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"EQUAL MEMBERS OF THE COMMUNITY": THE PUBLIC ACCOMMODATIONS PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT*

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INTRODUCTION

Nearly three decades ago, four black students sat down at a lunch counter in a Woolworth's store in Greensboro, North Carolina, ordered a cup of coffee, and refused to move until they were served.[1] Unknown to the four young men at the time, their act of courage would help precipitate a series of sit-in protests and other forms of civil disobedience challenging racial segregation at lunch counters, restaurants, parks, hotels, motels, and other facilities. The desegregation of such places was a principal objective of civil rights protests, lawsuits, and proposals for legislative reform during the early 1960s.[2]

Equal opportunity to use and obtain the benefits of places of public accommodation is a long-cherished right in American law. In the *Civil Rights Cases*,[3] decided in 1883, the Court posited, without deciding, that "a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement is one of the essential rights of the citizen . . . ."[4] In 1964, in his concurring opinion in *Bell v. Maryland*,[5] Justice Douglas stated that "the right to be served in places of public accommodations is an incident of national citizenship."[6] Justice Goldberg, concurring separately in that case, declared his belief that all Americans are guaranteed "the right to be treated as equal members of the community with respect to public accommodations."[7] Both Justice Douglas and Justice Goldberg viewed access to public accommodations as a le-

1. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 271 (1988); VIORST, FIRE IN THE STREETS: AMERICA IN THE 1960S 93 (1979). In introducing the bill for the original Americans with Disabilities Act in the Senate in 1988, former Senator Lowell Weicker noted that the roots of public accommodations civil rights laws could ultimately be traced to the Greensboro sit-ins. 134 CONG. REC. S5107 (daily ed. Apr. 28, 1988).

2. BRANCH, *supra* note 1, at 271-73, 295; VIORST, *supra* note 1, at 93-94, 106-08, 117-19; *Hearings on Civil Rights Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 2653-56 (1963) (quoted in Miller v. Amusement Enter., 391 F.2d 86, app. at 91 (5th Cir. 1967)).

3. 109 U.S. 3, 19 (1883) (fourteenth amendment does not confer plenary power upon Congress to regulate public accommodations, but citizens' rights to equal enjoyment of public accommodations may preclude states from abridging or interfering with their ability to use such accommodations).

4. *Id.*

5. 378 U.S. 226 (1964). The Bell v. Maryland majority did not reach the 14th amendment issues raised by the case; based on a change in state law, the Court vacated the convictions of the sit-in participants. *Id.* at 239-42.

6. *Id.* at 250 (Douglas, J., concurring).

7. *Id.* at 286 (Goldberg, J., concurring).

gally protected "civil right."[8] The Justices' characterization of equal access was endorsed by the enactment of the Civil Rights Act of 1964.[9] Subchapter II of the Civil Rights Act prohibits discrimination based upon race, color, religion, or national origin in "places of public accommodation."[10]

For individuals with disabilities, Title III of the Americans with Disabilities Act of 1990 ("ADA")[11] provides an analogous, but broader, prohibition against discrimination in public accommodations. Justice Goldberg's concept of a right to equal membership in the community is the foundational premise that undergirds the public accommodations provisions of the ADA.

This article traces the purposes and origins of the public accommodations provisions of the ADA, outlines the major legal concepts contained in these provisions, and examines the case law, legislative background, and other authorities that will guide the provisions' interpretation and application.[12]

I. EXTENT AND IMPACT OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS ON THE BASIS OF DISABILITY

In the first nationwide poll of people with disabilities, conducted in 1986, the Louis Harris organization asked a number of questions regarding the social integration and activities of Americans with disabilities.[13] The poll discovered that people with disabilities are an extremely isolated segment of the population. The National Council on Disability summarized the poll's results:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue. . . . While a decided majority of other Americans report that they are active in religious, volunteer, and recreation groups, most persons with disabilities are not active in such groups. The extent of non-participation of individuals with disabilities in social and recreational activities is alarming.[14]

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8. *Id.* at 252 (Douglas, J., concurring), 294-95 (Goldberg, J., concurring).

9. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000a-2000e (1988) and other scattered sections of 42 U.S.C.).

10. *Id.* § 2000a.

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991) and 47 U.S.C.A. §§ 225, 611 (West 1991)). Textual references to provisions of the ADA are cited to the codified sections of the U.S.C.A.

12. For a comprehensive analysis of the background of the Americans with Disabilities Act and the implications of its various provisions including public accommodations, see Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

13. LOUIS HARRIS & ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986) [hereinafter ICD SURVEY]. The survey results were based upon telephone interviews of 1,000 individuals with disabilities. *Id.* at iii.

14. NATIONAL COUNCIL ON DISABILITY, IMPLICATIONS FOR FEDERAL POLICY OF THE 1986

Specific findings of the poll included the following:

- Nearly two-thirds of all disabled Americans had not attended a movie in the year prior to the interview as compared with 22% of all adult Americans.
- Three-fourths of all disabled persons interviewed had not seen a live theater or musical performance in the past year while only about four out of ten of all adult Americans had not done so.
- Two-thirds of all disabled persons had not attended a sports event in the past year, compared to 50% of all adult Americans.
- Americans with disabilities are three times less likely than are Americans without disabilities to eat in a restaurant. Seventeen percent of disabled people never eat in restaurants, compared with 5% of nondisabled people. Only 34% of people with disabilities eat at a restaurant once a week or more, compared to 58% of the nondisabled population.[15]

The poll also examined grocery shopping and similar activities and found:

> Disability also has a negative impact on vital daily activities, like shopping for food. . . . Thirteen percent of disabled persons never shop in a grocery store, compared to only 2% of nondisabled persons. About 6 out of 10 disabled persons visit a grocery store at least once a week, while 90% of nondisabled adults shop for food this often.[16]

Why do people with disabilities not frequent places of public accommodation and stores as often as other Americans? The Harris poll highlighted two major reasons for the isolation and nonparticipation of persons with disabilities in the ordinary activities of life: not feeling welcome and the lack of safe access to public facilities.

The Harris poll reported that "[f]ear is the barrier mentioned most frequently by disabled people as an important reason why their activities are limited;" nearly six out of ten reporting activity limitations listed fear of injury as an important reason.[17] Self-consciousness about their disability was reported as an important factor by forty percent of survey participants.[18] Disturbingly large numbers of those with disabilities either do not feel welcome or feel that it is physically unsafe to attend or visit ordinary places open to the public for socializing, doing business, recreation, or engaging in other major societal activities.

Architectural barriers are another significant obstacle to the full participation of Americans with disabilities in mainstream society. The presence of physical barriers not only effectively bars people with certain disabilities from visiting social, commercial, and recreational establishments, but also enhances the population with disabilities' perception that they are unwelcome. Many people with impaired mobility, particularly those who use wheelchairs, cannot get into or

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HARRIS SURVEY OF AMERICANS WITH DISABILITIES 35 (1988). The Council's report analyzes the results of the Harris survey and identifies 31 major implications for federal disability policy.

15. ICD SURVEY, *supra* note 13, at 3.

16. *Id.*

17. *Id.* at 63. Interviewees were questioned explicitly about "fears" concerning the potential for being victimized or hurt. *Id.* at 65.

18. *Id.* at 64.

use a facility that has steps, narrow doorways, inaccessible bathrooms, and other architectural barriers. People with visual and hearing impairments are often unable to make effective use of a facility or to participate safely in its activities and services if there are no provisions for effective communication. According to the Harris poll, forty percent of individuals with disabilities reporting limitations on their activities said that an important reason is the inaccessibility of buildings and restrooms.[19]

The social isolation of people with disabilities results, in large part, from the discrimination they encounter when attempting to engage in the ordinary social and commercial transactions of daily life. People with various disabilities are turned away from restaurants because proprietors say that their presence will disturb or upset other customers.[20] During Senate committee hearings on the ADA legislation in 1989, Lisa Carl, a 21-year-old woman with cerebral palsy, gave dramatic testimony about her exclusion from a local movie theater in Tacoma, Washington.[21] The manager simply refused to allow her to enter because of her disability.[22] President Bush made an explicit reference to Lisa in his remarks at the ADA signing ceremony.[23]

At the height of civil rights confrontations in the early sixties, intransigent authorities closed some parks and zoos rather than permit these facilities to be integrated. Nearly thirty years later, people with disabilities were still having trouble gaining admission to many such establishments. In 1988, the *Washington Post* reported that a New Jersey zookeeper refused children with Down's syndrome admission to his zoo because he was afraid they would upset his chimpanzees.[24]

In a 1985 article in the *Washington Post*, the author described the lack of accessibility at Ford's Theatre and other Washington performing arts facilities.[25] Since that article appeared, some substantial improvements have been made to improve access at Ford's. These changes occurred largely because the theatre is subject to federal laws and regulations governing federally financed, owned, or leased buildings.[26] A complaint of discrimination was filed based upon the inaccessibility of the theatre. In resolving the discrimination complaint, the National Park Service concluded that accessibility changes were necessary and could be achieved without compromising the historic character of the

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19. *Id.*

20. Gittler, *Fair Employment and the Handicapped! A Legal Perspective*, 27 DE PAUL L. REV. 953, 969 n.52 (1978) (quoting NEWSWEEK, Nov. 1, 1976, at 13); *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 532 (1989) (testimony of Robert L. Burgdorf Jr.) [hereinafter *ADA Hearings*].

21. *ADA Hearings*, *supra* note 20, at 64-65 (testimony of Lisa Carl).

22. *Id.* at 64.

23. President's Remarks During Signing of the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1163-64 (July 30, 1990) [hereinafter President's Remarks].

24. Shapiro, *A New "Common Identity" for the Disabled*, Wash. Post, Mar. 29, 1988, (Health), at 19.

25. Burgdorf, *Fighting for Access to the Arts*, Wash. Post, June 4, 1985, at B5.

26. 29 U.S.C. § 794(a) (1988); 43 C.F.R. §§ 17.200-17.280 (1990).

theatre, and has worked diligently to have such changes implemented.[27]

Absent this federal nexus, Ford's Theatre would not have been prohibited from discriminating against people with disabilities even though it is an important public accommodation. Before enactment of the ADA, if a facility was privately owned and operated, improvements to increase accessibility could not have been required, and discrimination against people with disabilities would have persisted by virtue of operating policy and architecture. A privately owned place of public accommodation, prohibited by federal law from discriminating against people on the basis of race, religion, or national origin, was not legally deterred from engaging in blatant and invidious discrimination against people with disabilities. Indeed, until the ADA, there was no federal statute that would prevent a private operator from constructing a new public accommodation and intentionally (or maliciously) making it totally inaccessible to people with disabilities.

II. Scope of Public Accommodations Covered by the ADA

Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation, defines the phrase "place of public accommodation" to include a range of establishments that had generated serious segregation problems.[28] Such places include inns, hotels, motels, and other lodging establishments; restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, and other facilities selling food for consumption on the premises; gasoline stations; and motion picture houses, theaters, concert halls, sports arenas, stadiums, and other places of exhibition or entertainment.[29] Since 1964 it has been illegal for any of these establishments to discriminate on the basis of race, color, religion, or national origin.[30] Under the ADA, it is now unlawful for these same establishments to exclude, segregate, or otherwise discriminate against people because of their disabilities.

Further, the ADA expands the boundaries of the 1964 Civil Rights Act and adds new categories to the definition of public accommodations. The coverage of facilities selling food for consumption on the premises is broadened under the ADA to encompass establishments selling food *or drink*;[31] and the coverage of gasoline stations is subsumed under the much broader ADA category of "service establishments."[32] The full list of facilities constituting public accommodations under the ADA is as follows:

1. Places of lodging — inns, hotels, motels, etc.

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27. Telephone conversation with Mr. David C. Park, Chief, Special Programs and Populations Branch, National Park Service (Aug. 9, 1991). Changes to Ford's included the addition of an accessible restroom on the first floor of the theatre, and raising up the middle section of the last row of seats to create an accessible seating area. *Id.*

28. 42 U.S.C. § 2000a(b).

29. *Id.*

30. *Id.* § 2000a(a).

31. 42 U.S.C.A. § 12181(7)(B) (emphasis added).

32. *Id.* § 12181(7)(F).

2. Establishments serving food or drink — restaurants, bars, etc.
3. Places of exhibition or entertainment — motion picture houses, theaters, concert halls, stadiums, etc.
4. Places of public gathering — auditoriums, convention centers, lecture halls, etc.
5. Sales or rental establishments — bakeries, grocery stores, clothing stores, hardware stores, shopping centers, etc.
6. Service establishments — laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals, etc.
7. Transportation stations — terminals, depots, etc.
8. Places of public display or collection — museums, libraries, galleries, etc.
9. Places of recreation — parks, zoos, amusement parks, etc.
10. Places of education — nursery schools, elementary schools, secondary schools, undergraduate schools, post graduate schools, etc.
11. Social service establishments — day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, etc.
12. Places of exercise or recreation — gymnasiums, health spas, bowling alleys, golf courses, etc.[33]

With the exception of sales or rentals of residential housing, the ADA categories include almost every type of operation which is open for business to, or in contact with, the general public.[34]

Extension of the scope of the ADA's coverage of public accommodations beyond the types of businesses covered in Title II of the Civil Rights Act of 1964 was initially quite a controversial aspect of the legislation. The author of this article was the principal public spokesperson for such expanded coverage. Appearing as a legal and technical expert before the Senate Committee on Labor and Human Resources, the author testified as follows:

> Title II was designed to deal with the worst problems of discrimination that were faced in 1964. It chose to attack segregated hotels, motels, inns, restaurants, et cetera — places where the sit-ins had been occurring. . . . [P]eople with disabilities are facing discrimination in those places, but also in other places, and the concept of public accommodations is one of places open to the public. . . . There is no sense to having certain facilities that are more needed by people with disabilities be closed off, when other facilities are open to them.
>
> For example, it makes no sense to bar discrimination against people with disabilities in theaters, but not in shops; or restaurants, and not in stores; or by places of entertainment, but not in regard to such

33. *Id.* § 12181(7)(L). Entities are covered by Title III if they are on the list and their operations "affect commerce." *Id.*

34. For an extensive discussion of the expanded scope of public accommodations under the ADA, the constitutional basis for such expansion, and its implications for future civil rights statutes, see Burgdorf, *supra* note 12, at 470-73, 493-501.

> important things as doctors' offices. It makes no sense that you can't be discriminated against on the basis of disability if you want to buy a pastrami sandwich at the local deli, but that you can be discriminated against next door at the pharmacy where you need to fill a prescription.[35]

This testimony was quoted in the ADA committee reports in both the Senate and the House.[36] ADA advocates and the news media condensed the reference to the lack of rationale behind treating pharmacies and eating places differently to the phrase "pastrami sandwiches but not prescriptions" — this slogan became the battle cry for broad coverage of public accommodations.[37]

Ironically, in regard to Title II of the Civil Rights Act of 1964, a similar argument for broad coverage of public accommodations had been proffered by Justice Douglas. He had argued that the concept of equal access to places open to the public was not limited to denials of interstate transportation or to a restaurant refusing service to black persons, but also applied to a hospital refusing admission, to "a drugstore refusing antibiotics," or to a telephone company that refused to install a phone.[38] "Constitutionally speaking," he asked, "why should Hooper Food Co., Inc., or Peoples Drug Stores . . . stand on a higher, more sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers?"[39] The "pastrami sandwiches but not prescriptions" argument triumphed in the ADA negotiation process as it had not in fashioning the language of the Civil Rights Act of 1964.

The list of categories of public accommodations did not appear in the original versions of the ADA. As reintroduced in 1989, the legislation would have included all privately owned establishments whose operations affect commerce if they were either "used by the general public as customers, clients, or visitors" or were "potential places of employment."[40] Presenting the Bush Administration's position to the Senate, former Attorney General Thornburgh suggested that such broad coverage was not specific enough, and expressed a need to "work together to define the parameters of coverage in this area."[41] Subsequent negotiations with the Administration led to an enumerative approach substantially equal in breadth to the more generic approach it replaced.[42]

While the definition of public accommodations in the ADA is broad, it applies only to private entities.[43] Buildings owned by state and local governments are not within the definition of public accommodation, but most will be

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35. *ADA Hearings*, *supra* note 20, at 100.

36. S. REP. NO. 116, 101st Cong., 1st Sess. 11 (1989); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 35, *reprinted in* 1990 U.S. CODE CONG. & ADMN. NEWS 316-17.

37. Yost, *Tedious Meetings, Testy Exchanges Produced Disability-Rights Bill*, Wash. Post, Aug. 7, 1989, at A4.

38. Bell v. Maryland, 378 U.S. 226, 252-53 (1964) (Douglas, J., concurring).

39. *Id.* at 254-55.

40. S. 933, 101st Cong., 1st Sess. § 401(2)(A), 135 CONG. REC. S4990 (1989).

41. *ADA Hearings*, *supra* note 20, at 200 (testimony of former Attorney General Thornburgh).

42. Burgdorf, *supra* note 12, at 496.

43. 42 U.S.C.A. §§ 12181(6) & (7).

covered by the "public service" provisions in Title II of the ADA.[44] Under the Act, private clubs, religious organizations, and entities controlled by religious organizations are specifically exempted from regulation.[45] The exemption for private clubs is accomplished through a cross-reference to the exemption for private clubs or establishments in Title II of the Civil Rights of 1964.[46] The exemption for religious organizations was prompted by the Bush Administration's conviction that such an exception was necessary to protect the free exercise of religion.[47] Private homes, apartments, condominiums, cooperatives, and other private housing facilities and residences are also not included in the concept of public accommodations.[48]

In addition to public accommodations, the ADA requirements regarding accessibility of new construction and alterations of existing structures apply to all commercial facilities.[49] Commercial facilities encompasses those facilities: "(A) that are intended for nonresidential use; and (B) whose operations will affect commerce."[50] The concept of "affecting commerce" has been interpreted extremely broadly in American jurisprudence.[51] The ADA definition does not circumscribe this expansive formulation, but adds only that it does not apply to residential uses; the result is an extraordinarily broad definition of commercial facilities.

III. ADA Requirements Regarding Public Accommodations

The substantive requirements of Title III of the ADA establish a broad general rule proscribing discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or ac-

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44. *Id.* §§ 12131-12165.

45. *Id.* § 12187.

46. *Id.* (exemption of private clubs under 42 U.S.C. § 2000a(e) applies).

47. *ADA Hearings*, *supra* note 20, at 200. (testimony of former Attorney General Thornburgh) (legislation should avoid potential collision with constitutional protection of free exercise of religion).

48. 42 U.S.C. § 3604(f) (1988) (Fair Housing Act subjects many multi-family dwellings to accessibility requirements but exempts single family homes).

49. 42 U.S.C.A. § 12183(a).

50. *Id.* § 12181(2).

51. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (congressional power to create regulations requires only: (1) rational basis for congressional finding that regulated activity affects interstate commerce, and (2) reasonable connection between regulatory means selected and asserted ends); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (Court must defer to any rational congressional finding that commerce is affected); Perez v. United States, 402 U.S. 146, 154 (1971) (federal control extends to regulation of classes of activities whose total incidence affects commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (federal intervention permissible if Congress has a rational basis for finding regulatory scheme necessary to protect commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (federal regulatory authority extends to local activities that have a substantial harmful effect on commerce); Wickard v. Filburn, 317 U.S. 111, 125-29 (1942) (where cumulative effect on interstate commerce is substantial federal regulations may control local activity even if individual effects are trivial); United States v. Darby, 312 U.S. 100, 118 (1941) (federal regulation extends to intrastate activities which so affect interstate commerce as to make regulation appropriate).

commodations of any place of public accommodation . . . ."[52] Subsequent sections outline more specific requirements. For example, operators of public accommodations are prohibited from subjecting, by direct or indirect means, an individual or class of individuals with disabilities to any of the following forms of discrimination: (1) denying the chance to participate in or benefit from an opportunity; (2) affording an opportunity that is not equal to that made available to other individuals; (3) providing access that is different or separate, unless such separation or difference is necessary to provide an individual with a disability an opportunity that is as effective as that provided to others; (4) providing opportunities that are not in "the most integrated setting appropriate to the needs of the individual;" (5) using direct or contractually arranged standards or methods of administration that result in discrimination or that encourage others subject to common administrative control to discriminate; and (6) excluding or denying an individual equal treatment because of that person's association or relationship with a person who has a disability.[53]

Title III also establishes "specific prohibitions"[54] that delineate five major proscriptions against discrimination on the basis of disability:

(1) *Discriminatory Eligibility Criteria.* Places of public accommodation are prohibited from imposing or applying "eligibility criteria that screen out or tend to screen out"[55] individuals or classes of individuals with disabilities, unless these criteria "can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered."[56] The "necessary" test is similar to the stringent "business necessity" and "job-related" standards the ADA imposes in connection with tests and selection criteria in the employment context.[57]

(2) *Reasonable Modifications.* Operators of public accommodations are required to make "reasonable modifications to policies, practices, or procedures,"[58] to permit an individual with a disability an opportunity to obtain the "goods, services, facilities, privileges, advantages, or accommodations" being offered.[59] A business is not required, however, to make modifications that it "can demonstrate . . . would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."[60] Although the "reasonable modifications" requirement is generally equivalent to the "reasonable accommodation" requirement in employment,[61] the fundamental alteration limit imposes a much higher level of obligation upon operators of public accommoda-

52. 42 U.S.C.A. § 12182(a).

53. *Id.* § 12182(b)(1).

54. *Id.* § 12182(b)(2).

55. *Id.* § 12182(b)(2)(A)(i).

56. *Id.*

57. *Id.* §§ 12112(b)(6), 12113(a).

58. *Id.* § 12182(b)(2)(A)(ii).

59. *Id.*

60. *Id.*

61. *See* Alexander v. Choate, 469 U.S. 287, 299-301 (1985) (Court uses "reasonable accommodations" and "reasonable modifications" interchangeably).

tions than does the "undue hardship" limit upon employers.[62]

The United States Supreme Court introduced the fundamental alteration concept in the context of disability discrimination in *Southeastern Community College v. Davis*.[63] The *Davis* Court, interpreting section 504 of the Rehabilitation Act,[64] ruled that a university did not have to convert its clinical nursing program into a course of academic instruction in order to accommodate a woman with a hearing impairment.[65] The Court declared that "[s]uch a fundamental alteration is far more than the 'modification' the regulation requires."[66] Lower courts have further outlined the dimensions of the "fundamental alteration" concept: accommodations are not mandated if they would endanger a program's viability;[67] "massive" financial expenditures are not required;[68] nor are modifications required that would "jeopardize the effectiveness" of a program or that would involve a "major restructuring" of an enterprise;[69] and modifications that would so alter an enterprise as to create, in effect, a new program are not required.[70]

To assist in clarifying the judicial conceptualization of "fundamental alteration," commentators have proposed the following definition: "(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or essential components required to achieve a program or activity's primary purpose or benefit."[71]

(3) *Auxiliary Aids and Services.* Covered entities must "take such steps as may

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62. Burgdorf, *supra* note 12, at 474-75.

63. 442 U.S. 397, 410 (1979).

64. 29 U.S.C. § 794 (1988).

65. 442 U.S. at 409-10.

66. *Id.* at 410.

67. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 855 (10th Cir. 1982) (failure to accommodate students with disabilities does not constitute discrimination under § 504 of the Rehabilitation Act if program modification would jeopardize viability of public education system).

68. Dopico v. Goldschmidt, 687 F.2d 644, 653 (2d Cir. 1982) (massive expenditures not required to make mass-transit system accessible to the elderly and people with disabilities); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981) (DOT regulations requiring modifications resulting in extremely heavy financial burdens not valid means of enforcing § 504 of the Rehabilitation Act).

69. Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 607, 614 (D.R.I. 1982) (requiring retrofitting of 34 existing buses at cost of over $1200 each not justified), *rev'd in part, vacated in part, and remanded on other grounds*, 718 F.2d 490 (1st Cir. 1983).

70. Colin K. v. Schmidt, 715 F.2d 1, 3 (1st Cir. 1983) (no requirement to provide type of service not provided to individuals without disabilities); Doe v. Colautti, 592 F.2d 704, 707-09 (3d Cir. 1979) (federal Medicaid participants not required to implement news services for sole use by those with mental illnesses); Turillo v. Tyson, 535 F. Supp. 577, 587 (D.R.I. 1982) (child with disability's right to free public education requires school system to modify its schools but not to finance private educational placement); Lynch v. Maher, 507 F. Supp. 1268, 1280 (D. Conn. 1981) (providing home health care by means of private agency to person with disability receiving health care assistance not a change in program).

71. Burgdorf & Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITIES L. REP. 64, 70 (Jan./Feb. 1984).

be necessary"[72] to assure that no person with a disability "is excluded, denied services, segregated, or otherwise treated differently . . . because of the absence of auxiliary aids or services."[73] Auxiliary aids and services are defined in the statute to include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) acquisition or modification of equipment or devices; and
(D) other similar services and actions.[74]

The operator of a public accommodation can avoid the duty to provide such aids and services by demonstrating that doing so would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[75]

(4) *Readily Achievable Barrier Removal in Existing Facilities.* Public accommodations operators must remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable."[76] The phrase "readily achievable" is original statutory language concocted during the ADA negotiation process. When agreement was reached that the substantial retrofitting requirements imposed under the 1988 version of the bill for making existing facilities and vehicles accessible would not be retained in the 1989 version, the question remained whether any retrofitting at all would be required.[77] Disability rights advocates argued that it would be an inequitable policy not to require even "easy" steps to be taken to achieve accessibility.[78] A commonly cited example was the ramping of a single step or two at a large grocery store or department store; everyone seemed to agree that such simple, relatively cheap barrier removal ought to be required. Once the propriety of requiring "easy" removal of architectural and communication barriers was generally agreed to, there remained a problem of devising a phrase that would convey the concept of "easy" barrier removal. After initial discussions had not led to any workable suggestions of statutory language for this concept, the General Counsel of the Senate Subcommittee on Disability, Robert Silver-

72. 42 U.S.C.A. § 12182(b)(2)(A)(iii).

73. *Id.*

74. *Id.* § 12102(1). The list is not exhaustive according to the committee reports. *See* S. REP. NO. 116, *supra* note 36, at 63; H.R. REP. NO. 485, *supra* note 36, pt. 2, at 106-07; *id.* pt. 3, at 59.

75. 42 U.S.C.A. § 12182(b)(2)(A)(iv). *See supra* notes 63-71 and accompanying text for a discussion of fundamental alteration. The "undue burden" limit upon the duty to provide auxiliary aids and services is analogous to the "undue hardship" limitation the ADA applies in the employment context. 42 U.S.C.A. §§ 12112(b)(5)(A) & 12111(10). *See also* S. REP. No. 116, *supra* note 36, at 63; H.R. REP. No. 485, *supra* note 36, pt. 2, at 106-07; *id.* pt. 3 at 59.

76. 42 U.S.C.A. § 12182(b)(2)(A)(iv).

77. *ADA Hearings*, *supra* note 20, at 211-12, 90 (remarks of Sen. Harkin).

78. This statement and the discussion in the text that follows are based upon the personal recollections of the author.

stein, issued a challenge to a group of attorneys and other advocates; he personally would buy dinner for anybody who came up with an appropriate way of wording such a requirement. After several tries, the author of this article coined the phrase "readily achievable" — an accomplishment for which in the future, as this new terminology is interpreted and applied, he expects he may be accorded both credit and blame. The committee reports characterize the obligation to make "readily achievable" changes as "a modest requirement" between the more extreme alternatives of requiring full retrofitting to achieve accessibility or of requiring no retrofitting at all."[79] "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense."[80]

In determining whether a removal is readily achievable, the ADA directs consideration of the following factors:

(A) the nature and cost of the action needed under this Act;
(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the covered entity; the overall size of the business of the covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[81]

"Geographic separateness" was included in the list of factors as a legislative compromise. Some business interests contended that only the resources of the particular facility should be considered and not those of the parent company.[82] They argued that readily achievable changes should not be permitted to justify changes that would make a particular facility at a particular location unprofitable and thus cause a company to close it.[83] Disability rights advocates maintained, however, that the full complement of resources available to a facility through its parent company should be considered, arguing that more should be required of a large corporation with multiple sites than of a small, local, one-site operation.[84] The language adopted in the ADA provides that both the site-specific and parent company resources are to be considered.[85]

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79. S. REP. No. 116, *supra* note 36, at 65; H.R. REP. No. 485, *supra* note 36, pt. 2, at 109.

80. 42 U.S.C.A. § 12181(9).

81. *Id.*

82. *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess., 100-01, 110-15 [hereinafter *House Judiciary ADA Hearings*] (testimony of Christopher J. Hoey).

83. *Id.*

84. *Id.* at 328 (testimony of Robert L. Burgdorf Jr.).

85. 42 U.S.C.A. § 12181(9); *see, e.g.*, H.R. REP. No. 485, *supra* note 36, pt. 2, at 68, 109 (availability of resources should be considered in light of the interrelationship of facility and covered entity); *id.* pt. 3 at 55 (determination depends upon both the overall business and the site involved).

The ADA committee reports list, as examples of readily achievable barrier removal: "the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and braille markings on elevator control buttons, the addition of flashing alarm lights, and similar modest adjustments,"[86] but more extensive modifications may be readily achievable for public accommodations that have plentiful "overall financial resources."[87] The ADA's "readily achievable" concept provides a reasonable standard which requires existing facilities to remove only those barriers that can be removed without great difficulty; but collectively these minor changes may increase significantly the architectural and communication accessibility for people with disabilities.

(5) *Alternative Methods.* Where measures to remove barriers are not required because the operator of a public accommodation can demonstrate that they are not "readily achievable," the entity must still make its goods, services, facilities, privileges, advantages, or its accommodations available through "alternative methods," if such methods are readily achievable.[88] The committee reports include the following examples of "alternative methods":

> coming to the door to receive or return drycleaning; allowing a disabled patron to be served beverages at a table even though nondisabled persons having only drinks are required to drink at the inaccessible bar; providing assistance to retrieve items in an inaccessible location; and rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater.[89]

The requirements to remove barriers in existing facilities and to provide alternative methods where doing so is readily achievable apply to "communication barriers" as well as to "architectural barriers."[90] Thus, if structural changes to signage, loudspeaker systems, or visual displays in existing facilities to benefit people with visual, hearing, or cognitive disorders are not readily achievable in a particular situation (and are not otherwise required as an auxiliary aid),[91] places of public accommodation may nonetheless be required to undertake readily achievable alternatives for achieving communication.[92] For example, required alternatives might include providing a person to read information to persons with visual impairments, to transcribe aural communications for use by people with hearing impairments, or to escort an individual to the

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See also infra notes 179-80 and accompanying text for a discussion of the impact of the "readily achievable" standard on small businesses.

86. S. REP. No. 116, *supra* note 36, at 66; H.R. REP. No. 485, *supra* note 36, pt. 2 at 110.

87. 42 U.S.C.A. §§ 12181(9)(B) & (C).

88. *Id.* § 12182(b)(2)(A)(v).

89. S. REP. No. 116, *supra* note 36, at 66; H.R. REP. No. 485, *supra* note 36, pt. 2, at 110. The House Committee on Education and Labor adds that the theater in the last example is responsible for "notifying the public of the movie's location in any advertisements." *Id.* pt. 2, at 111.

90. 42 U.S.C.A. § 12182(b)(2)(A)(iv).

91. *See supra* notes 72-75 and accompanying text for a discussion of auxiliary aids requirements.

92. 42 U.S.C.A. § 12182(b)(2)(A)(iv).

location of goods, facilities, or programs that might otherwise be difficult or impossible for the individual to find.

IV. NEW CONSTRUCTION AND ALTERATIONS

In addition, Title III also includes particular provisions relating to new construction and alterations.[93] All newly constructed public accommodations and commercial facilities constructed for first occupancy thirty months or more after the ADA's enactment must be accessible to the population with disabilities, unless the sponsoring entity can demonstrate that doing so would be "structurally impracticable."[94] "Structurally impracticable" is a narrow exception that applies primarily to buildings that must be built on stilts over water or marshes.[95] The Act also exempts builders of small buildings from the obligation to install elevators.[96]

Alterations of public accommodations and commercial facilities must be constructed so that the altered portions are accessible.[97] If alterations are made to an area of a facility containing a primary function, the entity must provide an accessible path of travel to the altered area, as well as accessible bathrooms, telephones, and drinking fountains, unless doing so would be "disproportionate" to the overall cost and scope of the alterations.[98] The ADA gives the Attorney General the responsibility of establishing standards for the disproportionality criterion.[99] House committee reports accompanying the ADA suggest that additional costs must rise to thirty percent of the alteration to qualify as disproportionate.[100] Department of Justice regulations implementing this section, however, specify a standard of twenty percent of the cost of the overall alteration to the primary function area as the criterion for disproportionality.[101]

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93. *Id.* § 12183(a).

94. *Id.* § 12183(a)(1).

95. *See* H.R. REP. No. 485, *supra* note 36, pt. 2, at 120 (narrow exception that will apply only in rare and unusual circumstances; analogous to housing accessibility exception for homes built on stilts in flood areas); S. REP. No. 116, *supra* note 36, at 70-71 (narrow exception that will apply only when accessibility features would destroy physical integrity of structure; not merely steep grades; buildings requiring construction on stilts in marshlands or over water are one of the few situations to which it applies).

96. 42 U.S.C.A. § 12183(b); *see also infra* notes 124-25 and accompanying text for discussion of the exception exempting certain small buildings from the obligation to install elevators applying to alterations as well as new construction.

97. 42 U.S.C.A. § 12183(a)(2).

98. *Id.*

99. *Id.*

100. H.R. REP. No. 485, *supra* note 36, pt. 2, at 113; *id.* pt. 3, at 64.

101. 28 C.F.R. § 36.403(f)(1) (1990).

V. PRECEDENTS AND EXPERIENCES PROVIDING GUIDANCE FOR THE IMPLEMENTATION OF ADA PUBLIC ACCOMMODATIONS REQUIREMENTS

A. Accessibility Requirements

The ADA's accessibility provisions contain terms of art drawn from prior statutes and federal regulations — facilities and vehicles must be made "readily accessible to and usable by" individuals with disabilities.[102] Prior legislation and regulations devised and issued relatively specific standards and schematic drawings to aid in the application of the "readily accessible to and usable by" standard.[103] The ADA committee reports provide further guidance:

> The term is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility, entailing accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services, programs, facilities, accommodations and work areas available at the facility.[104]

The ADA's legislative history provides additional clarifications regarding the application of accessibility requirements in particular situations. For example, the legislative history indicates that all newly constructed buildings must have an accessible ground floor, even if they are not mandated to have elevators. Representative Steny Hoyer, ADA sponsor and House floor manager of the legislation, declared in his floor statement:

> The ADA's basic accessibility requirements may not be evaded by constructing facilities in such a way that no story constitutes a "ground floor;" rather, at least one accessible ground story must be provided in each building. In addition, where ground level entry is provided from more than one story of a facility, each such story must still be readily

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102. 42 U.S.C.A. §§ 12182(b)(2)(B), 12183(a), 12184(b)(3), (5), (6), & (7). *See*, S. REP. No. 116, *supra* note 36, pt. 2 at 69; H.R. REP. No. 485, *supra* note 36, at 117, in which the committees observe:

> The phrase "readily accessible to and usable by" is a term of art which, in slightly varied formulations, has been applied in the Architectural Barriers Act of 1968 ('ready access to, and use of'), the Fair Housing Act of 1968, as amended ('readily accessible to and usable by'), and the regulations implementing section 504 of the Rehabilitation Act of 1973 ('readily accessible to and usable by'), and is included in standards used by Federal agencies and private industry, e.g., the Uniform Federal Accessibility Standards ("UFAS") ('ready access to and use of') and the American National Standards Institute Standard for Buildings and Facilities — Providing Accessibility and Usability for Physically Handicapped People ("ANSI" A117.1) ('readily accessible to, and usable by').

103. *See, e.g.*, UNIFORM FEDERAL ACCESSIBILITY STANDARDS, 49 Fed. Reg. 31,528 (1984) [hereinafter UFAS]. The UFAS, jointly issued by the General Services Administration, Department of Defense, and Department of Housing and Urban Development, outline accessibility standards applicable to facilities either financed or constructed by the federal government. The standards also provide specific descriptions and graphic sketches as a guide to compliance.

104. S. REP. No. 116, *supra* note 36, at 69; H.R. REP. No. 485, *supra* note 36, pt. 2, at 117-18.

accessible to and usable by individuals with disabilities.[105]

Another important concept in the ADA's coverage of places of public accommodations is the term "facility." The Senate Report indicates that the term "facility" should be interpreted to refer to "all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property or interest in such property, including the site where the building, property, structure, or equipment is located."[106] The term "facility" applies to both indoor areas and all outdoor areas where human-constructed items or improvements have been added to the natural environment.[107]

On several occasions before passage of the ADA, the federal government recognized that protecting people with disabilities from discrimination required regulation of the human-made environment. Regulations promulgated pursuant to section 504 of the Rehabilitation Act of 1973[108] provide that all new buildings constructed by or for the use of a recipient of federal assistance must be readily accessible to and usable by handicapped persons. In developing minimum guidelines for section 504 regulations, the Architectural and Transportation Barriers Compliance Board ("ATBCB") reviewed the access standards issued by the American National Standards Institute ("ANSI"),[109] supplemented them where appropriate, and deviated from them when necessary to implement the "readily accessible to and usable by" standard.[110] In 1984, the federal government published its Uniform Federal Accessibility Standards ("UFAS") for the design, construction, and alteration of buildings and residential structures covered by the Architectural Barriers Act, to provide people with disabilities ready access to and use of such buildings and structures.[111]

When large majorities of both houses of Congress acted in 1988 to pass the Fair Housing Amendments Act ("FHA"),[112] which included requirements for accessibility in all new multi-family housing, they demonstrated their recognition of the need for structural regulation in carrying out a broad nondiscrimination policy.[113] The FHA directed the Secretary of Housing and Urban Development to encourage, but not require, state and local governments to establish and enforce accessibility standards consistent with FHA minimum access

105. 136 CONG. REC. E1919 (daily ed. June 13, 1990) (remarks of Rep. Hoyer).

106. S. REP. NO. 116, *supra* note 36, at 67. This definition is based upon the definition of the term "facility" in the § 504 regulations, and is similar to the definition employed in the UFAS, *supra* note 103, A117.1 at § 3.5, and in the AMERICAN NATIONAL STANDARDS INSTITUTE, AMERICAN NATIONAL STANDARD FOR BUILDING AND FACILITIES—PROVIDING ACCESSIBILITY AND USABILITY FOR PHYSICALLY HANDICAPPED PEOPLE, § 3.5, at 15 (1986) [hereinafter ANSI].

107. *ADA Hearings*, *supra* note 20, at 10-11 (testimony of Robert L. Burgdorf Jr.).

108. *See, e.g.*, 34 C.F.R. 104.23 (1990) (Department of Education requires that new facilities constructed or operated by recipients of its financial aid be readily accessible to and useable by individuals with disabilities).

109. *See* ANSI, *supra* note 106.

110. *See* 47 Fed. Reg. 33,863 (1982).

111. *See* UFAS, *supra* note 103.

112. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 28 U.S.C. §§ 2341, 2342 (1988); 42 U.S.C. §§ 3601, 3602, 3604-08, 3610-14, 3614a, 3615-19, 3631 (1988)).

113. 42 U.S.C. § 3604(f) (regulation aimed at preventing discrimination applicable to construction and rental of new multi-family housing).

requirements.[114] The Fair Housing legislation provided a useful model for the ADA. The ADA goes further and authorizes state and local governments to apply to the Attorney General for certification that a state law, local building code, or similar ordinance meets or exceeds the minimum accessibility requirements of the Act.[115]

The voluntary certification process notwithstanding, the ADA does not mandate the inclusion of its minimum accessibility standards in state and local building codes and ordinances. Since entities which fail to comply with the minimum accessibility requirements of the ADA may be subject to liability under that Act, however, it is likely that state and local regulatory agencies will begin to make their requirements consistent with the accessibility provisions of the ADA.[116] State and local governments can continue to select and/or develop their own codes, but they will probably not want their standards to fall below the minimum guidelines established by the ADA. State and local provisions that set equivalent or higher standards of accessibility than those required by the ADA are unaffected and remain fully enforceable through normal state and local processes.[117]

The ADA's approach to state and local accessibility standards is consistent with other federal nondiscrimination requirements, which have sometimes established uniform federal policies that differ from existing local or state practices. For example, at various times, some state laws and local ordinances restricted housing opportunities for blacks, Jews, and Catholics in certain areas of a community.[118] Congress decided, as a matter of public policy, to undercut such state and local policies by barring discrimination in housing and permitting federal courts to intervene.[119] As society has come to recognize and understand that severe discrimination also exists against people with disabilities, Congress has mandated measures to bar this kind of discrimination as well.

B. Limits upon Accessibility Requirements

Sections 302 and 303 of the ADA explicitly set limits upon the obligation of achieving full accessibility.[120] Thus, the ADA does not require full accessibility where: (1) in the case of new facilities, access would be "structurally impracticable"; (2) in the case of existing facilities, access is not "readily achievable"; or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible."[121] In such circumstances, a place of public accommodation is not required to exceed these limits in order to achieve full accessibility. Such an

114. *Id.* § 3604(f)(5)(C).

115. 42 U.S.C.A. § 12188(b)(1)(A)(ii). Such certification can take place only after prior notice and a public hearing, and in consultation with the ATBCB. *Id.*

116. *ADA Hearings*, *supra* note 20, at 542 (testimony of Robert L. Burgdorf Jr.).

117. 42 U.S.C.A. § 12201(b).

118. *ADA Hearings*, *supra* note 20, at 543.

119. 42 U.S.C. §§ 3601-19.

120. 42 U.S.C.A. §§ 12182, 12183.

121. *Id.* *See supra* notes 76-87 and accompanying text for additional discussion of the "readily achievable" standard.

entity is required, however, to take less extensive steps to achieve accessibility.[122] Even where full architectural and communication accessibility is not mandated, "alternative methods" are required, such as arranging for delivery of services or goods to a portion of the facility that *is* accessible.[123]

The ADA also provides an exception regarding the obligation to install elevators in certain small buildings. Pursuant to section 303(b) (new construction and alterations), elevators are not required in facilities that are less than three stories or that have less than 3,000 square feet per story, unless the facility is a shopping center, shopping mall, professional health care office, or is in a category determined by the Attorney General to require the installation of elevators.[124] Arguably, the addition of elevators in such facilities might make up only a small and managable percentage of overall building and renovation costs. The ADA attempts to ensure, however, that small building owners and builders would not be unduly burdened.[125]

1. Readily Achievable.

Under the ADA, physical access to existing facilities should be achieved without extensive restructuring or burdensome expense. For example, a public accommodation would generally not be required to provide access if there is a flight of steps which would require extensive ramping or the addition of an elevator. The agency or business would have to take other "readily achievable" steps, however, to provide program access. Thus, a small real estate agency doing business with the general public at a three story walk-up office would not be required to install an elevator to provide access to the upper floors. But the agency would be required to install a simple ramp over a few steps to its entrance, to provide access to first floor offices, and to add glue-on, raised-letter and braille markings to its floor numbers and elevator panels (if there are elevators).[126]

The "readily achievable" standard replaced a requirement in the earlier (1988) version of the ADA that structural barriers were to be removed within two years, if removal did not fundamentally alter the nature of the activity engaged in by a place of public accommodations.[127] The sponsors of the ADA in the 101st Congress considered it to be more practically and politically realistic to hold the private sector to a "readily achievable" standard.[128]

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122. *See supra* notes 88-92 and accompanying text for a discussion of the alternative method requirement.

123. *Id.*

124. 42 U.S.C.A. § 12183(b).

125. *See infra* notes 178-87 and accompanying text for a discussion of other ways in which the ADA addresses the needs of small businesses.

126. *ADA Hearings*, *supra* note 20, at 546; S. REP. No. 116, *supra* note 36, at 66.

127. S. 2345, 100th Cong., 2d Sess. §§ 7(a)(1), 7(b)(1) (1988). The bill provided that regulations issued under the Act could extend the two-year period to up to five years "where reasonably necessary for the completion of such modifications to particular classes of buildings and facilities." *Id.* at § 7(b)(2).

128. *ADA Hearings*, *supra* note 20, at 90, 211-12 (remarks of Sen. Harkin).

2. Topological Problems.

The Act makes allowances for exceptional cases where providing access would be impracticable or not feasible. The ADA recognizes that sometimes accessibility poses topological problems. For example, the ADA does not require full accessibility when: (1) in the case of new facilities, access would be "structurally impracticable"; or (2) in the case of altered facilities, access would be beyond the "maximum extent feasible."[129] Such limitations will apply only in rare and unusual circumstances, where unique characteristics of terrain make full accessibility unusually difficult.[130] Such accommodation to topological difficulties is analogous to an acknowledged exception to the accessibility requirements of the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying the Housing Act, the House Committee on the Judiciary noted:

> certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing may traditionally be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites.[131]

Likewise, provisions in the existing UFAS contain special requirements for alterations in cases where meeting the general standards would be impracticable or infeasible.[132]

Regulations implementing the Act indicate that the circumstances in which topological limitations can be invoked in the context of public accommodations are quite narrow.[133] In such circumstances, a place of public accommodation will not be required to exceed these limits in order to achieve full accessibility but will be required to take alternative measures to achieve accessibility.[134]

C. Environmental Impact of Accessibility

The limitations on accessibility requirements minimize the possible disruptive or burdensome effect of the ADA requirements. A common misconception exists that making facilities accessible may have an ecologically adverse effect, particularly in environmentally sensitive areas. Experience indicates, however, that proper planning and design, and proper construction or renovation of facilities should protect and maintain the integrity of the natural environment.

1. National Park Service Experience.

The National Park Service is an agency with considerable experience in

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129. 42 U.S.C.A. §§ 12183(a)(1) & (a)(2).

130. *See generally* S. REP. No. 116, *supra* note 36, at 70-71; H.R. REP. No. 485, *supra* note 36, pt. 2, at 120.

131. H.R. REP. No. 711, 100th Cong., 2d Sess. 27 (1988).

132. UFAS, *supra* note 103, §§ 4.1.6(2), (4)(c)(ii), 4.1.6(2)(e)(f), 4.17.3.

133. 28 C.F.R. § 36.401(c)(1) (1990).

134. 28 C.F.R. §§ 36.401(c)(2) & (3).

providing access to people with disabilities while protecting environmental interests. In implementing the requirements of section 504 of the Rehabilitation Act of 1973,[135] the National Park Services has spent the last eighteen years developing ways to make parks and recreation areas accessible to all persons with disabilities. At first glance, park and recreation facilities seem to pose challenging design problems. How can the Grand Canyon, Rocky Mountains, Cape Cod National Seashore, or Hawaiian volcanos be made accessible? In fact, through the application of a few simple principles, the National Park Service has found that it is feasible to provide an effective level of accessibility at almost all of its parks and facilities without undercutting environmental integrity.[136]

The National Park Service has stated, as one of its guiding principles, that "[t]he degree of accessibility provided will be proportionately related to the degree of man-made modifications made to the area or facility and to the significance of the facility."[137] Visitors' centers, for example, are completely man-made and have a high degree of importance, so accessibility should be optimal. In areas such as campgrounds, which have some man-made modifications, it may be appropriate to only make a few campsites accessible. In certain natural areas with extreme slopes, rugged terrain, and no man-made modifications required accessibility features will be minimal. But even in such areas, park staff are required to take steps to assist visitors with disabilities to experience, as nearly as is feasible, the type of recreation experience available at the site.[138]

Like the ADA, the National Park Service requires alternative methods of providing access when full accessibility is not possible. The Statue of Liberty is a good example. When the Statue was being renovated, it was determined that it was structurally impossible to provide an elevator to the lookout area in the crown. Yet, the experience of the crown area and the view from it are one of the major attractions available to visitors at the park. To compensate for the inaccessibility of that area to persons unable to climb the stairs to the top, a full-scale model of the crown was developed and displayed in the site's museum so that people can enter it and get an idea of its size. A video presentation of the view from the top is also provided. Of course, such alternative methods must be used with some caution to avoid superficial, unequal solutions — seeing a picture of a wild and scenic river is no substitute for rafting the river. People with

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135. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 390 (codified as amended at 42 U.S.C. § 794 (1988)).

136. *See, e.g.*, NATIONAL PARK SERVICE, SPECIAL DIRECTIVE 83-3 (1983) (document updates previous directives on accessibility to national parks by disabled persons and outlines new policies for improving access). The National Park Service ("NPS") directive recognizes, as basic principles, the need to provide access to national parks and programs by people with disabilities as well as the obligation to preserve and protect the resources it manages. *Id.*

137. *Id.* at 2 (Policies on Accessibility Related to Specific National Park Service Function).

138. The common-sense accessibility policies of the NPS are consistent with the ADA. The ADA does not require full access if: (1) in the case of new facilities, access would be "structurally impracticable"; (2) in the case of existing facilities, access is not "readily achievable"; or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible." *See supra* text accompanying note 121.

disabilities should have the opportunity for the first-hand experience whenever possible.

2. Other Agencies.

In addition to the National Park Service, other federal agencies, such as the United States Forest Service, the Fish and Wildlife Service, and the United States Army Corps of Engineers, have also had experience in developing accessible facilities.[139] A number of states also have passed legislation mandating accessibility in their park and recreation facilities.[140] The experiences of all these agencies have demonstrated that making facilities accessible can be accomplished through means that are in harmony with the environment.

VI. STANDARDS, GUIDELINES, AND TECHNICAL ASSISTANCE REGARDING ACCESSIBILITY OF PUBLIC ACCOMMODATIONS

At the time the ADA was enacted, considerable guidance for the application of accessibility requirements to concrete circumstances was available under existing standards, such as the ANSI Standard for Buildings and Facilities[141] and the UFAS.[142] ANSI is a private standards-setting organization that has promulgated codes covering many aspects of the built environment. These are used in most parts of the country. The large majority of states already have some form of accessibility requirements,[143] and ANSI's accessibility standards are those most-often referenced by existing local and state accessibility laws.[144]

The UFAS are similar in many respects to the ANSI standards, but have been carefully reworked by the four principal standard-setting federal departments for use in enforcing existing federal rules requiring nondiscrimination because of handicap.[145] The UFAS are particularly pertinent as a starting point for standards under the ADA, because the UFAS include thorough scoping requirements which make clear exactly what standards apply in specific situations. The UFAS eliminate potential confusion that might be engendered by a less specific set of standards.

The ADA authorizes the Attorney General to promulgate standards consis-

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139. *ADA Hearings*, *supra* note 20, at 550.

140. *See, e.g.*, ILL. ANN. STAT. ch. 111 1/2 ¶ 3713(r)(2) (Smith-Hurd 1988) (any building, structure, or improved area used for recreation); MICH. COMP. STAT. ANN. § 3.550(301) (West 1991) (recreation facilities available to public must be accessible); N.C. GEN. STAT. § 168-3 (1987) (places of public accommodation, amusement, or resort must be accessible).

141. ANSI, *supra* note 106.

142. UFAS, *supra* note 103.

143. *See, e.g.*, CAL. GOV'T CODE § 4450 (West 1980); FLA. STAT. ANN. § 553.45 (West 1988). *See also* Annotation, *Validity and Construction of State Statutes Requiring Construction of Handicapped Access Facilities in Buildings Open to Public*, 82 A.L.R. 4th 121 (1991) for a general discussion of state architectural accessibility statutes.

144. *See, e.g.*, FLA. STAT. ANN § 553.481 (West Cumm. Supp. 1990) (ANSI A117.1—1986 adopted and made applicable under Florida building code).

145. The four standard-setting agencies are the Department of Housing and Urban Development, the Department of Defense, the General Services Administration, and the U.S. Postal Service. UFAS, *supra* note 103, § 2.1.

tent with the minimum accessibility guidelines developed by the Architectural and Transportation Barriers Compliance Board ("ATBCB"). The ATBCB shall extrapolate upon existing Minimum Guidelines and Requirements for Accessible Design[146] and apply them to the various types of facilities and places of public accommodation and services covered by Titles II and III of the ADA.[147] The following examples evidence the variety of standards, guidelines, technical assistance documents, and how-to guides that are already available offering guidance for providing access to people with disabilities for various types of public accommodations.

A. Public Accommodations Generally

1. Standards.

Existing accessibility standards, such as the UFAS and ANSI standards, address accessibility of a wide variety of facilities. The "scoping provisions" of the UFAS describe the types of facilities covered and establish minimum standards for each category of room, element, area, or space in a facility that needs to be accessible.[148] These provisions are applicable to a wide spectrum of accommodations.[149]

For facilities covered by the scoping provisions, the UFAS prescribe general requirements and particular specifications. To comply with the UFAS, new construction of covered facilities must conform to substantive requirements and specifications regarding parking, routes to the facility, entrances, bathrooms and water fountains, common use areas of the facility, and access to the service or program.[150]

Certain categories of facilities regulated under the UFAS are subject to specific requirements. For example, the UFAS require special application of its standards to restaurants and cafeterias;[151] to health care facilities;[152] to mercantile establishments;[153] to libraries;[154] and to postal facilities.[155] Moreover, as to

146. 36 C.F.R. § 1190 (1990) (Minimum Guidlines).

147. 42 U.S.C.A. § 12186(c).

148. *See* UFAS, *supra* note 103, §§ 4.1-4.1.2, at 4-14. The UFAS apply to facilities such as hotels, motels, boarding houses, kindergartens and schools, hospitals, child care facilities, businesses (banks, barber shops, etc.), and mercantile facilities (markets, department stores, etc.), as well as places of assembly such as civic, social, recreation, and religious facilities. *Id.* §§ 4.14(4)-(11), at 8-11.

149. Accommodations subject to the provisions include: amusement parks and arcades, arenas, armories, art galleries, auditoriums, banquet halls, bleachers, bowling alleys, carnivals, churches, clubs, community halls, courtrooms, dance halls, drive-in theaters, exhibition halls, fairs, funeral parlors, grandstands, gymnasiums, motion picture theaters, swimming pools, tennis courts, lecture halls, libraries, museums, night clubs, passenger stations, pool and billiard halls, restaurants, skating rinks, stadiums, taverns and bars, studios, and theaters. *Id.* § 4.1.4(4)-(10).

150. *Id.* §§ 4.1.1-4.1.2, at 4-7.

151. *Id.* § 5, at 57.

152. *Id.* § 6, at 57.

153. *Id.* § 7, at 57.

154. *Id.* § 8, at 58.

155. *Id.* § 9, at 58.

places of assembly, sub-part 4.33 gives specific guidance regarding wheelchair seating locations, access to performance areas, placement and types of listening systems, and other issues pertinent to assembly areas within a facility.[156]

2. How-to Guides.

In addition to formal standards a variety of technical assistance manuals and how-to guides exist that give nuts-and-bolts descriptions of how to achieve public accommodation accessibility.[157]

B. Parks and Recreation Facilities

There is a wide range of standards and how-to guides for improving access to park and recreation facilities for people with disabilities.

1. Standards.

Existing accessibility standards are applicable to the majority of these facilities, either directly or indirectly. Both UFAS and ANSI standards contain provisions applicable to buildings, bathrooms, parking lots, entrances, and other features. As buildings, nature centers, visitors' centers, and many other park and recreation facilities are subject to accessibility standards applicable to buildings generally. Requirements regarding bathroom and parking facilities in parks and recreation areas are the same or similar to those applicable to other public accommodations. Further, the UFAS standards for certain special uses, such as restaurants, housing, assembly areas, and mercantile areas, can be applied to recreation facilities.[158]

Even where existing accessibility standards do not apply directly, they may provide substantial guidance indirectly. For facilities such as fishing piers, campgrounds, and nature trails, the UFAS and ANSI standards can be very useful. Major UFAS elements of accessible design, including parking, accessible routes, entrance and egress, bathrooms, and water fountains, can be applied or

156. *Id.* § 4.33, at 49.

157. For example, the hotel and motel business has been blessed with two fine resources: AMERICAN HOTEL AND MOTEL ASS'N, HANDICAP ACCESSIBILITY IN NEWLY CONSTRUCTED HOTELS & MOTELS: AN INTERPRETATION OF ANSI A117.1 (1986); THOMAS DAVIES & KIM BEASLY, DESIGN FOR HOSPITALITY: PLANNING FOR ACCESSIBLE HOTELS AND MOTELS (copublished by Paralyzed Veterans of Am. & Am. Hotel and Motel Ass'n). Both of these publications include schematic drawings, guidelines, and practical advice for designing and constructing accessible facilities.

There are similar publications for other areas of public accommodations. *See, e.g.*, EASTERN PARALYZED VETERANS ASS'N, CURB CUTS (1984); MARTHA ROSS REDDEM, WAYNE FORTUNATO - SCHWANDT & JANET WELSH BROWN, BARRIER-FREE MEETINGS: A GUIDE FOR PROFESSIONAL ASSOCIATIONS (Am. Ass'n for the Advancement of Sci., 1976); UNIVERSITY OF ARK. & FED. REHABILITATION SERVICES ADMIN., ACCESSIBILITY GUIDELINES FOR MEETING AND LODGING FACILITIES (1981).

158. *See supra* notes 141-56 and accompanying text for a discussion of the scope of the UFAS and ANSI standards.

adapted to such facilities.[159] Specifications for access to a pier, for example, can be extrapolated from the UFAS simply by considering the pier as an extension of the pathway, and applying appropriate criteria for making a pathway accessible.

2. Guidelines and Technical Assistance Manuals.

Since accessibility was mandated by section 504 of the Rehabilitation Act of 1973,[160] guidelines for federally assisted and federally conducted park and recreation programs have been available since the mid-1970s. For example, the Department of Housing and Urban Development published a technical assistance guide to making parks accessible in 1976.[161] In 1986, the National Park Service published guidelines and resource information to assist park personnel in working with visitors with disabilities.[162] The National Park Service has also produced two informative videotapes on accessibility.[163]

In 1985, the Federal Government Working Group on Access to Recreation prepared a technical paper for the ATBCB. This publication delineates certain underlying principles in providing accessible recreation facilities, and provides specific guidelines and technical requirements regarding accessible picnic areas, campgrounds, and trails.[164] In addition, a variety of other documents provide how-to guidance in creating accessibility to particular types of park and recreation activities.[165]

Further, a number of government and private agencies, such as the National Endowment for the Arts, the Smithsonian Institution, and the Disney Corporation have produced documents discussing accessibility in the context of their particular areas of interest.[166] In addition, in 1988, Northern Cartographic published *Access America: An Atlas and Guide to the National Parks for Visitors with Disabilities*, which presents comprehensive accessibility information, in-

159. *See supra* note 150 and accompanying text for a discussion of the substantive requirements prescribed by the UFAS.

160. *See supra* notes 108-09 and accompanying text for a discussion of various aspects of § 504 of the Rehabilitation Act.

161. *See* UNITED STATES DEP'T. OF HOUSING & URBAN DEV., BARRIER FREE SITE DESIGN (1977) (recommendations for specific technical requirements for construction of trails, campgrounds, swimming pools, and other recreational facilities).

162. NATIONAL PARK SERVICE, INTERPRETATION FOR DISABLED VISITORS IN THE NATIONAL PARK SYSTEM (1986).

163. *Access to Parks and Recreation: Disabled People Speak* (Nat'l Pk. Serv. 1988); *Access to Park and Recreational Facilities* (Nat'l Pk. Serv. 1989). Both are available from the National Park Service.

164. FEDERAL GOV'T WORKING GROUP ON ACCESS, ACCESS TO OUTDOOR RECREATION PLANNING AND DESIGN (1985).

165. *See, e.g.*, NORTHERN CARTOGRAPHIC, ACCESS AMERICA: AN ATLAS AND GUIDE TO NATIONAL PARKS FOR VISITORS WITH DISABILITIES (1988) (includes comprehensive information related to accessibility including maps, designs, access rating lists of accessible features, and data related to weather and elevation); NEW MEXICO NAT. RESOURCES DEP'T, ACCESSIBLE FISHING: A PLANNING HANDBOOK (1984) (contains comprehensive guidelines and technical requirements aimed at improving access to fishing for people with disabilities).

166. *House Judiciary ADA Hearings*, *supra* note 82, at 361-62 (testimony of Robert L. Burgdorf Jr.).

cluding maps, diagrams, access ratings, lists of accessible features and facilities, information about weather and elevations, and a wealth of other information about thirty-seven National Parks, along with essays about park use by individuals with disabilities and full-color photos of scenic views in the parks.

C. *Historic Buildings*

If an existing historic building is not being otherwise altered or renovated, owners are required to remove barriers only when doing so is "readily achievable."[167] This standard leaves considerable room for balancing the need for accessibility with the need to maintain the integrity of the building's historically significant features. Under existing law, providing access to historic properties has generally been found to be achievable without destroying a property's historic importance. For example, the National Park Service has established the following policy for addressing accessibility in historic buildings:

> The National Park Service will provide the highest feasible level of physical access for disabled persons to historic properties, consistent with the preservation of the properties' significant historical attributes. Access modifications for disabled persons will be designed and installed to least affect the features of a property that contribute to its significance. Some impairment of some features will be accepted in providing access. If it is determined that modifications of particular features would destroy a property's significance, however, such modifications will not be made.[168]

The Park Service notes: "The issue is not *if* we should make historic properties accessible but *how* to provide the *highest* level of access with the *lowest* level of impact."[169]

In cases where full access is not readily achievable, the ADA requires "alternative methods of making such . . . accommodations available."[170] The "alternative methods" requirement can generally be accomplished in historic buildings through a combination of alternative access features (e.g., ramps that are slightly steeper than code, usage of non-primary entrances) along with video presentations and other representational displays of inaccessible features of the building.

Section 504(c) of the ADA requires the ATBCB to develop minimum guidelines for "qualified historic properties."[171] These guidelines are to be generally consistent with the standards for accessibility of historic properties under the UFAS.[172] The UFAS allows for alternative methods of providing access to certified historic buildings.[173] For example, if it would impair the historic

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167. *See supra* notes 76-87 and accompanying text for a discussion of the "readily achievable" requirement.

168. NATIONAL PARK SERV. MEMORANDUM H42 (Jan. 13, 1989).

169. *Id.* (emphasis in original).

170. 42 U.S.C.A. § 12182(b)(2)(v).

171. *Id.* § 12204(c).

172. *Id.*

173. UFAS, *supra* note 103, § 4.1.7, at 13-14.

facade of a building to make the primary entrance accessible, another entrance may be altered.[174]

VII. Deference to the Needs of Small Businesses

During congressional consideration of the ADA, the small business community expressed a great deal of concern that the requirements of the ADA would impose serious hardships upon their enterprises.[175] Lack of familiarity with existing measures that prohibit discrimination against people with disabilities, serious misinformation about the actual requirements of the legislation, and a great deal of misunderstanding about the needs and rights of people with disabilities combined to create fears that the ADA ignored the needs of small businesses and that it would be economically disastrous for such businesses.

Actually, the ADA was carefully crafted to take into account the needs and situations of small businesses at every juncture. In testifying during Congressional hearings, the author did not hesitate to state that the ADA is the federal civil rights law most responsive to the particular situations and characteristics of small businesses that has ever been considered by the Congress.[176] Each of the major requirements of the Act was tailored to consider and make allowance for the important and unique needs of the small business operator. Small businesses were not wholly exempted from the coverage of the public accommodations provisions of the bill because they are too important a source of goods and services for the American public. Small businesses make up a large percentage of the establishments that provide services and goods on a daily basis; to cut them out of the ADA would have seriously undermined the statute's goal of opening up our society to people with disabilities on an equal basis. In many contexts, small business *is* business in America today. Thus, the approach of the ADA was not to eliminate small businesses from the requirements of the bill, but rather to tailor the requirements of the Act to take into account the needs and resources of small businesses — to require what is reasonable and not to impose obligations that are unrealistic or debilitating to businesses.

Rejection of a total exemption for small public accommodations is consistent with Title II of the Civil Rights Act of 1964, which covers all such public accommodations regardless of size.[177] There, as here, the omission of small restaurants, lunchrooms, theaters, or service stations from antidiscrimination requirements would have undermined a major purpose of the ADA. Congress deemed it essential that local neighborhood businesses be prohibited from engaging in such discrimination if the ADA was to have any real impact.

Each of the major sections and requirements of the ADA takes into account the fact that some businesses are very small, local enterprises that may have very

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174. *Id.*

175. *See ADA Hearings, supra* note 20, at 504-05, 507. The National Federation of Independent Businesses, for example, testified that the legislation would create "onerous requirements," and that "the practical implications could well be overwhelming for many small firms." *Id.*

176. *House Judiciary ADA Hearings, supra* note 82, at 328.

177. Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. § 2000a (1988)).

limited resources. In determining what is required, the ADA either directs that the size and resources of establishments are to be taken into account or some amelioration for small businesses is built into the substantive requirement itself. One obvious example — the small building elevator exception — was discussed above.[178] The following are some additional ways in which the public accommodations provisions of the ADA defer to the characteristics and needs of small businesses.

A. The Readily Achievable Limitation

As noted previously, the ADA places a limit on the requirement for removing architectural and communication barriers in existing public accommodations — such barriers need not be removed unless doing so is "readily achievable" (i.e., is "easily accomplishable and able to be carried out without much difficulty or expense").[179] The size and budget of a business are explicitly considered in determining what is readily achievable.[180] A struggling small business will be required to do much less than a bigger, more well-to-do establishment. The readily achievable standard takes into account the particular physical and financial realities of each individual establishment, requiring more of those realistically able to do more and less of those who are only able to do less.

B. Undue Burden Limitation as Applied to Auxiliary Aids and Services

The requirement that places of public accommodation make available "auxiliary aids and services" does not apply in circumstances where the provisions of such aids and services would "fundamentally alter" the enterprise or would "result in an undue burden."[181] The committee reports note that "[t]he determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business will be made on a case-by-case basis, taking into account the same factors used for purposes of determining 'undue hardship.' "[182] In determining whether providing an auxiliary aid or service amounts to an undue burden, the size, budget, and circumstances of a business are expressly relevant.[183] A struggling small business will be excused from providing an auxiliary aid or service in circumstances where a larger, more prosperous business might be required to provide it.

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178. *See supra* notes 124-25 and accompanying text.

179. *See supra* notes 76-87 and accompanying text for a discussion of the "readily achievable" standard.

180. 42 U.S.C.A. §§ 12181(9)(B) & (C). In addition, a 1990 amendment to the Internal Revenue Code added a provision that grants small businesses an annual credit against taxes for half of the first $10,000 expended to comply with the ADA. 26 U.S.C.A. § 44 (West Supp. 1991).

181. 42 U.S.C.A. § 12182(b)(2)(A)(iii); *see supra* notes 72-75 and accompanying text for a discussion of auxiliary aids and services.

182. S. REP. No. 116, supra note 36, at 63; H.R. REP. No. 485, supra note 36, pt. 2, at 106-07.

183. 42 U.S.C.A. § 12182(b)(2)(A)(vi).

C. The Readily Accessible to and Usable by Accessibility Standard

Making facilities readily accessible to and usable by persons with disabilities is a facility-by-facility process that involves consideration of the physical structure and of the nature of the activities that take place or will take place therein. Complying with the "readily accessible to and usable by" requirement of the ADA will require a business to make its services and facilities accessible to persons with disabilities, but will not require it to add additional features not made available to persons without disabilities.[184] For example, a business that does not provide drinking fountains or restroom facilities for the use of its customers will not be forced to add accessible fountains or toilets for customers with disabilities. Under this standard, small businesses with the fewest "frills" will have fewer such services and conveniences to make accessible.

D. Alternative Means to Serve Customers Allowed

Where the removal of an access barrier is not required under the ADA because such removal is not readily achievable, the ADA permits businesses to make goods, services, facilities, privileges, advantages, or accommodations available "through alternative methods".[185] Thus, small businesses can accommodate the needs of customers with disabilities without hurting their businesses or incurring extensive expenses. In no event do the readily achievable and alternative methods requirements require a small business to make impractical structural changes.

E. Telecommunications Relay Services

Title IV of the ADA provides for the establishment of a system of telecommunications relay services for individuals with speech or hearing impairments.[186] While it may not be apparent on its face, the development of this relay service is an accommodation to the interests of small businesses. Prior versions of the ADA had no relay service requirement. Places of public accommodation were required, however, to purchase and operate a Telecommunications Device for the Deaf ("TDD") so that customers and potential customers could call on their TDDs to make reservations, purchase tickets, inquire about products and prices, and check on store hours. While portable TDDs are relatively inexpensive (a good unit can usually be purchased for around $200), there was some concern that it was too burdensome on small businesses to require that they install TDDs. The relay service provisions were developed as an alternative. Under the requirements of Title IV, each area and locality of the country will be served by a telecommunications relay service, and individuals using TDDs will be able to call the relay service and have their inquiries, reservations,

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184. *See supra* notes 102-04 and accompanying text for a detailed discussion of "readily accessible to and usable by" standard.

185. 42 U.S.C.A. § 12183(b). *See also supra* note 89 and accompanying text for examples of alternative methods stated in the House and Senate committee reports.

186. 42 U.S.C.A. § 12182(b)(2)(v).

and purchases passed on by voice to the business. In this way, small businesses were spared the modest expense of obtaining TDDs.

It is clear that the ADA was designed with an eye toward accommodating the interests of small businesses. In his remarks at the signing of the bill, President Bush declared:

> I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my Administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation; and we've been committed to containing the costs that may be incurred.[187]

VIII. THE FRUITS OF PUBLIC ACCOMMODATIONS ACCESS REQUIREMENTS

A widely accepted premise of the American system of government is that the nation has an obligation to guarantee equal opportunity for its citizens, to prohibit discrimination, and to regulate facilities in the public interest. Consequently, access for people with disabilities has gained increasing recognition and acceptance as a legitimate public and governmental interest. Given that a significant portion of the populace has a disability or will experience one at some point, such requirements do not represent a fiscal sacrifice for a select few, but rather a basic insurance policy provided by and on behalf of our entire society.

ADA access requirements represent a crystallization of societal conviction that, at this point in our development, we have enough understanding of the significant life limitations imposed by attitudinal, architectural, and communications barriers on millions of our citizens to recognize that continued toleration of such barriers is folly. To continue to erect inaccessible public facilities, for example, when access can be provided cheaply, is to continue a form of discrimination that can be characterized as ignorant at best — at worst, as intentional. The ADA inaugurates a new public policy for the '90s and beyond that recognizes the aging of our society, the many groups of people with disabilities whose talents are needed by our culture and economy, and the need to decrease the percentage of our citizenry that depends on government benefits and entitlements because of discrimination and an inaccessible environment. Such positive objectives provide ample justification for regulating the operations of business to impose modest obligations not to discriminate. Fears that the legislation will have substantial disruptive effects upon America's small businesses are based largely upon misinformation and lack of familiarity about people with disabilities and the legal standards for protecting them from discrimination.

The ADA represents an important advance toward assuring that these and other places of public accommodation will begin to include people with disabilities as full and equal parts of the "public" they serve. As advocated for all Americans over twenty years ago, people with disabilities will be afforded "the right to be treated as equal members of the community with respect to public

187. President's Remarks, *supra* note 23, at 1164.

accommodations."[188]

188. Bell v. Maryland, 378 U.S. 226, 286 (1964) (Goldberg, J. concurring).