Handicapping Freedom

The Americans with Disabilities Act

Edward L. Hudgins

The Americans with Disabilities Act (ADA), which was signed into law on July 26, 1990, passed the U.S. Senate with only six nay votes and the House of Representatives with only 28. The bill had the strong support of President Bush and of Sen. Robert Dole (R-Kan.), then Senate Minority Leader, now Majority Leader. In the House, Rep. Newt Gingrich (R.-Ga.), the current Speaker, supported the legislation, while the current Majority Leader Richard Armey and Majority Whip Tom Delay, both Texas Republicans, opposed it.

The ADA was inspired in part by a desire to protect disabled Americans from hiring discrimination the same way civil rights legislation purports to protect racial and ethnic minorities. In fact, the ADA is one of the worst cases of the Bush-era reregulation of the economy. It runs contrary to the goals of the Republican Contract With America as well as sound policy principles because

- It devalues property by restricting use without paying the owners any compensation;
- It adds to the costs for enterprises to do business and for state and local governments to provide services, often with few, if any, offsetting benefits;
- Its requirements that state and local governments provide special facilities, many of which go under- or unutilized, are prototypical unfunded mandates.

The ADA suffers from other shortcomings as well:

- Its vague and contradictory definitions constitute irresponsible delegation of power by Congress to the courts and officials that must interpret the ADA's meaning;
- It has unleashed a plague of needless lawsuits; and
- In some ways it harms the very group it means to help: disabled Americans.

The ADA puts the rhetoric of both Republicans and Democrats to the test. By the Republicans' own criteria, it never should have been passed, certainly not in its current form. The Democrats profess to favor a "common-sense" approach to regulation, but the ADA constitutes the abrogation of common sense. If Congress is serious about lifting the regulatory burden from the economy, it must consider major changes in, if not outright repeal of, the ADA. And if Congress is to undo the damage already done by the act, it should consider paying reparations to cover the costs that individuals, private establishments, and enterprises have suffered under the ADA's provisions.

Statutory Protections

Few would disagree that, unlike able-bodied citi-

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zens, Americans with real physical disabilities face special challenges as they attempt to earn their livings and enjoy their lives. It is also understandable that policymakers would want to ease the burdens that disabled Americans face.

President Bush and his supporters in Congress promoted the ADA as a civil rights law. They argued that just as legislation in the 1960s sought to eliminate hiring discrimination and remove restrictions that kept blacks off city buses or out of private restaurants and hotels, the ADA would do the same for the handicapped. But there are two types of civil rights policies. One type requires that governments refrain from actions based, for example, on racial considerations. When applied to private behavior, such policies generally do not tend to require individuals to take positive actions, nor do they impose direct costs on individuals. Public facilities incurred no additional direct costs by accommodating all customers regardless of race. Nor were there major indirect costs, for example, from whites boycotting integrated establishments. Further, a business that hires the best job applicant regardless of race is following a wise and profitable practice, and certainly does not incur any additional direct costs.

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The other type of civil rights policy, based on a positive conception of rights, requires certain actions by governments or private individuals and can impose direct costs on them as well, often in the name of creating a level playing field. Hiring quotas and affirmative action, for example, can require businesses to employ a certain percentage of workers from a given racial or ethnic group, whether those individuals meet the employment needs of an enterprise or not.

The ADA is a civil rights law of the latter type, based on a positive conception of rights. It requires local governments and private enterprises to pay the costs of accommodation out of their own pockets.

Part of the philosophy behind the ADA is that disabled Americans should not be helped in ways that separate them from other citizens. Rather, to the greatest extent possible, Americans with disabilities should enjoy equal access to the same public places as other Americans; and in the workplace, employers should make reasonable accommodations for disabled workers. But in light of Republican calls for a cost-benefit rule to be applied to new regulations, the definitions of terms such as "reasonable" and the like, found throughout the ADA, take on added importance. As shall be seen below, in practice the ADA has strayed far from the common-sense approach.

Principal Provisions

The principal provisions of the ADA are summarized below.

Title I. Title I prohibits discrimination by public or private employers. Specifically, Title I, section 102 (a) of the ADA establishes that an employer cannot "discriminat[e] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employment compensation, job training, and other terms, conditions, and privileges of employment."

A disabled individual is protected if he can perform the "essential functions" of a position. The ADA also requires employers to make "reasonable accommodations" for the disabled employee. Such accommodations include job restructuring; part-time or modified work schedules; reassignment to vacant positions when the disability is so severe that employees no longer qualify for the position for which they were originally hired; or provision of qualified readers or interpreters. The act specifies that employers shall not be guilty of discrimination if "reasonable accommodations" create an "undue hardship" for them, meaning that the action would require "significant difficulty and expense." Prior to an offer of employment, employers may not inquire about whether an applicant is disabled or about "the nature or severity of such disability."

Complaints involving Title I violations must be filed with the federal government's Equal Employment Opportunity Commission (EEOC). The employment provisions of the act took effect in mid-1992 for businesses of 25 or more employees, and were applied to establishments with as few as 15 workers as of July 1994. Originally, government action in response to

complaints was supposed to be principally remedial, emphasizing correcting access problems—though equitable remedies could be imposed. Private damage awards were excluded in order to head off predatory lawsuits. But the 1991 Civil Rights Act amendments added to the ADA jury trials and damage awards of up to $300,000 for "pain and suffering."

Title II. Title II prohibits "discrimination" by state and local governments in the delivery of programs and services, including the facilities in which they operate. In addition, Title II mandates that modes of public transportation such as buses, subways, trains, and other facilities be accessible to the handicapped. Enforcement responsibilities rest with the Department of Justice and the Department of Transportation, respectively.

Title III. Title III bans discrimination in access to places of public accommodation and commercial facilities that are privately owned or privately operated. That is, hotels, restaurants, theaters, food stores, and other retail outlets must be accessible. Different types of facilities were covered on different timetables and in different circumstances.

Certain privately operated facilities, principally transportation facilities, were converted shortly after the act was passed. The act required that newly constructed facilities be built so as to accommodate the disabled. In effect, the federal government established a national building code. Other establishments were required to add facilities for the disabled when they made substantial modifications, with requirements applying separately to the inside and outside of facilities. When making substantive changes inside a facility, an establishment would have to devote up to 20 percent of the cost of alterations to provide an accessible path of travel to the place of the alteration. For instance, if the cost of space alterations for the office of an enterprise moving onto the sixth floor of a building is $10,000, the ADA would require as much as $2,000 of that sum to be spent on the route to the sixth floor office. Businesses are allowed to take as a tax credit 50 percent of certain conversion costs over $250, up to around $10,000. That is, a credit of up to $5,000 per year could be taken. Enforcement of Title III is the responsibility of the Justice Department.

Title IV. Title IV mandates special telecommunications and closed-caption services for the hearing-impaired.

How Many Handicapped?

ADA proponents claimed that 43 million of the 260 million American citizens, 16.5 percent of the population, were disabled. In fact, those numbers are highly inflated. The public and many policymakers usually think of the blind, the deaf, and wheelchair users as the principal groups of disabled individuals who deserve some form of special assistance. But about 400,000 Americans are blind, 1.7 million are deaf, and 720,000 use wheelchairs—for a total of 2.82 million. In order to get to 43 million, the act assumed that everyone over 65 years old, 31 million at the time the act passed, was disabled. The mentally handicapped and individuals with emotional problems make up a major portion of the remainder. Some of the categories overlap; for example, some persons over 65 years old have real disabilities.

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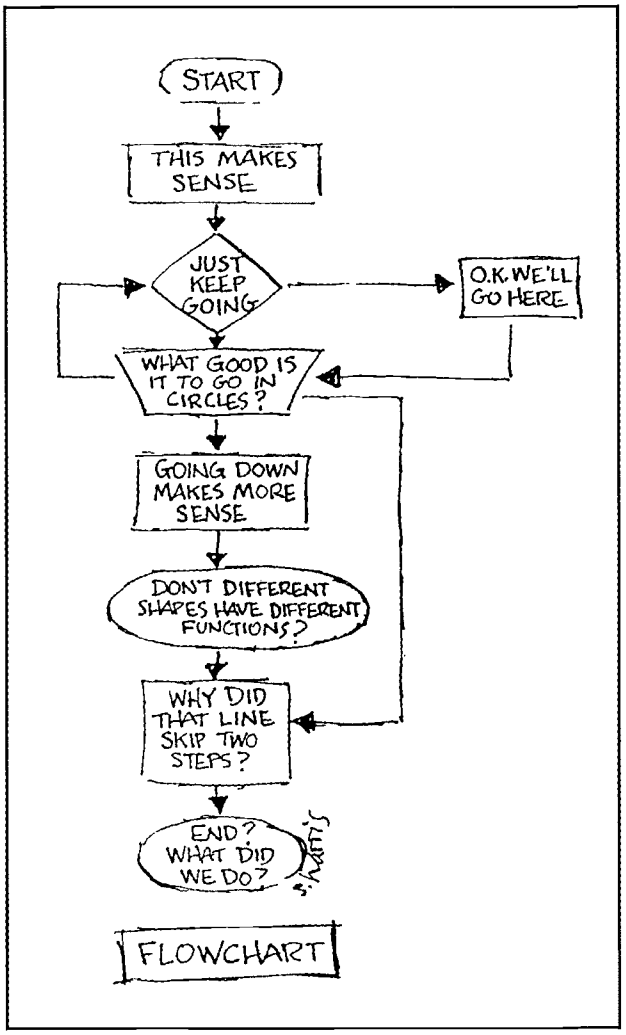
Effects on Employment

The ADA requires employers to make reasonable accommodations for employees with disabilities. But the specific accommodations mentioned in the act are anything but reasonable. For example, for an employer to provide qualified readers or interpreters—considered "reasonable" under the ADA—without regard to the employee's payscale, can be very costly. The facts indicate that by a cost-benefit standard, Title I has been less than successful.

Types of Complaints. An examination of the types of complaints under the ADA gives us some indication of the act's effectiveness. Between July 26, 1992 and March 31, 1995 some 45,053 ADA-based complaints were filed with the EEOC, a rate of about 15,000 annually. Of that number, only 4,806 complaints, or 10.7 percent of the total, concerned hiring discrimination.



Fully 22,834 ADA cases, or 50.7 percent of the total, dealt with dismissal of persons already employed. Failure to provide reasonable accommodation accounted for 11,819 cases, or 26.2 percent of the total.

Those numbers suggest that nearly 90 percent of those availing themselves of the ADA already are or have been in the workforce. In other words, the ADA so far does not seem to be an efficient way to get the disabled "mainstreamed" into the workforce.

Of the types of disabilities claimed in complaints to the EEOC, 8,738, or 19.4 percent, concerned back problems. Such suits are often combined with workers' compensation cases. In those cases, workers claiming to be unable to perform due to work-related injuries will also claim to be disabled, and therefore protected by the ADA.

Some 5,354 individuals, or 11.9 percent of those filing complaints, had neurological impairments, while 5,243 persons, or 11.6 percent, claimed emotional or psychological problems.

The blind, the deaf, and the motor-impaired—those typically thought of as "disabled"—make up only a fraction of those filing complaints. There were 3,500 people, 7.6 percent of the total, who required wheelchairs or had other difficulties with locomotion; 1,360, or 3 percent, were deaf or hearing impaired; and 1,257, or 2.8 percent, were blind or visually impaired.

Of the 45,043 cases filed, 24,494, or 54 percent, have been resolved. And of those, 46.1 percent were resolved through administrative closures, meaning, in most cases, that the complaining party failed to follow up sufficiently to make a complete complaint. Another 43.9 percent were thrown out for lacking reasonable cause. Those figures indicate that only a small portion of ADA employment complaints have merit. Of course, even if defendants avoid liabilities, they do not avoid the costs of defending themselves.

No New Workers. A major goal of the ADA was to facilitate workplace entry by disabled individuals. Yet the data on EEOC complaints suggest that the deaf, the blind, and wheelchair users—those traditionally thought of as disabled—have not been filing many employment complaints. Some might argue that the data suggest that the ADA is deterring employers who might otherwise discriminate. Thus, the act is doing its job and that is why fewer complaints are filed. But if that is the case, one might expect increases in employment of the disabled. The record so far indicates that the ADA has done little to help the disabled enter the workforce. According to the National Organization of the Disabled, a private group, only 31 percent of working-aged persons with disabilities were employed as of December 1993, compared to 33 percent in 1986, before the ADA took effect.

Conceptual Problems

The employment provisions of the ADA contain a number of conceptual problems that could be expected to result in excessive costs and administrative burdens on employers seeking to comply with the act.

Defining Disabilities. While it might be relatively easy to identify the approximately 3 million persons who are blind, deaf, or wheelchair-bound, Congress attempted to inflate the number

of handicapped individuals to 43 million to give the act broader appeal.

Section 3 (2) of the ADA defines a disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having an impairment." Thus, the definition of "disabled" in the act is confusing. Under definition (C), a person who has had no medical problems can be considered disabled. That confusing definition requires bureaucratic and judicial interpretation. The ADA does explicitly exclude from coverage impairments due to current drug or alcohol abuse. But under the act, an employer cannot discriminate against an alcoholic solely for being an alcoholic or a drug addict solely for being a drug addict. It is unclear which problems are covered and which are not.

The category of mental disorders is open to the greatest abuse. Many kinds of aberrant behavior that previously might have cost an employee his job now merit ADA coverage. The nature of many suits bears this out. Consider the following cases:

- A dentist who was dismissed for fondling his patients sued under the ADA, claiming that such urges constitute a disability;
- A GTE employee was fired for carrying a gun to work. He claimed that he was protected under the ADA because a nervous disability caused him to behave that way;
- A woman with memory problems that made her unable to perform her tasks adequately sued after being fired, remembering at least that the ADA could help her regain her position.
- Another woman claimed that so-called recovered memories caused her to become depressed and unable to perform her job; she argued that that constituted a protected disability under the ADA.
- A Washington, D.C. worker caught falsifying security records in a warehouse claimed he had an impulse to wrongdoing and is seeking ADA protection.

While such claims usually fail, they waste both time and resources.

Predicting Hardship. For an employer to judge whether he can make reasonable accommodation for a potential employee who is disabled, he must know what disabilities a job applicant has. But Title I, section 102 (c)(2)(A) of the ADA states that an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."

An employer might easily determine the effect of a disability and screen out those not qualified for a job by giving an applicant a test—for example, asking a wheelchair-bound individual to place a heavy box on a top shelf in a warehouse, if that were one of the essential functions of the available job. But a more difficult problem is how to determine future costs that might only become apparent after an applicant is hired. If he is not allowed to make inquiries, how can an employer know before the fact whether an employee will add an "undue hardship" or "substantial costs" to his business? And once an individual is hired, firing him because of a disability, no matter how costly that disability is to the business, virtually guarantees an ADA suit.

Activists can now claim that hiring practices have the "effect of discriminating." The burden does not rest upon the plaintiff or the government to prove discrimination; it rests on the employer to prove that he is innocent.

Job Inflexibility. Another problem with the ADA is that it impedes businesses' attempts to increase efficiency by increasing worker flexibility. For a decade or more the trend in American business has been towards more flexibility, allowing or expecting employees to do a number of tasks and to fill in wherever they are needed. But the ADA can hamper the honest efforts of businesses to operate more efficiently. For certain positions, it still might be easy to identify an "essential" function that the ADA would not adversely affect. For example, a large firm maintaining a large typing pool in which workers spend all day typing would not find its flexibility impaired by hiring individuals in wheelchairs. But forcing other enterprises, especially smaller ones, to limit disabled employees' work to "essential" functions could be a serious constraint.

Discrimination by Process. The ADA does not simply ban outright discrimination. Rather,

in Title I, section 102 (b)(3)(A) it bans hiring practices "that have the effect of discrimination on the basis of disability." That suggests that application of the ADA will follow the pattern set by various civil rights laws. Even if no explicit discrimination exists, activists will see in the results that certain firms do not hire as many disabled individuals as the activists believe is appropriate. Indeed, the link to abuses of civil rights law is a close one, since the 1991 Civil Rights Act amendments amended the ADA retroactively to allow collection for damages and jury trials. Activists can now claim that hiring practices have the "effect of discriminating." The burden does not rest upon the plaintiff or the government to prove discrimination; it rests on the employer to prove that he is innocent.

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Lawsuits: As Bad as Expected

Critics of the ADA claimed that the vague definitions of "reasonable accommodation" and other elements of the act would give rise to costly and ludicrous lawsuits. Unfortunately, those critics were correct.

For example, an applicant for a job as a subway train conductor for the New York City Transit Authority weighed 410 pounds and was too fat to fit in the small cab of a typical subway train. He is suing under the ADA, claiming that the Transit Authority must alter its trains to make "reasonable accommodation" for his alleged disability.

A good example of the concern over the ADA generating needless lawsuits can be found in a December 1994 ruling in the case of *Pedigo v. P.A.M. Transport, Inc.* by the U.S. District Court for the Western District of Arkansas. The case involved a truck driver who, after transferring to an office job for which he proved to be unqualified, went back to driving. When he suffered a heart problem that kept him from driving and was terminated rather than being offered another office job, he alleged wrongful dismissal. A mixed jury verdict on several counts awarded the plaintiff compensation.

Judge H. Franklin Waters pointed to the ADA's problems when he reluctantly upheld the verdict: "The court still finds it difficult to believe that Congress really intended to cover employees such as the plaintiff in this case and has a firm conviction that the Act . . . because of its ambiguities and intended or unintended broadness of coverage, has the potential of turning federal courts into workers' compensation commissions. . . . The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended . . . one of the primary beneficiaries of it will be trial lawyers who will ingeniously manipulate such ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases."

Another case pointing to such problems is one involving a New York stockbroker whose injured shoulder prevented him from raising his arm of preference in the trading pit. His employer advised him to use the other one. When he resigned some months later, he charged that his employer had pushed him out of his position because of the bad shoulder.

The current wave of lawsuits under the ADA creates four adverse effects. First, businesses will pay more to settle lawsuits against them under the ADA. It is difficult to obtain hard data concerning the costs because very often settlements are for undisclosed sums. But it can be assumed that in order to avoid high legal bills, employers often settle, even when they have a good chance to win in court. In addition, the bad press associated with being sued by a sympathetic plaintiff will often force settlement. As is the case with the Community Reinvestment Act, individuals or groups can engage in acts of legal extortion.

But those might be the least of the costs of lawsuits. After all, only 6.4 percent of EEOC Title I complaints were settled through negotiations between the parties, and only 3.1 percent were resolved through a finding of reasonable cause.

A second adverse effect of the ADA is higher legal bills for enterprises to defend against lawsuits. Since an enterprise must absorb the costs of its legal bills even when it wins a case, those bills will add to the costs of doing business. Connecticut attorney Patrick Shea estimates that the minimum legal bill for an ADA case is $10,000. Minnesota ADA lawyer Tom Marshall puts settlement costs at around $75,000.

A third adverse effect of the ADA is higher insurance costs for those enterprises that do not self-insure. In cases in which employers provide health care insurance for workers, higher costs would likely come from the need to meet the special needs of the disabled. But insurance to cover some of the costs of lawsuits is an even more likely added expense.

Finally, and perhaps most tragically, the ADA may cause employer hostility towards the disabled. Before the ADA, many employers were inclined to hire handicapped individuals for jobs that would pose no major difficulties for them. Employers might reason that handicapped workers would be especially anxious to do good jobs, to prove themselves worthy of their tasks, to show that their disabilities are, in effect, no real handicap. McDonald's, for example, went out of its way before the enactment of the ADA to recruit mentally handicapped workers for its fast-food outlets.

But under the ADA the employer is more likely to see a handicapped applicant as a lawsuit waiting to happen. If a handicapped worker does not receive regular raises or promotions, is criticized for unsatisfactory performance, or must be dismissed, the employer knows that the lawsuit remedy is an open and likely option for the employee. Employers need only examine the record of years of race-based lawsuits under civil rights legislation, most of which were without merit.

Some employers may look for any way to avoid hiring a disabled worker. Few will ever express such intentions publicly, for fear of appearing insensitive to those with demonstrable disabilities. But just as there is enough off-the-record, anecdotal evidence to suggest that that is the case for hiring minorities, so it is becoming the case with the disabled. Other employers might hire a certain number of handicapped individuals and keep them on staff as tokens, no matter how inefficient they are; but that is hardly an attitude that will benefit the handicapped.

Public Facilities

Title II, which requires public facilities such as public buildings and transportation to be accessible to the disabled, is a prototypical unfunded mandate, imposing costs on state and local governments. Since the ADA is relatively new, good data on the costs are hard to come by. But what evidence there is suggests both the magnitude of the costs and the severity of the tradeoffs involved.

Exorbitant Costs. A Price-Waterhouse study issued in October 1993 for the National Association of Counties surveyed 125 counties, representing 25 percent of the American population, and extrapolated to determine the total cost of unfunded mandates. For the ADA, it estimated an annual cost of $293.7 million, with a five-year cost of $2.8 billion. But even that amount seems low when the costs to particular localities are considered. A U.S. Conference of Mayors study puts the overall cost for cities at $2.2 billion. While more empirical work needs to be done on costs, as states, counties, and cities begin to comply with the ADA's provisions, some examples suggest the magnitude of the costs.

Cities of certain sizes with certain numbers of handicapped citizens might find it less costly to provide door to door limo service on call for the disabled.

- The city of Philadelphia lost a case protesting an ADA requirement that it put curb-cuts for wheelchairs on the corners of every street it resurfaces, not just renovated or newly built streets. Mayor Rendell fears that if the city is required to go back and alter curbs on every street resurfaced while the case was being fought, the cost could be as high as $140 million. Even if the number is high for Philadelphia, multiplying the cost nationwide for curb-cuts alone gives an idea of the costs of compliance.

It is obvious that any expenditure requires tradeoffs. Wages for Philadelphia's approximately 4,300 police officers are about $43,000 each in direct payroll costs annually, and perhaps as high as $60,000 with benefits. The $140 million that might be used for curb-cuts could hire 1,200 officers for a two-year period.

- The Good Hope Middle School in Cumberland Valley, Pennsylvania is facing costs of between $5.8 million and $7.3 million in renovations to meet ADA requirements.
- An August 1993 report by the state of Ohio estimated that the costs for conversions mandated by the ADA could be $311.5 million for its 4,000 state buildings, $148.3 million for public transit, and $119.2 million for state universities and colleges.

Lack of Flexibility. Attempts to "mainstream"

the disabled by adapting public transportation add rigidities to the ways that localities can meet ADA standards, and thus increase the costs of meeting those standards. For example, cities of certain sizes with certain numbers of handicapped citizens might find it less costly to provide door to door limo service on call for the disabled. But the ADA mandates, for example, that all new buses be equipped with wheelchair lifts and that subways be retrofitted over time with elevators. Further, lifts and elevators break down, inconveniencing wheelchair users. Local officials often keep vans and other means of transportation available for those whose disabilities are so severe that they cannot use buses and subways. It makes more sense to allow localities the flexibility to devise their own transportation mixes.

Parking garage owners must set aside handicapped spaces and leave them empty for disabled drivers' use, even if the garage is full and nondisabled customers are turned away. That mandate deprives owners of the use of and profit from their property.

Conflicting Regulations. One recent case illustrates both the problem of costs and the problem of safety tradeoffs faced by local governments as they attempt to comply with ADA mandates. In 1994 the Clinton administration's Department of Transportation used the authority of the ADA to order the Washington, D.C. Metropolitan Area Transit Authority (D.C. Metro) to remove the granite platform edges from which passengers enter subway cars, and replace them with domed strips. The Department of Transportation claimed that the current facilities pose an "immediate danger" to blind or visually impaired riders.

Recently the administration has backed off, admitting that the current arrangement is adequate, at least for now. The 18-inch granite edges can be distinguished by the blind from the hexagonal tiles that make up all but the edges of each platform. D.C. Metro did agree to install a $5 million system that allows blind passengers wearing beepers to be signaled when they are too close to the edge of a platform.

The D.C. Metro case gives us some idea of the costs and benefits of the ADA. Since the Washington-area subway opened in 1975, two blind passengers have fallen on the tracks, and those accidents were not traced to an inability to detect the granite strip at the platform's edge. The cost to D.C. Metro to replace all the edges would be $30 million. Even though that cost would be shared by the three jurisdictions served by Metro—D.C., Maryland, and Virginia—the burden would fall particularly heavily on the D.C. government, which is running a deficit of over $700 million. Despite all the cost, there is no evidence that the bumpy strips would have prevented those tragic deaths.

Another indication of the ADA's costs to localities is found in the 1993 debate over the Clinton administration's request for billions of dollars in new infrastructure spending to stimulate the economy. The American Public Transit Association issued a list of what it claimed were ready-to-go projects that supposedly would immediately employ new workers. What follows is a list of some of the ADA projects for which local transit authorities sought federal financing.

- Metro-Dade Transit in Miami, Florida sought $1.6 million to bring its light rail system into compliance with the ADA and $7.5 million to alter its bus system as mandated by the ADA;
- Bi-State Development Agency in St. Louis, Missouri sought $1.29 million for new vans that would help the city comply with the ADA;
- The Metropolitan Transit Authority in New York City requested $7.6 million to bring the Long Island Railroad into compliance and $1 million for an ADA employment facility for the Metro North Railroad;
- The Southeastern Pennsylvania Transit Authority in Philadelphia sought $3.2 million to make its transit stations conform to ADA requirements.

Mandating Unreasonable Accommodations

Title III of the ADA requires privately provided public accommodations to be accessible to the disabled. It applies to office buildings, stores, restaurants, theaters, and the like. Some evidence indicates that adjustment costs and difficulties could vary based on several factors. In California, a state that passed fairly stringent public accommodations laws in the 1980s, adjustments in many cases were not as costly as

elsewhere, simply because many enterprises had already made the transition.

While accommodations under Title III are supposed to be "reasonable," some are nonsensical by any standard. For example, banks have been required to install braille instructions on drive-through automatic teller machines on the driver's side. Another case involved a Florida man with muscular dystrophy who is suing the Walt Disney World Marathon because he was denied a chance to compete in the wheelchair race. He had a motorized wheelchair, and the race was for manual wheelchairs.

The ADA has been especially costly for restaurants. Uncertainty concerning the definition of "reasonable accommodation" is the usual problem. For example, in 1993 a lawsuit against McDonald's Corp. and Burger King Corp. was filed on behalf of individuals with asthma. The suit sought to ban smoking in those fast-food restaurants. At the time both McDonald's and Burger King already had nonsmoking sections; but that was not sufficient for the activists. A lower court dismissed the suit, but on April 4, 1995 the Second U.S. Circuit Court of Appeals ruled that the case should go to trial.

The case of Blair Taylor's Barolo Grill in Denver, well documented by Brian Doherty in the August/September 1995 issue of *Reason* magazine, illustrates some of the worst ADA abuses. Taylor has had to pay $67,000 in construction costs and civil penalties in his fights with the Justice Department over ADA compliance. To be sure, when the facility was reconstructed he should have made ADA alterations. But in any case, the alterations required point to the problems with the ADA. A particularly egregious example concerned an 11-inch raised platform in Taylor's restaurant, which had nine tables in addition to the 17 wheelchair-accessible ones in the rest of the establishment. As Doherty reports: "A ramp to the platform was built, destroyed, and then rebuilt in response to Justice's complaints. The first time the ramp wasn't long enough for [Justice's] very detailed building standards. The ramp is now the requisite 11 feet long and 41 inches wide to navigate a 11-inch rise, costing Taylor three tables worth of space in his usually sold-out restaurant."

By the "common-sense" standards of regulation that Democrats claim to favor, this regulatory order fails. Why force a ramp to be built when plenty of tables are available and accessible elsewhere in the restaurant? Further, the mandate by the Justice Department constitutes a taking of property by the standard set down in the Republican Contract, since the owner has the value of his property reduced through government restrictions. Other accommodations mandated under the ADA would also run afoul of the Republicans' property rights standard. For example, parking garage owners must set aside handicapped spaces and leave them empty for disabled drivers' use, even if the garage is full and nondisabled customers are turned away. That mandate deprives owners of the use of and profit from their property.

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The Barolo restaurant case illustrates another problem with the ADA. The Justice Department wanted Taylor to make certain changes to his restaurant immediately. The city government forbade him to make changes without what turned out to be eight and a half months of red tape. Taylor's excuse, that to move faster would break city ordinances and land him in jail, did not stop the Justice Department from fining him.

The Barolo case also flunks any cost-benefit test. According to Taylor, he gets no more disabled customers after the alterations than before—about one guest per month. Finally, the case points out the kind of problems that would be faced by citizens even if the Republican Contract were in place. The cost to the Justice Department of pursuing the case is estimated at $250,000. Rarely can private citizens compete in legal defense fees with the government, which, after all, has taxpayers' resources to call upon.

Conclusion

The ADA is a classic example of well-intentioned legislation that was so poorly thought through that it is now, and likely in the future will be, a

major source of lawsuits and unnecessary costs to the private and public sector. The definition of "disabled" includes so many individuals as to make a mockery of those who truly suffer handicaps. The definition of "reasonable accommodation" is anything but reasonable. The lack of flexibility adds needlessly to compliance costs when other, less costly options are available. The ADA is, in effect, a national building code, justified in the name of civil rights. And often the disabled reap few, if any, benefits from such costly efforts. If Congress is serious about relieving the citizens of the current regulatory burden, it must have the courage to reexamine the ADA.

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