

5-1-1994

Access Reigns Supreme: Title III of the Americans with Disabilities Act and Historic Preservation

Grant P. Fondo

Follow this and additional works at: <http://digitalcommons.law.byu.edu/jpl>

 Part of the [Disability Law Commons](#), and the [Historic Preservation and Conservation Commons](#)

Recommended Citation

Grant P. Fondo, *Access Reigns Supreme: Title III of the Americans with Disabilities Act and Historic Preservation*, 9 BYU J. Pub. L. 99 (1994)

Available at: <http://digitalcommons.law.byu.edu/jpl/vol9/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Access Reigns Supreme: Title III of the Americans with Disabilities Act and Historic Preservation

*Grant P. Fondo**

The true benefit of historic properties is not simply that they exist, but rather that people can see and experience them.¹

I. INTRODUCTION

Federal laws and regulations often do not coexist easily, and Congress often must limit or sacrifice the goals of one act to achieve the goals of another, as with the Americans with Disabilities Act (ADA)² and the National Historic Preservation Act of 1966 (NHPA).³

The enactment of the ADA mandated the elimination of many architectural and communication barriers that caused discrimination against disabled individuals.⁴ Unfortunately for the aspirations of those who supported the NHPA and other historic preservation laws, the ADA's goal of access interacts uneasily and at times conflicts with the NHPA's goal of historic preservation. Congress recognized these conflicts and attempted a compromise of sorts by creating exceptions to the statutes. This compromise reduced the accessibility requirements for qualified historic properties where modifications would threaten or destroy the historical significance of qualified buildings and facilities.⁵

* J.D. University of Virginia School of Law, 1993; Mr. Fondo currently practices law in Hartford, Connecticut for the law firm of Rogin, Nassau, Caplan, Lassman & Hirtle.

1. Nondiscrimination in Federal Financial Assistance Programs, 41 C.F.R. § 101-8.311(3)(b)(iv) (1992).

2. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (1990).

3. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470 to 470w-6 (1992)).

4. 42 U.S.C. § 12101(a)(5) (1992).

5. 42 U.S.C. § 12204(c)(i); 28 C.F.R. app. B to part 36, § 36.304 (1992). For

A closer examination of this compromise, however, indicates that there is little to offer preservationists in the ADA's historic preservation exemption. The exemption qualification is difficult to meet and offers only minimal protection. The result is that the ADA's goal of access for the disabled supersedes NHPA's goal of historic preservation.

This paper discusses the effect of the ADA, specifically Title III, on the historic preservation of buildings and facilities.⁶ Part II presents a brief history of historic preservation legislation. Part III provides an overview of the enactment of the ADA. Part IV discusses the entities covered by the ADA. Although some compliance issues remain unresolved, Part V examines the prohibitions and accessibility requirements imposed on entities covered by the ADA, and the means by which historic properties can be brought into compliance with both statutes. Part VI examines the historic properties exceptions, and Part VII provides a brief examination of Title III's enforcement provisions. Part VIII considers some of the Act's failures. The paper concludes with an analysis of the ADA mandate for historic properties and facilities.

II. HISTORIC PRESERVATION LEGISLATION

The first true effort at historic preservation began early in the twentieth century with the Antiquities Act of 1906,⁷ which authorized the President to set aside historic landmarks, structures, and objects located on federal lands as national monuments.⁸ In 1935, Congress declared historic preservation "a rational policy" when it enacted the Historic Sites, Buildings, and Antiquities Act.⁹ Limited in scope, the Antiquities Act charged the Secretary of the Interior with identifying historic buildings and sites of national significance within the National Park Service and designating them

an indepth analysis of these exceptions see Part V.

6. Although Title III also protects historical or antiquated cars, cars are beyond the scope of this article. See 42 U.S.C. § 12184(c) (1992) (statutory protection of historical or antiquated cars).

7. Antiquities Act, ch. 3060, 34 Stat. 225 (codified generally at 16 U.S.C. §§ 431-433 (1993)).

8. *Id.* § 431.

9. Historic Sites, Buildings, and Antiquities Act, ch. 593, 49 Stat. 666 (1935) (current version at 16 U.S.C. §§ 461-462 (1992)).

National Historic Landmarks.¹⁰

In 1949, Congress expanded its effort toward historic preservation by chartering the National Trust for Historic Preservation (National Trust).¹¹ The National Trust was created to facilitate public participation in historic preservation. As a non-profit organization, it could solicit property and monetary donations for the preservation and administration of historic sites.¹² Later, the Housing and Urban Development Act of 1965¹³ included a provision for the relocation of historic properties found within urban renewal projects.¹⁴ These acts were limited in their effectiveness, as they only protected those relatively few properties deemed nationally significant.¹⁵ This left a vast number of properties unprotected which were valuable historically, culturally, or architecturally at the community, state or regional level.¹⁶

This inadequate protection contributed to the enactment of the National Historic Preservation Act of 1966.¹⁷ The NHPA provided the first comprehensive federal framework for the protection of historic resources¹⁸ by requiring the cooperation of the federal government with other nations "and in partnership with the States, local governments, Indian tribes, and private organizations and individuals"¹⁹ to provide for the preservation, rehabilitation and restoration of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."²⁰ To further this end, Congress created the National Register of Historic Places.²¹ It also encouraged states to establish

10. *Id.* § 462.

11. Act of Oct. 26, 1949, ch. 755, § 1, 63 Stat. 927 (codified at 16 U.S.C. § 468 (1992)). For the legislative history of this act, see 1949 U.S.C.C.A.N. 2285.

12. *Id.* § 468.

13. Pub. L. 89-117, 79 Stat. 451 (codified at 42 U.S.C. §§ 1441-1490q (1992)).

14. *Id.* § 1460(c). This provision limited relocations to those for which a public or nonprofit organization was willing to take responsibility.

15. H.R. REP. NO 1916, 89th Cong., 2d Sess., at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3307 (hereinafter HOUSE REPORT 1916).

16. *Id.*

17. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470 to 470w-6 (1992)). For the legislative history of the National Historic Preservation Act of 1966, see 1966 U.S.C.C.A.N. 3307.

18. For a more comprehensive list of those acts which preceded the NHPA, see HOUSE REPORT 1916, *supra* note 15.

19. 16 U.S.C. §§ 470-471.

20. *Id.* § 470(a)(1)(A).

21. *Id.* § 470a(a)(1)(A).

programs for historic preservation through matching grants²² and established the Advisory Council on Historic Preservation. The Advisory Council's responsibilities include the coordination of historic preservation activities and advising the President and Congress on matters regarding historic preservation.²³ Arguably, the most important provision of the NHPA is section 106, which requires federal agencies to "take into account the effect of . . . [their] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."²⁴

Historic preservation is also extensively promoted at the state and local level. States often use their police power to enact legislation empowering their counties, municipalities, and towns to pass historic area zoning ordinances and create historic districts.²⁵ While the regulations of each state and locality differ, they often allow local governments—through historic district commissions—to regulate the construction, alteration, or remodeling of buildings and properties.²⁶

III. THE AMERICANS WITH DISABILITIES ACT

The Equal Opportunity for Individuals with Disabilities Act, more commonly known as the Americans with Disabilities Act ("ADA"),²⁷ was enacted on July 26, 1990 with implementation scheduled two years later. The ADA specifically mandates the elimination of discrimination against individuals with disabilities.²⁸ Prior to the ADA, only federal

22. *Id.* § 470a(b)(1).

23. *Id.* § 470j(a).

24. *Id.* § 470f.

25. *See, e.g.*, MD. CODE. ANN., Art. 66B, § 8.01(a)(2) (1983).

26. *Id.* §§ 8.01(a)(2), 8.05.

27. Pub. L. No. 101-336, 104 Stat. 27 (1990) (codified at 42 U.S.C. §12101-12213 (1992)).

28. *Id.* §§ 12101(b)(1), 12211. The term "disability" refers to "a physical or mental impairment that substantially limits one or more of the major life activities" of the person, whether that person has a record of such an impairment or is regarded as having such an impairment. 28 C.F.R. § 36.104 (1992). The phrase "physical or mental impairment" includes any physiological disorder, cosmetic disfigurement, or anatomical loss affecting a variety of body systems including the neurological and special sense organs. It also includes mental and psychological disorders such as mental retardation and emotional or mental illness. HIV is considered an impairment. The EEOC characterizes activities such as caring for oneself, walking, working, and learning as "major life activities." Conditions not considered to be disabilities include transvestism, exhibitionism, voyeurism, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania,

agencies and federally funded programs were legally required to provide protection for disabled individuals. The protection, provided by the Architectural Barriers Act of 1968 and the Federal Rehabilitation Act of 1973 (Rehabilitation Act),²⁹ required that all federal and federally assisted facilities and programs be made accessible. The Rehabilitation Act prohibited federal agencies, private contractors with federal contracts or subcontracts³⁰ and recipients of federal financial assistance³¹ from discriminating against employees due to physical or mental handicaps or disabilities.³²

The enactment of the ADA significantly expanded the protection accorded to handicapped individuals by including private employers within its scope³³ and by extending the general prohibitions against discrimination in section 504 of the Rehabilitation Act to privately operated places of public accommodations.³⁴

The ADA contains three primary titles: Employment,³⁵ Public Services,³⁶ and Public Accommodations and Services Operated by Private Entities.³⁷ Title III, Public Accommodations and Services Operated by Private Entities, mandates the most sweeping changes for private entities. It requires that all private entities offering public

homosexuality or bisexuality, drug use or obesity. 42 U. S. C. §12211.

29. Pub. L. 93-112, § 2, 87 Stat. 357 (codified at 29 U.S.C. §§ 701-796i (1992)).

30. *Id.* §§ 701, 794 (the regulations applied only to those private contractors with federal contracts or subcontracts in excess of \$2500).

31. *Id.*

32. *Id.*

33. See 42 U.S.C. § 12111(5).

34. H.R. REP. NO. 101-485(II), 101st Cong., 2d Sess., at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382; see also 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [T]itle V of the Rehabilitation Act of 1973 (29 U.S.C. [§] 790 *et. seq.*) or the regulations issued by Federal agencies pursuant to such title."). The ADA does not preempt state or local laws that provide greater protection to the disabled. 42 U.S.C. § 12201(b).

35. 42 U.S.C. §§ 12111-12117 (Title I). For an overview of Title I see Frank C. Morris, *Americans with Disabilities Act: Overview of the Employment and Public Accommodations Provisions*, 742 A.L.I.-A.B.A. 535 (1992); James D. Douglas, *The Americans With Disabilities Act Employment Implications For Museums*, 579 A.L.I.-A.B.A. 243 (1991).

36. 42 U.S.C. §§ 12131-12150 (Title II). Because the accessibility standards required of public entities in Title II are similar to those that were required under the Architectural Barriers Act of 1968 and the Rehabilitation Act of 1973, Title II will not be examined here.

37. *Id.* §§12181-12189 (Title III).

accommodations provide access for the disabled to both their programs and facilities. Although the ADA's requirements will have a profound impact on many types of properties, its impact on historic properties is of particular interest. Congress, with the enactment of the ADA and its limited exceptions for historic properties,³⁸ would seem to be taking a step backward in its almost ninety-year effort to preserve historic properties.

IV. ENTITIES COVERED UNDER TITLE III OF THE ADA

Title III of the ADA, entitled Public Accommodations and Services Operated by Private Entities, applies to private entities that are considered "places of public accommodations"³⁹ and specifically prohibits such places from discriminating against any disabled individual.⁴⁰ This is the most far reaching aspect of Title III. A private entity is considered a "public accommodation" if it affects commerce and fits into one of the following categories:

- (A) inn, hotel, motel, or other place of lodging except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar or other establishments serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of a accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a *museum*, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;

38. See *supra* Part V for an analysis of this exemption.

39. 42 U.S.C. §§ 12181(7), 12182.

40. *Id.* § 12182.

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other social service center establishment;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social services center or establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or golf course, or other place of exercise or recreation.⁴¹

While the above list is a complete list of categories applicable under Title III, the examples within each category are not exhaustive.⁴²

Although a business may not offer public accommodation, it may still be subject to several provisions of Title III. Section 12183 includes commercial facilities within the auspices of the ADA if the facility will be newly constructed or altered.⁴³ A commercial facility is defined as a facility that is intended for nonresidential use and whose operations affect commerce.⁴⁴ This definition is intended to be read broadly and apply to all types of activities that affect commerce, including office buildings and warehouses.⁴⁵

Some facilities may contain parts which are public accommodations and other parts which are not. Referred to as mixed use facilities, the ADA does not apply to those sections of a facility which are not places of public accommodations or

41. *Id.* § 12181(7) (emphasis added).

42. 56 Fed. Reg. 35,551 (1991).

43. 42 U.S.C. § 12183. For an analysis of new construction and alterations, and the standards imposed on them, see *infra* Part IV.B.2.

44. 42 U.S.C. §§ 12183, 12181(2). "Commercial facility" does "not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 242, or covered under . . . [Title II], railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et. seq.*" It is important to note that while Title I (Employment) generally protects employee accessibility to these facilities, the fifteen or more employees requirement does not apply here. Thus every commercial facility (as well as every place of public accommodation) is affected by Title III. 56 Fed. Reg. 35,547. Congress wanted to create uniformity in new construction regarding accessibility and recognized that accessibility was most easily accomplished in the construction phase. *Id.* While it often may be difficult to distinguish between "commercial facilities" and "places of public accommodation," a place of public accommodation "generally invites the broadest range of the public into its facilities to buy, sell, trade, enjoy or participate" while a commercial facility "invites a smaller and more exclusive number of individuals into its midst." Richard J. Wirth, *Is Your Client's Property Accessible to the Disabled?*, 38 PRAC. LAW. 15 (1992).

45. 56 Fed. Reg. 35,547.

commercial facilities.⁴⁶

V. PROHIBITIONS AND ACCESSIBILITY STANDARDS

Once an entity falls within the definition of a place of public accommodation, a variety of prohibitions and requirements apply.⁴⁷ A private facility that is a place of public accommodation is prohibited from discriminating on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation, by any person who owns, leases, or operates a place of public accommodation."⁴⁸

Title III provides a variety of provisions to clarify what a place of public accommodation must and must not do to avoid discriminating against a disabled individual. The most important and pertinent of those provisions relate to program participation and structural accessibility.

A. Program Participation

1. General requirements

The primary goal of the ADA is to provide disabled individ-

46. *Id.* at 35,552. For example, in a large hotel which has a residential section, the residential section would not be subject to the ADA because of the nature of the occupancy in that part of the facility. *Id.* The regulations also state that a company that operates a place of public accommodation is only subject to the ADA for that part of the operation and is not subject to the ADA in any areas that are not public accommodations. *Id.* at 35,551. Thus, it would appear that a historic building that offers tours or other similar activities would only have to make accessible those parts of the building that are used for the public, and that offices, research departments, and any other private areas not accessible to the public would not have to be made accessible. However, the employment provisions of Title I could apply to these areas, thus requiring some level of accessibility.

47. As discussed previously, commercial facilities are only subject to Title III if there is new construction or alteration. 42 U.S.C. § 12183. Title III requirements and prohibitions do not apply to "any private club[s] (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entities or public entities." 28 C.F.R. § 36.104(e). A private club under the ADA is equivalent to a private club or establishment exempted from coverage under Title II of the Civil Rights act of 1964 (42 U.S.C. § 2000a(e)). 28 C.F.R. § 36.201. See also 56 Fed. Reg. 35,552 (1991) (listing factors used to determine when a facility qualifies as a private club). Even if a religious entity engages in activities that would otherwise be considered as offering public accommodation (private school, daycare, etc.), it is still exempt from the ADA. 56 Fed. Reg. at 35,554.

48. 42 U.S.C. § 12182.

uals the opportunity to participate in or benefit from all that places of public accommodation have to offer.⁴⁹ An important aspect of this, especially in relation to historic properties, is access to the same information that non-disabled individuals have, through tours, brochures, or materials. Thus, a place of public accommodation is prohibited from denying a disabled individual participation in or the equal benefit of the goods, services, facilities, privileges, advantages or accommodations (i.e., "goods and services") of a place of public accommodation.⁵⁰ Nor can an entity provide different or separate goods and services unless such action is necessary to provide disabled individuals with equally effective goods and services.⁵¹ A failure to take necessary steps to prevent exclusion, denial of services or segregation due to lack of auxiliary aids or services is also discrimination "unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the [goods and services] . . . being offered or would result in an undue burden."⁵² For example, while a store would be required to communicate to a deaf person the location of the furniture department in writing, it probably would not be required to provide an interpreter as this could be an undue burden.⁵³ Auxiliary aids or services include, among others,

49. *Id.*

50. *Id.* § 12182(b)(1)(A)(i)-(ii).

51. *Id.* § 12182(b)(A)(iii). Separate programs are only permitted where an integrated program would not be appropriate. 56 Fed. Reg. 35,556. This provision is meant to be applied only in limited circumstances. *Id.* A disabled individual, however, cannot be denied the opportunity to participate in the programs that are not integrated. 42 U.S.C. § 12182(b)(C).

52. 42 U.S.C. § 12182(b)(2)(A)(iii). "Undue burden" is defined as a significant difficulty or expense. Factors used in determining whether an action would be an undue burden include:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources [and size] of any parent corporation or entity . . . ; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity.

28 C.F.R. § 36.104. There is no statutory definition of "fundamentally alter."

53. H.R. REP. NO. 101-485(III), 101st Cong., 2d Sess., at 59 (1990), *reprinted*

amplifiers, closed caption decoders, telecommunication devices for deaf persons, qualified interpreters, telephones compatible with hearing aids, large print materials, brailled materials, and written materials.⁵⁴

Similarly, the "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods and services . . . [is prohibited] unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods and services . . ."⁵⁵ Note that there is no undue burden exception in this provision, as there is above.

Neither the statute nor the regulations define the phrase "fundamentally alter." However, a House Report by Congress provides some guidance. Here Congress stated that failure to alter a "no pets" rule for a disabled person who uses a guide or service dog would violate this act. However, it would not be a violation to refuse to alter a "no touching" policy for a delicate work of art where doing so could threaten the integrity of the work.⁵⁶

Title III also prohibits the use of any "eligibility criteria that screen out or would tend to screen out" individuals with disabilities from fully and equally enjoying the place of public accommodation "unless such criteria can be shown to be necessary for the provision of the goods and services being offered."⁵⁷ Prohibited activities include assessing disabled individuals a surcharge to cover the costs of auxiliary aids and

in 1990 U.S.C.A.N. 445, 482 (hereinafter HOUSE REPORT 101-485(III)53.12).

54. 28 C.F.R. § 36.303(6).

55. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a). However, an entity may prohibit an individual from participating in or benefiting from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. 42 U.S.C. § 12182(b)(3); *see, e.g.,* Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992) (holding that, absent an individual assessment of the risk, a coach in a wheelchair coaching from the coaches box could not be held to impose a "direct threat" to youngsters in violation of § 12182(b)(3) of the ADA).

56. HOUSE REPORT 101-485(III), *supra* note 53, at 59.

57. 42 U.S.C. § 12182(b)(2)(A)(i). Examples of such discrimination would include prohibiting all hearing impaired people from playing on a golf course or all individuals with cerebral palsy from attending a movie theatre. 56 Fed. Reg. 35,564. Places of public accommodation may use criteria that screen out or tend to screen out individuals with disabilities if legitimate safety concerns are involved. *Id.*

services, or requiring that a disabled person be accompanied by an attendant.⁵⁸ Generally, disabled individuals are to be afforded the opportunity to fully participate in the most integrated setting appropriate.⁵⁹

2. Program modification

Chesterwood, the home and studio of sculptor Daniel Chester French, creator of the seated *Abraham Lincoln* for the Lincoln Memorial, exemplifies program modifications which improve accessibility for disabled persons. A person unable to tour the site may view large photographs of the site and items of interest displayed in each building.⁶⁰ Tour information in large print and braille are provided for the visually impaired, as well as reproductions of some of the sculptor's works that were designed to be touched. Furthermore, a sensory tour of Chesterwood has been designed using items belonging to Mr. French and other artifacts connected with the property.⁶¹

The Frank Lloyd Wright Home and Studio Foundation, owned by the National Trust has also attempted to make the site more accessible.⁶² For those unable to climb the stairs, a 35-minute videotape offers a visual tour of the house. This tape is also available for groups unable to visit the site.⁶³ Although this is a step in the right direction, it is unlikely the Trust's efforts at the Frank Lloyd Wright Home would be sufficient to satisfy both the program and structural requirements of the ADA.

3. Unresolved issues and concerns.

The regulations for program accessibility leave some issues unresolved, including the statutory definition of "fundamentally alter." Although the phrase "fundamentally alter" is used frequently in the regulations, it is not defined anywhere in the statute, and there is little guidance as to its implementation.

58. 56 Fed. Reg. 35,564.

59. 42 U.S.C. § 12182(b)(1)(B).

60. NATIONAL TRUST FOR HISTORIC PRESERVATION, INFORMATION SERIES NO. 55, THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON HISTORIC STRUCTURES 10 (1991). While it is unclear whether these program modifications are sufficient to satisfy Title III, they provide excellent examples of the methods available to private entities to accommodate the needs of the disabled.

61. *Id.*

62. *Id.* at 9.

63. *Id.*

Another issue is the effect of the undue burden standard on historic preservation properties and organizations. Undue burden is considered analogous to the undue hardship standard contained in Title I-Employment, which is derived from and should be applied consistently with sections 501 and 504 of the Federal Rehabilitation Act of 1973.⁶⁴ A report by the House contained an example of how the undue burden standard is to be applied. The report stated that:

A small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a State welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.⁶⁵

Although this application is for Title I and employers, the application to Title III's undue burden standard is analogous.

Nelson v. Thornburg,⁶⁶ an employment case under section 504 of the Federal Rehabilitation Act, offers additional insight into the application of the undue burden exception. At issue was whether a \$6,638 expenditure to provide readers for three blind workers was an undue hardship on the employer, a state agency. The court looked at the \$300 million annual budget of the Pennsylvania Department of Public Welfare and determined that this was not an unreasonable expense.⁶⁷

This case, and the examples in the House report, indicate that although there is a recognized duty to meet the requirements of the ADA, it may be difficult for private historical organizations to fully comply. Organizations must recognize that under the ADA, responsibility for, and control over, historic properties involves significantly increased effort and expense to comply with the program accessibility regulations. Managers of properties such as Drayton Hall in South Carolina, which is cooperatively owned and operated by the National Trust and

64. HOUSE REPORT 101-485(III), *supra* note 53, at 106.

65. *Id.* (citing 42 U.S.C. § 22676).

66. 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

67. *Id.* at 380.

several local historic associations, face budgeting challenges as well as creative opportunities. Organizations, such as the National Trust, should be aware that a court not only considers the budget of one historic property, but the annual budget of the entire organization to determine if the mandated changes would constitute an "undue burden" or hardship. Thus, while a \$10,000 expenditure may appear excessive for one building, it probably would not be considered a significant burden in relation to the entire budget of the National Trust.

Aside from funding problems, the ADA program accessibility provisions would appear to be the easiest to comply with, the lack of historic preservation exceptions notwithstanding. These requirements focus primarily on the approach an entity might take to its program presentation, rather than to structural barriers on the site. Though program requirements offer creative challenges, program adaptation has proven to be more easily achieved than structural modifications to historic sites, which poses many challenges to managers of historically significant properties.⁶⁸

B. Structural Accessibility

Title III divides accessibility requirements⁶⁹ into two types of structures: 1) currently existing, and 2) newly constructed or altered. Both types are considered below.

1. Currently existing structures

a. *General requirements for the "readily achievable" standard.* The most important and far-reaching of the structural accessibility requirements applies to currently existing places of public accommodation.⁷⁰ Under Title III, such places

68. Telephone Interview with Thompson Maze, attorney for the National Historic Society (April 21, 1993) (stating that meeting Title III's requirements for program accessibility has been the easiest aspect of complying with Title III) [hereinafter Maze Interview].

69. The standards for accessible designs for the new construction and alterations of buildings and facilities are promulgated by the Attorney General. 42 U.S.C. § 12186(b). These standards are required to be "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 . . ." *Id.* § 12186(c). These standards, entitled the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG") can be found at 28 C.F.R. app. A to § 36.

70. Commercial facilities are not subject to these requirements. *See supra* text accompanying note 53.

were required as of July 1992⁷¹ to have removed all "architectural and communication barriers [which bar access to disabled individuals] that are structural in nature . . . where such removal is readily achievable."⁷² Readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense."⁷³ While it is unclear how stringent the readily achievable standard actually is, it is less stringent than the undue burden standard discussed earlier, or the readily usable standard.⁷⁴ The differing standards applied to current and future building activities reflect the ADA's progressive focus, with the expectation that in the future, all newly-constructed or remodeled sites will be routinely accessible.⁷⁵ Thus, only modest expenditures are required to provide access to existing facilities.⁷⁶

Although the removal of barriers includes removing any structural impediment to access if the site is a place of public accommodation, the Department of Justice (DOJ) has created a non-exhaustive list of twenty-one actions that must be taken to remove barriers, including installing ramps, rearranging furni-

71. Though the requirement of removing barriers was to be met in 1992 where readily achievable, the obligation is a continual one. 56 Fed. Reg. 35,569.

72. 42 U.S.C. § 12182(b)(2)(A)(iv) (emphasis added). Also included are "transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift)."

73. 42 U.S.C. § 12181 (9). Factors in determining whether or not an action is readily achievable include:

- (A) the nature and cost of the action needed under this chapter;
- (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 or 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 a 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.

Id. Another important factor is the legitimate safety requirements that are necessary for safe operation. 28 C.F.R. § 36.104.

74. 56 Fed. Reg. 35,569; HOUSE REPORT 101-485(III), *supra* note 53, at 60. For a discussion of the readily usable standard, see *infra* Part IV.B.2.a.(1).

75. 28 C.F.R. app. B to § 36, subpart D.

76. *Id.*

ture, widening doors, installing accessible door hardware, making toilet facilities accessible, and removing high pile, low density carpeting.⁷⁷ Furthermore, the DOJ established a set of priorities for the removal of barriers. These priorities are:

- (1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation . . . ;⁷⁸
- (2) Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public . . . ;⁷⁹
- (3) Third, a public accommodation should take measures to provide access to restroom facilities . . . ;⁸⁰
- (4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.⁸¹

b. Historic properties qualified under the "not readily achievable" exception. Title III also provides a set of requirements for those entities where barrier removal is not readily achievable.⁸² Where the site is considered a "qualified" historic property,⁸³ barrier removal is not considered readily achievable if it would threaten or destroy the historic significance of that property. Where barrier removal is not readily achievable, property owners "shall not fail to make . . . [their] goods, services, facilities, privileges, advantages, or accommodations

77. 28 C.F.R. § 36.304(b). The measures taken to remove barriers under the readily accessible standard are required to meet the applicable requirements for alterations in 28 C.F.R. § 36.402 (Alterations), § 36.404 (Alterations: Elevator Exemption), § 36.405 (Alterations: Historic Preservation), and § 36.406 (Standards for New Construction and Alterations) for the element being altered. *Id.* at § 36.304(d)(1).

78. Examples include installing an entrance ramp, widening entrances, and providing accessible parking spaces. 28 C.F.R. § 36.304(c).

79. Examples include "adjusting the layout of display racks, rearranging tables, providing brailled and raised character signage, widening doors, providing visual alarms, and installing ramps." *Id.*

80. Examples include widening doors and toilet stalls, and the installation of grab bars. *Id.*

81. *Id.*

82. 42 U.S.C. § 12182(b)(2)(A)(v).

83. 28 C.F.R. app. B to part 36, § 36.304. For an analysis of the definition of "qualified historic properties," see *infra* Part V.A.

available through alternative measures if those methods are readily achievable."⁸⁴ A property owner, for example, may provide access through use of a portable ramp or a ramp with a steeper slope than mandated by the alterations provisions,⁸⁵ or by providing curb service and relocating activities to locations.⁸⁶

c. Examples of modifications. The Lincoln Home National Historic Site contains an example of such alternative measures.⁸⁷ The front porch, though inaccessible to some disabled persons, could not be altered because of its significant historical ties to President Lincoln. A modified industrial scissors lift was installed at the rear entrance to provide access to the first floor.⁸⁸ Access to the second floor is not provided, but there are alternative exhibits at the nearby visitors' center.⁸⁹

Drayton Hall in Charleston, S.C. is also an example of the use of alternative accessibility improvements. Drayton Hall, owned by the National Trust in conjunction with local preservation organizations, is especially difficult to make accessible due to its two front entrances and no back or side entrance. In addition, the stairways are quite steep and practically in by ramp. To provide greater access, a stair trac unit was installed. In addition, Drayton Hall includes a 50 minute video tour of the inaccessible parts of the house.⁹⁰ The stair trac unit, which costs \$3,500 to 4,500, can carry a wheelchair up the stairs to the first floor and did not require structural alterations to the building.⁹¹

For the hearing impaired, a written tour is provided, while a scale-model of the home, and "touch tours" with tactile displays, are provided for the visually impaired.⁹² It is unclear

84. 28 C.F.R. § 36.305(a).

85. *Id.* § 36.304(d)(2).

86. *Id.* § 36.305(b)(1), (2).

87. Although this site is a Title II site and not a Title III site, it still provides an excellent example of attempts to comply with the minimum requirements of the ADA provisions.

88. U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE CULTURAL RESOURCES, PRESERVING THE PAST AND MAKING IT ACCESSIBLE TO EVERYONE: HOW EASY A TASK? 8 (1991).

89. *Id.*

90. A tour of the outside grounds and ground floor were provided in conjunction with this video. *Id.* at 9.

91. *Id.* at 9-10.

92. *Id.*

whether these modifications would be sufficient to meet Title III's accessibility requirements, but they nevertheless provide commendable examples of alternative efforts to comply with the ADA.

d. Unresolved issues and concerns. The difference between the "not readily achievable" standard and the "threaten or destroy" standard remains unresolved. The "readily achievable" standard appears less stringent than either the "undue burden" standard or the "readily usable" exception. Yet, the Department of Justice has applied the "threaten or destroy" exception to the requirements of "readily achievable." This action indicates that the "not readily achievable" standard is more difficult to qualify for than the "undue burden" or the "readily usable" exception. However, this result appears counter to the discussions in the regulations concerning alterations.⁹³

Perhaps the superfluous and confusing inclusion of the "readily achievable" language here is the result of comments received by the Department of Justice during the ADA's comment period. During the comment period, several organizations expressed concern regarding historic properties satisfying the readily achievable requirement.⁹⁴ The National Trust argued that the phrase "readily achievable" should be clarified so as to indicate that *any* modification that would adversely affect the historic significance of the building would not be readily achievable.⁹⁵ The National Park Service similarly argued that even minimal accessibility requirements, such as an entrance to the principal floor, conflicted with the NHPA, which encourages the retention of significant features of a historic property, and therefore was not readily achievable.⁹⁶ The State Fire Mar-

93. See *infra* Part IV.B.2.b.

94. Additional comments emphasized the need for examples of what "readily achievable" would mean to historic properties. See, e.g., Comments to the Proposed Regulations on Title III of the ADA from the Advisory Council on Historic Preservation to John Wodatch, Office on the Americans with Disabilities Act (April 23, 1991) [hereinafter Comments from the Advisory Council on Historic Preservation] (on file with the author).

95. Comments on the Proposed Regulations for Title III of the ADA from the National Trust for Historic Preservation to John Wodatch, Office on the Americans with Disabilities Act (April 23, 1991) [hereinafter Comments from the National Trust for Historic Preservation] (on file with the author).

96. Comments on the Proposed Regulations on Title III of the ADA from the United States Department of the Interior, National Park Service, to John Wodatch, Office on the Americans with Disabilities Act (April 23, 1991) [hereinafter Comments from the National Park Service] (on file with the author).

shall of West Virginia went even further, stating that to make historic buildings "accessible and usable in accordance with all the ADA requirements would be unrealistic, costly and diminish their historical character."⁹⁷ Although the DOJ rejected the use of the "adverse effects" standard advocated by the National Trust and others, perhaps it included the more stringent "threaten or destroy" exception to mollify the preservationists. Its inclusion may also be due to the unique characteristics of historic properties, which do not ordinarily lend themselves to easily accomplished and less expensive changes as do other properties. For example, widening a doorway in a historic building involves painstaking demolition and restoration which is more costly and more difficult to accomplish than widening an ordinary doorway. In fact, the widening of doorways appears to be one of the most difficult alterations for historic properties to undertake.⁹⁸ Yet the difficulty and expense still do not clarify the confusing relationship between the "readily achievable" standard and the "threaten or destroy" exception.

A related concern for managers of historic properties is the scope of the qualification "easily accomplishable and able to be carried out without much difficulty or expense."⁹⁹ The overall financial resources of the facility is a determining factor in deciding whether access is readily achievable.¹⁰⁰ As discussed previously in reference to the undue burden standard, for organizations like the National Trust the implication of this qualification could be very important. Due to its greater resources, accessibility is generally more readily achievable for a historic property owned by a large nationwide organization than it is for a historic property owned by a local historic society.

2. *Newly constructed or altered*

a. *New construction.*

(1) *General requirements.* The requirements for new construction¹⁰¹ mandate that all places of public accom-

97. Comments to the Proposed Regulations to Title III of the ADA from Walter Smittle III, West Virginia State Fire Marshall, to John Wodatch, Office on the Americans with Disabilities Act (March 20, 1991) [hereinafter Comments from Walter Smittle] (on file with the author).

98. Maze Interview, *supra* note 68.

99. 42 U.S.C. § 12181(9).

100. Maze Interview, *supra* note 68 (emphasis added).

101. This provision applies to facilities with an occupancy date after January 26, 1993. 42 U.S.C. § 12183; 28 C.F.R. § 36.401.

modation and commercial facilities must design and construct their facilities so that they "are readily accessible to and usable by individuals with disabilities."¹⁰² The "readily accessible to and usable" standard for new construction represents a higher standard than the "readily achievable" standard required for existing structures.¹⁰³ This requirement "is intended to enable persons with disabilities to get to, enter, and use a facility."¹⁰⁴ While this requirement demands a high degree of convenient accessibility, total accessibility in the facility is not required.¹⁰⁵

(2) *Exceptions.* As with currently existing facilities, there is an exception available for newly constructed facilities unable to meet this burden. "Where an entity can demonstrate that it is structurally impracticable to meet these requirements,"¹⁰⁶ an entity must still make "any portion of the facility that can be made . . . to the extent that it is not structurally impracticable."¹⁰⁷ This exception for structurally impracticability is an extremely narrow exception meant only to be applied in those instances where the "unique characteristics of the terrain make accessibility unusually difficult" and where providing access would destroy the physical integrity of the facility.¹⁰⁸ An example of such a building is one which is built on stilts due to its location in a marsh or over water. Thus, unlike existing facilities with a "readily achievable" standard, cost is not a factor. Even if it would be structurally impracticable to meet the accessibility requirements mandated for newly constructed buildings, accessibility must still be provided. For example, while access for wheelchair bound individuals may be structurally impracticable, accessibility should be ensured for persons with other disabilities.¹⁰⁹

Another exception concerns the installation of elevators. If a facility is less than three stories high or has less than 3,000

102. 42 U.S.C. § 12183 (emphasis added). Accessibility must be provided for both patrons and employees to allow them to get to, enter and use the facility. 56 Fed. Reg. 35,582. Generally, at least 50% of entrances to new buildings must be made accessible. *Id.* at 35,586.

103. HOUSE REPORT 101-485(III), *supra* note 53, at 60.

104. *Id.*

105. *Id.*; see also 28 C.F.R. app. B to § 36, subpart D.

106. 42 U.S.C. § 12183(a)(1).

107. 28 C.F.R. § 36.401(c)(2).

108. 56 Fed. Reg. 35,577. This example is considered one of the few situations where the exception would apply.

109. 28 C.F.R. § 36.401(c)(3).

square feet per floor, installation of an elevator is not required to make the newly constructed building readily accessible.¹¹⁰

(3) *Unresolved issues and concerns.* While it seems inconsistent to be concerned about the historic preservation of a newly constructed building, there are a few situations where this might become important. For example, a newly constructed replica of an historic fort or building would have to be fully accessible, for there are no historic preservation exceptions for new construction. A building that was created out of historic materials or components could present similar concerns. For example, in New England contemporary barns are often reconstructed from individual pieces of historic barns. Often these barns are converted into antique stores or similar entities. At issue is whether these buildings constitute new construction or simply a historic renovation.

b. Alterations: General Requirements. Changes to any currently existing place of public accommodation or commercial facility—on which alterations began after January 26, 1992—must meet the readily accessible standard¹¹¹ to the maximum extent feasible.¹¹² This provision does not require any alterations to be made. However, it does require that if any are undertaken, they comply with Title III accessibility standards. As in new construction, a high degree of convenient accessibility is required.¹¹³

The statute defines “alteration” as a change that “affects or could affect the usability of the building or facility or any part thereof.”¹¹⁴ Alterations include “remodeling, renovations, rehabilitation, reconstruction, . . . changes or rearrangement in structural parts or elements, and changes or rearrangement in

110. 42 U.S.C. § 12183(b). Shopping malls, shopping centers, a professional health care provider’s office, any type of facilities that the Attorney General so designates, or “[a] terminal, depot or other station used for specified public transportation, or an airport passenger terminal” do not receive this exemption. *Id.*

111. *Id.* § 12183(a)(2). Accessibility must be provided for both patrons and employees in order to allow them to get to, enter and use the facility. 56 Fed. Reg. 35,582.

112. The qualification “maximum extent feasible” applies “to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration.” 28 C.F.R. § 36.402(c). If this is the case, then the facility must “provide the maximum physical accessibility feasible.” *Id.*

113. 28 C.F.R. app. B to § 36, subpart D.

114. 28 C.F.R. § 36.402(b). Alterations are not meant to be limited to major structural modifications or to apply to minor or cosmetic activities such as wallpapering or painting. 56 Fed. Reg. 35,581.

the plan configuration of walls and full-height partitions."¹¹⁵ Normal maintenance, painting, or changes to mechanical systems are alterations under the statute unless they affect the usability of the building.¹¹⁶ Historic restoration is specifically included as an alteration.¹¹⁷ Here, as in the structurally impracticable exception for newly constructed facilities, cost is not a factor in determining "to the maximum extent possible."¹¹⁸ Even if it is not feasible to provide accessibility to persons with certain disabilities, like those in wheelchairs, the facility must still be accessible to individuals with other types of disabilities, such as those who are on crutches or who are visually impaired.¹¹⁹

An important variation of the requirement applies where the alteration "affects or could affect the usability of or access to an area of a facility that contains a primary function."¹²⁰ A primary function is defined as "a major activity for which the facility is intended."¹²¹ If such an area is affected, the entity must ensure to the maximum extent feasible "the path of travel"¹²² to the altered area and the bathrooms, telephones, and drinking fountains serving the altered areas are readily accessible to disabled individuals."¹²³

115. 28 C.F.R. § 36.402(b)(1).

116. *Id.* Although there has been no litigation regarding the meaning of alterations under Title III yet, there has been under Title II. *See, e.g., Kinney v. Yerusalem*, 1993 WL 30014 (E.D. Pa. Feb. 2, 1993) (holding that resurfacing a street is an alteration).

117. 28 C.F.R. § 36.402(c).

118. *Id.*; 56 Fed. Reg. 35,581.

119. 28 C.F.R. § 36.402(1).

120. 42 U.S.C. § 12183(a)(2).

121. 28 C.F.R. § 36.403(b). Examples include the lobby of a bank or the dining area in a cafeteria. Employee lounges or locker rooms, entrances, corridors, and restrooms are not considered areas containing a primary function. 56 Fed. Reg. 35,582. If, however, such an area may be one of the major reasons for public patronage, then that area might be considered an area containing a primary function. The Department of Justice provides the example of a restroom at a roadside rest stop.

122. A "path of travel" includes a "continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility." 28 C.F.R. § 36.403(e)(1). Examples include: sidewalks; curb ramps; clear floor paths through lobbies, corridors, and rooms; parking access aisles; elevators; and restrooms, telephones, and drinking fountains serving the altered area. *Id.* § 36.403(e)(1)-(2).

123. 42 U.S.C. § 12182(2) (emphasis added). If the area altered is not an area that contains a primary function (such as a faculty lounge), then only the area

Cost may be considered when alterations affect a primary function of the site. In contrast, alterations not affecting such an area may not take cost into account when determining the feasibility of proposed changes to the structure. If the costs to ensure that primary function areas are readily accessible to the altered areas are disproportionate in relation to the overall cost and scope of the alterations, the entity need only make the path of travel as accessible as possible without incurring disproportionate costs.¹²⁴ Costs associated with making the path of travel are considered disproportional only when those costs exceed 20% of the cost of the alteration to the primary function area.¹²⁵ The National Conference of State Historic Preservation Officers unsuccessfully advocated the lower figure of 10%, due to the high costs associated with historic restorations.¹²⁶

Where those costs are considered disproportional, the Department of Justice has established a list of priorities for those elements that will provide the greatest access.¹²⁷ These priorities, in order, are: "(i) [a]n entrance; (ii) a route to the altered area; (iii) [a]t least one restroom for each sex or a single unisex restroom; (iv) [a]ccessible telephones; (v) [a]ccessible drinking fountains; and (vi) [w]hen possible, additional elements such as parking, storage, and alarms."¹²⁸

There is also an exception here for elevators as in newly constructed facilities. Generally, the same standards apply: an elevator is not required if the altered facility is less than three

altered must conform to ADAAG standards. 56 Fed. Reg. 35,581. Thus, if a window is altered, it must conform to ADAAG standards but does not trigger any subsequent requirements. *Id.* at 35,582. It is only when the alteration affects access to or usability of an area containing a primary function that the requirement of making the path of travel accessible is triggered. *Id.* at 35,581.

124. 42 U.S.C. § 12182(a)(2).

125. 28 C.F.R. app. B to part 36; 28 C.F.R. § 36.403(f)(1). Costs associated with making an accessible path of travel include costs incurred in making restrooms, telephones, and drinking fountains accessible as well as any costs associated with providing access to the altered area, including ramps or the widening of doorways. *Id.* § 36.403(f)(2).

126. Comments to the Proposed Regulations on Title III of the ADA from the National Conference of State Historic Preservation Officers to John L. Wodatch, Office on the Americans with Disabilities Act (April 23, 1991) [hereinafter Comments from the National Conference of State Historic Preservation Officers] (on file with the author).

127. 28 C.F.R. § 36.403(g)(2). The Department of Justice also established a list of priorities for existing places of public accommodation when attempting the readily achievable removal of barriers. *See supra* Part IV.B.1.(a).

128. 28 C.F.R. § 36.403(g)(2).

stories high or has less than 3,000 square feet per floor.¹²⁹ The primary difference is that the disproportionality standard applies here as well, the installation of an elevator in an altered facility is not required if it is technically unfeasible.¹³⁰ An exception also exists for alterations to certain qualified historic properties under historic preservation provisions of the ADA.

VI. HISTORIC PRESERVATION EXCEPTIONS

Congress, when enacting the ADA, "recognized the unique issues involved in applying the requirements of . . . [the ADA] to historic buildings and facilities."¹³¹ Section 12204 provides for different treatment of alterations and the modification of currently existing historic properties if meeting the requirements for alterations would "threaten or destroy the historic significance" of the qualified historic building or facility,¹³² whether the site consists of currently existing buildings and facilities or those that are being altered. Newly constructed buildings or facilities are ineligible for this exception.

A. *Eligibility for Historic Facility Exception.*

To qualify for this special treatment, a building or facility must be "eligible for listing in the National Register of Historic Places under the [NHPA]"¹³³ or "those buildings or facilities designated as historic under State or local law"¹³⁴ Buildings or facilities listed as such are classified as qualified historic properties under the ADA.¹³⁵

B. *The Threaten or Destroy Test*

The most significant aspect of this provision is the inter-

129. 42 U.S.C. § 12183(b). As with newly constructed facilities, this exception does not apply to "a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities." *Id.*

130. 56 Fed. Reg. 35,583-584. No definition of the phrase "technically infeasible" is provided.

131. 136 Cong. Rec. H2432 (daily ed. May 17, 1990) (statement of Rep. Hoyer).

132. 42 U.S.C. § 12204(a). This section applies to both Title II and Title III entities. *Id.*

133. 42 U.S.C. § 12204(c)(2).

134. *Id.* § 12204(c)(3).

135. *Id.* § 12204(c).

pretation of the phrase "threaten or destroy the historic significance of historic buildings." Prior to the DOJ's final publication of rules, there was extensive debate about the standard to be applied. Some commentators criticized the proposed DOJ standard. The proposed standard would not exempt the site from accessibility requirements unless the alteration substantially impaired the historic features of a property. The substantially impaired test is derived from section 504 of the Rehabilitation Act of 1973.¹³⁶ Commentators representing the National Trust and the Advisory Council on Historic Preservation advocated application of the "adverse effect" standard currently used under the NHPA.¹³⁷ Preservationists preferred the adverse effect standard because they were familiar with it, and because it was less stringent than the "threaten or destroy" standard contained in the ADA.¹³⁸ Others argued that stronger language was needed to ensure access to historic buildings. These groups argued that if historic buildings could be modified to include plumbing and electricity, they could similarly be renovated to make the building accessible.¹³⁹ The DOJ rejected the adverse effect interpretation advocated by

136. 28 C.F.R. app. B to § 36.405.

137. Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. app. B to § 36; Comments from the National Trust For Historic Preservation, *supra* note 95; Comments from Advisory Council on Historic Preservation, *supra* note 94; see also 36 C.F.R. § 800.9 (criteria of "adverse effect" published by the Advisory Council on Historic Preservation under the Preservation Act).

138. Clare W. Adams, Remarks at the National Conference of State Historic Preservation Organizations, The Americans With Disabilities Act Workshop (March 22, 1993) (hereinafter Adams, ADA Workshop) (Ms. Adams is the Senior Historic Sites Restoration Coordinator of the New York State Office of Parks, Recreations and Historic Preservation, Historic Preservation Field Services Bureau). Ms. Adams felt that the adoption of a separate criteria for ADA implementation would create confusion and be inconsistent with the adverse effect requirement commonly used by preservationists under § 106 of the NHPA. She further felt that regardless of the standard applied, most State Historic Preservation Organizations would in reality probably continue to apply the adverse effect standard while stating that they are using the threaten or destroy standard, simply because they are most familiar with the former.

139. Comments to the Proposed Regulations for Title III of the ADA from the Texas Planning Council for Developmental Disabilities to John Wodatch, Office on the Americans with Disabilities Act (April 22, 1991) [hereinafter Comments from the Texas Planning Council for Developmental Disabilities] (on file with the author); Comments to the Proposed Regulations for Title III of the ADA from the Texans with Disabilities to John Wodatch, Office on the Americans with Disabilities Act (April 20, 1991) [hereinafter Comments from the Texans with Disabilities] (on file with the author).

preservationists as inconsistent with Congressional intent and language under section 12204(c), and instead adopted the more stringent "threaten or destroy" standard.

The threshold to meet the "threaten or destroy" standard was intended to be very high. The DOJ stated in its preamble to the final regulations that section 12204(c) is to "be applied only in those *very rare* situations in which it is not possible to provide access to an historic property using the . . . access provisions in the ADAAG."¹⁴⁰

James Raggio, counsel to the Architectural and Transportation Barriers Compliance Board, described the difference between the "adverse effect" and "threaten or destroy" standards as a sliding scale, with adverse effect on the bottom and threaten and destroy at the top.¹⁴¹ Thus, it would take a lot of adverse effects to reach the threaten or destroy threshold.¹⁴² This led some observers to the conclusion that the special treatment and protection accorded historic properties is in fact limited.¹⁴³

The difficulty in attaining the threshold that would cause an exception to apply is further demonstrated by the revision and adoption of section 36.405 in the Code of Federal Regulations and ADAAG section 4.1.7(1)(a). These sections specifically state that historic properties "shall comply to the maximum extent feasible" with the general provisions for alterations.¹⁴⁴ This stringency is consistent with the ADA's goal of a high degree of access for altered buildings.¹⁴⁵ However, it is counter to the position of others, exemplified by Representative Hoyer's statement that the addition of section 12204 would provide "reasonable flexibility in making historic buildings accessible to persons with disabilities."¹⁴⁶ Perhaps such a high stan-

140. 28 C.F.R. app. B to § 36.405.

141. James Raggio, Counsel, Architectural and Transportation Barriers Compliance Board, Remarks at the National Conference of State Historic Preservation Organizations, The Americans With Disabilities Act Workshop (March 22, 1993) (hereinafter Raggio, ADA Workshop).

142. *Id.*

143. Adams, ADA Workshop, *supra* note 138.

144. 28 C.F.R. app. B to § 36.405.

145. 28 C.F.R. app. B to § 36, subpart D.

146. 136 Cong. Rec. H2432 (daily ed. May 17, 1990) (statement of Rep. Hoyer); see also HOUSE REPORT 101-485(II), *supra* note at 34 (stating that the qualified historic properties provision allows for flexibility in applying the requirements of the ADA to historical buildings where doing so might threaten and destroy the historical significance of such buildings).

dard was adopted because many consider the benefits derived from the simple existence of historic buildings secondary to the benefits derived from the actual experience of visiting these historic properties.¹⁴⁷

The result is that all historic properties are required to meet the general Title III guidelines unless, in accordance with DOJ procedures, doing so would threaten or destroy the historic significance of the qualified historic building.¹⁴⁸ If the entity follows DOJ procedures, and it is determined that compliance with the ADA requirements for alterations would threaten or destroy the historic significance of the qualified historic building, that entity would be required to use the alternative accessibility standards provided under 4.1.7(3) of the Uniform Federal Accessibility Standards.¹⁴⁹ Entitled "Historic Preservation: Minimum Requirements," this section still demands that some level of accessibility be provided. Thus, even historic properties are not exempt from the requirements of the ADA, compliance is simply a matter of degree. Some of these minimum requirements include an accessible route to the entrance, an accessible entrance, an accessible route to all publicly used spaces on the level where the accessible entrance is located, accessible toilets if any toilets are provided and displays and written documents which can be seen by a seated person.¹⁵⁰

C. *Seeking the Historic Preservation Exemption*

The application procedures for special treatment under section 12204 vary, depending on the type of qualified historic property. The ADA divides qualified historic properties into two classes: those qualified historic properties subject to section 106 of the NHPA and those that do not come under section 106.

Those qualified historic properties that are subject to section 106 must follow the specified process for that section.¹⁵¹

147. Federal Property Management Regulations, Nondiscrimination in Federal Financial Assistance Programs, 41 C.F.R. § 101-8.311 (1992).

148. 28 C.F.R. app. A, § 4.1.7(1)(a). See *infra* Part V.C and accompanying text for the procedural prerequisite to applying section 12204.

149. 28 C.F.R. app. A, § 4.1.7(3). It is important to realize that the ADA does not require a qualified historic property to apply for this exemption. If an entity wishes to fully comply with the ADA, it may do so. However, State or local historic preservation laws may bar full compliance, and in effect, mandate use of section 12204. See *infra* Part VII.C for a discussion of this problem.

150. See 28 C.F.R. app. A, § 4.1.7(3) for the exact specifications for these routes.

151. 28 C.F.R. app. A, § 4.1.7(2)(a)(ii). The section 106 process requires that a

If the State Historic Preservation Officer or Advisory Council on Historic Preservation agrees with the applying entity that compliance with the ADA accessibility requirements for alterations (both exterior and interior) would threaten or destroy the historic significance of the building or facility, then the entity is allowed to use the lesser requirement of 4.1.7(3).¹⁵² This lesser alternative cannot be used without first consulting one of these advisory agencies.¹⁵³ Failure to comply is a violation of the ADA.

The requirement for a non-106 qualified historic property is less rigid. All that is required is that the entity undertaking the alterations *believe* that compliance with the ADA's accessibility requirements would threaten or destroy the historic significance of the qualified historic building.¹⁵⁴ The entity should consult with the State Historic Preservation Officer (SHPO), and if that officer agrees that alterations would threaten or destroy the significance of the property, the entity may use the alternative requirement.¹⁵⁵

However, it is not mandatory for a non-106 entity to consult with anyone, and even if it does consult with the SHPO, it is not required to follow the SHPO's advice.¹⁵⁶ A non-106 entity can make a threaten or destroy conclusion unilaterally.¹⁵⁷ The term "should" is used, making consultation optional. The DOJ could not establish mandatory consultation for non-106 entities under the cloak of the ADA because no such requirement existed previously in federal historic preservation law.¹⁵⁸

Although consultation with a SHPO is not required, it is strongly recommended. In the event a discrimination suit is filed, failure to consult with or follow the advice of a SHPO

federal agency with jurisdiction over a federal, federally assisted, or federally licensed undertaking consider the effects of the agency's undertaking on buildings and facilities listed in or eligible for listing in the National Register of Historic Places, and give the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking prior to approval of the undertaking. *Id.* at app. A, § 4.1.7(2)(a)(i).

152. *Id.* at app. A, § 4.1.7(2)(iii).

153. Raggio, ADA Workshop, *supra* note 141.

154. 28 C.F.R. app. A, § 4.1.7(2)(b) (emphasis added).

155. *Id.* There is no requirement under the ADA that an entity use this alternative provision.

156. Raggio, ADA Workshop, *supra* note 141.

157. *Id.*

158. *Id.*

increases the entity's potential liability for discrimination against disabled persons and the amount of fines assessed.¹⁵⁹ This procedural requirement provides guidance for non-106 entities and thus protection from suits. For states and localities it provides the ability to protect the historic nature of their properties and yet assure access for disabled individuals.¹⁶⁰

Regardless of section 106 status, any entity seeking special treatment under section 12204 is advised to consult with interested parties, including disability organizations and state or local accessibility officials.¹⁶¹ The interaction of interested parties is more likely to lead to innovative approaches that satisfy all constituencies as well as reduce potential liability.

D. Comments Made During the Comment Period

A great deal of commentary existed regarding the historic preservation provision, both by preservationists and advocates for the disabled. Some preservationists felt that to include historical restoration within the definition of alterations contradicted the goals of the NHPA.¹⁶² They felt that by requiring the level of accessibility that this exemption demanded, historically accurate restoration would be nearly impossible.¹⁶³ Others felt that the alternatives under the exemption were too stringent to cover all the situations involving historic properties, and that to meet these standards would not be technically feasible without destroying significant features of the historic property.¹⁶⁴

159. *Id.* See *infra* note 174 for a discussion of the role of good faith in assessing civil penalties.

160. Raggio, ADA Workshop, *supra* note 141. The use of these procedures, however, does not provide absolute protection from suit. It simply shows a good faith effort to comply and provide a hedge against suit. Similarly, it is recommended that an entity seek the advice of reputable groups representing the interests of the disabled.

161. 28 C.F.R. app. A, § 4.1.7(2)(c).

162. Comments to the Proposed Rules on Title III of the ADA from the Kansas State Historical Society to John Wodatch, Office of the Americans with Disabilities Act (April 22, 1991) (on file with the author); Comments from the Advisory Council on Historic Preservation *supra* note 94; Comments from National Park Service, *supra* note 96.

163. Comments to the Proposed Rules on Title III of the ADA from the Kansas State Historical Society to John Wodatch, Office of the Americans with Disabilities Act (April 22, 1991) (on file with the author); Comments from the Advisory Council on Historic Preservation *supra* note 94; Comments from National Park Service, *supra* note 96.

164. Comments from the National Conference of State Historic Preservation

Yet, others argued that this exception was too lenient. In order to ensure complete access, some organizations, such as the Texas Planning Council for Developmental Disabilities, advocated language stronger than the threaten or destroy standard that was finally adopted.¹⁶⁵ Others felt that the exception should distinguish between the type of site as well as the part of the building being altered. The Commission on Persons with Disabilities argued that requiring accessibility in all alterations of a historic site, especially those sites designated historic due to events that occurred there (and not a building historic in itself) would not destroy the reason for the site's historic designation. Thus, these sites should not receive the exemption.¹⁶⁶ A similar argument was made to distinguish between alterations on the facade of a historic building and alterations to the interior, *i.e.*, where only the facade of a building was historic, the interior should remain subject to the regular accessibility requirements.¹⁶⁷ Although none of the above proposals were adopted, in reality it would seem that most such concerns were unfounded; the threaten or destroy standard protects most historic properties while assuring access where to do so will not destroy the significance of the site. For example, where the exterior of the building is the only aspect of historical significance, it is unlikely that a court would find that altering the interior to improve access would meet the stringent standards of the threaten or destroy exception. This is because the interior would probably suffer no damage to its historic integrity. A similar analysis applies to a site that is historic only because of a past event that occurred at that location, without any historic value inherent in the building itself. Such a site is highly unlikely to meet the threaten or destroy standard and therefore would not qualify for an exception.

Officers, *supra* note 126.

165. Comments from the Texas Planning Council for Developmental Disabilities, *supra* note 139.

166. Comments on the Proposed Rules to Title III of the ADA from the Commission on Persons with Disabilities to John Wodatch, Office on the Americans with Disabilities Act (April 18, 1991) (on file with the author).

167. *Id.*; Comments on Proposed Regulations to Title III of the ADA from the Michigan Center for a Barrier Free Environment to John Wodatch, Office on the Americans with Disabilities Act (April 20, 1991) (on file with the author); Comments on Proposed Regulations to Title III of the ADA from the Consortium for Citizens with Disabilities to John Wodatch, Office on the Americans with Disabilities Act (April 24, 1991) (on file with the author).

VII. ENFORCEMENT

The enforcement provisions of Title III are applied by the same mechanisms and remedies as Title VII of the Civil Rights Act of 1964.¹⁶⁸ A complaint may be brought by a disabled individual subjected to, or who has reasonable grounds for believing they will be subjected to, discrimination under Title III, or by the Attorney General if "any person or group of persons is engaged in a pattern or practice of discrimination under . . . [Title III] or if the discrimination against an individual or individuals raises an issue of general public importance."¹⁶⁹ To assist in ensuring compliance, state and local authorities may apply for and receive a certification that the state law, local building codes or similar ordinances in question meet or exceed Title III's minimum requirements of accessibility and usability from the Attorney General.¹⁷⁰ Such certification is a rebuttable presumption that the state law or local ordinance does not violate Title III standards.¹⁷¹

If a violation has occurred, a variety of remedies are available depending on who brought the suit. If suit is brought by a private litigant, injunctive relief can be obtained.¹⁷² An injunction can include an order to alter facilities to make them readily accessible and usable by disabled individuals or require the use of auxiliary aids or services, or the "modification of a policy or provision of alternative methods."¹⁷³ If the Attorney General brings suit, the court can issue injunctive relief or other remedies, including monetary relief to the aggrieved individuals and civil penalties not in excess of \$50,000 for the first offense and \$100,000 for any subsequent violations.¹⁷⁴

168. 42 U.S.C. § 12188; Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000a-20003(a) (1992)).

169. *Id.* §§ 12188(a)(1), 12188(b). The Attorney General is required to investigate any alleged violations. *Id.* § 12188(b)(1)(A).

170. *Id.* § 12188(b)(1)(ii). The Attorney General is required to consult with the Architectural and Transportation Barriers Compliance Board and provide public hearings for interested parties to testify against such certifications.

171. *Id.*; 56 Fed. Reg. 35,590.

172. 42 U.S.C. § 12188(a)(2).

173. *Id.*

174. *Id.* § 12188(b)(2). In assessing civil penalties, the court is directed to look at whether there was a good faith effort to comply, and if so, to what degree. *Id.* at § 12188(b)(5). The court should consider "whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability." A determination in a single action (settlement or judgement) that the entity has engaged in more than one discriminatory act is considered a single violation. *Id.* § 12188(b)(3).

Punitive damages are not allowed.¹⁷⁵ Attorney's fees are allowed for all parties except the United States, which is barred from recovering such fees.¹⁷⁶

VIII. SOME UNANSWERED QUESTIONS AND FAILURES

The following discusses several unanswered questions and failures which are a direct result of Congress' lack of foresight and the DOJ's failure to remedy the situation. Many of these questions may only be answered with future litigation.

A. *Failure to Adequately Define Terms*

Perhaps the most significant oversight was the DOJ's failure to clarify the meaning of the phrase "threaten or destroy." Although it appears that the standard is higher than the "adverse effect" standard advocated by many preservationists,¹⁷⁷ even this is debatable. According to several experts, many organizations are still using a standard roughly equivalent to the adverse effect standard. This is due in part to the confusion over the meaning to be imputed to threaten or destroy and in part because they feel there is no significant difference between the two.¹⁷⁸

However, this interpretation appears to be incorrect. The DOJ specifically stated in its preamble to its final regulations that section 12204 is to "be applied only in those *very rare* situations in which it is not possible to provide access to an historic property using the . . . access provisions in the ADAAG."¹⁷⁹ This conclusion is supported by Mr. Raggio's statements that the difference in the standards can be described as a sliding scale, with adverse effect on the bottom and threaten or destroy on the top.¹⁸⁰ Nevertheless, some would disagree, including several who participated in this conference. Mr. Maze of the National Historic Society continues to inter-

175. *Id.* § 12188(b)(4).

176. *Id.* § 12205; 28 C.F.R. § 36.505.

177. *See, e.g.*, Comments from the National Trust for Historic Preservation, *supra* note 95 .

178. *See, e.g.*, Adams, ADA Workshop, *supra* note 138; Telephone Interview with Tom Jester, attorney for the National Historic Trust (April 21, 1993) (hereinafter Jester Interview).

179. 28 C.F.R. app. to § 36.405.

180. Raggio, ADA Workshop, *supra* note 141 (Mr. Raggio is counsel to the Architectural and Transportation Barriers Compliance Board).

pret the new standard as being only slightly higher than the adverse effect standard.¹⁸¹ Regardless of which interpretation is correct, this demonstrates the confusion surrounding the standards to be applied and the DOJ's failure to avoid or clarify this problem.

Similarly, the DOJ failed to define the phrase "fundamentally alter" as it applies to program modification. The result will be confusion and differing applications of this provision. Although the program modification requirement seems to be the easiest to implement,¹⁸² litigation concerning its application is inevitable.

An additional question involves the application of the threaten or destroy standard to currently existing structures in which there has already been a finding of not readily achievable. As discussed previously,¹⁸³ it appears that the threaten or destroy exception is easier to meet than the not readily achievable exception. Yet requirements for the not readily achievable exception are considered fairly easy to meet.¹⁸⁴ It may be simply that there are a few unique situations in which the historic preservation exception would excuse noncompliance if the easier not readily achievable standard would not. If this is the intended application, Congress or the courts need to state as much to avoid confusion. Inevitably, these failures will require litigation to clarify the definition of crucial terms in the statute and to establish less ambiguous standards.

B. Failure to Provide Examples of Compliance

Examples of compliance for historic properties that qualify for the exemption would greatly enhance the understanding and implementation of the historic preservation exemption. Several commentators to the proposed DOJ regulations regarding Title III specifically requested such examples.¹⁸⁵ Notwithstanding these requests, the DOJ failed to provide any.

181. *Id.*

182. Maze Interview, *supra* note 68.

183. *See supra* Part IV.B.2.a.(2).

184. *See supra* Part IV.B.1.a.

185. *See, e.g.,* Comments from the Advisory Council on Historic Preservation, *supra* note 94.

C. *Failure to Provide Sufficient Guidance for Non-106 Compliance and Conflicts*

A particularly troubling problem exists for a non-106 entity that makes every effort to follow the DOJ's procedures for using the "threaten or destroy" exception. What is a private entity to do if it seeks SHPO guidance, SHPO concludes that the alterations do not threaten or destroy the historical significance of the property, and the local historic preservation board fails to certify the alterations because it feels the alterations do not adequately respect the historic property? If the site owner abides by the local historic preservation board's decision, the owner may find itself being sued for failure to comply with Title III. Yet they cannot proceed with alterations. The only options are to wait until suit has been brought or to sue the local historic preservation board for failure to issue a certificate of appropriateness.¹⁸⁶ Neither is a particularly appealing option.

D. *Failure to Provide Sufficient Guidance and Resources for SHPOs*

1. *SHPO's role*

Finally, an area of major concern to SHPOs is defining their role in the ADA implementation process.¹⁸⁷ The regulations state that non-106 entities should consult with SHPOs to determine whether they meet the "threaten or destroy" exception, but little additional guidance is provided.¹⁸⁸ While SHPOs, with their technical staff, are arguably the best organization to handle this responsibility,¹⁸⁹ little is stated about the extent of this responsibility. Should an SHPO require that a property owner submit several plans or simply submit one? If only one is submitted, are SHPOs required to make a yes or no decision on that plan or are SHPOs required to ask for more

186. General discussion at the National Conference of State Historic Preservation Organizations, The Americans With Disabilities Act Workshop (March 22, 1993) [hereinafter General Discussion]; Raggio, ADA Workshop, *supra* note 141.

187. Raggio, ADA Workshop, *supra* note 141.

188. 28 C.F.R. app. A, § 4.1.7(2)(b).

189. Comments to the Proposed Rules for Title III of the ADA from the State of New Jersey Department of Environmental Protection to John Wodatch, Office on the Americans with Disabilities Act (April 23, 1991) [hereinafter Comments from the State of New Jersey Department of Environmental Protection] (on file with the author).

plans so as to examine the range of options? Similarly, should an entity consulting an SHPO seek written confirmation of all discussions and decisions, for fear of litigation? While it clearly is advisable to do so, is it required? Guidelines should be established to enable SHPOs and private entities to understand their mutual obligations in this process.

2. *Increased administrative burden*

SHPOs must also decide how they are to deal with the increased administrative burden imposed as a result of mandatory and suggested advisement duties. At this time, SHPOs are receiving calls daily requesting advice on making historic properties.¹⁹⁰ To review each and every set of plans and draft formal responses is extremely time consuming and currently unrealistic, given current staff and budget sizes.¹⁹¹ This issue, too, was addressed by commentators, yet appears to have been ignored by the DOJ.¹⁹²

3. *SHPO Liability*

A related question is that of SHPO liability. What if a private entity requests consultation and a SHPO is simply unable to provide it? Is a private entity allowed to proceed without consultation? Would a SHPO be liable for failure to provide consultation? If a SHPO does provide assistance, is it liable to an entity that follows the advice and still loses in court?

E. Landscapes and Sidewalks

Another unanswered question concerns landscaping and sidewalks. The DOJ currently proposes regulations to Title II (Public Entities) that would treat sidewalks and boardwalks along beaches in a manner similar to ADAAG 4.1.7 (Alterations), thus allowing a historic preservation exception.¹⁹³ Some advocates believe that this new regulation should include landscapes, gardens, cemeteries, and battlefields.¹⁹⁴ Yet, the

190. General Discussion, *supra* note 186.

191. *Id.*

192. Comments from the State of New Jersey Department of Environmental Protection, *supra* note 189.

193. Proposed Rules, Architectural and Transportation Barriers Compliance Board, 57 Fed. Reg. 60,612 (1992).

194. Adams, ADA Workshop, *supra* note 138.

question remains how these properties are affected by the ADA and exactly what requirements must be met.¹⁹⁵

IX. CONCLUSION: ACCESS REIGNS SUPREME

For those involved in historic preservation, the enactment of ADA left many issues unresolved. The ADA has clearly stated that disability access to historic properties was of greater concern to Congress and the DOJ than fully preserving the historical integrity of our historic properties. Therefore, these properties must be made accessible. The evidence of this is fourfold.

First, there are no historic preservation exceptions for program accessibility.¹⁹⁶ The exceptions allowed are provided for all entities, with no special provisions for historic properties.¹⁹⁷

Second, historic properties did receive exemptions, but these exemptions are not absolute. Thus, historic properties are still required to meet minimum standards of accessibility. Some preservationists argued for levels of compliance lower than the minimum standards,¹⁹⁸ but these recommendations were not heeded.

Third, minimum requirements for historic properties are still rigorous and will affect the historical integrity of some buildings. Accessibility to the building and all its publicly used spaces on the accessible level still must be met.¹⁹⁹ The potential damage caused by accessibility requirements may explain why many critics call for even lower standards than the exceptions provide, and for no standards at all for those historic properties whose historical character would be diminished.²⁰⁰

Finally, qualifying for exceptions is very difficult. Simply doing historic restoration is not enough. Restoration is consid-

195. *Id.*

196. See 42 U.S.C. § 12182.

197. For a more detailed analysis of these provisions, see *supra* Part IV.A.

198. Comments from the National Trust for Historic Preservation, *supra* note 95; Comments from National Park Service, *supra* note 96.

199. See 28 C.F.R. app. A to Part 36, § 4.1.7. For a more detailed analysis of these requirements, see *supra* notes to Part V.

200. Comments from the National Conference of State Historic Preservation Officers, *supra* note 126 (lower standards); Comments from the National Trust for Historic Preservation, *supra* note 95 (lower standards); Comments from the National Park Service, *supra* note 96 (lower standards); Comments from Walter Smittle III, *supra* note 97 (no requirements for some buildings).

ered an alteration and thus subject to the general alterations requirements.²⁰¹ For currently existing facilities and alterations to qualify for the exception, the modifications must threaten or destroy the historic significance of qualified historic buildings and facilities.²⁰² As discussed earlier, this threshold was intended to be quite difficult to meet and to be applied only in "very rare situations."²⁰³ Thus, few historic properties will be allowed to use this exemption.

The conclusion arising from an examination of these regulations and their limited recognition of the realities of historic preservation is that accessibility is of the utmost importance. It appears that Congress determined that the goals of the ADA outweighed those of the NHPA and historic preservation. Therefore, except in very limited circumstances, historic properties must fully comply with the ADA's requirements, sometimes at the risk of compromising the historic value of the property itself.

201. 28 C.F.R. § 36.402(a)(1).

202. 42 U.S.C. § 12204(c)(1).

203. 28 C.F.R. app. B to § 36.405; Raggio, ADA Workshop, *supra* note 141. For a detailed analysis of this standard, see *supra* Parts V.B. and VII.A.