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Damages for Intentional Discrimination by Public Entities Under Title II of the Americans With Disabilities Act: A Rose by Any Other Name, but Are the Remedies the Same?

Cheryl L. Anderson*

I. INTRODUCTION

In 1990 the United States Congress passed perhaps the most monumental piece of civil rights legislation since the 1960s, the Americans with Disabilities Act (ADA).1 Since passage of the ADA, there has been a steady stream of scholarship discussing the impact of the act and its anticipated interpretation.2

The majority of the focus on the ADA has been on two parts of the act—Title I, which applies to disability discrimination in employment,3 and Title III, which applies to commercial facilities and places of public accommodation.4 Virtually ignored in the shuffle has been Title II, which

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3. 42 U.S.C. §§ 12111-12117 (Supp. IV 1992). Title I is expressly limited to disability discrimination in employment. Id. § 12112(a). Section 12112(a) provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” Id. A “covered entity” may be “an employer, employment agency, labor organization, or joint labor-management committee.” Id. § 12111(2). The definition of “employer” does not distinguish between public or private employers. See id. § 12111(5). For a discussion of the threshold size requirement to be a “covered entity” and varying effective dates under Title I, see infra note 17.

4. Id. §§ 12181-12189. Title III requires private businesses to provide accessibility to “places of public accommodation” and “commercial facilities.” See id. § 12182 (prohibiting discrimination based on disability by public accommodations); id. § 12183 (requiring that all
which prohibits discrimination by "public entities" such as state or local governments, their departments and agencies.\textsuperscript{5}

Title II was modeled in large part on section 504 of the Rehabilitation Act of 1973,\textsuperscript{6} which prohibits discrimination based on disability by recipients of federal financial assistance.\textsuperscript{7} Title II was primarily enacted to extend this prohibition "to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive federal financial assistance."\textsuperscript{8} As such, the language in

new construction and alterations in public accommodations and commercial facilities be readily accessible to and usable by individuals with disabilities; see also id. § 12131(6) (defining private entity as any entity other than a public entity as defined in 42 U.S.C. § 12131(1)); "Public accommodation" is defined to include twelve specific types of private entities. See id. § 12181(7) (defining "public accommodation" to include, among others, such businesses as restaurants, shopping centers, parks, schools, and health clubs). The term "commercial facilities" includes facilities whose operations affect commerce, and are "intended for nonresidential use," but does not include certain railroad operations and facilities or facilities covered by or expressly exempted from the Fair Housing Act of 1968 (42 U.S.C. §§ 3601-3616). Id. § 12181(2).

5. Id. § 12132 (prohibiting discrimination by public entities); id. § 12131(1)(A), (B) (defining public entities to include state and local governments, their departments, agencies, special purpose districts, and instrumentalities). Title II broadly provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Id. § 12132.

Title II is broken down into two subsections. The first section is entitled "Part A—Prohibition Against Discrimination and Other Generally Applicable Provisions," and contains general definitions, the broad prohibition against discrimination by public entities, and enforcement provisions. See id. §§ 12131-12134. The second subsection, entitled "Part B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory," operates primarily to define what is discrimination in various forms of public transportation. See id. §§ 12141-12165. The remainder of Title II is implemented through regulations promulgated by the Department of Justice. See id. § 12134(a); 28 C.F.R. pt. 35 (1993).


7. This section provides as follows:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


Title II prohibiting disability discrimination greatly resembles that contained in section 504, and the regulations implementing Title II are substantively similar to those implementing section 504.

Perhaps Title II has seen little of the spotlight to date because Congress characterized it as "simply" extending the coverage of section 504 to all actions of state and local government. This characterization upon disability "under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a) (Supp. IV 1992). In contrast, Title II more broadly prohibits discrimination based upon disability by "public entities." See 42 U.S.C. § 12132 (Supp. IV 1992).

9. See supra notes 5, 7. However, in addition to Title II's deletion of references to federal financial assistance, there are a few differences between the two statutes which should be mentioned. Section 504 also applies to programs and activities conducted by the Executive branch of the federal government and the United States Postal Service. See 29 U.S.C. § 794(a) (Supp. IV 1992). This language was not included in Title II. See 42 U.S.C. § 12132 (Supp. IV 1992). Title II, therefore, does not provide for a cause of action against the federal government or its agencies for discrimination on the basis of disability. Cf. Doe v. Attorney Gen., 941 F.2d 780, 794-95 (9th Cir. 1991) (holding that claimant had right of action against Department of Justice and FBI under § 504 because Congress expressly included federal agencies within the scope of that statute).

In addition, Title II does not contain the word "solely" as in the phrase "solely by reason of her or his disability" found in § 504. Compare 42 U.S.C. § 12132 (Supp. IV 1992) (prohibiting discrimination against qualified individuals with disabilities "by reason of such disability") with 29 U.S.C. § 794(a) (Supp. IV 1992) (prohibiting discrimination against a qualified individual "solely by reason of his or her disability"). However, the legislative history of Title II reflects that Congress did not view this as a significant difference between the two statutes, because § 504 has not been interpreted as narrowly as that language suggests. See H.R. REP. NO. 485(II) at 85-86, reprinted in 1990 U.S.C.C.A.N. at 367-69 (recognizing, in a discussion of the overlap between Title II and § 504, that § 504 was not limited to those cases in which the plaintiff could prove discrimination based "solely" on disability, because such an interpretation would lead to absurd results).

10. See 28 C.F.R. pt. 35 (1993). In fact, the Department of Justice has expressly stated that it took "major portions" of the regulations from the existing regulations implementing § 504 of the Rehabilitation Act. 56 Fed. Reg. 35,694 (1991); see also 42 U.S.C. § 12134(a) (Supp. IV 1992) (directing Department of Justice to adopt regulations consistent with § 504 coordination regulations adopted by the Department of Health, Education and Welfare in 28 C.F.R. pt. 41 for recipients of federal financial assistance, except for those provisions relating to program accessibility for existing facilities and communications, which are to be consistent with 28 C.F.R. pt. 39).

Because Title II does not displace the existing jurisdiction of funding agencies under § 504, regulations setting out procedures for handling claims with overlapping jurisdiction have also been produced. See 28 C.F.R. § 35.171(a)(3)(i) (1993) (giving § 504 agencies jurisdiction to process complaints that fall under both § 504 and Title II); see also 57 Fed. Reg. 14,630-31 (1992) (to be codified at 28 C.F.R. pt. 37) (proposed April 21, 1992) (coordination regulations setting forth procedures governing the processing of complaints that fall under § 504 and Title I of the ADA, including claims that also fall under Title II of the ADA).

11. The House of Representatives Committee Report reflects that the Committee "[chose] not to list all types of actions that are included within the term 'discrimination,' [under Title II], as was done in Titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in § 504 [of the Rehabilitation Act] to all actions of state
is substantially misplaced because Title II has potentially the broadest reach of any disability discrimination law enacted to date. Title II imposes federal mandates on the day-to-day operation of local governments, regardless of whether federal funds have been provided to support those operations, and regardless of the size of the entity. Therefore, citizens of even the smallest local communities may ultimately pay for compliance with Title II with their tax dollars. This represents a substantial change from the voluntary nature of the "if you take our money, you will follow our rules" relationship which gives rise to section 504 obligations.

Because Title II potentially impacts all taxpayers, its scope is also broader than either Titles I or III of the ADA, which primarily impact the


12. Neither Title II nor § 504 delimits its coverage based on the size of the entity. In contrast, in order to be a covered entity under Title I of the ADA, an employer must have fifteen employees or more. 42 U.S.C. § 12111(5)(A) (Supp. IV 1992); see also infra note 17. Therefore, while some smaller employers are not subject to the employment discrimination mandates of Title I, all local governments are subject to the mandates of Title II even if they would otherwise not be a covered entity under Title I.

13. See John J. Coleman III & Marcel L. Debruge, A Practitioner's Introduction to ADA Title II, 45 ALA. L. REV. 55, 56 (1993) (noting that much has been written on the impact of Titles I and III on the private sector, despite the fact that Title II can have direct impact on the amount of tax dollars that property owners pay). The ADA has been mentioned prominently by state and local community officials in recent protests of "unfunded federal mandates" which impose affirmative burdens on local governments but do not provide financial assistance to meet those burdens. See, e.g., Gary Lee, Costly Federal Mandates Spur Protest; States, Counties Seek Relief from Programs Imposed Without Funding, WASH. POST, Oct. 27, 1993, at A3 (reporting that a coalition of state and local officials launched a protest against "unfunded federal mandates" that included the ADA); Will Hacker, Village to Fight Against Unfunded U.S. Mandates, CHI. TRIB., Oct. 15, 1993, Southwest Section, at 3 (reporting that a local community will aid national groups in fighting unfunded federal mandates, with the potential impact of ADA on decision to expand the local Village Hall specifically noted). At the time this Article was written, the 104th Congress was considering the "Unfunded Mandate Reform Act," which would limit the ability of Congress to pass legislation imposing such unfunded mandates. However, this legislation specifically excludes anti-discrimination laws such as the ADA. S. 1, 104th Cong., 1st Sess. § 4 (1995); H.R. 5, 104th Cong., 1st Sess. § 4 (1995).

A recent example of the impact that Title II can have on community coffers is found in Kroll v. Saint Charles County, Mo., 766 F. Supp. 744, 752 (9th Cir. 1991), in which a county was required to demolish and rebuild three government buildings because they were not in compliance with the ADA and could not feasibly be renovated to bring them into compliance. After the county attempted to pay for this work through a special sales tax, which was defeated by the voters, the presiding federal judge gave the county two months to find the funding or the judge would "consider imposition of [the] sales tax." id. at 752; see also Coleman & Debruge, supra note 13, at 55 (discussing Kroll).

private sector. Nevertheless, Title II is substantively similar to both of these titles. This similarity is best shown by Title II’s incorporation of the substantive employment discrimination provisions of Title I of the ADA. In fact, Congress recently amended section 504 to also incorporate the same substantive employment discrimination standards which are applicable to Title I. In other words, regardless of whether the coverage falls under Title I, Title II, or section 504, employment discrimination based on disability is now governed by Title I substantive standards.

15. See Coleman & Debruge, supra note 13, at 56. Title III is expressly limited to the private sector and only applies to certain facilities. See supra note 4. Title I is not limited to the private sector, and, in fact, public entities with more than fifteen employees will be subject to both Titles I and II. 42 U.S.C. § 12111(5) (Supp. IV 1992); see also infra note 17. Title I is, however, limited to employment, whereas Title II applies to employment, facilities, communication, transportation, and many other aspects of the day-to-day operation of public entities. See, e.g., 42 U.S.C. § 12132 (Supp. IV 1992) (general prohibition of discrimination); 28 C.F.R. § 35.130 (1993) (general prohibitions against discrimination); id. § 35.149 (prohibition of discrimination in program accessibility); see also supra note 3.

16. The substantive similarity between Title I and Title II comes through Title II’s incorporation of Title I’s substantive standards regarding discrimination based on disability in employment. See 28 C.F.R. § 35.140 (1993); see infra note 17. The substantive similarity between Title II and Title III relates to accessibility standards. Under both Title II and Title III, facilities must be “readily accessible to and usable by individuals with disabilities.” See, e.g., 42 U.S.C. § 12183(a)(1) (Supp. IV 1992) (requiring under Title III that all new construction be readily accessible to and usable by individuals with disabilities); id. § 12183(a)(2) (requiring under Title III that alterations in existing facilities also be done in manner making them readily accessible and usable by individuals with disabilities); 28 C.F.R. pt. 35.150(a) (1993) (requiring under Title II that public entity must operate each service, program, or activity in an existing facility in a manner that, when viewed as a whole, the program, service or activity is readily accessible to and usable by individuals with disabilities); see generally Coleman & Debruge, supra note 13, at 86-90 (outlining Title II program accessibility requirements); Robert L. Burgdorf, Jr., “Equal Members of the Community”: The Public Accommodations Provisions of the Americans with Disabilities Act, 64 TEMPLE L. Q. 551 (1991) (outlining Title III accessibility requirements).

17. Although Title II lacks any independent substantive provisions specifically addressing employment discrimination, such discrimination falls within the title’s broad prohibition against discrimination. Ethridge v. Alabama, 847 F. Supp. 903, 905-06 (M.D. Ala. 1993). The employment discrimination regulations adopted for Title II defer to two sources—Title I of the ADA and § 504. 28 C.F.R. § 35.140 (1993). To the extent that employment discrimination claims are subject to jurisdiction under Title I, Title I standards apply. Id. § 35.140(b)(1). If there is no Title I jurisdiction, § 504 standards apply. Id. § 35.140(b)(2). In order for Title I jurisdiction to apply, the employer involved must employ more than a threshold number of employees, which is currently fifteen. 42 U.S.C. § 12111(5)(A) (Supp. IV 1992). For claims which arose after the effective date of Title I, July 26, 1992, but before July 26, 1994, the threshold amount of employees was twenty-five. Id.; Pub. L. No. 101-336, § 108, 104 Stat. 337 (1990).

18. 29 U.S.C. § 794(d) (Supp. IV 1992). Section 794(d) provides that “[t]he standards used to determine whether this section has been violated . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . as such sections relate to employment.”
Despite this overlap of substantive standards, these statutes prescribe different remedies for intentional discrimination. Remedies under Title I are determined by reference to Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, whereas remedies under section 504 are determined by reference to Title VI of the Civil Rights Act of 1964. Therefore, although both statutes now allow compensatory and equitable relief, remedies under Title VII are defined and limited

19. See infra notes 20-22 and accompanying text. This Article addresses only remedies for intentional discrimination. Title II will likely also be interpreted to prohibit disparate impact, or "unintentional," discrimination. Unlike the remedies for intentional discrimination, remedies for disparate impact discrimination are fairly consistent among the various federal statutes, and are limited to equitable relief such as backpay, reinstatement (when appropriate), and injunctions. For example, Congress has limited remedies for violation of Title I of the ADA and Title VII of the Civil Rights Act of 1964 to equitable remedies, unless the alleged violation was based on intentional discriminatory treatment of the claimant. See 42 U.S.C. § 1981a(a)(1) (Supp. IV 1992) (excluding cases involving disparate impact discrimination from provisions allowing compensatory relief for violation of Title VII of the Civil Rights Act of 1964); id. § 1981a(a)(2) (excluding cases involving disparate impact discrimination from provisions allowing compensatory relief for violation of Title I of the ADA); id. § 2000e-5(g) (authorizing backpay, reinstatement, and injunctive relief in disparate impact and disparate treatment actions). The United States Supreme Court has similarly interpreted Title VI of the Civil Rights Act, which prohibits both disparate treatment and disparate impact discrimination based on race. See Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582 (1983). While arguments have been raised for expanding disparate impact discrimination remedies to make them similar to intentional discrimination remedies, this is not likely to happen in the near future. See John D. Biggs, Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act, 1986 DUKE L.J. 197 (1986) (arguing that compensatory relief should be available for any violation of § 504).


22. 29 U.S.C. § 794a(2) (1988) (incorporating the remedies, rights and procedures set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d to 2000d-7)). The remedial standards applicable to Title VI are discussed in detail in part II of this Article infra notes 31-129 and accompanying text. The recent amendment to § 504 should not affect enforcement standards under that section, because the new subsection only refers to "the standards used to determine whether this section [§ 504] has been violated." Id. § 794(a) (Supp. IV 1992). Enforcement of § 504 is governed by a separate section of the Rehabilitation Act. See id. § 794a(2) (1988); see also notes 35-39 and accompanying text discussing Rehabilitation Act enforcement standards; cf. Petersen v. University of Wisconsin Bd. of Regents, 818 F. Supp. 1276, 1280 (W.D. Wis. 1993) (Title II adopts only the substantive provisions of Title I, not the procedural requirements).
by statute, whereas remedies under Title VI are governed by a common-law presumption in favor of "any appropriate relief."\(^{23}\)

Unfortunately, Title II contains an ambiguous enforcement provision which can be read to refer to either of these two different standards, or both.\(^{24}\) How this ambiguity is resolved will determine whether Title II remedies are consistent with Title I remedies in situations in which similar substantive standards are applied.\(^{25}\) Regardless of how this ambiguity is resolved, however, remedies under Title II and Title III for similar substantive violations will be quite different because Title III remedies are expressly limited to equitable relief in any private cause of action under that title.\(^{26}\)

Part II of this Article addresses the two remedial standards referred to in Title II and concludes that Title II incorporates the same remedial standard for intentional discrimination as section 504, namely the "any appropriate relief" standard.\(^{27}\) Part III examines what the "any appropriate relief" standard means in the context of Title II and concludes that compensatory and equitable relief as well as attorney's fees may be recovered, but punitive damages may not be.\(^{28}\) Part IV then addresses the anomaly created by Title II's incorporation of the "any appropriate relief" standard: the fact that acts of intentional disability discrimination subject to similar substantive standards will result in different remedies, depending on which title of the ADA is applied.\(^{29}\) Finally, Part V suggests that in order to fix this anomaly, it is necessary to equalize the remedial standards for similar acts of intentional discrimination.\(^{30}\)

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23. See discussion infra part II.
24. See 42 U.S.C. § 12133 (Supp. IV 1992). For a detailed discussion of this statute, the ambiguity inherent in it, and the remedial standard that Congress apparently intended to be applied, see infra part II of this Article, notes 31-129.
25. See infra notes 233-72 and accompanying text.
26. Title III expressly incorporates the remedies available under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a to 2000a-6 (1988), in any private cause of action by a person aggrieved by a violation of Title III. 42 U.S.C. § 12188(a)(1) (Supp. IV 1992). Remedies are limited to equitable, non-monetary relief. Id. § 2000a-3; see also Mayberry v. von Valtier, 843 F. Supp. 1160, 1167 (S.D. Mich. 1994) (holding that private plaintiff under Title III is not entitled to monetary damages). The United States Attorney General has authority to bring a lawsuit if there is "reasonable cause to believe that there has been a pattern or practice of discrimination or that an alleged instance of discrimination raises an issue of general public importance." 42 U.S.C. § 12188(b)(1)(B) (Supp. IV 1992). In any such suit, the available remedies are broader, and include compensatory (but not punitive) damages. Id. § 12188(2). As will be discussed in the following part, there is no similar limitation in Title II on a private claimant's ability to obtain compensatory relief. See generally infra part II.
27. This includes employment discrimination claims that would be subject to overlapping jurisdiction under Title I. See infra notes 113-19 and accompanying text.
28. See infra notes 130-33 and accompanying text.
29. See infra part IV.
30. See infra notes 267-72 and accompanying text.
II. WHAT IS THE REMEDIAL STANDARD APPLICABLE TO INTENTIONAL DISCRIMINATION UNDER TITLE II?

The enforcement section of Title II provides that "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202." Although this appears to clearly endorse private enforcement of Title II, it unfortunately also creates an inherent ambiguity. Section 505 contains two separate and very different standards for the awarding of damages.


34. See 29 U.S.C. § 794a (1988). Section 794a provides in pertinent part as follows:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. . . .

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) shall be available to any person aggrieved by any act of failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Subsection (a)(1) of section 505 establishes the remedies available for violation of section 501 of the Rehabilitation Act, which are the rights, remedies, and procedures available under Title VII of the Civil Rights Act of 1964. On the other hand, subsection (a)(2) of section 505 establishes the remedies available for violation of section 504 of the Rehabilitation Act, which are the rights, remedies, and procedures available under Title VI of the Civil Rights Act of 1964.

One court has suggested that the failure of Congress to differentiate in Title II between these two subparts of section 505 indicates that the remedies afforded under Titles VI and VII are coextensive. However, as discussed below, this is not the case. Accordingly, because Title II fails to distinguish between these two subparts of section 505, the enforcement provisions of Title II are ambiguous.

A. The Two Damages Standards Under Titles VII and VI of the Civil Rights Act of 1964

Title VII remedies are specifically set forth in the pertinent statutes. In contrast, Title VI remedies are established by case law, and the full extent of those remedies has not yet been clearly defined.

39. See Rivera Flores v. Puerto Rico Tel. Co., 776 F. Supp. 61, 70 (D. Puerto Rico 1991). The court in Rivera Flores concluded that Title VI remedies were limited to the type of equitable remedies available at that time under Title VII. Id. at 71 (holding that the prevailing plaintiff under Title VI is entitled to injunctive relief, backpay, and attorney’s fees, but not compensatory relief for mental suffering).
40. See discussion infra part II.A.
41. Noland v. Wheelley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (noting that § 12133 is ambiguous because it fails to distinguish between § 794(a)(1) and § 794(a)(2), each of which incorporates different rights, procedures, and remedies).
43. See infra notes 52-102 and accompanying text.
I. Title VII remedies

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based upon race, religion, sex, or national origin. Until 1991, recovery under Title VII was limited to equitable remedies, which essentially meant backpay, reinstatement, and injunctive relief. In 1991, Congress passed a new civil rights act which expanded the remedies available for intentional discrimination in employment. Compensatory damages are now available as well as punitive damages in some circumstances, but the total amount of damages recoverable are capped depending upon the number of persons employed by the employer, with an ultimate limit of $300,000. The complainant is still also entitled to those equitable remedies previously recoverable under Title VII.

2. Title VI remedies

Title VI provides that "[n]o person shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or
activity receiving Federal financial assistance.”\textsuperscript{52} The remedies available for violation of Title VI have been developed through convolution of statutes and court decisions.

a. Supreme Court precedent. The United States Supreme Court has not specifically decided what damages are recoverable under Title VI for intentional discrimination.\textsuperscript{53} The Court has, however, recently addressed this issue in a case involving a similar statute, Title IX of the Education Amendments of 1972.\textsuperscript{54} Title IX prohibits sexual discrimination in educational programs which receive federal funding.\textsuperscript{55} It has been generally accepted that Title IX is patterned after Title VI, and “analysis of the two statutes is substantially the same.”\textsuperscript{56}

In Franklin v. Gwinnett County Public Schools, the Supreme Court held that the trial court, in a private cause of action by an aggrieved person,\textsuperscript{58} had the power to award “any appropriate relief” to the prevailing plaintiff in a Title IX action.\textsuperscript{59} The plaintiff in Franklin alleged that while she was a student at North Gwinnett High School in Gwinnett County, Georgia, she was subjected to continual sexual

\textsuperscript{53} The Court did address Title VI remedies in a badly fragmented 1982 decision, Guardians Ass’n v. Civil Serv. Comm’n of the City of New York, 463 U.S. 582 (1982), in which the opinion of the court was limited to a finding that compensatory damages are not available for unintentional discrimination under Title VI. See infra notes 73-76 and accompanying text. The Court has not directly addressed the scope of damages for intentional discrimination under Title VI.
\textsuperscript{55} Title IX provides in pertinent part that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (1988).
\textsuperscript{56} Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 619 (11th Cir. 1990), rev’d on other grounds, 503 U.S. 60 (1992); see also Guardians Ass’n, 463 U.S. at 594 (noting that Title IX was derived from Title VI and Congress intended remedies under these two statutes to be similar).
\textsuperscript{57} See S. REP. No. 1297, 93d Cong., 2d Sess. at 39-40, reprinted in 1974 U.S.C.C.A.N. 6373, 6390 (stating that § 504 was patterned after and is almost identical to Title VI).
\textsuperscript{58} 503 U.S. 60 (1992).
\textsuperscript{59} Franklin, 503 U.S. at 70-71.
harassment by a sports coach and teacher employed by the district.60
The lower court concluded that compensatory damages were not available
under Title IX, regardless of whether plaintiff proved intentional
discrimination because Title IX was to be narrowly construed to provide
only equitable relief.61

The Supreme Court disagreed, stating broadly that it would "presume
the availability of all appropriate remedies unless Congress has expressly
indicated otherwise."62 The Court reaffirmed the common-law principle
it had previously set forth in Bell v. Hood,63 that "where legal rights
have been invaded, and a federal statute provides for a general right to
sue for such invasion, federal courts may use any available remedy to
make good the wrong done."64

60. Id. at 63-64. The alleged sexual harassment of the plaintiff, Franklin, allegedly
occurred starting when she was in tenth grade in 1986 and apparently continued until some
time in 1988. Id. Franklin also alleged that teachers and administrators at the school became aware
of the harassment and conducted an investigation of the teacher's actions, but failed to take any
action to stop the harassment and encouraged Franklin not to press charges against the teacher.

61. Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990), rev'd, 503
U.S. 60 (1992). The Eleventh Circuit interpreted Guardians Ass'n as leaving open the question
of whether compensatory damages were available for intentional violations of Title VI. 911
F.2d at 621. The court reasoned that the plurality opinion in Guardians Ass'n emphasized that
relief under statutes such as Title VI and Title IX, which are enacted pursuant to Congress's
Spending Clause powers, must be carefully defined to respect the right of the recipient of the
federal funding to limit the exposure incurred with the receipt of the funds. Id. (citing
Guardians Ass'n, 463 U.S. at 3229-31); see U.S. CONST. art. I, § 8, cl. 1. The Eleventh
Circuit further reasoned that Guardians Ass'n did not overrule a pre-Guardians Ass'n case
which held that the only available remedies were declaratory and injunctive relief designed to
eliminate the discriminatory activity. Franklin, 911 F.2d at 622 (citing Drayden v. Needville
Indep. Sch. Dist., 642 F.2d 129 (5th Cir. Unit A Apr. 1981)). The court concluded that it
must "proceed with extreme care, where Congress has not expressly provided such a remedy
as a part of the statutory scheme, where the Supreme Court has not spoken clearly, and where
binding precedent in this circuit is contrary." Id.

62. Franklin, 503 U.S. at 66 (citing Davis v. Passman, 442 U.S. 228, 239 (1979)).
63. 327 U.S. 678 (1946).
64. Bell, 327 U.S. at 684; Franklin, 503 U.S. at 66. The Franklin Court noted that this
rule had its roots in English common law. Id. (quoting 3 W. BLACKSTONE, COMMENTS
23 (1783)). The Court also noted that the presumption had a long history of application in the
Court's own jurisprudence. Id. The Court rejected an argument by the respondents and the
United States as amicus curiae that it had backed away from this principle in succeeding cases,
Franklin, 503 U.S. at 66-71. In regard to Guardians Ass'n, the Court stated that "a clear
majority [of Justices] expressed the view that damages were available under Title VI in an
action seeking remedies for an intentional violation, and no Justice challenged the traditional
presumption in favor of a federal court's power to award appropriate relief . . . ." Id. at 70.
The Court made the same observation about Darrone, a case in which a unanimous Court held
that § 504 of the Rehabilitation Act authorized an award of backpay. Id. (citing Darrone, 465
U.S. at 630 n.9).
Because the Court had earlier ruled that there was an implied private cause of action under Title IX, it now considered whether Congress had expressed any intention to limit this presumption. The Court dismissed the lack of discussion of remedies in the legislative history, noting that because this cause of action had been implied in the statute, it was "hardly surprising" that Congress was silent on the remedies. Thus, instead of focusing on the legislative history of the statute, the Court was more concerned with the state of the law at the time the legislation was passed, as well as with the amendments to the statute that were passed after the Court's decision that the statute permitted an implied cause of action. The Court reasoned that these amendments evidenced no intent to limit available remedies, but rather, if anything, broadened the coverage of Title IX and related anti-discrimination statutes.

The Court in Franklin accordingly concluded that Congress did not intend to limit the recovery available under Title IX. Rather, its

65. Cannon v. University of Chicago, 441 U.S. 677 (1979); see also supra note 58.
67. Id. at 71. The Court in Franklin reasoned that "[b]ecause the cause of action was inferred by the Court in Cannon, the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis." Id. The Court also reasoned that "[s]ince the Court in Cannon concluded that this statute supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action." Id.
68. Id. at 71-72. The Court in Franklin again reiterated that the presumption in favor of all available remedies was the prevailing presumption "[i]n the years before and after Congress enacted this statute . . . ." Id.
70. Franklin, 503 U.S. at 73; see also supra note 69.
71. Franklin, 503 U.S. at 73.
actions reflected an endorsement of the availability of expansive remedies.\textsuperscript{72}

The same conclusion should apply to the question of remedies under Title VI. In reaching its decision in \textit{Franklin}, the Court expressed its belief that its decision in a prior case, \textit{Guardians Association v. Civil Service Commission of the City of New York},\textsuperscript{73} was properly interpreted as approving the same expansive remedies for violation of Title VI.\textsuperscript{74} Although the Court delivered a badly fragmented plurality opinion in \textit{Guardians Association}, which was limited to a finding that compensatory damages were not available to a plaintiff who could not show proof of discriminatory intent,\textsuperscript{75} a majority of the justices also appeared to agree

\textsuperscript{72} See id. The Court also rejected additional arguments advanced for not applying the presumption, the most intriguing of which was that Title IX was a Spending Clause statute and the Court had previously interpreted such statutes to require limited damages. \textit{Id.} at 74 (citing \textit{Pennhurst State Sch. and Hosp. v. Halderman} (\textit{Pennhurst I}), 451 U.S. 1, 28-29 (1981)); \textit{see also} U.S. CONST. art. I, \S\ 8, cl. 1; \textit{see also supra} note 61. Justice White, who wrote the opinion in \textit{Franklin}, had previously stated in his plurality opinion in \textit{Guardians Ass'n} that "'make whole' remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its 'power under the Spending Clause to place conditions on the grant of federal funds.'" \textit{Guardians Ass'n}, 463 U.S. at 596 (quoting \textit{Pennhurst I}, 451 U.S. at 1).

Justice White side-stepped this issue in \textit{Franklin} by distinguishing between unintentional and intentional violations. \textit{Franklin}, 503 U.S. at 74-75. The Justice reasoned that whereas in cases alleging unintentional violations, the point of not permitting money damages is that the recipient of the federal funds lacks notice that it will be liable for a monetary award, such concerns do not arise in cases of intentional violations. \textit{Id.}

As Justice White recognized, because intentional discrimination claims involve violation of a clearly stated mandate in the statute itself, the fund recipient can hardly be heard to argue that it was unaware of its obligations. \textit{See id.} On the other hand, disparate impact claims often involve more subtle aspects of the statutes and regulations, which are not apparent to the actor until some later time after the funds are received and put into use. As will be further developed in part IV, the victims of intentional discrimination suffer similar manifestations of harm, which supports applying a consistent remedy for intentional violations under all similar federal anti-discrimination laws.

\textsuperscript{73} 463 U.S. 582 (1982).

\textsuperscript{74} \textit{Franklin}, 503 U.S. at 70 (citing \textit{Guardians Ass'n}, 463 U.S. at 595). \textit{Guardians Ass'n} involved a racial discrimination claim under Title VI brought against the City of New York and other parties by black and Hispanic police officers, alleging that the examination procedures of the New York City Police Department had a discriminatory impact on the minority officers which resulted in their being laid off from the police force. \textit{Guardians Ass'n}, 463 U.S. at 585. Specifically, the minority officers alleged that the entry-level written examinations, administered between 1968 and 1970, had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. \textit{Id.} The class of officers bringing suit had all passed the exam and were hired during that period through October, 1974. \textit{Id.} Because police officers were hired and given seniority in order of test scores, the minority officers, who were then among the last hired, were disproportionately affected when a reduction in force on a "last-hired, first-fired" basis was conducted in 1975. \textit{Id.}

\textsuperscript{75} Justice White delivered the opinion of the court, concluding that Title VI reaches unintentional, disparate-impact discrimination, but that absent proof of discriminatory intent, the petitioners were not entitled to the relief they sought. \textit{Guardians Ass'n}, 463 U.S. at 584.
that compensatory damages would be available if intent could be shown.  

Further, the same subsequent legislation the Court considered significant in Franklin also similarly expanded the scope of Title VI. In light of the close relationship between Title VI and Title IX, the Court’s interpretation of Guardians Association, and the lack of any subsequent expression of Congressional intent to limit remedies under Title VI, there should be little question that courts may also award “any appropriate relief” under Title VI.

b. The lower courts. Franklin should resolve a split of authority that currently exists among the lower courts regarding whether compensatory damages can be recovered for violations of Title VI, Title IX, and section 504, as well as the scope of any such recovery. Some

76. Justice White’s opinion in Guardians Ass’n stated that “it may be that the victim of ... intentional discrimination should be entitled to a compensatory award, as well as prospective relief.” Id. at 597. Justice Rehnquist disagreed with the conclusion that Title VI allowed actions for disparate-impact discrimination, but appeared to join in that portion of White’s opinion which stated that compensatory damages would likely be available in intentional discrimination cases. Id. at 612 (Rehnquist, J., concurring in judgment). In a dissenting opinion, Justice Marshall stated his conclusion that compensatory damages were available under Title VI regardless of whether the plaintiff could show proof of discriminatory intent. Id. at 615 (Marshall, J., dissenting). Similarly, Justice Stevens, in a separate dissenting opinion joined by Justices Brennan and Blackmun, also reasoned that there was no limitation in Title VI which would preclude an award of compensatory relief to those who could not show discriminatory intent. Id. at 635-39 (Stevens, J., dissenting).

77. See supra notes 69-70 and accompanying text.

78. The holding in Franklin broadly states that “a damages remedy is available for an action brought to enforce Title IX,” and does not expressly limit this rule only to cases of intentional discrimination. Franklin, 503 U.S. at 76. Nonetheless, given the fact that Franklin clearly involved a claim of intentional discrimination, in the form of sexual harassment, and the Court’s interpretation of its prior Spending Clause rulings as limiting remedies in claims based on unintentional discrimination, the Court’s ruling in Franklin can only reasonably be interpreted as limited to cases of intentional discrimination.

79. For a discussion of the interrelationship of these statutes, see supra note 56.

80. Courts disagreed as to whether compensatory damages were available under either Title VI or Title IX. Compare Pfeiffer v. Marion Ctr. Area Sch. Bd., 917 F.2d 779, 788-89 (3d Cir. 1990) (holding that compensatory damages are available under Title IX) and Craft v. Board of Trustees, 793 F.2d 140, 142 (7th Cir. 1986), cert. denied, 479 U.S. 829 (1986) (stating that “granting of compensatory relief under § 2000d [Title VI] requires proof of discriminatory intent”) with Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990), rev’d, 503 U.S. 60 (1992) (holding that compensatory damages are not available under Title IX) and Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129, 133 (5th Cir. Unit A Apr. 1981) (holding that compensatory damages are not available under Title VI).

There was a similar split of authority regarding § 504. Compare Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 (7th Cir. 1987) (stating that compensatory damages are available as a remedy under § 504) and Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1982) (holding that damages are available under § 504 in a case in which plaintiff sought compensatory relief) with Eastman v. Virginia Polytechnic Inst., 939 F.2d 204, 207-08 (4th Cir. 1991) (interpreting the reference to
courts limited recovery outright to declaratory and injunctive relief.\textsuperscript{81} Other courts achieved the same effect by recognizing a right to recover compensatory damages, but then concluded that for purposes of federal discrimination law, this did not include non-pecuniary relief for such things as emotional distress and pain and suffering.\textsuperscript{82} Still other courts permitted recovery of compensatory damages without any apparent limitation.\textsuperscript{83} Of these various decisions, those which limited relief to equitable remedies are most clearly called into question by \textit{Franklin}.\textsuperscript{84} The decisions which refused non-pecuniary relief such as emotional distress should also be overruled by the "any appropriate relief" standard adopted in \textit{Franklin}.

A number of courts which concluded that only limited damages were available under these statutes did so by analogizing Title VI remedies to Title VII remedies.\textsuperscript{85} For example, in \textit{Eastman v. Virginia Polytechnic Institution v. Virginia Polytechnic Institute and State University} (1991), the court held that plaintiff in § 504 action can recover equitable remedies including backpay, reinstatement, and loss of job benefits such as insurance, but cannot recover compensatory damages such as mental anguish, humiliation, embarrassment, or pain and suffering; \textit{Ruth Anne M. v. Alvin Indep. Sch. Dist.}, 532 F. Supp. 460, 473 (S.D. Texas 1982) (holding that remedies under § 504 are limited to injunctive and declaratory relief).

\textsuperscript{81} See, e.g., Turner v. First Hosp. Corp. of Norfolk, 772 F. Supp. 284, 288 (E.D. Va. 1991) (holding that plaintiff in § 504 action can recover equitable remedies including backpay, reinstatement, and loss of job benefits such as insurance, but cannot recover compensatory damages such as mental anguish, humiliation, embarrassment, or pain and suffering); \textit{Shuttleworth v. Broward County}, 649 F. Supp. 35, 37 (S.D. Fla. 1986) (reasoning that as used in the context of federal employment discrimination claims, "compensatory damages" means Title VII equitable remedies, including backpay, but does not include mental suffering and humiliation).

\textsuperscript{82} See, e.g., \textit{Eastman}, 939 F.2d at 207 (interpreting \textit{Guardians Ass'n} 's reference to compensatory damages as limited to only equitable monetary relief similar to that available under Title VII); \textit{Shuttleworth v. Broward County}, 649 F. Supp. 35, 37 (S.D. Fla. 1986) (reasoning that as used in the context of federal employment discrimination claims, "compensatory damages" means Title VII equitable remedies, including backpay, but does not include mental suffering and humiliation).

\textsuperscript{83} See, e.g., \textit{Pfeiffer}, 917 F.2d at 788 (holding that plaintiff in Title IX action is entitled to compensatory damages, but not to equitable remedies); \textit{Zolin}, 812 F.2d at 1107 (holding that plaintiff in § 504 action is entitled to "full panoply of remedies, including equitable relief and monetary damages"); \textit{Doe v. District of Columbia}, 796 F. Supp. 559, 573 (D.D.C. 1992) (holding that plaintiff may recover compensatory damages under § 504); \textit{Cortes v. Board of Governors}, 766 F. Supp. 623, 625 (N.D. Ill. 1991) (same).

\textsuperscript{84} See \textit{Doe}, 796 F. Supp. at 572 n.14 (questioning cases which limited relief to equitable remedies in light of Supreme Court's ruling in \textit{Franklin}).

\textsuperscript{85} This includes both cases finding no right to compensatory relief and cases finding a right to compensatory relief but limiting it to equitable-type remedies. See, e.g., \textit{Eastman}, 939 F.2d at 208-09 (analogizing Title VI and Title VII to conclude that compensatory relief under Title VI is limited to equitable remedies); \textit{Shuttleworth}, 649 F. Supp. at 37-38 (analogizing § 504 and Title VII to conclude that compensatory relief under § 504 means "equitable monetary damages similar to those recoverable under Title VII"); \textit{Turner}, 772 F. Supp. at 287 (analogizing Title VII to § 504 and Title VI to conclude that § 504 plaintiff is limited to equitable remedies); \textit{Ruth Anne M.}, 532 F. Supp. at 473 (same).
Institute, the Fourth Circuit concluded that section 504 did not permit an award of compensatory damages for pain and suffering because the court was persuaded that analogy to Title VII's limitation to equitable relief was appropriate.

The court in Eastman first reasoned that the term "compensatory damages" was used in Guardians Association only in a limited sense to describe equitable monetary relief in the form of back pay. The court then applied a "legislative-intent approach" to determine what in fact was allowable as "compensatory damages" and concluded that Congress did not intend section 504 and Title VI "to create a new species of statutory torts." The court in Eastman was not deterred by the fact that Title VII was limited to employment claims:

The scope of Title VI extends beyond the employment arena, but this fact does not dilute the persuasive force of the Title VII/Title VI analogy. Both statutory schemes provide weapons against discriminatory practices, and the differences between the two do not argue for distinct approaches to damages. The considerable overlap of the two, e.g., racial discrimination claims against a federally-funded employer, militates in favor of a basic congruity of remedies. Nothing in the legislative history of Title VI points to any reason why the anti-discrimination statutes should not be treated similarly in this regard.

In addition, the court noted that at the time the Rehabilitation Act was amended in 1978 to incorporate Title VI remedies, there was a fourteen year track record indicating that no remedy for pain and suffering was available under Title VII.

Despite the Eastman court's cogent argument for interpreting similar anti-discrimination statutes to provide similar remedies, analogy to Title VII remedies would now seem inappropriate. The Supreme Court's

86. 939 F.2d 204 (4th Cir. 1991).
87. Id. at 208. The court noted that Justice Marshall, in his dissent in Guardians Ass'n, had stated that Title VII is a useful guidepost in Title VI analysis. Id. (citing Guardian's Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 634 (Marshall, J., dissenting)).
88. Eastman, 939 F.2d at 207. The court in Eastman reasoned that the term "compensatory" was used only in discussing the distinction between retrospective relief, such as backpay, and prospective relief, such as injunctive and declaratory relief aimed at rectifying the discriminatory practice in the future. Id. at 206-07.
89. Id. at 208.
90. Id. at 208.
91. Id. at 209 (citations omitted).
92. Doe v. District of Columbia, 796 F. Supp. 559, 572 n.14 (D.D.C. 1992). The court in Doe reasoned that "[t]he holding in Franklin that damages may be recovered in private actions to enforce Title IX, and by analogy, Title VI, leads to the reasonable conclusion that the remedies available under § 504 are not limited to equitable relief. Accordingly, after
decision in Franklin establishes that Title IX and similar statutes are subject to a different analysis. Cases which have arisen under section 504 since Franklin reflect this. However, most of these cases resolve this issue by simply imputing Franklin to section 504 because of the interrelationship between section 504 and Titles VI and IX. Although the analogy is appropriate, these cases fail to effect a complete application of Franklin. A complete application of Franklin requires a separate determination of whether Congress has expressed an intent to limit the remedies available under the particular statute in question.

In Miller v. Spicer, the court considered both parts of the Franklin analysis in concluding that Franklin’s general rule in favor of “all available remedies” applied to claims arising under section 504. The court first determined that Franklin’s rationale applied to section 504 because of the relationship among section 504, Title VI, and Title IX.

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94. See, e.g., Doe, 796 F. Supp. 559, 572 (D.D.C. 1992) (concluding that the reasoning of Franklin is applicable by analogy to Title VI and, therefore, equally applicable to § 504, thereby permitting award of compensatory damages, including emotional pain and suffering); Kraft, 807 F. Supp. at 792 (noting that courts which have addressed this issue subsequent to Franklin agree that compensatory damages are available under Title VI and, accordingly, § 504); Tanberg, 787 F. Supp. at 973 (holding that compensatory damages are available under § 504 based on Court’s ruling in Franklin that such damages are appropriate to redress injuries caused by intentional discrimination).

95. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70-71, 75-76 (1992); see also supra notes 66-72 and accompanying text. After first stating that it continued to apply the common-law presumption which authorized any appropriate remedy, the Court then stated that a clear majority of justices in Guardians Ass’n expressed a view that damages were available under Title VI. Franklin, 503 U.S. at 66-68, 70. If the relationship between these federal statutes were all that is necessary in order to resolve the issue of remedies, the Court could have simply ruled that Title IX, therefore, also permitted monetary relief. The Court did not do this, however, and instead moved on to separately analyze whether Congress had expressed an intent to limit the common-law presumption allowing any appropriate relief as applied to Title IX. Id. at 75-76.


97. Id. at 168. The court in Miller divided Franklin’s analysis into two parts. First, the court considered whether the relationship between the various statutes indicated that damages were available under § 504 for intentional discrimination. Id. at 167. Second, the court considered whether the Supreme Court’s analysis in Franklin applied to § 504 and “leads to the same conclusion [that] money damages are available.” Id. at 167-68.

98. Id. at 167. This part of the analysis was relatively straightforward. The court reasoned that since analysis of Title VI and Title IX has developed along concurrent lines, after the Supreme Court’s holding in Franklin and its interpretation of Guardians Ass’n it was “clear that money damages are available for intentional violations of Title VI.” Id. Because § 504 incorporates the remedies of Title VI, a similar conclusion applied to § 504. Id.
The court in *Miller* then considered whether Congress had expressed any intention to override the presumption in favor of all available remedies with regard to section 504.\(^99\) The court concluded that it had not,\(^100\) reasoning that, as with Title IX, Congress had adopted both section 504 and subsequent legislation impacting on section 504 without demonstrating an intent to limit any available remedy.\(^101\) Therefore, the presumption was not overcome and money damages were available for intentional discrimination under section 504.\(^102\)

**B. Which Standard Applies to Title II?**

Title VI and section 504 remedies are thus based on the common-law presumption in favor of any appropriate relief.\(^103\) Therefore, if the rights and remedies available under Title II are those available under section 504, which in turn are those available under Title VI, the scope of recovery for intentional discrimination is quite broad.

On the other hand, if the rights and remedies are those available under section 501 of the Rehabilitation Act, which in turn are those available under Title VII, the scope of recovery for intentional discrimination is more limited.\(^104\) Title VII remedies are specifically set forth in the statutes and are subject to limitations both in kind and amount.\(^105\)

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99. *Id.* at 167-68.
100. *Id.* at 168.
101. *Id.* Although the court in *Miller* did not expressly indicate to which statutes it was referring, presumably the court meant the same two statutes discussed in *Franklin*, namely the Civil Rights Equalization Amendments of 1986 and Civil Right Restoration Act of 1987, in that these statutes also amended § 504. *See supra* note 69. The Supreme Court’s analysis of these two statutes in the context of Title IX applies with equal force to § 504 because those statutes also amended § 504 without any indication of an intent to limit the scope of recovery under that statute. *Id.; see also* Ali v. City of Clearwater, 807 F. Supp. 701, 704-05 (M.D. Fla. 1992) (reasoning that because the remedy provisions of § 504 are silent as to appropriate relief, federal courts have the power to award any appropriate relief, not limited to equitable remedies).

103. *See discussion supra* part II.A.2.
104. Under this scenario, the remedies available under Title II would also be identical to those available under Title I. *See supra* notes 20-21 and accompanying text regarding remedial standards under Title I.
Title II's enforcement provision itself provides no basis for differentiating between Title VI and Title VII remedies.\textsuperscript{106} Title II could even be interpreted to incorporate one set of remedies for intentional disability discrimination in employment and another set of remedies for all other acts of disability discrimination.\textsuperscript{107} As the following discussion will demonstrate, however, this does not appear to be what Congress intended. Rather, Congress intended that Title VI remedies apply to all Title II claims through the conduit of section 504.

Congress clearly indicated that Title II was intended to be substantially similar to section 504.\textsuperscript{108} This is reflected not only in the choice of language in Title II, which is substantively almost identical to that in section 504,\textsuperscript{109} but also in the legislative history which indicates that Title II is to be applied and enforced in a manner similar to section 504.\textsuperscript{110}

For example, although Congress did not expressly state in the statute itself that there was a private cause of action under Title II, the legislative history reflects that Congress presumed such cause of action was available, and that this cause of action included section 504 rights, remedies, and procedures:

As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.\textsuperscript{111}

Similarly, Congress directed the government to use the administrative sanctions available under section 504 to enforce Title II, when applicable.\textsuperscript{112}

\begin{footnotesize}
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\item[106.] See \textit{supra} note 32 and accompanying text.
\item[107.] See \textit{infra} notes 113-19 and accompanying text.
\item[108.] Because the statute does not clearly indicate which section was meant to reply, the legislative history of Title II provides valuable insight into resolution of this ambiguity. \textit{Cf.} Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632 n.13 (1984) (stating that language as broad as that of \textsection 504 cannot be read in isolation from its legislative history).
\item[109.] See \textit{supra} notes 5, 7 & 9 and accompanying text.
\item[110.] See \textit{infra} notes 112-13 and accompanying text.
\item[112.] See \textit{id.} Specifically, the Committee indicated its "intent that administrative enforcement of \textsection 202 of the legislation [42 U.S.C. \textsection 12132] should closely parallel the Federal government's experience with \textsection 504 of the Rehabilitation Act of 1973." \textit{Id.} The committee report further references use of "section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area." \textit{Id.} The federal agencies charged with overseeing compliance with and investigating and resolving complaints under \textsection 504 would likewise handle compliance and complaints under Title II. \textit{Id.} For those cases where the fund termination procedures under \textsection 504 were inapplicable because
\end{itemize}
\end{footnotesize}
Because Title VII applies to employment claims, an argument might be made that Congress was actually anticipating that the courts would apply two different remedial standards—one for employment discrimination and one for all other claims. As the passage quoted above demonstrates, however, the legislative history reflects no such distinction. Congress intended the "full panoply of remedies," which would not have been available for employment discrimination claims at the time that the ADA was enacted.

Similarly, when Congress subsequently addressed remedies under the ADA in the Civil Rights Act of 1991, its actions reflected an understanding that only Title I required amendment in order to provide for compensatory relief. The Civil Rights Act of 1991 specifically enumerates those statutes to which its damages provisions apply, and while it specifically amended Title I, the statute makes no mention whatsoever of Title II. Indeed, if Congress had intended that Title II incorporate Title VII remedies, it could have simply used the same language found

the state or local government entities involved do not receive federal funds, the Committee intended that the cases be referred to the Department of Justice, which could then proceed to file suits in federal district court. Id.

The regulations adopted by the Department of Justice incorporate these concepts. See 28 C.F.R. § 35.170-.174 (1993) (establishing administrative enforcement procedures); 28 C.F.R. § 35.172 app. A. The regulations do not specifically include any provisions outlining the remedies available under Title II. In the appendix to the complaint resolution regulations, however, the Department of Justice notes that the legislative history clearly indicates an intent to provide the "full panoply of remedies." 28 C.F.R. § 35.172 app. A.

In at least one decision to date, the court in dicta suggested that the damages provisions of the Civil Rights Act of 1991 applied to a Title II employment discrimination case, even after recognizing that Title II otherwise incorporates § 504 enforcement standards. See Ethridge v. Alabama, 847 F. Supp. 903, 908 n.13 (M.D. Ala. 1993). In Ethridge, the court, after first recognizing that Title II remedies are those available under the Rehabilitation Act, stated that the plaintiff's right to recover compensatory damages was limited by a provision in the Civil Rights Act of 1991. Id. at 908 n.13 (applying 42 U.S.C. § 1981a(a)(2) (Supp. IV 1992) which prevents claimant in Title I suits from recovering compensatory damages if the defendant employer has made a good faith effort to reasonably accommodate the plaintiff's disability); see also G. William Davenport, The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues, 43 ALA. L. REV. 307, 319 (1992) (giving hypothetical example of claim involving public entity defendant but applying Civil Rights Act damages caps to limit amount which claimant was entitled to recover).

113. See supra note 111.
115. See supra note 46 and accompanying text.
116. See supra notes 47-50 and accompanying text.
in Title I of the ADA. At the very least, some distinction would be found in the language of the statute or in the legislative history between employment discrimination and all other types of discrimination actionable under Title II. Absent a distinction, however, the most reasonable interpretation is that Congress intended the reference to section 505 of the Rehabilitation Act to be a reference to the remedial provisions applicable to section 504 of that Act, rather than to section 501, even as applied to employment discrimination claims.

Therefore, Congress' oblique reference in Title II's enforcement provisions to the "rights, procedures and remedies set forth in section 505 of the Rehabilitation Act" appears to be based upon an assumption that it would be clearly interpreted as a reference to the remedial standards applicable to section 504, rather than section 501. Only if the remedies under section 504, and accordingly Titles VI and IX, are available under Title II for intentional discrimination based on disability, will a private plaintiff be entitled to the "full panoply of remedies" that Congress intended.

118. See 42 U.S.C. § 12117 (Supp. IV 1992). The specific language of this statute reads as follows:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Id.; see also supra note 20.

119. The regulations adopted by the Department of Justice further reflect that Title II adopts Title I's substantive provisions, but not its remedial provisions. See 28 C.F.R. § 35.140(b)(1) (1993) (incorporating the substantive requirements of Title I established in 29 C.F.R. pt. 1630); 28 C.F.R. § 35.172 app. A (1993) (incorporating language from committee report providing for "full panoply of damages"); see also Petersen v. University of Wisconsin Bd. of Regents, 818 F. Supp. 1276, 1279-80 (W.D. Wis. 1993) (concluding that Department of Justice regulations incorporated only substantive provisions of Title I as applied to Title II employment discrimination claims, and said regulations were entitled to substantial weight in light of ambiguity in Title II's enforcement statute).

120. The Department of Justice has confirmed this interpretation of Title II and its regulations in an amicus brief recently filed in a pending Title II case. See Memorandum of the United States, Appearing as Amicus Curiae, in Response to Defendants' Motion to Dismiss, Livingston v. The Honorable Zoro J. Guice, Jr., (W.D.N.C.) (Civil No. 5:92CV131-MU). Livingston involves a claim under Title II that the plaintiff was wrongly excluded from the first degree murder trial of her nephew when the judge in the case refused to permit her to use the only wheelchair accessible door to the courtroom. Id. at 3. In the amicus brief filed by the Department of Justice, the Department of Justice asserted that Title II was patterned on § 504, and should be construed to provide the same rights and remedies as those provided under § 504, Title VI, and Title IX. Id. at 5-6. The Department of Justice further argued that Franklin's analysis applied "with equal force" to Title II claims, and that Congress intended a private cause of action under this section with the "full panoply of remedies." Id. at 9-13.
It thus follows that the remedies analysis of *Franklin* applies to claims brought under Title II. The established relationship between Title II, section 504, Title VI, and Title IX directly supports application of the Court’s reasoning in *Franklin* to Title II and the conclusion that there is a presumption in favor of all appropriate remedies under that statute.\(^{121}\) Furthermore, there is no indication in the language of Title II nor its legislative history that Congress intended to limit damages under that statute so as to overcome such a presumption.\(^{122}\) To the contrary, Congress’ reference to the “full panoply of remedies” appears to be an endorsement of that broad remedial standard.

The case law interpreting Title II to date has not directly addressed the issue of available recovery. The cases generally center on one aspect of Title II enforcement, namely whether a private plaintiff must exhaust administrative remedies before pursuing a civil claim.\(^{123}\) The reasoning in these cases suggests that when squarely presented with this issue, courts will apply section 504/Title VI remedies to Title II claims.

For example, in *Petersen v. University of Wisconsin Board of Regents*,\(^{124}\) the Federal District Court for the Western District of Wisconsin accepted in dicta the proposition that Title II incorporates the remedies, rights, and procedures of section 504 and Title VI.\(^{125}\) The court also reasoned that the regulations adopted by the Department of Justice, which incorporate section 504 enforcement standards, were to be given substantial weight because of the ambiguity in Title II’s enforcement provisions.\(^{126}\) The court then applied section 504 enforcement

\(^{122}\) Id. at 167-68.
\(^{124}\) 818 F. Supp. 1276 (W.D. Wis 1993).
\(^{125}\) Id. at 1278-79 n.1. The court in *Petersen* reasoned that Title II incorporates the rights and remedies of the Rehabilitation Act which “does not require non-federal employees to exhaust administrative remedies . . . .” Id. at 1278-79. The court then stated that the Rehabilitation Act adopts the remedies, procedures and rights of Title VI. Id. at 1279 n.1. This latter reference establishes that the court was referring to § 504 remedial standards because § 504 is the section of the Rehabilitation Act which incorporates Title VI standards. *See supra* notes 38-39 and accompanying text.
\(^{126}\) Id. at 1280. Similarly, the court in *Noland* reasoned as follows:

The language of the relevant enforcement provision, § 12133, admittedly is ambiguous. In referring to § 794a, § 12133 fails to distinguish between § 794(a)(1) and § 794(a)(2), each of which incorporates different rights, remedies, and procedures . . . . In light of this ambiguity, the regulations promulgated by the Department of Justice interpreting Title II of the ADA are entitled to controlling weight.
standards to determine that Title II claimants were not required to exhaust administrative remedies before pursuing a private cause of action. 127

The reasoning in Petersen is representative of those cases which have considered this issue. 128 Given this reliance on section 504 enforcement standards in regard to exhaustion of remedies, courts will likely engage in similar reasoning to conclude that Title II likewise incorporates section 504 remedies, which in turn incorporate the Title VI standard of “any appropriate relief.” 129

III. WHAT DAMAGES ARE RECOVERABLE AS “ANY APPROPRIATE RELIEF” UNDER TITLE II?

As much as Franklin answered regarding the scope of damages available under Title IX and the related statutes, it left a great deal unanswered. The plaintiff in Franklin alleged that she was entitled to damages, but what specific type of damages she sought is not discussed in the Supreme Court opinion. 130 The Court referred only to the fact that the Court of Appeals found no right to “monetary” damages. 131 Later in the opinion, the Court reasoned that the equitable remedies of “backpay and prospective relief” were not sufficient to afford Franklin

Noland, 835 F. Supp. at 483 (citations omitted).

127. Petersen, 818 F. Supp. at 1280. The court supported its conclusion regarding Title II by referring to the regulations issued by the Department of Justice, which expressly reject any requirement of exhaustion of remedies. Id. at 1279-80 (quoting 28 C.F.R. § 35.172 app. A).

128. See, e.g., Noland, 835 F. Supp. at 483 (holding that plaintiff was not required to exhaust administrative remedies because regulations adopted under Title II adopted § 504 standards and were to be given controlling weight); Ethridge v. Alabama, 847 F. Supp. 903, 907 (M.D. Ala. 1993) (reasoning that “even assuming that Title II’s incorporation of the remedies of the Rehabilitation Act does not settle the exhaustion question, the regulations plainly state that exhaustion is not required.”).

129. Another context in which this issue has arisen is in regard to whether violation of Title II can be the basis for a civil rights action under 42 U.S.C. § 1983 against the individual’s involved. See, e.g., Independent Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs., 840 F. Supp. 1228, 1345 (N.D. Cal. 1993) (holding that the ADA does not preclude a suit under § 1983); see also infra note 231. In the process of reaching its decision on the § 1983 issue, the court in Independent Housing Servs. reasoned that “[t]he parties have briefed the question of whether a § 1983 claim may be based on a violation of § 504 of the Rehabilitation Act. Since the ADA incorporates the remedies, procedures, and rights set forth in the Rehabilitation Act, . . . [this] briefing is applicable to the ADA claim.” Id. at 1345. The court, therefore, apparently presumed that the reference to the Rehabilitation Act in Title II, was in fact a reference to § 504.

130. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 64-65 (1992). The Eleventh Circuit opinion also does not reveal what specific types of damages the plaintiff in Franklin sought. See Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 618 (11th Cir. 1990) (stating only that plaintiff was “seeking damages” against the school district).

131. Franklin, 503 U.S. at 65.
a remedy. The majority opinion, therefore, apparently presumed that "monetary" damages meant something broader than equitable-type remedies, but did not specifically state what this meant.

The regulations adopted by the Department of Justice to implement Title II also do not specifically address the scope of what might be considered "monetary damages" under Title II. Nonetheless, some general standards can be discerned from the existing statutes and case law. As the following discussion reflects, a claimant under Title II should be entitled to both pecuniary and non-pecuniary compensatory

132. See id. at 75-76. Backpay provided the plaintiff in Franklin no remedy because she was a student rather than an employee of the district. Id. Prospective relief, such as an injunction prohibiting the alleged harasser from handling future classes, was not effective because the alleged harasser no longer taught at the school and the plaintiff herself no longer attended that school. Id.

133. The plaintiff in Franklin was presumably seeking some type of compensatory relief for pain and suffering and emotional distress, based on her allegation that she was sexually harassed by her former teacher. A pre-Franklin case which also arose in the educational context demonstrates how courts in these cases implicitly recognize the limited pecuniary relief suffered by some discrimination claimants. See Pfeiffer v. Marion Ctr. Area Sch. Bd., 917 F.2d 779 (3d Cir. 1990). The plaintiff in Pfeiffer alleged sexual discrimination in her dismissal from her high school chapter of the National Honor Society (NHS) after she became pregnant. Id. at 782. Although the court in Pfeiffer did not specifically spell out what damages would be considered "compensatory," the court's discussion of the factual context reflects that the court did not intend to limit such damages to equitable-type remedies such as backpay.

Before reaching the issue of whether compensatory damages could be recovered under Title IX, the court considered whether, in this case, the plaintiff could prove any monetary losses:

There is also a serious question as to what monetary damages, if any, could be available to [Pfeiffer], should the district court determine she was discriminated against in violation of Title IX. Her dismissal from the NHS did not affect her status or record as a student. She graduated with honors and with her class. She did not apply for, or lose, any collegiate scholarships or awards because of her dismissal from the NHS. She elected not to attend college for reasons having nothing to do with her dismissal and has not been denied a job because she was dismissed from the NHS. . . . She has admitted that she knows of no one who holds her in disrepute because of her dismissal from the NHS.

Id. at 786 (citation omitted). The court then stated that it was "[a]ssuming, but not deciding, that some monetary damages could be calculated." Id. at 787. It appears from this discussion of the plaintiff's damages in Pfeiffer that about the only damages left would be for pain and suffering and mental distress.

134. The regulations simply refer to the language in the legislative history of Title II which states that there is a private right of action under that statute which includes the "full panoply of remedies" without specifically defining what this "full panoply" encompasses. See 28 C.F.R. § 35.172 app. A (1993).
A. Compensatory and Equitable Relief

"Monetary damages" should include, at the least, damages to compensate for the actual loss suffered by the plaintiff. In the context of other federal civil rights statutes, such as 42 U.S.C. § 1983, the Supreme Court has recognized that general compensatory principles govern awards of damages for injuries caused by a defendant's breach of duty. The question for courts should, therefore, center on what compensatory relief is "appropriate."

"Appropriate" compensatory relief should include those damages which the plaintiff can prove were actually caused by the defendant's breach of duty under Title II. This should certainly include any pecuniary losses such as medical expenses, transportation costs, admission fees, licensing fees, and other out-of-pocket expenses, and loss of professional opportunities. It should also include noneconomic losses such as damage to reputation, inconvenience, loss of enjoyment of life, mental anguish and distress, and pain and suffering.

135. See discussion infra part III.A.
136. See id.
137. See discussion infra part III.B.
138. See discussion infra part III.C.
139. See Carey v. Piphus, 435 U.S. 247, 254 (1978) (reasoning that the "cardinal principle of damages in Anglo-American law is that of compensation for the injury caused plaintiff by defendant's breach of duty." (citation omitted)).
140. Cf. Carey, 435 U.S. at 264 (requiring proof of actual injury in order to recover compensatory damages for mental anguish and distress under 42 U.S.C. § 1983); see also Curtis v. Loether, 415 U.S. 189, 197 (1974) (stating in the context of a claim for violation of the fair housing provisions of Title VII of the Civil Rights Act of 1968 (42 U.S.C. § 3612) that "[i]f a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount"); cf. RESTATEMENT (SECOND) OF TORTS § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.").
142. Cf. Carey, 435 U.S. at 264 (concluding that emotional distress-type damages are appropriate for violation of a federal statute when there is proof of the nature and circumstances of the wrong and its effect on the plaintiff); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985) (approving award of compensatory damages under 42 U.S.C. § 1981 and § 1983 in the amount of $100,000 where plaintiff established emotional stress, loss of sleep, marital
Many of these damages, including emotional distress and loss of enjoyment of life, are enumerated as appropriate compensatory relief under the Civil Rights Act of 1991 for violations of Title I.\textsuperscript{143} Although the Civil Rights Act does not apply to Title II, it does illustrate what Congress considered “compensatory” and suggests what Congress may have had in mind when it referred to the “full panoply of damages.”

Moreover, these damages should be awarded upon proof of loss, regardless of whether equitable remedies are available. The Supreme Court in Franklin indicated that courts should determine the adequacy of the remedies at law before resorting to equitable remedies.\textsuperscript{144} Accordingly, even in those cases in which reinstatement injunctive relief might provide some remedy, a court’s first inquiry is whether there are appropriate monetary damages which can be awarded.\textsuperscript{145} Once appropriate monetary damages are determined, the court may then consider whether additional equitable remedies would be appropriate, assuming such remedies have been requested.\textsuperscript{146}

\begin{itemize}
  \item strain, and humiliation because of violation of his civil rights); Tanberg, 787 F. Supp. at 973 (concluding that plaintiff could recover mental anguish and pain and suffering he allegedly experienced as a result of being fired for having the HIV virus); Kermie, supra note 141, at 169-72. The Court in Franklin also likely had this type of damages in mind when it expressed its concern that the plaintiff would be “remediless.” See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992); see also supra note 133.
  \item See 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992). Section 1981a(b)(3) actually sets the limitations on compensatory relief that can be recovered for violation of the covered statutes, but in doing so it outlines a range of compensatory damages that can be awarded under § 1981a(a)(2): “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” Id. Presumably, past pecuniary losses would also be recoverable, although not subject to the damage caps.
  \item Franklin, 503 U.S. at 75-76 (reasoning that “[u]nder ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate”).
  \item See Tanberg, 787 F. Supp. at 973 (reasoning that the adequacy of compensatory damages are considered first, but without limiting the plaintiff to compensatory damages); cf. Kraft v. Memorial Medical Ctr., Inc., 807 F. Supp. 785, 792 (S.D. Ga. 1992) (rejecting defendant’s argument in § 504 employment discrimination suit that Franklin should be confined to Title IX non-employment claims where equitable remedies provide no relief).
  \item See Tanberg, 787 F. Supp. at 973 (court reasoned that although it would consider monetary damages first, it was not limiting the plaintiff to “compensatory damages alone”). The Civil Rights Act of 1991 similarly provides that claimants, under the statutes subject to that act, are entitled to compensatory damages in addition to any equitable relief already authorized under existing statutes. See 42 U.S.C. § 1981a(a)(1), (2) (Supp. IV 1992). The statutes do not state that compensatory relief is determined before equitable relief, but the language in Franklin regarding “the ordinary convention” to consider remedies at law first would seem to also apply to determining damages under § 1981a. See Franklin, 503 U.S. at 76.
  \item This standard is also applied to racial discrimination in making and enforcing contracts under 42 U.S.C. § 1981 (Supp. IV 1992). See Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 476 (1st Cir. 1993) (finding that damages awarded by jury were adequate to compensate the plaintiff such that district court properly denied any additional equitable relief).\end{itemize}
Under this approach, backpay, as well as loss of future wages, should be awarded as compensatory relief. Although backpay is expressly characterized under Title VII as an equitable remedy, it is awarded as a legal remedy under statutes such as 42 U.S.C. section 1981, which prohibits discrimination in making and enforcing contracts, and other statutes which the Supreme Court has found to provide a right to recover compensatory damages, enforced through a private cause of action. At least one circuit, the Eleventh, has already concluded, post-Franklin, that backpay claims under section 504 of the Rehabilitation Act are compensatory damages at law, such that the plaintiff is entitled to have these damages determined by a jury.

147. See 42 U.S.C. § 2000e-5(g) (Supp. IV 1992) (authorizing award of backpay as equitable remedy to enforce violation of Title VII). The Court in Franklin, in dicta, also characterized backpay as an equitable remedy. Franklin, 503 U.S. at 75-76 (rejecting defendant's arguments that remedies under Title IX should be limited to equitable remedies).


149. See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990) (concluding that backpay is a legal remedy in actions brought for breach of duty of fair representation and violation of § 301 of the Labor-Management Relations Act (29 U.S.C. § 185 (1988)); Curtis v. Loether, 415 U.S. 189, 197 (1974) (characterizing backpay as "compensatory" and "legal" remedy under § 812 of Title VIII of the Fair Housing Act (42 U.S.C. § 3612)). In both Terry and Curtis, the Supreme Court distinguished Title VII's treatment of backpay as equitable on the grounds that Congress specifically categorized backpay under that statute as a form of "equitable relief." Terry, 494 U.S. at 572; Curtis, 415 U.S. at 198. For example, in Curtis, the court reasoned that "[i]n Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based ... contrasts sharply with § 812's simple authorization of an action for actual and punitive damages." Id. at 197. Likewise, under Title II, there is a "simple authorization" of "any appropriate relief."

150. Waldrop v. Southern Co. Servs., 24 F.3d 152, 157 (11th Cir. 1994) (holding that the plaintiff was entitled to a jury trial on her claim for backpay under § 504 of the Rehabilitation Act because backpay is a form of legal relief under that statute). The court in Waldrop distinguished some courts' treatment of backpay under § 504 as a form of equitable relief based on analogy to Title VII, on the grounds that "the remedy portions of the [two] statutes are materially different. Title VII, as opposed to § 504 and Title VI from which the § 504 remedies are derived, (1) specifically defines what relief is available under the statute, and (2) only refers to equitable relief." Id. at 158 n.10 (citation omitted). The court then concluded that backpay under § 504 could not be characterized as a form of equitable restitution, because it was not awarded to "cure unjust enrichment of the defendant" nor to
Some courts have also characterized the award of lost future wages, or "frontpay," as an equitable remedy under Title VII,\textsuperscript{151} although this remedy is generally allowed only as an alternative to reinstatement when hostility is too great to allow plaintiff to return to his or her prior job or when an adequate position is not currently available.\textsuperscript{152} Such awards of frontpay under the equitable enforcement provisions of Title VII have been criticized, however, because frontpay is not expressly authorized by the language of that statute and is more in the nature of "a legal rather than an equitable remedy."\textsuperscript{153}

The claimant's ability to recover lost future wages under Title II should not be contingent on the availability of reinstatement because, according to Franklin, monetary remedies should be considered first.\textsuperscript{154} Additionally, the awarding of equitable remedies is subject to the discretion of the court, whereas legal remedies such as money damages are awarded as a matter of right if the plaintiff establishes the cause of

\textsuperscript{151} See, e.g., Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985) (concluding that award of frontpay may be awarded as equitable relief in Title VII claim in discretion of the court); Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986) (same). The Equal Employment Opportunity Commission has also issued guidelines indicating that it will treat frontpay as an equitable remedy under both Title VII and Title I of the ADA, and, therefore, not subject to that act's damages caps. See Equal Employment Opportunity Commission Decision No. 915.002, 1992 WL 189089, at *1, 4 (July 14, 1992) (FLB-EEOC).

\textsuperscript{152} See, e.g., Thorne, 802 F.2d at 1137 (reasoning that frontpay is appropriate when it is impossible to reinstate); cf. Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469-70 (5th Cir. 1989), cert. denied, 493 U.S. 842 (1989) (noting in age discrimination action that "[i]t has been held that front pay cannot be recovered unless plaintiff shows that reinstatement is not feasible") (citation omitted). Section 2000e-5(g) provides that courts may order reinstatement as well as backpay, but makes no express mention of frontpay. See 42 U.S.C. § 2000e-5(g). Courts allowing frontpay see it as a necessary element to returning the plaintiff to the status quo, which is one of the goals of Title VII. See Shore, 777 F.2d at 1160 (remanding case for determination if frontpay necessary to place plaintiff in position she would have been but for the discriminatory acts).

\textsuperscript{153} McKnight v. General Motors Corp., 908 F.2d 104, 117 (7th Cir. 1990); see also 42 U.S.C. § 2000e-5(g) (outlining equitable relief available under Title VII). The court in McKnight stated that "the premise [of awarding frontpay under Title VII] can be doubted, as can the propriety, under a statute confined to equitable relief, of an award of what is really damages for lost future earnings—a legal rather than an equitable remedy." McKnight, 908 F.2d at 117.

\textsuperscript{154} See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992). That is not to say that the plaintiff would not have a duty to reasonably mitigate any lost wages. See Skinner, 859 F.2d at 1446 (recognizing that plaintiff cannot recover lost wages which could have reasonably been avoided); cf. RESTATEMENT (SECOND) OF TORTS § 918(1) (1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.").
action and actual loss.155 Lost wages should, therefore, be handled under Title II in the same manner as they are in section 1981 claims: namely, they should be treated as part of the plaintiff’s compensatory damage remedies, awarded as a matter of right upon proof of actual loss without regard to the availability of equitable relief.156

B. Attorney’s Fees

The general provisions of the ADA provide that in any action brought under the ADA the prevailing party, other than the United States, can recover reasonable attorney’s fees as well as litigation expenses and costs.157 Accordingly, there should be little question that the prevailing party in a Title II action can recover attorney’s fees.158 The regulations adopted by the Department of Justice also reflect that attorney’s fees may be awarded in actions under Title II.159

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155. Cf. Curtis v. Loether, 415 U.S. 189, 197 (1974). The Supreme Court in Curtis reasoned that “[i]n Title VII cases . . . the courts have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount.” Id.


As a practical matter, this issue may be of most concern in regard to whether the plaintiff is entitled to a jury trial. See Waldrop v. Southern Co. Servs., 24 F.3d 152, 159 (11th Cir. 1994) (holding that trial court improperly denied plaintiff a jury trial on her backpay claims under § 504 of the Rehabilitation Act); Skinner, 859 F.2d at 1444 (concluding that backpay claim was properly submitted to jury in action under § 1981 because it was in the nature of legal relief). The scope of any right to a jury trial under Title II of the ADA is beyond the scope of this Article. However, if a jury trial is available for at least some types of damages under Title II, it would certainly simplify matters if all damages could be submitted for determination by that jury. Cf. Skinner, 859 F.2d at 1443-44 (outlining difficulty in allocating fact-finding functions between court and jury when backpay is available as equitable relief under one statute and monetary damages under another).

157. 42 U.S.C. § 12205 (Supp. IV 1992). This section provides as follows:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Id.

158. In addition, § 505(b) of the Rehabilitation Act provides that the court may, in its discretion, award the prevailing party a reasonable attorney’s fee. 29 U.S.C. § 794a(b) (1988). Unlike § 794a(a), this provision establishes the same rule for actions brought under § 501 or § 504, or any applicable provision of the Rehabilitation act. See id. There should, therefore, be little doubt that this section also applies to Title II.

159. 28 C.F.R. § 35.175 (1993) (providing that in any action or administrative proceeding brought under Title II, the court or agency may, in its discretion, allow the prevailing party a reasonable attorney’s fee, including litigation expenses and costs).
C. Punitive Damages

Some commentators have suggested that Franklin’s language is broad enough to permit the award of punitive damages.\(^{160}\) Indeed, there is no implicit limit in the “any appropriate relief” standard which would preclude punitive damages.\(^{161}\) Nonetheless, although some limited support for this proposition can be found in Congress’ use of the term “full panoply of remedies,”\(^{162}\) punitive damages likely will not be available for violations of Title II, for a number of reasons.

First, Franklin would have to be read as modifying the well-established rule in City of Newport v. Fact Concerts, Inc.\(^{163}\) that government entities are immune from punitive damages.\(^{164}\) Second, even in suits against private parties, the overwhelming weight of authority at the time the ADA was passed was that punitive damages were per se not available under section 504 of the Rehabilitation Act.\(^{165}\) Congress was aware of this rule when considering passage of the ADA and did not


\(^{161}\) The Court in Franklin neither explicitly authorized nor ruled out an award of punitive damages. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992). In fact, the Court did not at any point in its analysis refer to punitive damages. See id.


\(^{164}\) Fact Concerts specifically held that municipalities are immune from punitive damages. Id. at 271. This ruling has been extended to school boards, transportation districts, and other arms of municipal government. See, e.g., Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 670 F.2d 1, 4 (1st Cir.), cert. denied, 457 U.S. 1120 (1982) (municipal water district); Okeson v. Tolley Sch. Dist. No. 25, 570 F. Supp. 408, 412 (D.N.D. 1983) (school boards), rev’d on other grounds, 760 F.2d 864 (8th Cir. 1984); Ferguson v. Joliet Mass Transit Dist., 526 F. Supp. 222, 226 (N.D. Ill. 1981) (public utility providing mass transportation). State immunity has not been an issue because states are immune from suit under the Eleventh Amendment for violations of § 1983. Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II), 465 U.S. 89, 101 (1984). Although states are not immune under the ADA, the reasoning behind the Supreme Court’s decision in Fact Concerts also supports a conclusion that state governments and their agencies and instrumentalities are likewise immune from punitive damages. See infra notes 168-89 and accompanying text.

\(^{165}\) See discussion infra part III.C.1.
clearly express an intent to modify it under Title II. 166 Third, the problems inherent in imposing punitive damages against a municipality on a case-by-case basis argue against anything other than a per se prohibition. 167

1. Fact Concerts and municipality immunity from punitive damages

Eleven years prior to Franklin, the Supreme Court in City of Newport v. Fact Concerts, Inc. held that municipal governments are immune from claims for punitive damages. 168 The Supreme Court concluded that the history of nonavailability of punitive damages against municipalities, combined with public policy concerns about allowing such damages, precluded exposing municipalities to punitive damages. 169 Although Fact Concerts specifically involved a claim brought under 42 U.S.C. § 1983, 170 the Court's analysis applies with equal force to punitive damage claims against government entities under Title II, even after Franklin. 171

The Supreme Court in Fact Concerts first looked to common-law principles which existed at the time the precursor of section 1983 was enacted as part of the Civil Rights Act of 1871. 172 At that time, 42 U.S.C. § 1983 (1988). The precursor to § 1983 was part of the Civil Rights Act of 1871, which was enacted to enforce the Thirteenth, Fourteenth and Fifteenth Amendments. See H.R. 320, 42d Cong., 1st Sess. § 1, 17 Stat. 13 (1871).

171. Fact Concerts has been extended to civil rights claims brought under other federal statutes, including §§ 1981 and 1985. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1270-71 (7th Cir. 1984) (concluding that punitive damages are not recoverable from a municipality under 42 U.S.C. § 1981 or 42 U.S.C. § 1983); Lee, 586 F. Supp. at 240 (holding that county is immune from punitive damages under §§ 1981 and 1983 under Supreme Court’s analysis in Fact Concerts).

172. Fact Concerts, 453 U.S. at 258; see also supra note 170. The Court reasoned in Fact Concerts that an “important assumption underlying the Court’s decisions in this area is that members of the 42d Congress were familiar with common-law principles . . . and that they
common law treated municipalities like natural persons, subject to suit for a wide range of activities. This did not extend, however, to the award of punitive damages. Courts at that time were virtually unanimous in stating that no punitive damages could be awarded against municipalities.

Municipalities were seen as appropriately protected from punitive damages because "such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." Compensation was an obligation properly shared by the municipality, but punitive obligations were properly borne by the wrongdoer himself or herself.

The Court then considered the legislative history of section 1983 within the context of this prevailing rule. Given that municipal immunity from punitive damages was well established in the common law at the time the statute was enacted, the Court "proceed[ed] on the familiar presumption that Congress would have specifically so provided if it had wished to abolish this doctrine." The Court found no such language in either the statute or the legislative history.

The Court then turned to the current state of the law to determine if the common-law rule should be abolished. The Court ultimately concluded that public policy concerns about allowing such damages against municipal governments continued to militate against this form of relief.

likely intended that these common-law principles obtain, absent specific provisions to the contrary." Fact Concerns, 453 U.S. at 258.

173. Id. at 259-60.

174. Id.

175. Id.

176. Id. at 263.

177. Id.

178. Id.

179. Id. (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)); see also supra note 172.

180. Fact Concerns, 453 U.S. at 266-64. The Court noted that there was little debate regarding § 1 of the Civil Rights Act of 1871. Id. at 264. Instead, the Court looked to the debate concerning what was labelled the Sherman amendment, which would have imposed liability on any inhabitant of a municipality for damages inflicted by persons "riotously and tumultuously assembled." Id. at 264 n.24. This amendment was rejected by Congress, in large part over concerns that it would place an unmanageable burden on local governments and unfairly punish innocent taxpayers. Id. at 265-66. The Court reasoned that "Congress' opposition to punishing innocent taxpayers and bankrupting local governments [in conjunction with the Sherman amendment] would [not] have been less applicable with regard to the novel specter of punitive damages against municipalities." Id. at 266. For a more extensive discussion of the Sherman amendment and the general legislative history of the Civil Rights Act of 1871, see Monell v. Department of Social Servs., 436 U.S. 658, 664-95 (1978).

181. Fact Concerns, 453 U.S. at 266.

182. Id. at 271.
The Court reiterated that an award of punitive damages against a municipality "punishes" only the taxpayer, who took no part in the commission of the tort.\textsuperscript{183} The Court was skeptical that punitive damages would serve their intended objective of deterring future misconduct if the municipality were required to pay, rather than the official who committed the wrongful act.\textsuperscript{184} The Court was further concerned about the unlimited discretion of a jury when presented with financial information relevant to the punitive damage award, such as the unlimited taxing ability of a municipality.\textsuperscript{185} The Court concluded that:

\textit{The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large. Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.} \textsuperscript{186}

This forceful rejection of punitive damages against a municipality strongly suggests that the Supreme Court might continue to uphold the common-law immunity of municipalities, even after Franklin.\textsuperscript{187} Franklin permits the courts to award "any appropriate relief," but the Court has already concluded in Fact Concerts that punitive damages are not "appropriate" when the defendant is a government entity. Nothing in Franklin indicates that the Court was contemplating a change in this

\textsuperscript{183.} Id. at 267. The Court characterized punitive damages as a "windfall" to the plaintiff who is otherwise appropriately compensated for his or her losses due to the official misconduct. \textit{Id.}

\textsuperscript{184.} Id. at 268-69; see also \textbf{RESTATEMENT (SECOND) OF TORTS} § 908(1) (1977) (purpose of punitive damages is to "punish \[the defendant\] for his outrageous conduct and to deter him and others like him from similar conduct in the future."). This concern about imposing punitive liability on the individual wrongdoer has not seen consistent application, even in those courts which have applied Fact Concerts and ruled that municipalities are immune from punitive damages. For example, in Kolar v. County of Sangamon, 756 F.2d 564 (7th Cir. 1985), the court, while giving lip service to Fact Concerts, ruled that the defendant county had waived its immunity via a statute which directed local governments to indemnify employees acting within the scope of their employment for "any tort judgment or settlement." \textit{Id.} at 567. This despite the fact that the statute in question did not expressly provide for indemnification of punitive damages. But see Keenan v. City of Philadelphia, 983 F.2d 459, 481 (3rd Cir. 1992) (Higginbotham, Jr., J., dissenting in part) (criticizing "legal fiction" created when courts find government entities immune from punitive damages but then impose such liability through application of indemnification statutes).

\textsuperscript{185.} Fact Concerts, 453 U.S. at 270-71. The Court was concerned that information about the unlimited taxing ability of a municipality might lead a jury to make "a sizeable award." \textit{Id.} at 270.

\textsuperscript{186.} \textit{Id.} at 270-71 (footnote omitted).

\textsuperscript{187.} Lower courts have concluded that Fact Concerts' rationale applies to other federal discrimination statutes such as § 1981 and § 1985. \textit{See, e.g.,} Bell v. City of Milwaukee, 746 F.2d 1205, 1270-71 (7th Cir. 1984) (finding punitive damages not recoverable under 42 U.S.C. §§ 1981, 1985); \textit{see also supra} note 164.
rule. The same concerns raised in *Fact Concerts* arise in this context—namely, that punitive damages are effective, if at all, only when they punish the actual wrongdoers, and such deterrence is not present when a municipality must pay through its taxing power, imposing a burden on taxpayers which may be both undue and unwarranted.\(^{188}\)

Nevertheless, because the Court in *Fact Concerts* recognized the importance of both the prevailing common-law rule at the time the legislation was enacted, as well as Congress' ability to change that rule,\(^ {189}\) an inquiry must be made whether this rule has been modified in the context of subsequent legislation. Accordingly, the next issue is what the prevailing rule was regarding punitive damages under the Rehabilitation Act and related statutes at the time that the ADA was enacted, and whether Congress evidenced any intent to change that rule.

2. **Did Congress indicate an intent in Title II to change the prevailing rule of no punitive damages under federal disability discrimination laws?**

At the time that the ADA was passed, there was a consensus among the lower courts that punitive damages were not available in *any* action under section 504.\(^ {190}\) While some courts based their rulings on the premise that only equitable remedies were available for violation of section 504,\(^ {191}\) an analysis clearly called into question by *Franklin*,\(^{192}\)

\(^{188}\) See *Fact Concerts*, 453 U.S. at 266-67. The Court's concern regarding the effect evidence of the municipalities taxing power may have on the jury, encouraging "sizeable" punitive damages awards has less weight. See id. at 270. Juries generally contain taxpayers, who know about fiscal consequences of large awards. Cf. Jeffery V. Strahan, Note, Torts—Municipal Liability—Exemplary Damages Available Against Municipality Performing Proprietary Function if Willful or Malicious Conduct Directly Attributable to City Official(s), City of Gladewater v. Pike, 727 S. W2d 514 (Tex. 1987), 19 ST. MARY'S L.J. 773, 786 (1988) (suggesting that in the context of state law authorizing punitive damages against government entities, juries presumably composed of taxpayers are arbiters which can invoke punitive damages effectively and with appropriate discretion when deterrence is necessary).

\(^{189}\) See supra notes 172-80 and accompanying text.


\(^{191}\) See, e.g., *Eastman*, 939 F.2d at 209 (rejecting punitive damage remedies under the Rehabilitation Act because court found no Congressional intent to authorize any damages of a "non-equitable" nature); Doe v. Southeastern Univ., 732 F. Supp. 7, 10 (D.D.C. 1990) (rejecting claims for both compensatory and punitive damages because the Rehabilitation Act
other courts separately analyzed the two types of damages and concluded that compensatory damages were available but punitive damages were not. 193

One reason advanced for denying punitive damages under statutes such as section 504 is that deterrence is properly accomplished by the use of administrative termination of federal funding. 194 This rationale would, of course, not apply to entities which do not receive federal funds and are not subject to these administrative remedies. 195 Therefore, this reasoning has limited relevance to statutes such as Title II, which does not premise liability on compliance with federal funding mandates.

A more pertinent and appropriate rationale is that punitive damages are not "necessary," or appropriate, relief under section 504. 196 One court reasoned as follows:

In determining whether punitive damages are available under § 504, it is well to keep in mind the Supreme Court's admonition that courts authorize only equitable relief).


194. See Glanz, 750 F. Supp. at 45. Franklin rejected this rationale as a reason to limit compensatory relief. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (rejecting government's argument that administrative action would help other similarly-situated students, because such an argument would provide the petitioner no remedy).

195. Cf. Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990), rev'd on other grounds, 503 U.S. 60 (1992) (refusing to apply Title VII analysis by analogy to Title IX claim on the grounds that Title VII is an outright prohibition of discrimination whereas Title IX is based on the conditional grant of federal funding).

In fact, a converse argument might be advanced in favor of allowing punitive damages against entities which do receive federal funding. Those entities would not necessarily need to resort to local taxpayer funds to pay a punitive damage award. There is, however, no guarantee that such awards would not exceed the amount of funds received. Whereas this is true even of compensatory awards, the difference between a compensatory recovery, designed to compensate for actual losses, and a punitive recovery, which is based on the concept of punishing and deterring the actual wrongdoer, justifies potentially taking taxpayer funds for the former but not for the latter. This is implicit in the reasoning of Fact Concerts. See City of Newport v. Fact Concerts, 453 U.S. 247, 269 (1981) (suggesting that allowing imposition of compensatory remedies against municipality may prompt taxpayers to take action to remove wrongdoer).

196. See Cortes, 766 F. Supp. at 626; Glanz, 750 F. Supp. at 45. This analysis should be distinguished from that in which a court, having decided that punitive damages can be awarded, determines that they are not necessary or appropriate in that particular case. Cf. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) (holding that although punitive damages are presumably available under § 504, they were not justified in that case).
must "be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." Although Congress was silent on the availability of compensatory damages under § 504, such damages are arguably necessary to accomplish the statutory objectives. Punitive damages, on the other hand, are not necessary to "make good the wrong." when plaintiff is already being allowed to seek front pay, back pay, compensatory damages and even reinstatement. There is insufficient reason to imply a punitive damage remedy when Congress has given no indication whatsoever that it intended to authorize such relief. Therefore, this court concludes that punitive damages are not available under § 504.197

This analysis of "necessary" relief is consistent with the Supreme Court's concept of "any appropriate relief" under Franklin.198 One of the Court's concerns in Franklin was that without compensatory damages, the plaintiff would be left "remediless."199 Once the plaintiff is compensated for actual loss, punitive damages are not necessary in order to afford a remedy. Rather, punitive damages are, in effect, a windfall to that particular plaintiff.200 Franklin does not suggest that the Court would approve a rule that goes any farther than assuring adequate compensation for the injured party.

Additionally, there is no indication in the enforcement provisions of Title II that Congress intended to allow punitive damages.201 Although the legislative history of Title II reflects Congressional intent to permit the "full panoply of damages," this must be taken in context. Congress intended Title II to be enforced "like section 504."202 Congress must be presumed to have been aware of the overwhelming agreement among

197. Cortes, 766 F. Supp. at 626 (citations omitted).
198. Franklin, 503 U.S. at 71; see also Terry, supra note 160, at 739 n.103 (noting that whether punitive damages can be recovered under ADA will depend on whether courts find the remedy "appropriate").
199. See Franklin, 503 U.S. at 76. The Court in Franklin reasoned that under Title IX, a statute that prohibits discrimination in education, the traditional equitable remedies of backpay and prospective relief were clearly inadequate. Id. As a student, plaintiff would not be entitled to backpay. Id. Because the teacher who allegedly harassed her was no longer employed by the school, prospective relief such as an injunction, provided the plaintiff with no remedy at all. Id.
200. See Glanz, 750 F. Supp. at 45 (concluding it is unlikely Congress intended § 504 to provide a "windfall" to plaintiffs in the form of punitive damages); see also City of Newport v. Fact Concerts, 453 U.S. 247, 267 (1981) (reasoning that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff.").
202. See supra note 112.
the lower courts that no punitive damages were available under section 504. 203

The only place where Congress expressly addressed punitive damages in conjunction with the ADA is in the damage provisions of the Civil Rights Act of 1991. In that act, Congress modified the rule prohibiting punitive damages, but only in regard to claims brought under Title I of the ADA against non-government defendants. 204 This limitation on punitive damages was apparently considered so unremarkable that Congress felt it only necessary to note it as a parenthetical in the text of the statute. 205

There is one provision in the general provisions of the ADA, applicable to all titles of the act, which might arguably indicate an intention to permit punitive damages, at least in regard to state defendants. 206 This provision makes state liability coextensive with that of other defendants:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State. 207

203. Cf. Fact Concerts, 453 U.S. at 258 (applying an assumption that Congress was familiar with common-law principles in existence at the time that the statute was enacted and intended those principles to apply absent provisions to the contrary). This same reasoning was implicit in Franklin as well. See Franklin, 503 U.S. at 71-72 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)) (reasoning that to determine whether Congress intended to limit presumption in favor of "any appropriate remedy," court must look to state of law at the time Title IX was enacted).

204. 42 U.S.C. § 1981a(b)(1). This section provides that:
[a] complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id.


207. Id. (emphasis added). The language of § 12202 is essentially identical to the Civil Rights Remedies Equalization Act of 1986, 42 U.S.C. § 2000d-7, which the Supreme Court
A literal translation of this language might suggest state government liability for punitive damages under the ADA and the Rehabilitation Act, if non-state defendants would have such liability. As previously discussed, however, the prevailing rule at the time the ADA was passed was that such damages were not available against any defendant, public or private.

There is nothing in the legislative history of this section that suggests Congress intended to do anything more with this provision than abrogate state Eleventh Amendment immunity. The amendment to Title I through the Civil Rights Act of 1991 reinforces this conclusion by its general prohibition of punitive damages against "a government, government agency or political subdivision" without recognizing any distinction between state and local governments. If Congress had intended the abrogation of state immunity under the ADA to be an authorization of punitive damages against state governments, its subsequent amendment of Title I remedies would presumably have reflected such intent.

Beyond that, the rationale that taxpayers are unfairly burdened with punitive damage claims applies with equal force to state defendants. States, like municipalities, would potentially face payment of large punitive damage claims out of funds obtained through its taxing found significant in Franklin. See 42 U.S.C. § 2000d-7(a)(2) (1988); see also supra notes 68-72 and accompanying text. Justice Scalia, in his concurring opinion in Franklin, concluded that Congress implicitly acknowledged that damages are available under Title IX by including in this statute the provision that "remedies (including remedies both at law and in equity) are available for [violations of Title IX] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." Franklin, 503 U.S. at 78 (Scalia, J., concurring) (quoting 42 U.S.C. § 2000d-7(a)(2)).

Section 12202 would not have any effect on municipal liability, because it expressly applies only to states. 42 U.S.C. § 12203 (Supp. IV 1992). The Supreme Court has held that municipalities and other local government entities are not "states" for purposes of Eleventh Amendment analysis. See, e.g., Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (holding local school board is not an arm of the state entitled to Eleventh Amendment immunity).

208. Section 12202 would not have any effect on municipal liability, because it expressly applies only to states. 42 U.S.C. § 12203 (Supp. IV 1992). The Supreme Court has held that municipalities and other local government entities are not "states" for purposes of Eleventh Amendment analysis. See, e.g., Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (holding local school board is not an arm of the state entitled to Eleventh Amendment immunity).

209. See supra notes 189-96 and accompanying text.

210. See H.R. REP. No. 485(II), 101st Cong., 2d Sess., at 138 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 421 (stating only that § 503 (42 U.S.C. § 12202) abrogates State Eleventh Amendment immunity and was included to comply with the standards set by the Supreme Court in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)). So far, courts have considered § 12202 only for the basic proposition that it abrogates state immunity from suit. See Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993) (finding that ADA unequivocally indicates Congressional intent to abrogate state immunity under Eleventh Amendment, without discussion of damage remedies in particular).

powers.\textsuperscript{212} Congress cannot be presumed to have acted in disregard of such longstanding concerns, without having specifically stated its intention to do so.\textsuperscript{213}

3. \textit{Should there be a case-by-case approach to punitive damages, rather than a per se prohibition?}

\textit{Fact Concerts} establishes a per se rule that municipalities are immune from liability for punitive damages, absent some expression of Congressional intent to permit such damages.\textsuperscript{214} Even assuming such intent is not found, the Court's decision does not entirely foreclose the possibility of a case-by-case determination of municipal liability for punitive damages in some limited circumstances. The Court's reasoning suggests it would consider a "compelling reason" for approving such an award.\textsuperscript{215} The majority opinion contains a footnote that suggests one such reason may involve "an extreme situation where the taxpayers are directly responsible for perpetuating an outrageous abuse of constitutional rights."\textsuperscript{216}

There may also be situations in which the nature of the discriminatory act may cause only limited compensable damage.\textsuperscript{217} Without the

\textsuperscript{212} Taxpayers would face the prospect of higher taxes, as well as possible curtailment of offered services, whether the defendant is the state or a local government. \textit{Cf.} City of Newport v. Fact Concerts, 453 U.S. 247, 267 (1981) (reasoning that award of punitive damages against municipality are likely accompanied by a tax increase or reduction in public services); Ferguson v. Joliet Mass Transit Dist., 526 F. Supp. 222, 225 (N.D. Ill. 1981) (rejecting an argument that \textit{Fact Concerts} rule should not apply to a water district which did not have its own taxing power because it received financial support from a local sales tax as well as state funds, which raised the specter of increased taxes and curtailed services).

\textsuperscript{213} \textit{Fact Concerts}, 453 U.S. at 258.

\textsuperscript{214} Id. at 271.

\textsuperscript{215} Id. (concluding that "absent a compelling reason for approving such an award, not present here," the Court would not impose liability for punitive damages on a municipality).

\textsuperscript{216} Id. at 267 n.29. This footnote provides as follows:

It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.

\textit{Id.} Courts which have considered this footnote have consistently concluded that the cases before them did not warrant imposition of punitive damages. \textit{See, e.g.}, Korotki v. Goughan, 597 F. Supp. 1365, 1376 & n.46 (D. Md. 1984) (noting that no court after \textit{Fact Concerts} has found a situation which called for application of footnote 29); \textit{see also} Wade v. Cicero, Illinois, 571 F. Supp. 157, 159 (N.D. Ill. 1983) (suggesting that only a referendum in which voters overwhelmingly mandated an unconstitutional action would be sufficient to meet the taxpayer involvement exception).

\textsuperscript{217} One area in which this may arise is the program accessibility provisions of Title II. \textit{See generally supra} note 16. Conceivably, access might be denied to a government program which does have a significant pecuniary impact on the victim, such as some of the recreational activities sponsored by cities and counties. This assumes that the victim of the discrimination
addition of punitive damages in such cases, it may be argued, there would be little incentive for the individuals involved to change the discriminatory policy or activity. A per se prohibition against awarding punitive damages might, therefore, result in a failure to serve the interests protected by the federal legislation, particularly when such action is taken pursuant to official government policy. 

Thus, it could be argued that a case-by-case determination of the appropriateness of punitive damages should instead be allowed. At least one state supreme court has in recent years adopted such a standard. This standard, as adopted in Texas, requires the plaintiff to meet a two-pronged test for the appropriateness of punitive damages:

As a general rule a municipality may not be liable for exemplary damages; however, if a plaintiff can show that there is intentional, willful, or grossly negligent conduct which shows an entire want of care to his rights and that such conduct can be imputed directly to the governing body of the municipality, exemplary damages may be recovered.

218. Cf. Fact Concerts, 453 U.S. at 273 n.2 (Brennan, J., dissenting) (reasoning that when a violation of federal civil rights law is committed in accordance with official government policy, it is perfectly reasonable to impose punitive damage on the citizens who elected those officials, and are ultimately responsible for them). This scenario also raises questions of municipal liability under 42 U.S.C. § 1983, the full implications of which are beyond the scope of this Article. See Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978) (local governments may be liable under § 1983 when the alleged act is taken in accordance with government policy, practice or custom); see also infra note 232 for a brief discussion of liability of individual government employees or officials under § 1983 for violations of federal discrimination statutes.

219. The type of per se prohibition adopted in Fact Concerts has been criticized by some members of the Court in other contexts. See International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979). In Foust, the Court ruled that unions were immune from punitive damage claims in suits alleging the union’s breach of the duty of fair representation in failing to properly pursue a member’s grievance. Id. at 52. The dissent in Foust criticized this per se rule, finding no prohibition in the law for such damages and concluding that punitive damages in the “exceptional case will serve at least to deter egregious union conduct.” Id. at 60-61 (Brennan, J., concurring in the result); see also Fact Concerts, 453 U.S. at 273 n.2 (Brennan, J., dissenting).

220. In City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex. 1987) the Texas Supreme Court held that punitive, or exemplary, damages could be recovered from a municipality performing proprietary, as opposed to governmental, functions. In reaching its decision, the court in Pike reasoned that while “[i]t is true that only a few cases have recognized that the municipality will be liable [for punitive damages] . . . it seems that many of the results were due not to the law, but rather to the facts.” Id. at 521.

221. Id. at 522. The second prong of this test appears to adopt a standard similar to that adopted by the Supreme Court in Monell for general local government liability under 42 U.S.C. § 1983. See Monell v. Social Servs., 436 U.S. 658, 690-91 (1978) (holding that a local government is not liable under § 1983 unless the alleged action “implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that
This two-pronged test arguably responds to the concerns raised by the Supreme Court in *Fact Concerts*, namely effective deterrence and avoiding unwarranted burdens on taxpayers. Because policy-making officials must be directly linked to the wrongdoing, deterrence occurs through the fear of association to the malfeasance, which presumably carries the threat of not being reelected. Unwarranted burdens on the public would be avoided by the high standard of improper conduct which the plaintiff must show. As the Texas Supreme Court concluded, "By requiring a plaintiff to show both wanton, malicious, or grossly negligent behavior and actual imputation to the city leaders, [this rule] will limit recovery to only those exceedingly few situations where the actions of persons in authority show utter disdain for the protection of the citizens' rights." 

Even this standard, however, does not adequately address concerns about the effect of punitive damage awards on public entities performing body's officers," or is taken pursuant to "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels."). As such, it is broader than the exception to the no punitive damages rule suggested in footnote 29 of *Fact Concerts*, which would require taxpayer participation. See *Fact Concerts*, 453 U.S. at 267 n.29; see also supra note 216 discussing this footnote and the lower courts' interpretations of it.

The Texas Supreme Court did not rely on the Supreme Court's analysis in *Monell*, nor did it refer to footnote 29 in *Fact Concerts*. Rather, the court's standard was synthesized from prior Texas cases, in which the court found a willingness to impose punitive damages if there was a "showing of concurrence in, or ratification of, the acts of the municipal officers by the governing body ...." *Pike*, 727 S.W.2d at 522 (quoting *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 279-80 (Tex. Civ. App. 1975)).

222. See *Strahan*, supra note 188, at 785.

223. Id. It is further suggested that juries presumably composed of taxpayers are arbiters which can invoke punitive damages effectively and with appropriate discretion when deterrence is necessary. Id.

224. *Pike*, 727 S.W.2d at 524. The court in *Pike* further stated that "[t]he proper facts have never arisen in this State, and there is no certainty that they ever will." Id.

The *Pike* standard is also expressly limited to government entities performing proprietary functions, as opposed to governmental functions. See *Pike*, 727 S.W.2d at 519 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.024). A proprietary function is one intended primarily for the advantage and benefit of the inhabitants of the municipal corporation rather than the general public. Id. in Texas, the government undertakings that constitute government functions are specifically enumerated by statute. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1994). The Texas legislature added this statute after the decision of the Texas Supreme Court in *Pike*, to expand the definition of governmental functions in order to severely limit the situations in which the *Pike* rule would apply. See *Strahan*, supra note 188, at 787-88. This raises the question of whether certain government functions subject to coverage under Title II and related statutes would be proper for punitive damages and others not. However, unlike state laws such as that found in Texas, there is no similar "proprietary versus government function" counterpart in Title II or related statutes, which could be used to make such a determination.
This standard would potentially allow a large punitive damage award for a single act of discrimination against a single claimant. In such a case, the service, program, or activity may be rendering a benefit to its intended class, a benefit which is nondiscriminatory on the whole. Nonetheless, funding for that service, program, or activity would be diverted to pay the damage award, thereby threatening the benefit. Clearly, a large compensatory damage award could have the same result, but the sense of justice that is involved in compensating an individual for actual loss tempers the harshness in this context.

Another problem is determining when punishment for the acts of an official are appropriately vested upon the taxpaying public. This

225. The 

226. A recent example of just how large punitive damage awards can be in comparison to the amount of compensatory damages is found in EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993), one of the first cases litigated under Title I of the ADA. In AIC Sec., the jury, in addition to $50,000 in compensatory damages, awarded $250,000 in punitive damages against each of two defendants for the wrongful discharge of a plaintiff who developed terminal brain cancer. Id. at 572. The court found that the total amount of punitive damages, $500,000, was ten times the amount of compensatory damages and clearly excessive. Id. at 579. The court then reduced the amount to $150,000, the total available under the damage caps established in 42 U.S.C. § 1981a(b)(3), and held both defendants jointly and severally liable for this amount. Id. at 579-80. If the case had been litigated under Title II, the damage caps would not have applied.

227. A related issue is that those entities which offer certain services, programs, or activities primarily because they are subsidized by the federal government, in effect, voluntarily assumed federal liability under the Rehabilitation Act, Title VI, or similar statutes. See Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I), 451 U.S. 1, 17 (characterizing legislation enacted pursuant to Congress' spending power to be in the nature of a contract, whose obligations a State may voluntarily and knowingly accept). To some extent, this federal money cushioned the effect of any liability imposed on the entities. See also supra note 72.

With the advent of the ADA and, in particular, Title II, liability is no longer conditional on the receipt of funds. If the entity is a “public entity” as defined in 42 U.S.C. § 12131(1), the entity shoulders this liability, whatever its limits. State court systems are a good example of the type of institution whose necessary services may be significantly affected by the mandates of Title II, without the cushion of federal funding. For two such examples, see supra note 13 discussing the Kroll case, in which the county was required to tear down and rebuild government buildings and find a means to pay for this work or face imposition of a special sales tax by the federal district court, and note 120 discussing the Guice case, in which the Department of Justice has asserted that a state court is potentially liable for a broad range of damages in a claim involving an alleged failure to make a courtroom accessible to an individual in a wheelchair.

228. The Supreme Court in Fact Concerts implicitly recognized that compensatory awards have an impact on municipal resources, but apparently saw this as justified. See City of Newport v. Fact Concerts, 453 U.S. 247, 267 (1981) (suggesting that impact of compensatory awards on fiscal condition of municipality may induce public to vote wrongdoers out of office).
approach raises questions regarding what involvement the taxpaying public must have with the offending official or policy, and whether it is fair to impose punitive sanctions on that portion of the public which voted against the official or policy or, for that matter, failed to vote at all.\footnote{229}

Even the Texas Supreme Court reflected some skepticism that, under its case-by-case approach, an appropriate case for imposing punitive damages on a municipality would ever arise.\footnote{230}

Rather than focusing on punitive damage liability of a government entity, a better approach may be to impose this liability on the individual wrongdoer. The ability to impose liability on the individual wrongdoer was an important factor in the Supreme Court's analysis in \textit{Fact Concerts}.\footnote{231} Un Fortunately, the parameters of any personal liability of the individual wrongdoer for violation of Title II, or other related federal civil rights laws, is beyond the scope of this Article.\footnote{232} In summary

\footnote{229. Cf. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 670 F.2d 1 (1st Cir. 1982), cert. denied, 457 U.S. 1120 (1982) (questioning the feasibility of creating some type of "taxpayer involvement" exception to the \textit{Fact Concerts} rule). The First Circuit's reasoning in \textit{Heritage Homes}, a case involving claims against a municipal water district alleged to have committed racial discrimination in its decision to exclude a housing development from the district, illustrates the problems inherent in allowing a case-by-case evaluation of punitive damage claims against a municipality. \textit{See Heritage Homes}, 670 F.2d at 2. The court reasoned that while there was overwhelming evidence of racial motivations in the discussions prior to the vote, only a small number of voters attended the meeting. \textit{Id.} The court further reasoned that if punitive damages could be recovered, "[t]he actions of a small claque of voters would burden several thousand non-participants, many of whom presumably were unaware of the entire controversy." \textit{Id.} The court concluded that a "compelling showing" was required that those who did not attend the meeting knew there was a serious threat of the discriminatory actions, which would compel them to either vote or stay away at their peril. \textit{Id.} The court also concluded that there was little chance that the small number of voters who allegedly acted in a discriminatory manner would be deterred by the knowledge that several thousand other taxpayers would be sharing any punitive damage award imposed on the municipality for their actions. \textit{Id.}; \textit{see also} Wade v. Cicero, Illinois, 571 F. Supp. 157, 159 (N.D. Ill. 1983) (suggesting that only a referendum in which the voters overwhelmingly mandated an unconstitutional action would be sufficient to meet the taxpayer involvement exception).}

\footnote{230. City of Gladewater v. Pike, 727 S.W.2d 514, 524 (Tex. 1987).}

\footnote{231. \textit{Fact Concerts}, 453 U.S. at 269-70 (observing that "[b]y allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, [§ 1983] directly advances the public's interest in preventing repeated constitutional deprivations"); \textit{cf.} Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 785-86 (N.D. Ill. 1993) (expressing concern that "if [supervisory employees] who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever").}

\footnote{232. Title II itself most likely does not permit individual liability on the part of the employees which commit the discriminatory acts. The definition of a "public entity" under Title II contains no reference that would encompass individual employees. \textit{See} 42 U.S.C. § 12132 (Supp. IV 1992) (defining "public entity" to include only governmental units, agencies, and instrumentalities); \textit{cf. id.} § 12111(2) (defining "employer" under Title I to include agents of the employer); \textit{id.} § 2000e(b) (1988) (defining "employer" under Title VII}
then, it is unlikely that punitive damage liability will be imposed on governmental units unless Congress takes affirmative steps to do so.

IV. SIMILAR CONDUCT, SIMILAR SUBSTANTIVE RULES, DIFFERENT RECOVERY

Congress has made some attempt in recent years to equalize the remedies available for similar acts of discrimination. This was, in fact, the impetus behind the Civil Rights Act of 1991. Because a compromise led to the inclusion of the damages caps in that act, however, Congress' actions were less than successful. The ADA is an additional example of the disparity that still exists in remedies afforded for intentional discrimination. In the case of the ADA, this disparity to also include agents of employer); Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986) (finding that supervisory employee can be held personally liable under Title VII if supervisory employee participated in the decision-making process that formed the basis of the discrimination).

There may be an alternate route for finding individuals liable for Title II violations: namely, via an action under 42 U.S.C. § 1983. The Supreme Court has held that violations of certain federal statutory rights are actionable under § 1983. Maine v. Thiboutot, 448 U.S. 1 (1980). The Court has also determined that the individuals committing these acts may be held liable for both compensatory and punitive damages. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974) (finding that individual defendant could properly be held liable for monetary damages for violation of § 1983); Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that individual defendant in § 1983 claim may be liable for punitive damages when that party's conduct is shown to be motivated by evil motive or intent, or involves reckless or callous indifference to the federally protected rights of others). This raises a number of other issues, including the impact of good faith immunity, and whether the remedial devices in Title II are sufficiently comprehensive so as to evidence Congress' intent to preclude suits under § 1983. See Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) (holding that Title II did not demonstrate an intent to preclude enforcement under § 1983). A more thorough consideration of these issues is beyond the scope of this Article and will await further development elsewhere.


234. The original intent of the Civil Rights Act of 1991 and the compromise which led to the inclusion of the damages caps is discussed in more detail infra notes 253-54 and accompanying text. For a discussion of the damages caps themselves, see supra notes 48-50 and accompanying text.

235. This disparity would have been avoided, but for another compromise. The original version of Title I contained an enforcement provision which would have permitted a broad scope of remedies:

The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9), and the remedies and procedures available under section 1981 of the Revised Statutes (42 U.S.C. 1981) shall be available, with respect to any individual who believes that he or she is being or about to be subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 204, concerning employment.
exists for exactly the same type of discrimination, subject to the same or similar substantive rules, within the same federal act.

As the foregoing discussion establishes, remedies under Title II of the ADA vary from those available under Title I and Title III. If each title addressed a dissimilar type of discrimination, this disparity might be justified. Unfortunately, this is not the case. In regard to Title I and Title II in particular, the same act of intentional discrimination, subject to identical substantive rules, may result in one party being made whole and another party not.

Because Title II incorporates the substantive rules and regulations of Title I for claims of employment discrimination based upon disability, an act of employment discrimination which violates Title II will necessarily also violate Title I. Despite this fact, the amount a particular plaintiff can recover under these two titles may not necessarily be the same because the two titles look in different directions to find their remedies. The following hypothetical illustrates this anomaly:

Jane is a clerk in a county court in the State of New Sweden. Jane also has cerebral palsy. For a number of years, she clerked for a particular judge, who has now retired. The two of them had no difficulty working together, and Jane was able to do her job with some limited accommodation.

After that judge retired, Jane was assigned to Judge Smith. Judge Smith did not prove willing to work with Jane, and often expressed his displeasure out loud and in the presence of others. For instance, on

H.R. 2273, 101st Cong., § 205 (1990). Under § 1981 standards, a claimant would have been entitled to the full range of compensatory relief. See, e.g., Muldrew v. Anheuser-Busch, 728 F.2d 989, 992-93 (8th Cir. 1984) (upholding award to plaintiff that included compensatory relief for out-of-pocket losses, and emotional distress and mental suffering).

The original enforcement provision was changed in order to obtain passage of the ADA, to include only those equitable remedies allowed at that time under Title VII. See H.R. REP. No. 485(III), 101st Cong., 2d Sess., at 88 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 506 (outlining negotiations between Senate and Bush Administration which led to compromise on damages in Title I in exchange for broadening the public accommodation provisions under Title III of the ADA); see also 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5 which provides for equitable remedies only). When this version of the statute was passed, Congress was already considering new civil rights legislation to amend the enforcement provisions of Title VII to allow compensatory relief, which the supporters of the original version of Title I apparently believed would accomplish their goal by providing for broader remedies. See S. 2104, 101st Cong., 2d Sess. (1990) (Civil Rights Act of 1990); H.R. 4000, 101st Cong., 2d Sess. (1990) (same); see also H.R. REP. No. 485(III), 101st Cong., 2d Sess., at 89 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 507 (stating objection to proposed attempt to broaden Title I remedies through amendment of Title VII and urging amendment of the ADA to "de-link" Title I remedies from Title VII remedies so as to clearly retain limited equitable relief).

236. For a discussion of Title I remedies, see supra notes 20-21 and accompanying text. For a discussion of Title III remedies, see supra note 26.

237. See supra note 17.
more than one occasion he told Jane that her physical condition distracted courtroom participants and prevented others from getting their own work done. On other occasions, he made extremely disparaging comments about her physical appearance, including one time while they were in the middle of a court session. Despite Jane's requests that the judge stop this behavior, he persisted. The judge also filed evaluations highly critical of her work, and Jane was eventually dismissed from her job. She has been unable to find new employment, in large part because of the negative outcome of her last job.

Jane sues the county for violation of Titles I and II of the ADA. Her case is tried, and a verdict is returned which includes compensatory damages in the amount of $500,000, not including backpay and pecuniary losses to the date of trial.

Under Title II, Jane is entitled to recover the full $500,000. Title II permits recovery of compensatory damages, which in this case should encompass such things as loss of future wages and benefits, any impairment to her earning capacity, mental anguish and humiliation, damage to reputation, and any out-of-pocket expenses, past or future.

Under Title I, however, Jane's recovery is limited. As an initial matter, the county would be subject to liability under Title I only if it has fifteen or more employees. This is probably not a problem when a county is the public entity in question, but it may be an issue with smaller political subdivisions in rural areas.

Assuming this threshold is met, Jane could at most recover $300,000 of the compensatory damages she was awarded because Title I is subject to the $300,000 liability limit set forth in the Civil Rights Act of 1991. Furthermore, the $300,000 cap only applies if the county has

238. For a discussion regarding why loss of wages should be characterized as a component of compensatory damages under Title II, rather than equitable relief, see supra notes 147-56 and accompanying text.

239. Jane should also be entitled to backpay (whether characterized as equitable or compensatory relief), reinstatement, and attorney's fees, but not punitive damages. See supra part III.

240. 42 U.S.C. § 12111(5) (Supp. IV 1992). If the claim arose before the effective date of Title I, July 26, 1992, there would be no liability under Title I at all. See id. If the claim arose after that date but before July 26, 1992, the threshold number of employees would be twenty-five. See id.; see also supra note 17.

241. There would be no liability under Title I, but Title II has no size limitation. In contrast, if this scenario had played out in a private office, and there were fewer than fifteen employees, there would be no federal liability for discrimination based on disability unless this business happened to be a recipient of federal financial assistance.

242. Because the only pecuniary losses to which the caps apply are future pecuniary losses, the caps would not limit recovery of out-of-pocket losses such as medical or counselling expenses incurred prior to judgment. See 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992). The caps also do not limit other forms of equitable relief otherwise authorized by 42 U.S.C. § 2000e-
500 or more employees.\textsuperscript{243} If the county has fewer employees, the caps drop in stages, to a low of $50,000 for an employer with more that fourteen but fewer than 101 employees.\textsuperscript{244}

In any situation involving a public entity, the plaintiff will likely choose to pursue the claim under Title II because the substantive rules are the same but recovery is not capped. If the defendant is not a public entity, however, the ADA plaintiff does not have this choice.\textsuperscript{245} If Jane had sued a private company for the exact same acts of discrimination, her recovery would be limited by the damage caps. In fact, her recovery would likely be subject to the lowest damage tier of $50,000 because the vast majority of private business in the United States have 100 or fewer employees.\textsuperscript{246}

\textbf{A. Victims of Intentional Discrimination Stand in the Same Shoes}

Differing remedies under the various civil rights statutes are not new. For example, courts have held that there is no inherent problem with awarding broader remedies against an individual defendant in actions brought under other federal civil rights statutes, such as sections 1981 and 1983, than would be available for the same violation under Title VII.\textsuperscript{247} However, other courts have stated that civil rights statutes

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\textsuperscript{243} 42 U.S.C. \textsection 1981a(b)(3)(D).
\textsuperscript{244} These caps would also limit recovery if Jane sued a private employer and was awarded punitive damages. \textit{See} EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571, 577 (N.D. Ill. 1993) (holding that amount of punitive damages must be reduced so that, when added to amount of compensatory damages, the total award does not exceed the appropriate cap for the number of employees employed by the defendant).
\textsuperscript{245} If the entity is a recipient of federal financial assistance, the plaintiff could pursue a claim under the Rehabilitation Act, and have the same range of remedies as the Title II plaintiff. These remedies would not be available in claims against "the 'mainstream of society,'" which is likely to be involved in disability discrimination claims that fall under Title I of the ADA. \textit{Cf.} H.R. REP. No. 485(III), 101st Cong., 2d Sess., at 90 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. at 508 (asserting that although federal agencies and recipients of federal funds have been covered by laws prohibiting disability discrimination since 1973, "the 'mainstream of society' has had no such experience").
\textsuperscript{246} See 137 CONG. REC. S15,472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (observing that ninety-eight percent of all businesses fall within the lowest damage tier in the Civil Rights Act of 1991); \textit{see also} Office of Advocacy, United States Small Business Administration, \textit{Handbook of Small Business Data} 27 (1988) (table listing non-farm enterprises by employment size, listing employers with less than 100 employees as representing ninety-eight to ninety-nine percent of all businesses surveyed).
\textsuperscript{247} \textit{See} Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975) (reasoning in dicta that an individual who brings claim under Title VII is not deprived of other remedies he possesses and is not limited to Title VII relief); \textit{see also} Stallworth v. Shuler, 777 F.2d
\end{small}
protecting similar interests should provide similar remedies.\textsuperscript{248} For example, this theme is found in the decisions of those courts which, prior to \textit{Franklin}, determined the scope of remedies under section 504 and Title VI by analogizing to the remedies available under Title VII.\textsuperscript{249}

When it passed the ADA, Congress clearly indicated its intent that the act be construed in a manner consistent with other existing discrimination laws.\textsuperscript{250} Although there are some substantive differences between Title II and other anti-discrimination statutes, these statutes are modeled after each other\textsuperscript{251} and frequently overlap in the categories of

1431, 1435 (11th Cir. 1985) (approving award of compensatory damages for emotional distress and mental suffering in intentional racial discrimination claim under 42 U.S.C. §§ 1981 and 1983, in addition to the award of backpay under joined Title VII claim); Harris v. Richards Mfg., 675 F.2d 811, 814 (6th Cir. 1982) (concluding that private plaintiff can bring action under both Title VII and 42 U.S.C. § 1981 for racial discrimination and is entitled to equitable relief under Title VII and equitable relief, compensatory and punitive damages under § 1981); Bradshaw v. Zoological Soc'y of San Diego, 569 F.2d 1066, 1068 (9th Cir. 1978) (holding plaintiff could recover punitive damages in racial discrimination claim brought under 42 U.S.C. § 1981 despite fact claim was joined with Title VII claim in which such damages were not available). Compensatory and punitive damages may now be awarded under Title VII for intentional discrimination, except punitive damages cannot be awarded against government defendants. See 42 U.S.C. §§ 1981a(a)(1), (b)(1) (Supp. IV 1992).


249. \textit{See} Eastman, 939 F.2d at 208; \\

250. \textit{See} supra notes 6-18, 56 and accompanying text.
persons covered and conduct prohibited. 252 The victims of intentional discrimination under these statutes stand in the same shoes—they have been intentionally deprived of a federally protected right by a party acting with a discriminatory motive. 253

When Congress was considering the Civil Rights Act of 1991, the House initially justified the addition of compensatory and punitive damage remedies under Title VII by outlining how intentional gender and religious discrimination have the same manifestations and harms as racial discrimination, which was already subject to these broad remedies under 42 U.S.C. § 1981:

Gender and religious discrimination may have different cultural or historic origins than racial discrimination. However, it does not follow that Congress should differentiate among them for purposes of the remedial scheme provided by federal law for intentional discrimination. The manifestations of these various forms of intentional employment discrimination are the same: loss of employment opportunities; disparities in wages, employee benefits, and other forms of compensation; imposition of unequal working conditions; and harassment. Moreover, the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries. 254

252. For a discussion of the overlap between Title VI and Title VII, both of which prohibit racial discrimination, see supra note 90 and accompanying text. Some other examples include the ADA and the Rehabilitation Act, both of which prohibit disability discrimination, as discussed in the first part of this Article, and Title VII and Title IX, both of which prohibit sexual discrimination, including sexual harassment. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing sexual harassment as form of sexual discrimination under Title VII); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (recognizing sexual harassment as form of sexual discrimination under Title IX and applying the standard set out in Meritor).

253. The basic theme that runs through the jurisprudence of intentional discrimination is that the defendant has treated individuals less favorably because of a characteristic or characteristics protected by federal law, based on a discriminatory motive. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (describing general theory of disparate treatment discrimination in the context of a Title VII claim); Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (Former 5th Cir. 1981) (noting that "Title VII jurisprudence is . . . for the most part applicable to intentional social-bias discrimination against handicapped persons"); cf. Franklin, 503 U.S. at 75 (reasoning that the duty not to intentionally discriminate on the basis of sex, specifically the duty not to sexually harass, is "unquestionable" under Title IX, by analogy to Title VII standards).

254. H.R. REP. No. 40(1), 102d cong., 1st Sess., at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603. The report begins this discussion by stating that there is "an unfair preference in federal civil rights law" because current law permits unlimited compensatory and
Despite the recognition that victims of intentional discrimination suffer similar harms, the legislation that was eventually passed by Congress and signed by the President added damages caps for not only gender and religious discrimination, but for disability discrimination under Title I as well.\footnote{255} In doing so, the Civil Rights Act not only perpetuated the preferential remedies for racial discrimination as opposed to gender and religious discrimination, but also created the disparate remedies between Title I and Title II for the exact same type of discrimination.\footnote{256}

\subsubsection*{B. Status As a Public Entity Should Not Support the Disparity in Amount Which Can Be Recovered for Intentional Discrimination}

The question then becomes whether there is a justification for treating entities differently under each title of the ADA. In some contexts, the status of the defendant might justify a different recovery, even if the substantive rules are similar. For example, in comparing Titles II and III, there is arguably a greater public interest in making sure that government entities operate in a manner accessible to all citizens,

punitive damages for racial discrimination but only equitable relief for gender and religious discrimination. \textit{Id.} The report further states that

Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well. Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the same for purposes of making victims whole, encouraging private enforcement, and deterring future violations of federal law. \textit{Id.}

\footnote{255. See 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992). The initial version of the 1991 legislation would have amended 42 U.S.C. § 2000e-5(g) directly to provide that compensatory and punitive damages may be awarded without limitations based on the size of the employer. H.R. 1, 102d Cong., 1st Sess., § 206 (1991). The Bush Administration proposed an alternative version of the bill which included damage caps in the amount of $150,000 for all claims of intentional discrimination under Title VII and Title I of the ADA. S. 611, 102d Cong., 1st Sess., § 8 (1991). The version eventually passed, S. 1745, represented a compromise whereby the damages provisions were added as a separate subsection and contained caps on the amount of damages based on the number of employees of the defendant entity, up to a maximum amount of $300,000. See 42 U.S.C. § 1981a(b)(3); see also 137 CONG. REC. S15,472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (outlining the compromise on the damages provisions). Because the legislative reports are based on H.R. 1, they reflect the discussion of the need to equalize damages but do not explain how this goal is accomplished by the inclusion of damage caps. \textit{See, e.g.}, H.R. REP. No. 40(I), supra note 254. For more information on the compromise process that led to the final version of the act, see Linda Urbanik, Comment, \textit{Executive Veto, Compromise, and Judicial ConfUsion: The 1991 Civil Rights Act—Does It Apply Retroactively?}, 24 LOY. U. CHI. L.J. 109 (1992).

256. A similar disparity exists between Title II and Title III remedies, despite their substantive overlap. For a brief discussion of this overlap, see \textit{supra} note 16.}
which would justify the fact that Title II allows compensatory damages in a private cause of action but Title III does not.

Even that rationale, however, fails to be persuasive. The types of entities covered by Title III are largely similar to public entities in the general public importance of the services they offer. For example, the places of public accommodation covered by Title III, such as establishments serving food and drink, places of public gathering, hospitals, shopping centers, museums, and private schools, are appropriately considered "quasi-public entities" because the services they provide are used and relied upon by a broad segment of the community. The public interest in ensuring operation of these entities in a manner accessible to all citizens is certainly strong.

In regard to Title I, the argument runs in reverse. Public employment is not something of such broad public concern that it warrants allowing broad remedies against a public entity but not private employers. The general public has at least as great an interest in ensuring equal treatment in private employment as in public employment, if not greater, given the number of people employed in the private sector. Furthermore, both groups of employees experience the same manifestations of harm which Congress recognized are suffered by victims of intentional employment discrimination.

The only difference between these entities is that one kind is supported by taxpayer funds and the other kind is not. However, the distinction of taxpayer funding, if anything, calls for restraint in the exposure to damage remedies. Despite the Supreme Court's view that public entities have "unlimited taxing power," the reality is that these entities regularly face funding cutbacks and attempts to increase tax revenues to fund even basic services are met with strong protest.

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257. See supra note 26 regarding the remedial provisions of Title III. A similar argument might be made that this public interest justifies limiting remedies in suits against employers subject to jurisdiction only under Title I, because they are neither public entities nor recipients of federal financial assistance.

258. Of course, to the extent that these public accommodations receive federal financial assistance, they would be subject to the Rehabilitation Act, which requires that programs, services, and activities be accessible to individuals with disabilities. See 29 U.S.C. § 794. This creates another situation where the same conduct is subject to similar substantive rules, but differing remedies. See Mayberry v. von Valtier, 843 F. Supp. 1160 (S.D. Mich. 1994) (denying a claim for monetary damages under Title III in private cause of action for failure to meet accessibility requirements, but permitting same claim under § 504).

259. See supra note 254 and accompanying text.

260. For a discussion of reasons for restraint in permitting remedies against public entities, see supra notes 225-30 and accompanying text discussing the difficulties inherent in awarding punitive damages against public entities on a case-by-case basis.

What is perhaps most troubling about this anomaly is that nothing in the legislative record of the ADA or in the Civil Rights Act of 1991 suggests that Congress recognized or considered this difference. The original version of Title I would have permitted uncapped compensatory and punitive damages, similar to those available for racial discrimination under 42 U.S.C. section 1981. This would have resulted in similar remedies under Titles I and II. However, when this provision presented a roadblock to passage of the ADA, Congress compromised by deferring to Title VII remedies.

This compromise was fueled in part by the fact that Congress was already considering a new Civil Rights Act which would also have equated the remedies available under Title VII with those available under 42 U.S.C. section 1981. Unfortunately, this also ran into roadblocks, which ultimately led Congress to agree to the damage caps. There is no evidence that during this process Congress revisited Title II and considered the fact that it was creating two different remedial standards for disability discrimination and employment discrimination, based on disability in particular. As a result, rather than fulfilling its goal of equalizing remedies for acts of discrimination which result in similar harms, Congress only added to the patchwork remedial scheme.

To some limited extent, consistency in remedies for intentional discrimination can be accomplished by following Congress’ directive to interpret Title II consistent with section 504, which is in turn interpreted consistent with Titles VI and IX. However, this only solves the problem among those three statutes. It does not resolve the disparity that exists for claims of disability discrimination within the ADA.

One potential solution to this convoluted situation would be to pass new legislation lifting the caps on damages established by the Civil Rights

262. See supra note 234.
263. Id.
265. See supra note 255.
266. The same is true for the disparity created with Title III. The entire focus of the ADA debate appears to have been on the effect the new legislation would have on Title I. See, e.g., 137 CONG. REC. S14,589 (daily ed. Oct. 31, 1991) (statement of Sen. Kennedy) (outlining Title I provisions affected by Civil Rights Act of 1991).
267. See 42 U.S.C. § 12134 (Supp. IV 1992) (directing that regulations adopted under Title II be consistent with regulations adopted under Rehabilitation Act); id. § 12201 (directing that construction of the ADA be consistent with and not be construed to apply any lesser standards than applicable under the Rehabilitation Act or any other state or federal law providing “greater or equal protection for the rights of individuals with disabilities.”).
Act of 1991. Such legislation has, in fact, been introduced in Congress, the first versions of which were introduced soon after passage of the Civil Rights Act in 1991.\textsuperscript{268} Unfortunately, this proposed legislation, and the subsequent versions which were re-introduced in the current session of Congress and were still pending at the time this Article was prepared, have failed to make significant headway.\textsuperscript{269}

Even if this legislation is passed, however, it would only strike the language in 42 U.S.C. section 1981a which establishes the damages caps for employment discrimination claims.\textsuperscript{270} Such an approach simply lays the groundwork for future confusion because it neglects those claims that do not arise out of the employment relationship.

In order for this legislation to be entirely effective, it must expressly provide that in any cause of action for intentional discrimination based upon violation of a federal anti-discrimination statute, “any appropriate relief” may be awarded. “Any appropriate relief” would include, but not be limited to, compensatory damages and equitable remedies.\textsuperscript{271} The legislation should further specifically provide that it applies to all current and future federal anti-discrimination statutes which provide either an express or implied cause of action for intentional discrimination. Only if Congress has specifically provided otherwise in the existing legislation or specifically spells out the available remedies in any subsequently enacted legislation would this rule not apply.

This would, however, not resolve the disparity between Title II and Title III. Congress should revisit this area and adopt conforming standards. Intentional discrimination under Title III should be treated in


\textsuperscript{271} Punitive damages should be limited, however, to parties other than the federal, state, or local governments, for reasons set out in part III of this Article.
the same way as intentional discrimination under any other disability discrimination law, in order to provide appropriate compensation.\textsuperscript{272}

V. CONCLUSION

The prohibition of discrimination based on disability under Title II of the Americans with Disabilities Act should ultimately reach most of the day-to-day activities of state and local governments in this country. Along with this broad prohibition comes a broad range of remedies for victims of intentional discrimination. The overriding principle is that victims of intentional discrimination should be fully compensated for the losses they sustain. Although the enforcement provisions of Title II are ambiguous on the surface, the legislative history combined with the Supreme Court’s recent affirmation of the expansive remedial powers of federal courts\textsuperscript{273} should be interpreted to provide victims of intentional discrimination with the right to the full range of compensatory and equitable relief.

As a result, Title II provides the most expansive remedies of any of the three substantive titles of the ADA. Due to unequal remedies under each of those titles, Congress has perpetuated unequal treatment of acts of discrimination which have similar manifestations and harms. This is not only inequitable for the victims of discrimination, but it also places an unequal burden on the entities ultimately charged with implementing the ADA through compliance with its mandates. The “any appropriate relief” standard which is applicable under Title II should at the very least be applied with consistency under each of the titles of the ADA. Despite the act’s laudable goals, until Congress takes the final step of bringing all of the disparate remedial standards for intentional discrimination into conformity with one another, the ADA will stand as a prime example of

\textsuperscript{272} Cf. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76 (1992) (distinguishing unintentional and intentional discrimination and the remedies available for each in part on the grounds that entities “unquestionably” have notice of their duty not to intentionally discriminate). Even the smallest of businesses have been subject to Title III enforcement since at least January, 1993. See 28 C.F.R. § 36.508 (1993) (setting out the effective dates of Title III and provisions for delaying enforcement of that title for businesses with fewer than twenty-five employees and less than $1,000,000 in gross receipts until January 26, 1992, and for businesses with fewer than ten employees and less than $500,000 in receipts until January 26, 1993). All businesses have, therefore, had time to know their obligations under Title III. There are already substantive safeguards built into Title III to address the needs of small businesses. See Burgdorf, supra note 16, at 577-80 (discussing substantive standards such as undue burden which are deferential to the needs of small businesses). Providing a consistent right to compensation to those who can prove intentional failure to comply with even these deferential standards would not be an unreasonable burden.

\textsuperscript{273} See Franklin, 503 U.S. at 75-76.
the consequences of Congress' patchwork approach to the protection of victims of discrimination.