTA or FAHA.¹⁸⁸

In response, DOT promulgated more modest interim regulations rather than issuing a final set of regulations.¹⁸⁹ The interim regulations contained two noteworthy provisions. First, the regulations contained a "local option" provision allowing transit systems to choose whether to accommodate the disabled through

179. See *ADAPT*, 881 F.2d at 1186 n.1 (defining "paratransit"). Paratransit users are generally served with wheelchair-accessible vans rather than with conventional buses. *Id.*

180. 43 Fed. Reg. 2132, 2138 (1978).

181. *ADAPT*, 881 F.2d at 1188.

182. 44 Fed. Reg. 31,442 (1979).

183. *Id.* at 31,478.

184. *ADAPT*, 881 F.2d at 1188. See also AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 7 (1998) (describing APTA).

185. 655 F.2d 1272 (D.C. Cir. 1981).

186. *Id.* at 1278.

187. *Id.*

188. *Id.* at 1278-80.

189. See *ADAPT*, 881 F.2d at 1188-89 (describing interim regulations and Congress's dissatisfaction with DOT's slow pace).

making buses more accessible to the disabled, establishing a separate paratransit system, or using disabled-accessible buses for some areas and paratransit for others.¹⁹⁰ Second, the interim Regulations contained a “safe harbor” provision relieving transit systems of their obligation to serve the disabled as long as they spent three and a half percent of funds on such services.¹⁹¹

In December of 1982, Congress enacted the Surface Transportation Act of 1982 (STAA), which required DOT to issue regulations establishing minimum criteria for the provision of services to the disabled.¹⁹² The primary purpose of STAA was not to “specify any substantive standard”¹⁹³ but to “prod DOT into action following the 1981 remand of the regulations in *APTA v. Lewis*.”¹⁹⁴

Nevertheless, DOT did not issue final regulations until 1986.¹⁹⁵ The regulations maintained the interim regulations’ local option provision, and established minimum service criteria for transit-only systems (that is, systems that proposed to serve the disabled solely through fixed-route transit),¹⁹⁶ paratransit systems, and mixed systems combining fixed-route transit and paratransit. The minimum service criteria required, inter alia, that transit service for the disabled be comparable in hours, days of service, service area, and fares to service for the non-disabled.¹⁹⁷ In addition, the regulations maintained the interim regulations’ “safe harbor” provision. The safe harbor provision stated that transit systems were not required to spend more than 3% of operating costs on service for the disabled, even if, as a result, they did not meet the DOT’s minimum service criteria.¹⁹⁸

In *ADAPT v. Skinner*, seven disabled individuals and disability rights organizations challenged the local option and safe harbor provisions of the regulations. Plaintiffs argued that the local option provision was invalid because the law required “mainstreaming” (that is, that fixed-route buses and trains be accessible to the disabled even

190. See *ADAPT*, 881 F.2d at 1188.

191. See *ADAPT*, 881 F.2d at 1188-89.

192. See *ADAPT*, 881 F.2d at 1189 (citing 49 U.S.C. § 1612(d)). The statute is now codified at 49 U.S.C. § 5310(f), which requires DOT “to prescribe regulations establishing minimum criteria . . . [federal aid recipients] shall comply with in providing mass transportation to elderly individuals and individuals with disabilities.”

193. *ADAPT*, 881 F.2d at 1195 (emphasis omitted).

194. *Id.* at 1196.

195. See 51 Fed. Reg. 18,994 (1986).

196. A fixed-route transit system is one “on which a vehicle is operated along a prescribed route according to a fixed schedule.” 42 U.S.C. § 12141(3).

197. See *ADAPT*, 881 F.2d at 1189-90.

198. *Id.* at 1190.

in jurisdictions providing paratransit service) and that the safe harbor provision was arbitrary and capricious.¹⁹⁹ The U.S. Court of Appeals for the Third Circuit rejected the first argument and endorsed the second. The court upheld DOT's local option rule, because none of the relevant statutes (the Rehabilitation Act, UMTA, FAHA and STAA) expressly required mainstreaming,²⁰⁰ because case law thereunder had generally rejected mainstreaming,²⁰¹ and because DOT's local option rule was "adequately supported by record evidence of the relative costs and benefits."²⁰² The court also relied on the doctrine that in "the absence of a clear congressional mandate . . . [courts should] defer to an agency's interpretation of the relevant statute in its regulations."²⁰³

By contrast, the court held that the 3% safe harbor provision was "arbitrary and capricious"²⁰⁴ because "under the safe harbor provision, cities could deny to the disabled the minimum quality of service mandated by the Congress with impunity."²⁰⁵ The court explained that "according to DOT, if the 3% safe harbor were implemented, cities of less than one million people in which the transit authorities implemented a paratransit-only system would virtually never meet all of the applicable service criteria"²⁰⁶—a result that was not contemplated by Congress.²⁰⁷ In fact, the 3% safe harbor violated STAA because that statute required DOT to establish minimum service criteria, and the safe harbor rule allowed transit operators in all but the largest cities to avoid meeting those criteria.²⁰⁸

B. Why Pre-ADA Law Was Inadequate

After *ADAPT*, many transit systems sought to make their buses available to the disabled; by 1990, 35% of America's buses, and half of all newly acquired buses, were accessible to the disabled.²⁰⁹

199. *Id.* at 1186-87. An arbitrary and capricious regulation violates the federal Administrative Procedure Act. See 5 U.S.C. § 706.

200. *ADAPT*, 881 F.2d at 1191.

201. *Id.* at 1193-94.

202. *Id.* at 1198.

203. *Id.* at 1193.

204. *Id.* at 1201.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1202-03.

209. See H.R. REP. NO. 101-485, pt. I, at 24 (1990); Paul Stephen Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans with Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 317 (1990).

Nevertheless, Congress believed that "17 years of experience with [the Rehabilitation Act] . . . have demonstrated the need for further legislative action in this area."²¹⁰ Under the local option rules, a transit system could comply with DOT regulations solely by making their buses and trains accessible to the disabled²¹¹ while failing to meet the needs of the 1.4 million Americans²¹² who required additional assistance to use public transportation.²¹³ For example, individuals with severe vision impairments cannot use ordinary trains and buses without assistance if they are traveling in unfamiliar surroundings or have only recently lost their vision.²¹⁴ Similarly, "chronic fatigue . . . a lack of cognitive ability to remember and follow directions, or a special sensitivity to temperature"²¹⁵ may prevent an individual from traveling to a bus stop.

Conversely, a local government could seek to meet the needs of the disabled solely through paratransit, but this option also could not accommodate all disabled transit users. The House Education and Labor Committee found that paratransit was often inadequate

for the following reasons, among others; the need to make reservations in advance often conflicts with one's work schedule or interests in going out to restaurants and the like; the cost of rides when used frequently is often exorbitant; limitations on time of day and the number of days that the paratransit operates; waiting time; restrictions on use by guests and nondisabled companions who are excluded from accompanying the person with a disability; the expense to the public agency; and restrictions on eligibility placed on use by social service agencies.²¹⁶

For example, one disabled witness from Indianapolis testified that he was forced to rely on that city's paratransit services because his city had only six buses with wheelchair lifts, and that one day when he was released from a hospital, the transit agency "called to say that they could not pick me up even though I had scheduled my ride three weeks in advance . . . there are more than 100 persons on a

210. H.R. REP. NO. 101-485, p. IV, at 24.

211. See *ADAPT*, 881 F.2d at 1191-98 (upholding local option rule allowing local governments to rely solely on improving fixed-route transit).

212. See Rennert, *supra* note 17, at 399.

213. See H.R. REP. NO. 101-485, pt. II, at 37 ("Witnesses testified about the need to pursue a multi-modal approach to ensuring access for people with disabilities which provides that . . . paratransit is made accessible for those who cannot use the fixed route accessible vehicles."); *id.* at 38 (quoting numerous witnesses).

214. See H.R. REP. NO. 101-485, pt. I, at 29.

215. *Id.*

216. H.R. REP. NO. 101-485, pt. I, at 38.

waiting list to utilize this very limited form of accessible public transportation."²¹⁷ Congress sought to solve these problems by enacting the ADA.

C. The ADA's Requirements

Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."²¹⁸ Much of Title II of the ADA²¹⁹ clarifies this general rule by explaining what transit systems must do to avoid "discrimination" against the disabled.

The ADA's most significant transit-related provisions, Sections 222 and 223,²²⁰ require transit systems to provide the disabled with both accessible fixed route service and paratransit. Section 222 provides that any public entity that purchases or leases a new bus, rapid rail vehicle, or light rail vehicle, must make the vehicle "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."²²¹ However, nothing in Section 222 requires public entities to purchase or lease new vehicles, or even to provide any transit service at all. Thus, a public entity can avoid Section 222 by reducing transit service.²²²

Section 222 specifically "mandates lifts [for wheelchairs] on every new public transit bus."²²³ The House Committee on Public Works and Transportation added that

[a]lthough individuals who use wheelchairs are specifically referenced, the concept of making a vehicle readily accessible to and usable by individuals with disabilities involves more than simply making it available to an individual using a wheelchair. For example . . . this section may require vehicles to incorporate non-slip floors for individuals whose disabilities cause balance problems

217. *Id.*

218. 42 U.S.C. § 12132.

219. 42 U.S.C. §§ 12131 *et. seq.*

220. 42 U.S.C. §§ 12142-43.

221. 42 U.S.C. § 12142(a). DOT later issued detailed guidelines that define what makes a bus, train, or facility "accessible" to the disabled. See 49 C.F.R. §§ 37.7 and 37.9, 49 C.F.R. pt. 38.

222. See *infra* notes 273-83 and accompanying text (discussing case law allowing transit agencies to reduce service).

223. H.R. REP. NO. 101-485, pt. I, at 58 (1990) (additional views of John Paul Hammerschmidt and ten other legislators). However, the obligation to purchase lift-equipped buses may be temporarily suspended if such buses are unavailable. See 42 U.S.C. § 12145; 49 C.F.R. § 37.71 (b-g) (setting forth procedures for waiver).

or specific visual information for the hearing-impaired.²²⁴

Transit systems may not evade ADA requirements by purchasing used vehicles that are not accessible to the disabled, because a transit agency may not purchase or lease used buses or trains unless it “makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.”²²⁵ Similarly, transit systems may not evade the ADA by remanufacturing buses or trains, because all remanufactured transit vehicles must be “to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.”²²⁶

Section 223 requires all government agencies operating fixed route systems to provide paratransit service as a “safety net” for disabled individuals incapable of using conventional public transit.²²⁷ Such service must be “sufficient to provide to [disabled] individuals a level of service . . . comparable to the level of designated public transportation services provided to individuals without disabilities using such system.”²²⁸ Specifically, paratransit systems should have response times²²⁹ and service areas²³⁰ comparable to those of fixed

224. H.R. REP. NO. 101-485, pt. I, at 27.

225. 42 U.S.C. § 12142(b). *See* 49 C.F.R. §§ 37.73 (b-d) and 37.81 (b-d) (setting forth procedures for waiver). The “good faith” provision does not mean that transit providers may purchase inaccessible vehicles merely because they are less expensive; rather, the agency must show that it cannot find an accessible vehicle even after a nationwide search. *See* 49 C.F.R. § 37.73, App. D. The DOT has stated that “good faith efforts [may] involve buying fewer accessible buses in preference to more inaccessible buses.” *Id.*

226. 42 U.S.C. § 12142(c)(1). The term remanufacture “is to include changes to the structure of the vehicle which extend the useful life of the vehicle for five years . . . [but not] engine overhaul and the like.” 49 C.F.R. § 37.75, app. D. *See* 49 C.F.R. §§ 37.75(d) (remanufacturing bus to make it accessible to disabled feasible unless “engineering analysis demonstrates that including accessibility features required by this part would have a significant adverse impact on the structural integrity of the vehicle”) and 37.83(c) (establishing same proposition for rail cars and trains). This subsection does not apply to “historic vehicles.” 42 U.S.C. § 12142(c)(2). The National Register of Historic Places determines whether a vehicle is “historic,” 49 C.F.R. § 37.76(d), and if an agency operates an historic vehicle, it need only make “such modifications to make the vehicle accessible which do not alter the historic character of such vehicle, in consultation with the National Register of Historic Places.” 49 C.F.R. § 37.76(e). *See also* 42 U.S.C. § 12148(b)(2) and 49 C.F.R. § 37.83(d-e) (establishing similar rules for historic trains).

227. *See* 49 C.F.R. § 37.121, app. D.

228. 42 U.S.C. § 12143(a)(1).

229. *See* 42 U.S.C. § 12143(a)(2) (Paratransit users should have “response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities.”). DOT regulations provide that transit systems may require paratransit users to make reservations a day in advance. *See*

route service. Paratransit services must be provided to (1) disabled individuals who are unable, due to their disability, to board, ride or disembark from buses or trains without the assistance of another individual (other than the operator of a wheelchair lift or other boarding assistance device);²³¹ (2) any disabled individual who needs a wheelchair lift or other boarding assistance device to board, ride or disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel at a time when fixed route vehicles with such assistance devices are not available;²³² (3) individuals who can travel on a bus or train but cannot, due to their disability, travel to a bus or train stop;²³³ and (4) to persons traveling with disabled individuals eligible for paratransit service.²³⁴

Like Section 222, Section 223 essentially requires state and local governments to provide comparable transit service for disabled and non-disabled alike, but does not prohibit governments from reducing transit service for everyone.²³⁵ Moreover, government agencies need not comply with Section 223 if doing so "would impose an undue financial burden on the [agency]."²³⁶ In such situations, transit

49 C.F.R. § 37.131(b). Paratransit service hours, however, must be as extensive as those of a transit provider's fixed route service. *See* 49 C.F.R. § 37.131(e).

230. *See* 42 U.S.C. § 12143(c)(2) (requiring "the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system"). Specifically, a transit agency shall provide service to any place within 3/4 of a mile of a bus or train stop in its jurisdiction. *See* 49 C.F.R. § 37.131(a)(1) and (a)(3).

231. *See* 42 U.S.C. § 12143(c)(A)(i).

232. *See* 42 U.S.C. § 12143(c)(1)(A)(ii). An individual may be paratransit-eligible for some bus routes but not for others, depending on whether an accessible bus is available for a particular bus route. *See* 49 C.F.R. § 37.123, app. D.

233. *See* 42 U.S.C. § 12143(c)(1)(A)(iii). *See also* 49 C.F.R. § 37.123, app. D (Such disabilities may include, but are not limited to, blindness, chronic fatigue, lack of ability to follow directions, or unusual temperature sensitivity.).

234. *See* 42 U.S.C. § 12143(c)(1)(B) and (C). Subsection (B) provides that at least one individual may always travel with a disabled individual, and Subsection (C) adds that additional individuals may also do so if space is available. DOT regulations establish that the one guaranteed companion is in addition to any personal attendant required by a rider, so that a disabled rider may travel with one personal attendant and one additional companion. *See* 49 C.F.R. § 37.123(f)(1). On the other hand, a disabled individual may not be required to travel with an attendant. 49 C.F.R. § 37.123, app. D.

235. *See infra* notes 368, 396 and accompanying text (noting that some transit agencies have reduced overall transit service in order to avoid supplying the disabled with paratransit services).

236. 42 U.S.C. § 12143(c)(4). The Federal Transit Administration (FTA) may consider a wide variety of factors in deciding whether to grant or deny a "undue burden" waiver, including the likelihood of fare increases or service reductions in conventional transit service that might be caused by the denial of a waiver, the possibility of preventing such

systems need only provide paratransit services "to the extent that providing such services would not impose such a [undue] burden."²³⁷ Transit systems must prepare paratransit plans after a public hearing and public comment,²³⁸ and submit such plans annually to DOT for its approval.²³⁹ Should DOT find that a plan does not satisfy ADA requirements, it must disapprove the plan, and the transit system must submit a modified plan.²⁴⁰ A transit system must comply with its own paratransit plan.²⁴¹

Sections 222 and 223 are the most widely applicable provisions of the ADA because fixed-route bus systems serve more riders than rail systems or demand-responsive service.²⁴² ADA provisions governing demand-responsive systems,²⁴³ new transit facilities (such as rail stations and bus terminals),²⁴⁴ and rail systems echo Sections 222 and 223. For example, the ADA requires demand-responsive systems to make new vehicles accessible to the disabled,²⁴⁵ and requires new

outcomes through efficiencies or coordination of efforts with other transit providers, the resources available for paratransit, current levels of paratransit and fixed-route service, and any other unique circumstances that may be relevant. See 49 C.F.R. § 37.155(a).

237. *Id.* However, the FTA may require public agencies to provide a minimal level of paratransit service (e.g., service along a transit agency's most popular routes during peak hours of service) even if such service would be unduly burdensome. See 49 C.F.R. § 37.153(c)(2).

238. See 42 U.S.C. § 12143(c)(6). See also 49 C.F.R. § 37.139 (describing appropriate contents of paratransit plans).

239. See 42 U.S.C. § 12143(c)(7) and (d)(1).

240. See 42 U.S.C. § 12143(d).

241. See 42 U.S.C. § 12143(e).

242. See TRANSIT FACT BOOK, *supra* note 184, at 110-123 (On an average weekday Americans take 16 million fixed-route bus trips, as opposed to 341,000 demand-response trips and about 8 million heavy and light rail trips.); *id.* at 119 (only 11 American metro areas have subway or similar rail service); *id.* at 121 (only 21 American metro areas have subway or similar rail service, some of whom have heavy rail service as well or have downtown-only service); H.R. REP. NO. 101-485, pt. II, at 94 (1990) (pointing out limited scope of demand responsive service other than paratransit).

243. See 42 U.S.C. § 12141(1) (Demand-responsive system is "any system of providing . . . public transportation that is not a fixed route system.") Demand-responsive systems other than paratransit are generally limited to small towns and rural areas. See H.R. REP. NO. 101-485, pt. II, at 94.

244. DOT regulations define facilities as "buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or any other real or personal property" used to provide public transit. 49 C.F.R. § 37.3.

245. See 42 U.S.C. § 12144. This requirement does not apply, however, if a demand-responsive transit "system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities." *Id.*

transit facilities²⁴⁶ and alterations of existing facilities²⁴⁷ to be accessible to the disabled.

The ADA also requires that rail systems go beyond merely improving new or altered facilities. Specifically, it requires that "key" rail stations (such as stations with high ridership, end-of-the-line stations, and stations at which riders likely to transfer between rail lines or between buses and trains)²⁴⁸ be made accessible to the disabled within three years,²⁴⁹ and that all rail systems operating multi-car trains have "at least 1 vehicle per train that is accessible to individuals with disabilities . . . as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section."²⁵⁰

Title II of the ADA (which encompasses the public transportation provisions discussed above) provides that the remedies set forth in the Rehabilitation Act²⁵¹ shall govern actions involving discrimination relating to government programs.²⁵² The House Judiciary Committee explained that the ADA, like the Rehabilitation Act, provides for a private right of action.²⁵³

Finally, the ADA required the DOT to issue regulations implementing its transit-related provisions,²⁵⁴ which the DOT did in 1991.²⁵⁵ In addition to interpreting some of the ADA provisions addressed above,²⁵⁶ DOT regulations addressed a wide variety of issues not directly addressed by the ADA. For example, DOT regulations:

246. See 42 U.S.C. § 12146.

247. See 42 U.S.C. § 12147(a).

248. See H.R. REP. NO. 101-485, pt. I, at 32; 49 C.F.R. § 37.47(b) (listing criteria relevant to definition of key stations).

249. See 42 U.S.C. § 12147(b)(2)(A). This deadline may be extended, however, for "extraordinary expensive structural changes." 42 U.S.C. § 12147(b)(2)(B) (allowing extensions for up to 30 years as long as 2/3 of key stations accessible within 20 years).

250. 42 U.S.C. § 12148(b)(1).

251. 29 U.S.C. § 794(a).

252. 42 U.S.C. § 12133 ("The remedies, procedures and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].").

253. See H.R. REP. NO. 101-485, pt. III, at 52. ADA plaintiffs, however, are typically limited to injunctive relief rather than damages. See *Midgett v. Tri-County Transp. Dist.*, 74 F. Supp. 2d 1008, 1018 (D. Or. 1999) (Damages may be awarded only if transit system engaged in intentional discrimination or deliberate indifference to plaintiff's rights.).

254. See 42 U.S.C. § 12149(a).

255. See 49 C.F.R. pts. 37, 38.

256. See *supra* notes 220-54 and accompanying text.

- require that vehicles already accessible to the disabled remain accessible²⁵⁷ and gave specific directions as to how wheelchair lifts should be maintained;²⁵⁸

- provide that paratransit fares may not exceed twice the fixed-route fare for a comparable ride;²⁵⁹

- prohibit paratransit providers from imposing restrictions on priorities based on an individual's trip purpose;²⁶⁰

- require that certain major bus stops should be announced for disabled passengers;²⁶¹

- provides that where numerous bus routes serve one bus stop, transit systems shall provide means by which visually impaired individuals may identify the proper vehicle to enter;²⁶²

- require that disabled passengers be allowed to travel with portable oxygen supplies²⁶³ and service animals;²⁶⁴

- require that disabled passengers be provided with adequate information about public transportation;²⁶⁵

- require that certain bus and train seats be designated as priority seating for the disabled;²⁶⁶ and

- set forth means of administrative enforcement of the ADA.²⁶⁷

In addition to issuing regulations, DOT simultaneously issued guidelines interpreting those regulations.²⁶⁸ Parts of these guidelines merely restate the regulations, but others are less obviously based on the ADA or the regulations. For example, the guidelines clarify that paratransit service may be either door-to-door or curb-to-curb and that paratransit service may therefore take an individual to an accessible transit stop rather than to an ultimate destination,²⁶⁹ and interpret the nondiscrimination requirement of the ADA to mean that obnoxious conduct associated with a disability does not justify

257. See 49 C.F.R. § 37.161.

258. See 49 C.F.R. § 37.163-65.

259. See 49 C.F.R. § 37.131(c).

260. See 49 C.F.R. § 37.131(d). In fact, providers should not even ask the purpose of a trip. See 49 C.F.R. § 37.131, app. D.

261. See 49 C.F.R. § 37.167.

262. See 49 C.F.R. § 37.167(c). DOT has declined to prescribe specific means for such identification. See 49 C.F.R. § 37.167, app. D.

263. See 49 C.F.R. § 37.167(a).

264. See 49 C.F.R. § 37.167(d).

265. See 49 C.F.R. § 37.167(f).

266. See 49 C.F.R. § 37.167(j).

267. See 49 C.F.R. § 37.11.

268. See 49 C.F.R. pt. 37, app. D.

269. See 49 C.F.R. § 37.123, app. D.

exclusion of disabled passengers unless it represents a direct threat to other riders.²⁷⁰

D. ADA Case Law

Case law interpreting the ADA's public transportation provisions has been quite sparse, perhaps because many disputes under the ADA settle.²⁷¹ Nevertheless, a few decisions have interpreted those provisions, and will be discussed below.

(1) Service Reductions

*Hassan v. Slater*²⁷² is arguably the most far-reaching case decided under the ADA's transit-related provisions. In *Hassan*, a disabled commuter alleged that a transit agency's decision to close a nearby rail station²⁷³ violated the ADA. Because of the station's closure, the nearest station would be four miles from the plaintiff's home—too far for plaintiff to walk, and too far for plaintiff to afford a taxicab ride to the station on a regular basis.²⁷⁴

The court denied plaintiff's request for a preliminary injunction, holding, *inter alia*, that he had "not established a likelihood of success on the merits."²⁷⁵ The court explained that "[i]t does not appear that the ADA requires the [transit system] to keep all of its stations open . . . rather, the ADA only requires that [it] make new stations and its designated key stations fully accessible to and usable by people with disabilities."²⁷⁶ The transit agency's decision to close a station did not breach the latter requirement, because "the station closing affects all potential users, not merely disabled users."²⁷⁷

270. See 49 C.F.R. § 37.5, app. D.

271. See, e.g., *Collins v. S.E. Pa. Transp. Auth.*, 69 F. Supp. 2d 701 (E.D. Pa. 1999) (awarding attorneys' fees to plaintiffs who settled ADA dispute); *Neff v. Via Metro. Transit Auth.*, 179 F.R.D. 585 (W.D. Tex. 1998) (upholding settlement of ADA action); *James v. S.E. Pa. Transp. Auth.*, No. Civ. A. 93-CV-5538, 1997 WL 698035 (E.D. Pa. Nov. 4, 1997) (awarding attorneys' fees to plaintiffs who settled ADA dispute). Cf. *Bacal v. S.E. Pa. Transp. Auth.*, No. Civ. A. 94-6497, 1998 WL 324907 (E.D. Pa. June 3, 1998) (interpreting ADA consent decree).

272. 41 F. Supp. 2d 343 (E.D.N.Y. 1999), *aff'd*, 199 F.3d 1322 (2d Cir. 1999) (table).

273. The station was a commuter rail station rather than a light or heavy rail station; however, commuter rail stations are subject to ADA provisions analogous to those governing other forms of public transit. See 42 U.S.C. § 12161 et. seq.

274. *Hassan*, 41 F. Supp. 2d at 346. The court did not mention whether the station was served by buses.

275. *Id.* at 350.

276. *Id.* at 351.

277. *Id.*

The *Hassan* court could simply have stated that because the station at issue was not a new facility or a "key station,"²⁷⁸ the ADA was irrelevant. Instead, the *Hassan* court apparently went out of its way to point out that a transit system has a right to terminate service as long as it harms disabled and nondisabled transit users equally—a ruling that would seem to apply to buses and key stations, as well as to non-key stations.

The *Hassan* court's view is not unique: another district court has noted that "the ADA does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service."²⁷⁹ Similarly, the DOT has noted that "the ADA does not attempt to meet all the transportation needs of individuals with disabilities . . . the ADA is intended simply to provide to individuals with disabilities the same mass transportation service opportunities everyone else gets, whether they be good, bad or mediocre."²⁸⁰

This view is not directly foreclosed by the text of the ADA, which appears to focus on equal treatment between disabled and non-disabled transit users. For example, the ADA provides that if a government chooses to finance public transit, transit vehicles must be made accessible to the disabled,²⁸¹ and paratransit service must be "comparable to the level of designated public transportation services provided to individuals without disabilities."²⁸² But as the *Hassan* court pointed out, the ADA does not explicitly require state and local governments to provide transit service to *anyone*, nor does it state how much transit service to provide to individuals without disabilities. Thus, a local government can, under *Hassan*, comply with the ADA by eliminating public transportation entirely—hardly a result consistent with the ADA's goal of "welcom[ing] individuals with disabilities fully into the mainstream of American society . . . [by ensuring that] this country can continue to make progress in providing much needed transit services for individuals with disabilities."²⁸³ Obviously, the ADA's purpose is not satisfied when transit service is reduced rather than increased.

278. *Id.* (noting that station at issue was not designated as key station).

279. *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1012 (D. Or. 1999).

280. 56 Fed. Reg. 45584, 45601 (1991) (explaining 49 C.F.R. § 37.123, setting forth standards for ADA paratransit eligibility).

281. 42 U.S.C. § 12142(a).

282. 42 U.S.C. § 12143(a)(1).

283. H.R. REP. NO. 101-485, pt. I, at 24 (1990).

If politically powerful majorities used public transit, the majority could not reduce transportation to the disabled without reducing transportation for itself. But in reality, transit users are a disorganized, dispossessed minority. Transit riders are disproportionately poor,²⁸⁴ and have no lobby that makes political contributions (unlike auto- and highway-related interests).²⁸⁵ Not surprisingly, politicians use public transit as a whipping boy whenever money is scarce: federal highway grants to state and local governments increased by 150% between 1980 and 1999,²⁸⁶ while public transit grants nosedived in real terms, increasing by only 27% while the cost of living nearly doubled.²⁸⁷ And over the long term, as noted above, transit-dependent Americans have fewer opportunities than they once did because of the movement of jobs to transit-free suburbia.²⁸⁸

So by limiting transit service to the disabled to the same level as transit service to everyone else, the *Hassan* court essentially interpreted the ADA to mean that one group of second-class citizens (the disabled) is equal to another group of second-class citizens (other transit-dependent Americans)—hardly a result consistent with the ADA's ideals. It follows that *Hassan*, although consistent with the ADA's text, is hardly consistent with its egalitarian goals.

(2) *Service Slip-Ups*

Most ADA claims, by contrast, have involved narrow issues and been decided upon narrow grounds. For example, in *Midgett v. Tri-County Transportation District*,²⁸⁹ a wheelchair user contended that

284. See TRANSIT FACT BOOK, *supra* note 184, at 13-14 (in 1992, 27% of transit trips taken by persons with family incomes below \$15,000); 1999 ABSTRACT, *supra* note 2, at 478 (about 13% of all Americans had family incomes below \$15,000). The same is true of the disabled. See *Survey Program*, *supra* note 49 (29% of the disabled live in poverty, as opposed to 10% of non-disabled, and only 16% of disabled live in households earning over \$50,000 annually, as opposed to 39% of non-disabled.).

285. I examined the Center for Responsive Politics Website, <http://www.opensecrets.org> (last visited July 9, 2000), and could find no public transit-related Political Action Committee. By contrast, committees affiliated with the road construction, automobile, and homebuilding industries donated millions of dollars to candidates. *Id.*

286. See 1999 ABSTRACT, *supra* note 2, at 314 (highway spending increased from \$9.2 billion to \$22.7 billion).

287. *Id.* at 314 (transit spending increased by 27%, from \$3.12 billion to \$3.94 billion), 882 (consumer price index doubled between 1980 and 1998). I note, however, that transit spending has increased in recent years. See Plungis, *supra* note 82..

288. See *supra* notes 25-47 and accompanying text (discussing large number of jobs and other opportunities inaccessible without car in suburbs and small cities).

289. 74 F. Supp. 1008 (D. Or. 1999).

“he would like to travel to work by bus, but because of [a local transit agency’s] alleged failure to adequately train its bus operators and failure to maintain the wheelchair lifts”²⁹⁰ his mobility was impeded in violation of the ADA. On one cold morning, a bus stopped for plaintiff but the bus’s wheelchair lift was inoperable due to cold weather.²⁹¹ That very same day, plaintiff was unable to board two other buses due to similar maintenance problems.²⁹² Plaintiff accordingly sought a preliminary injunction requiring “a laundry list of augmented practices”²⁹³ including, inter alia, improved data collection, improved bus driver training, a media outreach program to increase awareness among bus riders of lift access and complaint procedures, a backup system to ensure against lift failure in cold weather, a dedicated customer service line for lift users, and revised scheduling procedures to allow sufficient time for inspections.²⁹⁴

The court refused plaintiff’s request for injunctive relief, for two reasons. First, the court found that “the desired corrective action has already been taken.”²⁹⁵ For example, the transit agency’s maintenance department had recently begun using a new hydraulic fluid that enabled its wheelchair lifts to operate more consistently in cold weather.²⁹⁶ Second, although “plaintiff points to occasional lift problems he and other wheelchair passengers have encountered, when viewed in the larger context of [the] entire fixed-route system . . . the occasional lift problems do not violate the ADA or its implementing regulations.”²⁹⁷

Thus, *Midgett* holds that occasional inaccessibility problems, as opposed to a pattern of incompetence, do not violate the ADA if a transit agency has taken steps to eliminate the problem; it is not clear from *Midgett* whether plaintiff’s problems with wheelchair lifts would have been actionable had the transit authority did nothing. As a practical matter, *Midgett* suggests that the courts will not meddle in a

290. *Id.* at 1010.

291. *Id.*

292. *Id.*

293. *Id.* at 1014.

294. *Id.*

295. *Id.* at 1018. In fact, the court stated that it would not award costs to the victorious defendant because plaintiff’s complaints caused “valuable and beneficial improvements in [the] fixed-route bus system, particularly in the areas of accessibility, training, equipment and awareness . . . [thus] plaintiff’s lawsuit ultimately benefited both the disabled and non-disabled members of the community.” *Id.* at 1019.

296. *Id.*

297. *Id.* at 1018.

transit system's management merely because service breaks down occasionally.

But other cases, such as *James v. Peter Pan Transit Management, Inc.*,²⁹⁸ hold that service breakdowns may violate the ADA if they are sufficiently egregious. In *James*, a wheelchair-using plaintiff claimed that she had "experienced numerous problems with CAT Connector [a local demand-response system] due to inoperable CAT Connector wheelchair lifts and improperly trained CAT Connector drivers."²⁹⁹ After describing plaintiff's complaint, the court enumerated nineteen separate examples of CAT Connector incompetence.³⁰⁰

The court denied defendants'³⁰¹ summary judgment motion because plaintiff had submitted evidence that the bus service had repeatedly failed to check wheelchair lifts to determine whether they were operable (which in turn caused lifts to become inoperable), failed to promptly repair vehicles with defective lifts, and did not train drivers to operate lifts.³⁰² Thus, a issue of fact requiring trial existed as to whether defendants "adequately maintained and repaired its CAT Connector wheelchair lifts and adequately trained its employees to operate the lifts."³⁰³

Similarly, *Cupolo v. Bay Area Rapid Transit*³⁰⁴ granted a preliminary injunction requiring a transit agency to repair its elevators. The *Cupolo* plaintiffs, a class of individuals with mobility disabilities, alleged that they were repeatedly unable to use the elevators at a transit agency's key rail stations. For example, in one fourteen-month period there were 76 separate incidents in which passengers were trapped in elevators.³⁰⁵ The court found that the transit agency's own documents indicated "widespread problems,"³⁰⁶ that the "much of the [agency's] maintenance work has been fairly cursory,"³⁰⁷ that the agency "has had difficulty obtaining replacement parts in a timely manner . . . [which] has exacerbated problems with

298. No. 5:97-CV-747-BO-1, 1999 WL 735173 (E.D.N.C. Jan. 20, 1999).

299. *Id.* at *2.

300. *Id.* at *4.

301. The defendants were a city and a private contractor hired to provide demand response service by the city. Although the contractor provided the service, the city was held vicariously liable for the contractor's conduct. *Id.* at *9 (public entity liable under ADA for independent contractor's violations as well as those of its employees).

302. *Id.* at *6-7.

303. *Id.* at *7.

304. 5 F. Supp. 2d 1078 (N.D. Cal. 1997).

305. *Id.* at 1080.

306. *Id.* at 1081.

307. *Id.*

repairing elevators speedily,”³⁰⁸ and that the agency’s “inability to perform through preventive maintenance . . . has probably been a significant factor behind the problems encountered by class members.”³⁰⁹ In sum, the transit agency’s problems constituted “a pattern of unreliable elevator service that cannot accurately be characterized as isolated or temporary interruptions.”³¹⁰

Because the ADA requires transit systems to make key rail stations accessible to disabled persons, and unreliable elevator service “resulted in the denial of access to [trains] to individuals with mobility disabilities,”³¹¹ the court found that plaintiffs had demonstrated a strong likelihood of success on their ADA claim. The court further found that the transit agency’s plan to repair its elevators did not render the suit moot, because many of the elevators’ problems had not been resolved.³¹² The court accordingly granted a preliminary injunction requiring that the elevators in the transit agency’s key stations be repaired.³¹³

Despite their varying results, *James* and *Cupolo* are consistent with *Midgett*: the former cases hold that a transit agency violates the ADA through consistently inadequate service, while the latter case holds that isolated service problems do not violate that statute.

(3) *Establishing Disability*

In *Hamlyn v. Rock Island County Metropolitan Mass Transit District*,³¹⁴ the court made it clear that a person who is “disabled” for other ADA-related purposes is also “disabled” for purposes of the ADA’s public transit provisions, and that all disabled persons are entitled to equal treatment regardless of the cause of their disability.

The *Hamlyn* plaintiff, who suffered from AIDS, sought to be included in a county program reducing bus fares for disabled

308. *Id.*

309. *Id.* at 1082.

310. *Id.* at 1083.

311. *Id.*

312. *Id.* at 1084-85.

313. *Id.* at 1085-86. The parties eventually reached a settlement requiring the agency to rehabilitate or replace all elevators and escalators in key stations over the next three or four years and promptly fix broken elevators and maintain them in good working order, as well as maintaining the sanitary conditions of the elevators . . . increas[ing] surveillance of the elevators to reduce incidence of vandalism and urination . . . [and improve the accessibility of other facilities and equipment].

Mattie C. Condray, *Recent Developments in Public Transportation Law*, 30 URB. LAW. 1091, 1094 (1998).

314. 986 F. Supp. 1126 (C.D. Ill. 1997).

passengers.³¹⁵ The program's application form, however, stated: "WHO DOES NOT QUALIFY: A. Applicants whose sole disability is . . . AIDS."³¹⁶ The court held that because AIDS is a disability under the ADA,³¹⁷ and the ADA bars discrimination by reason of disability,³¹⁸ the ADA's language barred the transit agency from excluding persons disabled by AIDS.³¹⁹ Thus, *Hamlyn* stands for the proposition that just as a transit agency cannot discriminate against the disabled generally, it also may not discriminate against persons with one particular type of disability—a result clearly supported by the ADA's provision that "no qualified individual with a disability shall, by reason of such disability . . . be subject to discrimination by any [public] entity."³²⁰

The case of *Weinreich v. Los Angeles County Metropolitan Transit Authority*³²¹ addressed a different eligibility issue: whether a plaintiff can be required to pay to prove his disability. Between 1982 and 1992, the *Weinreich* plaintiff participated in a transit agency's reduced fare program.³²² In 1992, the transit agency promulgated a rule requiring disabled participants to provide medical information recertifying that they are disabled.³²³ In 1993, plaintiff sought an exemption from this rule on the ground that he could not afford to pay a doctor to recertify his condition.³²⁴ The transit agency refused to grant an exemption, and refused to renew plaintiff's eligibility for the program.³²⁵ Plaintiff then filed suit³²⁶ under the ADA, asserting that the ADA mandated "reasonable modifications whenever a state imposes a requirement that prevents qualified disabled people from having 'meaningful access' to a state-provided benefit."³²⁷ The court

315. *Id.* at 1129.

316. *Id.* at 1129-30.

317. *Id.* at 1130 (citing ADA legislative history, regulations, and cases). This conclusion was confirmed by the Supreme Court and expanded to encompass asymptomatic HIV-carrier status in *Bragdon v. Abbott*, 524 U.S. 624 (1998).

318. 42 U.S.C. § 12132.

319. *Hamlyn*, 986 F. Supp. at 1130.

320. 42 U.S.C. § 12132.

321. 114 F.3d 976 (9th Cir. 1997).

322. *Id.* at 978.

323. *Id.*

324. *Id.*

325. *Id.*

326. Ironically, the indigent plaintiff was represented by an attorney from the highly prestigious law firm of Skadden, Arps, Slate, Meagher, and Flom. *See id.* at 977 (naming counsel); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (describing Skadden, Arps as "prestigious").

327. *Weinreich*, 114 F.3d at 979.

disagreed, holding that plaintiff's lack of access to the reduced fare program was based not upon his disability, but upon his failure to prove his disability (and in particular upon his poverty, which prevented him from proving disability).³²⁸ In other words, the ADA bars discrimination due to disability, but does not bar transit systems from imposing fees that adversely affect the poorest among the disabled. This rule, although seemingly hard-hearted, seems consistent with the ADA. That statute apparently contemplates that transit authorities may on occasion charge fares unrelated to ability to pay; for example, DOT regulations authorize transit systems to charge more for paratransit than for conventional bus service.³²⁹

(4) *Alterations of Facilities*

Two separate ADA provisions provide that if a public transit or commuter rail agency alters its facilities, such alterations must, "to the maximum extent feasible . . . [be] readily accessible to and usable by individuals with disabilities."³³⁰ The case of *Molloy v. Metropolitan Transit Authority*³³¹ applied this rule to a commuter railroad's attempt to automate ticket sales at a commuter rail station.

In *Molloy*, a group of individuals and organizations representing the interests of blind and visually impaired riders challenged the railroad's decision to remove ticket clerks from numerous commuter rail stations, and to substitute ticket vending machines at a majority of those stations.³³² Plaintiffs sought a preliminary injunction against the staff reduction plans, and the railroad argued in response that the ADA was inapplicable because no "alterations" to its facilities occurred.³³³

The court separately addressed the removal of the ticket clerks and the installation of the vending machines. As to the first issue, the court held that such staffing changes did not constitute "alterations" within the meaning of the ADA, for three reasons. First, the language of the ADA (which refers to "alterations" to stations or

328. *Id.*

329. See 49 C.F.R. § 37.131(c).

330. 42 U.S.C. § 12147(a) (alterations of fixed route services' facilities); 42 U.S.C. § 12162(e)(2)(B)(i) (alterations of commuter and inter city rail stations). See also 42 U.S.C. § 12147(b) (key rapid and light rail stations must be accessible to the disabled); 42 U.S.C. § 12162(a) (new commuter or intercity rail stations, existing intercity rail stations, and key commuter rail stations must be similarly accessible).

331. 94 F.3d 808 (2d Cir. 1996).

332. *Id.* at 810.

333. *Id.* at 812.

facilities)³³⁴ inherently suggests a physical alteration to a structure rather than a change in personnel.³³⁵ Second, DOT regulations interpreting the ADA support this view, because the regulations list numerous examples of "alterations," all of which involve physical changes to facilities rather than personnel changes.³³⁶ Third, the ticket clerks only worked at the station until 1 PM. So if the removal of ticket clerks constitutes an "alteration," "every day at one o'clock the station [would be] altered in contravention of the statute"³³⁷—obviously an absurd result.

By contrast, the installation of ticket vending machines was clearly an "alteration" to the station, because it was a physical change that would require additional wiring and communications lines.³³⁸ The railroad argued that the installation of the machines was not an alteration because the alterations, like such primitive changes as the installation of a bench, could be removed. The court disagreed, explaining: "[i]t is easy to imagine, however, how the installation of a bench in a station could block an otherwise wheelchair-accessible path, or otherwise render a station less accessible to the disabled."³³⁹ The court nevertheless declined to grant an injunction because plaintiffs could purchase tickets through other means and would thus not be irreparably harmed by the installation of the machines.³⁴⁰

Molloy appears to be consistent with the ADA's language, in that it defines "alterations" to "facilities" as physical alterations rather than other changes affecting the quality of service. As the court pointed out, any other holding would have led to bizarre results.

(5) *Paratransit*

Cases under the paratransit provisions of the ADA have been decided upon the narrowest of grounds. In *O'Connor v. Metro*

334. 42 U.S.C. § 12147(a) (referring to "alterations of an existing facility or part thereof"); 42 U.S.C. § 12162(e)(2)(B)(i) (referring to "alterations of an existing station or part thereof").

335. See *Molloy*, 94 F.3d at 811.

336. *Id.* at 811-12.

337. *Id.* at 812.

338. *Id.*

339. *Id.*

340. *Id.* at 813. The court was rather vague as to whether plaintiffs' claim could succeed on the merits. The court explained that although the machines were not fully accessible to visually impaired riders, it was not yet clear whether the machines were accessible "to the maximum extent feasible" as required by the ADA. *Id.* at 812-13. Cf. 42 U.S.C. § 12147(a) (Altered facilities need only be accessible to the disabled to maximum extent feasible.).

Ride,³⁴¹ a disabled couple sued a transit provider for personal injuries suffered after a paratransit driver left them at the end of a driveway instead of helping them into a friend's house.³⁴² The husband sought to push his wheelchair-using wife into the friend's doorway, but instead fell down the latter's stairs, causing both husband and wife to be injured.³⁴³ Plaintiffs then sued the transit agency under, among other grounds, the ADA.

The transit system argued that the ADA did not require it to provide plaintiffs with door-to-door service, because the ADA and DOT regulations require only "origin-to-destination" service.³⁴⁴ The court held that it did not need to define the scope of the term "origin-to-destination," reasoning: "[b]ecause Defendants incorporated door-through-door service in the paratransit plan they proposed to the Department of Transportation, they may be liable under the ADA."³⁴⁵ This ruling was based upon Section 223(e)(4) of the ADA, which provides that the term "discrimination" includes the failure "to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to [DOT]."³⁴⁶ In other words, a transit agency must follow the paratransit plan it submits to the DOT—even if that plan is more ambitious than the ADA would otherwise require. *O'Connor* appears to follow the plain meaning of the statute, and therefore should not be particularly controversial.³⁴⁷

State courts as well as federal courts have interpreted the ADA's paratransit provisions. In *Sells v. New Jersey Transit Corp.*,³⁴⁸ the court upheld a state transit agency's decision to deny paratransit services to a mentally retarded plaintiff. Plaintiff applied for paratransit service on two separate grounds.

341. 87 F. Supp. 2d 894 (D. Minn. 2000).

342. *Id.* at 896.

343. *Id.*

344. *Id.* at 900 (citing 49 C.F.R. § 37.129).

345. *Id.*

346. 42 U.S.C. § 12143(e)(4).

347. In another section of its opinion, the *O'Connor* court also suggested that defendants violated the Rehabilitation Act by failing to provide door-to-door service, stating that paratransit's

purpose is to ensure the safety of disabled persons who "by reason of" their disabilities require special assistance to get around safely. Door-to-door service is one component of that assistance, and denial of it, if proved to a jury, is the precise type of behavior that the Rehab Act is enacted to prevent.

O'Connor, 87 F. Supp. 2d at 899. It is not clear, however, whether the court would have so held had the agency not promised such service in its transit plan.

348. 689 A.2d 1386 (N.J. Super. Ct. App. Div. 1997).

First, plaintiff claimed that he was generally unable to use fixed-route transit.³⁴⁹ But plaintiff himself testified at a hearing that he "was still sometimes using regular fixed route bus service."³⁵⁰ Because the evidence showed that plaintiff rode ordinary buses, the court rejected his claim that he could not do so.³⁵¹

Plaintiff also claimed that even if he was generally able to use fixed-route service, he was no longer able to safely walk from his residence to the nearest bus stop for the route he used to get to work, because the nearest bus stop was three miles away, and he could no longer cut through a field that he had previously been able to cut across.³⁵² The state agency disagreed, finding that plaintiff in fact lived only half a mile from the bus stop, and because (despite the absence of sidewalks on his route) there was a grass median that he could use.³⁵³ The court affirmed without much discussion, stating that the state agency's findings "that the expressed dangers were less severe than originally described and that the actual distance was less than the original calculation . . . have ample support in the record."³⁵⁴

Sells stands for the proposition that a disabled person (other than one with a walking-related disability) is not entitled to paratransit merely because he cannot conveniently or pleasurably travel to a bus stop—for example, if he has to walk 1/2 mile on a street without sidewalks. Rather, the bus stop must be virtually impossible to reach. This view is probably consistent with the DOT's regulations, which provide that a person is ineligible for paratransit only when "a reasonable person with the impairment-related condition in question would be deterred from making the trip."³⁵⁵ Nevertheless, *Sells* reduces the mobility of the ambulatory disabled, because unfavorable conditions such as the absence of sidewalks are likely to ensure that some individuals will walk to a bus stop only if absolutely necessary.³⁵⁶

The case of *Pfister v. City of Madison*³⁵⁷ was far simpler. In *Pfister*, plaintiff appealed a city's denial of her application for paratransit service, on the ground that her impaired vision, mobility

349. *Id.* at 1391.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at 1392.

355. *Id.* at 1391-92 (quoting 49 C.F.R. § 37.123, app. D).

356. Cf. H. Eric Schockman, *Municipal Measures Offer Opportunities to Aid City, L.A. DAILY NEWS*, Oct. 25, 1998, at V3 (improved sidewalks increase mobility of disabled).

357. 1995 WL 640599 (Wis. Ct. App. Nov. 2, 1995) (unpublished decision).

impairments and migraine headaches required her to use such service. The court agreed with the city's decision, based on "testimony from a paratransit driver that on several occasions [plaintiff] had asked to be dropped off at one location and would then make her way to her ultimate destination on her own, and that this involved traveling several blocks."³⁵⁸ Such testimony established that plaintiff was capable of walking to a bus stop and thus did not need paratransit.³⁵⁹

The *Pfister* court's dictum may be more noteworthy than its holding. In response to the city's argument that many people with impairments similar to plaintiff's disabilities rode fixed-route buses, the court responded: "it is irrelevant what other riders do, since the question is whether [plaintiff] is prevented from traveling to a boarding location."³⁶⁰ Thus, *Pfister* suggests that a plaintiff's eligibility for paratransit should be determined solely by reference to plaintiff's own capacities, as opposed to those of other persons with similar problems.

(6) *Damages*

In addition to addressing when injunctive relief is appropriate for minor service breakdowns, the *Midgett* court addressed the question of when damages were an appropriate remedy for violations of the ADA's public transit provisions. Specifically, that court held that "compensatory damages are not available under Title II of the ADA absent a showing of discriminatory intent or, at a minimum, deliberate indifference."³⁶¹ Because no evidence of discriminatory

358. *Id.* at *2.

359. *Id.*

360. *Id.*

361. *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1018 (D. Or. 1999). There is a great deal of non-transit case law addressing the question of when compensatory damages are appropriate for unintentional discrimination under the ADA. See, e.g., *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) (Intentional discrimination must be shown in order to recover compensatory damages under Title II of the ADA.); *Wood v. President & Trs. of Spring Hill Coll.*, 978 F.2d 1214, 1219-20 (11th Cir. 1992) (same); *Tayofa v. Bobroff*, 865 F. Supp. 742, 749-50 (D.N.M. 1994) (stating that courts have generally held that intentional discrimination a prerequisite to damages under 42 U.S.C. § 12133), *aff'd mem.*, 74 F.3d 1250 (10th Cir. 1996); *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1444-45 (D. Kan. 1994) (holding that the plaintiff could not recover compensatory damages because he did not allege that intentional discrimination caused his emotional distress, mental anguish and humiliation). But see *Ferguson*, 157 F.3d at 676-80 (Tashima, J., dissenting) (arguing that Title II does not require plaintiffs to prove intentional discrimination); *Tyler*, 118 F.3d at 1406 (Jenkins, J., dissenting) (same). For a discussion of the different standards courts have used to determine if an act is "intentional," see Leonard J. Augustine, Jr., *Disabling the Relationship Between*

intent was presented in *Midgett*, the court granted summary judgment as to plaintiff's claim for compensatory damages.

III. The ADA: Inadequate or Counterproductive?

A. At Best Inadequate . . .

The purpose of the ADA is to provide mobility to the disabled.³⁶² But the ADA's requirements (at least under current case law) are inadequate to achieve this goal.

The ADA requires that most of the same buses and trains that are available to the general public be made accessible to the disabled as well.³⁶³ And transit systems have to some extent met this narrow goal.³⁶⁴ But the ADA does not state how much service must be provided either to the disabled or to the general public. As a result, courts have suggested that disabled transit users may receive minimal service as long as other riders are similarly immobilized. For example, the *Midgett* court wrote that "the ADA does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service."³⁶⁵ Similarly, the *Hassan* court wrote that the ADA does not prohibit major reductions in service (such as the closing of a train station) as long as the cutback "affects all potential users, not merely disabled users."³⁶⁶

It logically follows that a government may meet its obligations under the ADA by reducing rather than increasing transit service. For example, suppose county X does not want to go to the expense of providing transit service to the disabled. It can comply with the ADA *and* cut costs by refusing to provide transit service for anyone, as

Intentional Discrimination and Compensatory Damages Under Title II of the Americans with Disabilities Act, 66 GEO. WASH. L. REV. 592 (1998).

362. See H.R. REP. NO. 101-485, pt. I, at 24 (1990) (purpose of ADA to bring disabled "fully into the mainstream of American society").

363. See 42 U.S.C. § 12142(a) (Newly purchased or leased buses and rail vehicles must be accessible to disabled.); 42 U.S.C. § 12143 (Disabled persons incapable of using conventional public transit must be provided with paratransit service.).

364. See, e.g., Dan Hartzell, *Tentative LANTA Workers Pact Awaiting Ratification By Union*, ALLENTOWN MORNING CALL, Mar. 24, 2000, at B3 (By 2001, 50 of 70 Allentown, Pa. buses will be accessible to disabled.).

365. 74 F. Supp. 2d at 1012.

366. 41 F. Supp. 2d at 351.

many municipalities have in fact done.³⁶⁷ For example, in Tulsa, Oklahoma, the city council voted first to eliminate, and later to drastically limit, a bus route from suburban Sand Springs to downtown Tulsa because paratransit for Sand Springs would have cost at least two and a half times the cost of fixed-route service.³⁶⁸

Such policies are by no means politically impossible or even infrequent. Transit-dependent Americans are a small minority of the electorate,³⁶⁹ are disproportionately low-income,³⁷⁰ and, unlike highway users, are supported by no significant lobby that can make campaign contributions to candidates.³⁷¹ As a result, transit has had far less political support than automobiles and highways. While highway spending has dramatically increased over time no matter how tight the fiscal constraints affecting the rest of government,³⁷² transit spending has gone up and down depending on the strength of federal, state and municipal finances. For example, governmental support for public transit operating expenses³⁷³ actually decreased by about 20% in real terms between 1990 (the year of the ADA's enactment)³⁷⁴ and 1996.³⁷⁵

The ADA apparently does not require that disabled transit users be made equal to the auto-using majority: instead, it requires only

367. See *supra* notes 27-47 and accompanying text (describing inadequacy of transit service in most suburbs and small cities); *infra* notes 369 and 396-97 and accompanying text.

368. See Bill Swindell, *Sand Springs Again Will Receive Bus Service*, TULSA WORLD, Feb. 15, 1997, at A11. The service was limited to morning and evening rush hour due to concerns over the cost of providing paratransit for all-day service. *Id.*

369. See 1999 ABSTRACT, *supra* note 2, at 643 (over 90% of households own cars).

370. See *supra* note 284 and accompanying text.

371. See *supra* note 285 and accompanying text.

372. See 1999 ABSTRACT, *supra* note 2, at 314 (highway spending increased by 150% between 1980 and 1999, from \$9.2 billion to \$22.7 billion).

373. Operating expenses include the costs of operating and maintaining existing vehicles, such as employee benefits, tires, fuels, utilities, and insurance. See TRANSIT FACT BOOK, *supra* note 184, at 57-58. By contrast, government has been more generous with capital costs (which include the costs of new facilities and construction). *Id.* at 38-39, 46-47. Over 2/3 of capital spending goes to rail. *Id.* at 47. Because the majority of cities have bus-only transit systems, spending figures for operating expenses are far more relevant to the majority of transit systems. See *id.* at 23 (America has 2250 bus systems, as opposed to 22 light rail, 16 commuter rail, and 14 heavy rail.), 69 (61% of transit users ride buses).

374. See George Bush, Signing Statement, Pub. L. No. 101-336, reprinted in 1990 U.S.C.C.A.N. 601 (Act signed in July 1990).

375. See TRANSIT FACT BOOK, *supra* note 184, at 52 (government funding increased by less than 1% between 1990 and 1996); 1999 ABSTRACT, *supra* note 2, at 495 (consumer price index for all items increased by 20% between 1990 and 1996).

that they be made equal to other transit-dependent Americans,³⁷⁶ who in most of small-town and suburban America are also second-class citizens.³⁷⁷ If the federal government had followed similar principles when it enacted civil rights laws addressing racial discrimination,³⁷⁸ it would have required that African-Americans be treated identically to other then-despised minorities (for example, homosexuals) rather than being treated identically to the white majority—obviously an absurd result. A policy that would be absurd when applied to African-Americans has been unsuccessful when applied to disabled Americans: some studies suggest that disabled Americans are as poor today as they were in 1990.³⁷⁹

B. Or Counterproductive?

If the ADA had merely allowed transit systems to eliminate bus routes or avoid creating service where none existed, it would have been at worst harmless. But in practice, the ADA actually gives transit systems an incentive to reduce transit service for everyone.³⁸⁰

As noted above, in the late 1990s the ADA cost transit authorities about \$1.4 billion a year³⁸¹—more than 1/3 of all federal

376. See *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1012 (D. Or. 1999) (“[T]he ADA does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service.”).

377. See *supra* notes 24-47 and accompanying text (describing inadequacy of American public transit).

378. See, e.g., 42 U.S.C. § 2000a (prohibiting discrimination in public accommodations “on the ground of race, color, religion or national origin”); 42 U.S.C. § 2000e-2 (prohibiting similar discrimination in employment context).

379. See *supra* notes 50-52 and accompanying text (questioning whether status of disabled has improved since 1990, and suggesting possible explanations for the absence of progress).

380. See John J. Coleman & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 ALA. L. REV. 55, 105 (1993) (If cities cannot afford to expand transit service for disabled to extent required by ADA, they face a choice between “either ignoring the regulations . . . or complying with the regulations in the only way that they can afford—eliminating mass transit entirely.”).

381. See Hynes-Cherin, *supra* note 11. About 3/4 of this sum was spent to satisfy the ADA's paratransit requirements. See Doherty, *supra* note 11. It is unclear whether Congress expected the ADA to cost this much: before the statute's passage, the Congressional Budget Office estimated the costs of retrofitting buses and train stations to make them more accessible to the disabled, but refused to estimate the costs of the ADA's paratransit provisions. See H.R. REP. NO. 101-485, pt. III, at 80-82 (1990) (stating that “we cannot estimate the potential cost of the paratransit requirement” but estimating that addition of wheelchair lifts to buses would cost \$20-30 million per year, maintenance of lift-equipped buses would cost \$15 million per year, and modernization of rail facilities would cost \$1 billion over 20 years).

transit subsidies for some years.³⁸² But the federal government did not help state and local governments pay the cost of the ADA's mandates; instead, the federal government actually reduced transit spending while it was dumping the costs of transporting the disabled upon state and local transit systems. Between 1990 and 1996, the federal government increased total transit spending by less than the rate of inflation,³⁸³ and reduced operating subsidies by over 40%.³⁸⁴

By both reducing subsidies and imposing the ADA's costs on transit agencies, the federal government took a huge bite out of transit agencies' revenues. If \$1.4 billion in ADA costs³⁸⁵ are subtracted from the total of federal transit grants, federal support for transit was cut nearly in half, after adjusting spending totals for inflation, between 1990 and 1999.³⁸⁶

And because federal spending cuts were targeted to operating subsidies³⁸⁷ (which disproportionately fund small-city, bus-only transit³⁸⁸ systems used primarily by the poor and the disabled)³⁸⁹ as

382. See 1999 ABSTRACT, *supra* note 2, at 314 (In the late 1990s, federal grants to transit systems ranged from \$3.9 billion to \$4.5 billion.).

383. See *id.* at 314, 495 (Transit spending increased from \$3.7 billion to \$4.2 billion, or 15%, while consumer price index increased by 20%).

384. See TRANSIT FACT BOOK, *supra* note 184, at 52. As noted above, operating expenses are more important to most transit users than capital expenses, because capital spending goes mostly to rail systems, and most cities lack rail of any sort. See *id.* at 37 (only 35.5% of capital grants went for bus-related projects), 119 and 121 (only 25 cities have heavy or light rail service).

385. See Hynes-Cherin, *supra* note 11.

386. I calculate this figure as follows: federal transit grants, including both capital subsidies and operating expense subsidies, increased in nominal terms from \$3.7 billion to \$4.2 billion between 1990 and 1998. 1999 ABSTRACT, *supra* note 2, at 314. To reach the "post-ADA" total, I subtract \$1.4 billion in ADA-related costs (thus giving a federal spending total of \$2.8 billion, a 24% cut in nominal terms). See Hynes-Cherin, *supra* note 11 (estimating that ADA costs transit agencies \$1.4 billion annually). I then factor in the 21% decrease in the dollar's value, 1999 ABSTRACT, *supra* note 2, at 493, for a grand total of a 45% cutback.

387. See TRANSIT FACT BOOK, *supra* note 184, at 38 (federal and state governments increased capital spending on transit between 1990 and 1996), 52 (federal government cut operating subsidies by over 40%, before adjusting for inflation); *Congress Approves \$4.1 Billion for Transit in Fiscal Year '96*, URBAN TRANSP. NEWS, Nov. 8, 1995, available at 1995 WL 8354546 ("new starts" capital grant program not cut at all, while operating assistance cut by 44%) [hereinafter *\$4.1 Billion*].

388. See TRANSIT FACT BOOK, *supra* note 184, at 37, 57 (only 35.5% of capital grants used for bus projects, as opposed to 57.6% of operating expenses); *Mid-Sized Transit Agencies Hit Hardest by Federal Cuts*, URBAN TRANSP. NEWS, Jan. 3, 1996, available at 1996 WL 8088255 (transit service cut most in mid-sized cities as opposed to larger cities, because mid-sized cities more dependent on federal operating assistance); *Urban Caucus Opposes Operating Assistance Phase-Out*, URBAN TRANSP. NEWS, Jan. 7, 1994, available at 1994 WL 2684899 ("[S]mall and mid-sized transit agencies... depend heavily on [operating] assistance."); *Lean with the Green*, MASS TRANSIT, July 1, 1994, at 44

opposed to capital spending (which primarily funds rail projects in a few big cities),³⁹⁰ those cutbacks disproportionately affected the transit-dependent poor and disabled.

Not surprisingly, most transit agencies raised fares and cut service during the early and mid-1990s. In late 1995 and early 1996 alone, half of all American transit agencies raised fares, cut back service, and laid off workers due to reductions in federal operating assistance.³⁹¹

But transit service would have been reduced even if the federal government had not reduced assistance to transit systems, because the ADA essentially pitted disabled riders against other passengers. In May 1995 (six months before the harshest federal budget cuts were enacted),³⁹² a survey by the American Public Transit Association (a transit system trade association)³⁹³ revealed that 31% of transit systems had reduced service, increased fares, or laid off employees to meet the costs of ADA compliance, and 29% were considering doing so.³⁹⁴ For example, in 1997 suburban Chicago's bus system, Pace, increased paratransit services, but financed the increase by eliminating eight bus routes and increasing paratransit fares by one-third.³⁹⁵

Other transit agencies eliminated or reduced fixed-route bus service in order to avoid spending money on comparable paratransit service. For example, Henrico County, Virginia reduced evening bus service after the ADA was enacted, because it was not willing to

("[F]ederal operating aid takes up a relatively small share of expenses for transit systems in large cities such as New York.").

389. See TRANSIT FACT BOOK, *supra* note 184, at 72-73 (transit users in smaller cities more likely to be poor, female and disabled); Eric Mann, *Radical Social Movements and the Responsibility of Progressive Intellectuals*, 32 LOYOLA L.A. L. REV. 761, 776 (1999) (bus riders in Los Angeles disproportionately low-income and minority to greater extent than subway riders).

390. See TRANSIT FACT BOOK, *supra* note 184, at 37 (capital spending targeted to rail/non-bus projects), 23, 119, 121 (only a few large cities have rapid or light rail service).

391. See *Fares Up, Service and Employment Down as Transit Budget Cuts Hit Home*, APTA Survey Finds, U.S. NEWswire, May 6, 1996, available at 1996 WL 5621136. The cuts were approved by Congress in November 1995, which means that the service cuts and fare increases took place over a period of only seven months. See *\$4.1 Billion*, *supra* note 387.

392. In November 1995, Congress passed a budget that reduced operating assistance by 44%. *Id.*

393. See TRANSIT FACT BOOK, *supra* note 184, at 7.

394. See *Costs of Paratransit Service Higher than Government Admits*, URBAN TRANSP. NEWS, May 24, 1995, available at 1995 WL 8354463.

395. See Crimmins, *supra* note 12.

spend \$500,000 to provide evening service to paratransit users.³⁹⁶ In such a situation, everybody loses: paratransit users get no more service, and fixed-route riders get less.

If no disabled persons had been able to use public transit before the ADA's enactment, it could be argued that the ADA benefited the disabled by shifting resources from nondisabled transit users to disabled transit users. But this was not the case. In fact, many disabled Americans have always been able to use buses and trains that do not fully comply with ADA standards: for example, blind Americans could generally use fixed-route buses before the ADA was enacted.³⁹⁷ By and large, the ADA's reforms were targeted towards paratransit users³⁹⁸ (who constitute a small minority of disabled nondrivers)³⁹⁹ and wheelchair users.⁴⁰⁰ Thus, the ADA, by reducing service to the citizenry as a whole, actually reduced service to those disabled persons who used public transit before its enactment (that is, disabled persons other than wheelchair users).

Indeed, even paratransit users sometimes suffer from the ADA, in two ways. First, as noted above, the ADA as written gives transit systems a financial incentive to eliminate bus routes for everyone in order to reduce its obligations to paratransit users. A transit system need only provide paratransit service to persons living within 3/4 of a mile of a bus or rail stop⁴⁰¹—so if the system eliminates a bus route, it also eliminates its obligation to serve disabled persons living near that route.⁴⁰² In fact, some transit systems have eliminated bus routes for

396. See Marian Lumpkin, "Everybody Loses" in *Bus Cuts*, RICHMOND TIMES-DISPATCH, Sept. 27, 1992, at B1. See also Swindell, *supra* note 368 (describing similar reductions in Tulsa bus service).

397. See Orsi, *supra* note 13 (blind especially dependent on public transit even before ADA's enactment).

398. See *supra* note 11 (\$1.1 billion of \$1.4 billion cost of ADA devoted to paratransit).

399. See Millar, *supra* note 2 (estimating that 24 million disabled Americans unable to drive); Rennert, *supra* note 17, at 399 (only 1.4 million Americans unable to use fixed-route transit).

400. See H.R. REP. NO. 101-485, pt. I, at 27 (1990) ("individuals who use wheelchairs are specifically referenced" in ADA); *id.* at 58 (Section 222 of ADA "mandates [wheelchair] lifts on every new public transit bus."); Tucker, *supra* note 9, at 931 (major ADA-related change to fixed-route service is that "new buses and rail systems will have to be fitted with lifts or ramps and fold-up seats or other wheelchair spaces with appropriate securement devices"); *Regulations Compliance Update*, MASS TRANSIT, July 1, 1994, at 44 (Transit industry executives discussed ADA compliance, and consistently described their major challenges as paratransit spending and making buses wheelchair-accessible.).

401. See 49 C.F.R. § 37.131(a)(1) and (a)(3).

402. See Judith Davidoff, *Riders to Get Say on Bus Fares, Cuts*, CAP. TIMES, May 6, 2000 ("Cutting an entire [bus] route can have dire consequences not only for those who use the fixed route service, but for paratransit riders as well: Service for people with disabilities

that very purpose.⁴⁰³ Second, transit systems have been forced to eliminate paratransit service for persons living outside the 3/4 mile limit in order to finance other ADA requirements. For example, in Lafayette, Indiana, the local bus system limited paratransit service to persons living within the 3/4 mile limit in order to finance service for persons living within that territorial limit.⁴⁰⁴

The ADA's purpose was to increase transit service for the disabled – but in fact the ADA has, by reducing transit agencies' revenues, sometimes reduced transit service for the disabled.

IV. Solutions

The ADA, as interpreted by the courts, is fatally flawed because instead of requiring that the disabled be given comparable transportation to the auto-using majority, it requires only that the disabled be given as much transportation as other transit-dependent Americans⁴⁰⁵—which is to say, not much.⁴⁰⁶ This means that where, as in most of America, transit-dependent Americans are an impoverished minority, the transit-dependent disabled, too, are an impoverished minority. It follows that if the disabled are to achieve anything resembling equality of transportation opportunities, the disabled must be given opportunities equal to those given to *drivers*. This Part proposes a variety of transportation-related⁴⁰⁷ reforms that, if enacted, will move the disabled toward such equality.

is provided only within three-quarters of a mile from a mainline route.”); Mark Eddington, *Route Plan May Strand Disabled Riders*, SALT LAKE TRIB., Feb. 25, 2000, at C1 (Possible elimination of bus routes in suburban Salt Lake City might strand disabled individuals living near areas served by routes.).

403. See Lumpkin, *supra* note 396 (describing service cuts near Richmond, Va.); Swindell, *supra* note 368 (describing service cuts in Tulsa, Ok.); Trebor Banstetter, *Palm Tran Routes, SpecTran Cut in Jupiter*, PALM BEACH POST, Apr. 21, 1999, at 1B (describing service cuts in Jupiter, Fla.).

404. See Lori McClung, *Losing Access: Compliance with Act Restricts Bus Line's Service Area*, J. & COURIER, Feb. 1, 1993, available at 1993 WL 3148300. Cf. Scott Powers, *Board May Not Cut Its Bus Rides for the Disabled*, COLUMBUS DISPATCH, Sept. 25, 1996, at 4B (bus system in Columbus, Ohio, considered but rejected similar cutbacks).

405. See *Hassan v. Slater*, 41 F. Supp. 2d 343, 351 (E.D.N.Y.), *aff'd*, 199 F.3d 1322 (2d Cir. 1999) (elimination of train station did not violate ADA if it “affects all potential users, not merely disabled users”); *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1012 (D. Or. 1999) (“[T]he ADA does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service.”).

406. See *supra* notes 25-47 and accompanying text (describing gaps in American transit service).

407. In addition, a variety of other reforms in areas unrelated to transportation could assist transit-dependent Americans by reversing the anti-urban/anti-transit policies

A. No More Cutbacks

In *Hassan*, the court gave local governments free rein to cut transit service without reducing services for drivers or violating the ADA.⁴⁰⁸ As a result, the ADA may sometimes actually decrease the mobility of the disabled, by giving local governments an incentive to reduce all transit service in order to finance ADA-mandated spending⁴⁰⁹ or to avoid spending money on comparable paratransit services for the most severely disabled.⁴¹⁰ Such attacks upon public transit may technically comply with the ADA, but nevertheless are destructive of the ADA's goal of making the disabled more independent and employable.⁴¹¹

The logical solution to this gap in the ADA is to overrule *Hassan* (either legislatively or judicially),⁴¹² by prohibiting local governments from reducing transit service or maintenance⁴¹³ in any way, or from raising fares without raising drivers' costs in a similar manner (e.g., by raising fuel taxes by the same amount as transit fares were raised).

discussed *supra* in notes 129-60, thus making it easier for all Americans to live and work in transit-friendly areas. A full discussion of such "smart growth" reforms, however, is so extensive as to be beyond the scope of this Article. Cf. Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue Anymore*, 84 MARQ. L. REV. 301, 371-82 (2000) (proposing educational and tax reforms to make cities and older suburbs areas more attractive to middle class); ANDRES DUANY ET AL., *SUBURBAN NATION* (2000) (proposing a variety of land use-related reforms to make suburbs and cities less auto-dependent).

408. See *Hassan*, 43 F. Supp. at 351.

409. See *supra* notes 394 and accompanying text (By 1995, 60% of transit systems either had reduced services, increased fares, or laid off employees to meet costs of ADA compliance, or were considering doing so.); Crimmins, *supra* note 12 (example of service reduction in order to meet costs of ADA compliance).

410. See Lumpkin, *supra* note 396 (example of service reduction calculated to reduce paratransit expenses by reducing fixed-route transit service); Swindell, *supra* note 368 (same); Banstetter, *supra* note 403 (same).

411. See 42 U.S.C. § 12101(8) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."); H.R. REP. NO. 101-485, pt. I, at 24 (purposes of ADA are to "welcome individuals with disabilities fully into the mainstream of American society" and to "make progress in providing much needed transit services for individuals with disabilities").

412. A legislative solution is preferable because as a matter of law, *Hassan* may have interpreted the ADA correctly. See *supra* notes 282-83 and accompanying text (suggesting that *Hassan* consistent with text of ADA).

413. I consider maintenance cutbacks to be de facto reductions of service, because such policies effectively reduce the quantity of transit service a rider can purchase by making buses unusable. See *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1010 (D. Or. 1999) (maintenance failures prevented disabled plaintiff from boarding buses); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1083 (N.D. Cal. 1997) (inadequate maintenance rendered trains unusable to disabled).

Or to preserve governmental flexibility and avoid a direct conflict with *Hassan*, a legislature or court could allow transit cutbacks only if government reduced comparable services for drivers—for example, by closing one road for every bus route eliminated, or by reducing road funding by the same percentage as transit funding was reduced. Because local governments would presumably be unwilling to close roads⁴¹⁴ or otherwise inconvenience drivers except during the gravest fiscal crises, this statute would effectively bar the elimination of bus routes.

A “no cutbacks” law would not only prevent reductions in service, but also protect the settled expectations of the disabled and other transit-dependent individuals: they could establish homes and businesses near bus routes, and be secure in the knowledge that government could not make their investments worthless by reducing service. By contrast, today anyone who relies upon the existence of public transportation services does so at his or her peril.⁴¹⁵ Moreover, a “no cutbacks” law would be cheaper than mandating massive increases in service, because it would require only that local governments maintain existing levels of service.

It could be argued that a “no cutbacks” law would impair the ability of governments to respond to fiscal crises. This argument lacks merit, for two reasons. First, public transit spending comprises only 2% of state and local government spending.⁴¹⁶ Second, government has grown so consistently over time⁴¹⁷ that spending reductions are unlikely to be truly necessary under any circumstances short of an emergency that could require cutbacks in highway service (e.g., reductions in highway maintenance spending) as well as transit service. Thus, a “no cutbacks” statute would merely prevent public

414. Cf. *Roads*, *supra* note 91 (fifty largest metro areas added new road capacity during 1980s and 1990s, usually at greater rate than growth of regional population).

415. See Banstetter, *supra* note 403 (Resident of Jupiter, Fla. opposed elimination of bus route because “My [visually impaired] wife and I deliberately chose our house because it is close to the bus lines . . . [t]his [route cut] will create tremendous difficulties for us.”); Davidoff, *supra* note 402 (quoting Madison, Wisconsin local officeholder’s statement that “if you take off a route, you could be stranding people who are very transit dependent”); Eddington, *supra* note 402 (Superintendent of state developmental center asserted that if certain bus routes near Salt Lake City were eliminated, “about 100 people with disabilities would lose their jobs and independence if those routes are lost.”).

416. See 1999 ABSTRACT, *supra* note 2, at 317 (State and local governments spent \$25 billion on public transit in 1996, and \$1.3 trillion on all government services; thus, public transit constituted 2% of state and local budgets.).

417. *Id.* at 316 (state and local government spending increased by nearly 220%, from \$307 billion to \$982.6 billion, from 1980 to 1997), 495 (consumer price index increased by less than 100% during same period).

transit from being singled out for budget cuts rather than giving transit a privileged position.

It could also be argued that a “no cutbacks” statute would prevent transit systems from eliminating “inefficient” routes with low ridership. This argument is essentially a variant of the common anti-transit argument that public transit does not “pay for itself”⁴¹⁸—an argument that proves too much. Few if any government services pay for themselves in the sense of being paid for by users: for example, no trust fund supports food stamps or other social welfare programs, and highway spending is supported partially by general revenues.⁴¹⁹ So a policy based solely on such a narrow definition of “efficiency” narrowly defined would require the elimination of most government services.

Admittedly, a “no cutbacks” law would not require actual expansion of public transit, nor would it narrow the gap between the transit-dependent disabled and auto users – but at least it would prevent local government from widening that gap.

B. No Roads Without Transit

State and local governments do not reduce transit service solely by eliminating bus routes or reducing hours of service: they also reduce opportunities for the transit-dependent by the more politically popular⁴²⁰ technique of building and widening roads. As noted above,⁴²¹ suburban road expansions often reduce opportunities for transit-dependent individuals (including the transit-dependent disabled) by encouraging individuals and their employers to move to areas with little or no public transit.

418. See Al Lembke, *Rail Failures*, PRESS DEMOCRAT, June 7, 1997, at B7 (criticizing proposed light rail system because “[n]o public transportation system pays for itself through fares The only people who benefit from such an undertaking are the contractors and politicians who get kickbacks”).

419. See 1999 ABSTRACT, *supra* note 2, at 635 (government at all levels spent \$92 billion on highways, but received only \$59 billion in fuel taxes). Moreover, government arguably subsidizes drivers by financing a variety of auto-related costs other than highways from general revenues. See F. Kaid Benfield, *Running on Empty: The Case for a Sustainable National Transportation System*, 25 ENVTL. L. 651, 654 (1995) (According to study by Natural Resources Defense Council, “[a]utomobiles received a much higher aggregate subsidy than does bus or rail transport” because drivers do not pay social costs such as “congestion, subsidized parking, accidents, noise, building damage, and air and water pollution.”); Lewyn, *supra* note 93, at 541-42.

420. See 1999 ABSTRACT, *supra* note 2, at 314, 635 (highway funding consistently increased in 1980s and 1990s).

421. See *supra* notes 85-102, and accompanying text.

The only way to prevent such "stealth cutbacks" is a "No Roads Without Transit" (NRWT) law that would condition all road expansions in metropolitan areas upon transit improvements to commercial areas served by (and thus likely to develop because of)⁴²² road improvements.

Specifically, a state or federal law could provide that any new or widened roads be accompanied by significant transit service to the road itself (if the road was a commercial street accessible to pedestrians) or to commercial streets near highway exits (if the road was a limited-access highway).⁴²³

The major advantage of NRWT is that it would not increase government spending by one cent: if governments did not want to spend money on transit, they would not have to spend money on roads. Indeed, drivers might be better off, because if local governments were unwilling to throw money either at roads or at transit, they might reduce transportation spending and reduce the gasoline taxes that traditionally finance a large portion of such spending.⁴²⁴ NRWT merely applies the principles of the ADA to highway spending: just as the ADA apparently gives local governments the choice between providing public transit to the disabled and providing public transit to no one,⁴²⁵ NRWT would give local governments the choice between improving transportation for the transit-dependent (including the transit-dependent disabled) and improving transportation for no one.

C. More Radical Remedies

A "no cutbacks" law, together with a NRWT law, would prevent governments from using transportation policy to widen the gap between the transit-dependent disabled and drivers. But neither proposal would remove or even narrow inequities caused by past policies. To remedy the harm caused by the policies of the past century, government would actually have to improve transit service

422. See *supra* note 86 and accompanying text (noting that suburban highways shift commercial as well as residential development to suburbs).

423. Because the primary purpose of such a law would be to ferry transit users to jobs and recreational opportunities in the suburbs, the NRWT law would require service only to streets containing such amenities, and would require service for as long as such opportunities were open (e.g., until most or all merchants on the street closed at night).

424. See 1999 ABSTRACT, *supra* note 2, at 635 (over 60% of highway spending financed by fuel taxes).

425. See *Midgett v. Tri-County Metro. Transp. Dist.*, 74 F. Supp. 2d 1008, 1012 (D. Or. 1999) ("[T]he ADA does not require public transit systems to provide better service to disabled passengers than is provided to other passengers, only comparable service.").

rather than merely refusing to further degrade public transit. Ideally, state and local governments would be required to make most or all jobs transit-accessible.

Such a "universal transit access" law would, despite its cost, merely extend existing ADA principles. The ADA as written already provides that no covered employer (that is, employer with over 15 employees)⁴²⁶ may discriminate against the disabled,⁴²⁷ and that a qualified individual is one who "with or without reasonable accommodation, can perform the essential functions of the employment position."⁴²⁸ Thus, employers have a duty to "reasonably accommodate" disabled employees under the ADA⁴²⁹ unless such an accommodation would create "undue hardship."⁴³⁰ For example, an employer in an area with no evening bus service might be required to allow a disabled employee to work an earlier shift so that the employee could finish work in time to use a bus⁴³¹—but only if such an accommodation would be "reasonable" enough not to create "undue hardship." This principle could be extended to require that employers fail to reasonably accommodate disabled employees as a class if they locate in areas without public transit. Because mandatory relocation would arguably constitute "undue hardship" such a requirement should not be imposed by judicial fiat.

Instead, a "universal transit access" law could require that every urban or suburban⁴³² employer covered by the ADA (that is, every employer employing 15 persons or more)⁴³³ be reachable by regular bus or train service. For example, the statute could provide: "All employers which are located within a metropolitan area and which employ over 15 persons must be accessible by fixed-route transit

426. See 42 U.S.C. § 12111(5)(a).

427. See 42 U.S.C. § 12112 (No covered employer "shall discriminate against a qualified individual because . . . of the disability of such individual.").

428. 42 U.S.C. § 12111(8).

429. See 42 U.S.C. § 12112(b)(5) (Discrimination means "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability.").

430. *Id.* See also Jeffrey Van Detta, "Typhoid Mary" Meets the ADA: A Case Study of the "Direct Threat" Standard Under the Americans with Disabilities Act, 22 HARV. J. LAW & PUB. POL'Y 849, 867 & nn.75-78 (1999) (discussing factors relevant to "undue hardship" inquiry).

431. See *Patterson v. Meijier*, 897 F. Supp. 1002, 1007 (W.D. Mich. 1995).

432. Presumably, such a statute would contain an exemption for rural employers; suburban employers could employ transit-dependent individuals from central cities, but rural employers by definition have no central city to recruit anyone from.

433. See 42 U.S.C. § 12111(5) ("[T]he term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees.").

service. Such service must run at least once an hour until after the closing of the employer's business." This statute arguably would not require a significant number of employers to relocate, because many suburban governments might, in order to receive sales and property tax revenue from employers, be willing to invest in bus service in order to retain suburban employers.⁴³⁴

Such a statute would benefit millions of people: a 1998 Harris survey revealed that 30% of disabled Americans surveyed (and 17% of nondisabled individuals)⁴³⁵ identified inadequate transportation as a problem. Admittedly, a "universal transit access" statute would by no means grant the transit-dependent disabled full equality with drivers, because some individuals would no doubt have to take multiple buses (that is, take bus A, then transfer to bus B to reach suburban employer C) to reach suburban employers. But at least the disabled would be entitled to something they now lack: a guaranteed minimal level of transit service to suburban employers.

The most persuasive objection to such a proposal would be cost—and certainly the costs of such a bold proposal would require further study. However, there is some reason to believe that state and local governments could afford to comply with a universal transit access statute. According to a researcher at the American Public Transit Association, hourly bus service to every employer with over 15 employees would cost only \$1 billion⁴³⁶—less than 1% of total government transportation spending⁴³⁷ and less than 0.1% of all state

434. See BENFIELD ET AL., *supra* note 34, at 112-13 ("There is a common belief among local governments that, contrary to the situation with respect to residential neighborhoods, the revenues generated from commercial land uses have only positive fiscal benefits and may be used to offset the high costs of providing public services to residential developments As a result, many local governments still aggressively seek commercial and industrial developments.").

435. See Thomas P. Wyman, *Disabled Fight to Keep IndyGo Service*, INDIANAPOLIS STAR, Dec. 14, 1998, at A1.

436. See Correspondence with Terry Bronson, Aug. 20, 1998 (on file with author). Ironically, the researcher opposed universal transit access on the ground that even \$1 billion was too much because of the likely low ridership. I disagree, because I believe there may be a significant untapped potential demand for public transit. Only 5.3% of Americans use public transit to commute to work, 1999 ABSTRACT, *supra* note 2, at 641, but 9% of households lack a vehicle, *id.* at 643, and many auto-owning households (including every such household with a child under 16) presumably include at least one nondriver. Specifically, there are 182 million persons over 16, but only 163 million licensed drivers. *Id.* Thus, 19 million adults have no drivers' license—a number that exceeds the number of carless households by 10 million. In addition, the 54 million Americans under age 16 presumably do not drive. *Id.*

437. See 1999 ABSTRACT, *supra* note 2, at 635 (\$101 billion spent on highways alone).

and local government spending.⁴³⁸ It follows that even if bus service was required every quarter hour, the total cost might be as low as \$4 billion—less than 4% of total government transportation spending⁴³⁹ and less than 0.4% of total state and local government spending.⁴⁴⁰ If these estimates are correct (admittedly a huge if) the costs of universal transit access would certainly be low enough to justify a universal transit access law. Alternatively, if universal transit access risked imposing heavy costs on existing employers or on local governments, a state or federal government could grandfather existing businesses by requiring only that new businesses be transit-accessible.

It could also be argued that an employer's duty to accommodate individual disabled employees (for example, by allowing them to finish work before bus service stops running) would render universal transit access unnecessary.⁴⁴¹ This argument is meritless for two reasons. First, some employers have no offices served by any public transportation, and thus could not reasonably accommodate transit-dependent employees. Second, disabled job applicants might be unable to avail themselves of such a reasonable accommodation, either because of ignorance of their legal rights or inability to even reach a workplace for a job interview.

D. Paratransit Only: A Reform That Won't Work

It could be argued that the reforms above are unnecessary, because an expanded paratransit system alone could handle the needs of the disabled. The logic behind this argument is that traditional fixed-route systems waste billions on mostly-empty buses rather than targeting service to the disabled who need transit the most.⁴⁴²

This argument lacks merit for three reasons. First, paratransit is arguably even less cost-effective than fixed-route service.⁴⁴³ Nearly

438. *Id.* at 1319 (State and local government spending exceeds \$1.3 trillion.).

439. *See supra* note 437 and accompanying text.

440. *See supra* note 438 and accompanying text.

441. *See Patterson v. Meijer*, 897 F. Supp. 1002, 1007 (W.D. Mich. 1995) (such an accommodation reasonable).

442. *See, e.g., Jerry Heaster, Mass Transit: Just the Ticket to Waste Taxes*, KANSAS CITY STAR, June 9, 2000, at C1 (Instead of investing in buses and trains for everyone, society should "subsidize transportation assistance for the economically disadvantaged, the disabled or the elderly unable to get around on their own. This sort of taxpayer help, however, would be focused narrowly on the need of those for whom help is crucial to their well-being.").

443. *See Rennert, supra* note 17, at 362 ("Paratransit is so costly that it can meet only a small fraction of the transportation needs of disabled riders."); *id.* at 395-97 (citing DOT

80% of disabled persons who use public transportation rely on fixed-route buses rather than paratransit,⁴⁴⁴ less than 5% of all transit-dependent disabled individuals are physically incapable of using fixed-route service,⁴⁴⁵ and less than 2% of all transit trips involve any form of demand-response transportation (including but not limited to paratransit).⁴⁴⁶ Yet paratransit engulfs about 3/4 of all ADA-related spending.⁴⁴⁷

Second, paratransit, despite its high cost, need not serve all disabled Americans under existing law: as noted above, the ADA requires local governments to finance paratransit service not for all disabled Americans, but only for riders who, for one reason or another, are unable to use fixed-route transit to reach their destinations.⁴⁴⁸ Moreover, paratransit users are subject to a variety of other limitations that make paratransit less effective than fixed-route service. For example:

- Paratransit users often must make reservations 24 hours in advance to use paratransit,⁴⁴⁹ instead of receiving service on demand. As the House Education and Labor Committee found at the time of the ADA's enactment, this limitation "often conflicts with one's work schedule or interests in going out to restaurants and the like."⁴⁵⁰ Because the demand for service exceeds the amount of service

cost projections supporting this view and explaining that DOT actually overestimated usefulness of paratransit by counting only wheelchair users as disabled fixed-route users but counting all passengers as paratransit riders); Lynette Petty, *Section 504 Transportation Regulations: Molding Civil Rights Laws to Meet the Realities of Economic Constraints*, 26 WASHBURN L.J. 558, 600 (1987) ("Paratransit systems are the most expensive to operate An accessible bus system appears to be the most cost-effective approach for small cities.").

444. Cheryl Little, *Disabled in Action*, ENVTL. ACTION, Mar. 22, 1996, at 27.

445. See Millar, *supra* note 2 (24 million disabled Americans unable to drive); Rennert, *supra* note 17, at 399 (1.4 million Americans too severely disabled to use fixed-route buses).

446. See TRANSIT FACT BOOK, *supra* note 184, at 110-123 (On an average weekday Americans take 341,000 demand-response trips, as opposed to over 24 million bus and train trips.).

447. See Hynes-Cherin *supra* note 11 (ADA cost transit operators \$1.4 billion per year); Doherty, *supra* note 11 (paratransit provisions of ADA cost transit operators \$1.1 billion per year).

448. See 42 U.S.C. § 12143(c)(1) (Paratransit services must be provided to disabled individuals who are unable to board buses or trains without assistance, cannot travel to bus or train stop, or wish to travel at a time when only buses or trains available are inaccessible to the disabled.).

449. See 49 C.F.R. § 37.131(b).

450. See H.R. REP. NO. 101-485, pt. I, at 38 (1990).

available, there is often a waiting list for paratransit service; moreover, rides are often delayed.⁴⁵¹

- DOT regulations require only that reservation service must be available only during normal business hours (as opposed to evenings and weekends).⁴⁵² So a rider cannot schedule a ride if he learns of his needs the evening before a possible trip.

- Just as paratransit is more expensive for state and local governments, it is also more expensive to riders: under DOT regulations, paratransit fares may be twice the fixed-route fare for a comparable ride.⁴⁵³

- Reductions in fixed-route service might lead to reductions in paratransit service, because under current law paratransit need not serve anyone who lives more than 3/4 mile from a bus or train stop.⁴⁵⁴

- Paratransit service need not cross jurisdictional boundaries even for persons living within 3/4 mile of a bus stop.⁴⁵⁵

To be sure, all of these problems could be solved by changes in the law: transit systems could be required to serve paratransit users on demand no matter where they lived, and all disabled Americans could be made eligible for paratransit service. But such innovations would cause the cost of paratransit to balloon—and some of the same commentators who now complain about the alleged cost and inefficiency of fixed-route service would no doubt complain about the cost and inefficiency of paratransit service. Finally, fixed-route service has advantages that paratransit lacks. Because the general public uses fixed-route buses and trains, such service not only aids the disabled, but aids other public goals, such as the public interest in helping the carless poor reach jobs,⁴⁵⁶ the public interest in reducing

451. See Kate Miller, *Disabled Riders Rely on Unreliable Service*, TENNESSEAN, July 5, 2000, at 1B (In Nashville, “[a]t times the waiting list for rides has topped 400 . . . Delays and changes in pickup times remain troubling. For a disabled person dependent on public transportation, these minutes can be the difference between having and not having a job, getting or not getting a degree and making or missing doctor appointments.”); Alfonso R. Castillo, *The Ride Stuff: Disabled Want Better Bus Service*, NEWSDAY, Mar. 18, 2000, at A37 (In Suffolk County, New York, paratransit riders “must call a week in advance if they expect to get an appointed time near the one they want . . . once the appointment is made, the buses rarely show up on time.”).

452. See 49 C.F.R. § 37.131(b).

453. See 49 C.F.R. § 37.131(c).

454. See 49 C.F.R. § 37.131(a)(1).

455. See 49 C.F.R. § 37.131(a)(3).

456. See Heaster, *supra* note 442 (transit critic admits that public spending necessary to assist transit-dependent poor); Simmons, *supra* note 2, at 260 (94% of welfare recipients lack cars).

traffic congestion by taking cars off the road,⁴⁵⁷ and the public interest in reducing auto-induced air pollution.⁴⁵⁸ So even if fixed-route buses are more expensive than paratransit, they also create benefits that paratransit service targeted to the disabled does not create.

In sum, a paratransit-only strategy is no substitute for expanded fixed-route service—both because the limited paratransit service required by the ADA does not serve the disabled as effectively as fixed-route service, and because the paratransit expansion necessary to make paratransit a worthy substitute for fixed-route service might be just as expensive and less socially useful than existing fixed-route service.

Conclusion

For nearly a century, government at all levels has, through a variety of policies, immobilized transit-dependent Americans (including many disabled Americans). The ADA attempted to remedy this wrong by requiring that the disabled receive as much public transportation as anyone else—a solution that has proven to be unworkable because thanks to the anti-transit policies of the past, many jobs and other opportunities are now inaccessible by public transit. It follows that if America wishes to give the disabled full mobility, it must make the disabled equal not only to other transit users but to drivers, by prohibiting government from expanding highway service without expanding transit service, by prohibiting further cutbacks in transit service, and by increasing transit service to existing job sites.

457. See *Miller Tours, Inc. v. Vanderhoof*, 13 F. Supp. 2d 501, 503 (S.D.N.Y. 1998) (State aids mass transit "as a means of reducing energy demands, traffic congestion, and air pollution.").

458. *Id.*