

**When Access to the Benefits of
Public Services Is Handicapped:
An Analysis of the Seventh Circuit’s Decision in
Wisconsin Community Service v. City of Milwaukee
and Its Implications for Disabled Americans**

“Whenever there is a conflict between human rights and
property rights, human rights must prevail.”

—Abraham Lincoln

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I. Introduction	434
II. Overview of the Case	437
A. Factual and Procedural Background	437
B. The District Court’s Ruling.....	438
C. Judge Easterbrook’s Panel Decision	440
D. Judge Wood’s Dissent.....	442
III. Legislative History.....	443
A. Section 504.....	443
B. Title II of the ADA.....	445
IV. Common Law Analysis	447
A. Supreme Court Decisions Imply that There Is a Duty of Reasonable Accommodation in Title II of the ADA.....	448

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B. Other Courts Have Also Recognized that Title II of the ADA Includes the Failure to Reasonably Accommodate as a Theory of Recovery	449
C. Seventh Circuit Case Law	451
D. Critique of Judge Easterbrook's Reasoning	453
V. Conclusion	455

I. INTRODUCTION

The problem cannot be overstated. An estimated 19.4% of non-institutionalized civilians in the United States, or 48.9 million people, have a disability.¹ Almost half of these people, an estimated 24.1 million Americans, have a severe disability.² Of all non-institutionalized persons age fifteen and over in the United States, 17.5% (roughly 34.2 million people) are limited in physical functions.³ These limitations include the ability to walk up a flight of stairs, hear what is said in normal conversation, see words or letters in ordinary newsprint, or get in and out of bed.⁴

In addition, approximately 28.1% of Americans, or 51.3 million people, suffer from a diagnosable mental disorder.⁵ An estimated 2.2 million American adults suffer from schizophrenia.⁶ According to the National Institute of Mental Health, 90% of people who commit suicide have a diagnosable mental disorder.⁷ An estimated 284,000 inmates are identified as having a mental illness, which represents about 16% of the inmate populations of state and local jails.⁸ Lastly, four of the ten leading causes of disability in the United States—major depression,

¹ National Institute on Disability and Rehabilitation Research, *Access to Disability Data: Chartbook on Disability in the U.S.*, http://www.infouse.com/disabilitydata/disability/1_1.php (last visited Mar. 30, 2006).

² *Id.*

³ National Institute on Disability and Rehabilitation Research, *Access to Disability Data: Chartbook on Disability in the U.S.*, http://www.infouse.com/disabilitydata/disability/1_2.php (last visited Mar. 30, 2006).

⁴ *Id.*

⁵ National Institute on Disability and Rehabilitation Research, *Access to Disability Data: Chartbook on Disability in the U.S.*, http://www.infouse.com/disabilitydata/disability/1_5.php (last visited Mar. 30, 2006).

⁶ See National Institute of Mental Health, *Mental Disorders in America*, <http://www.intelihealth.com/IH/ihIH/WSIHW000/8271/8849.html> (last visited Mar. 30, 2006).

⁷ *Id.*

⁸ See *Mental Illness and the Criminal Justice System*, http://www.geocities.com/stargazers_here/mental_illness.html?200528 (last visited Mar. 30, 2006).

bipolar disorder, schizophrenia, and obsessive-compulsive disorder—are mental illnesses.⁹

By 1990, Congress had come to recognize that existing law did not deal with this issue adequately. Thus, Congress passed the Americans with Disabilities Act (“ADA”)¹⁰ to correct the “discrimination against individuals with disabilities [that] persists in such critical areas as . . . institutionalization, health services . . . and access to public services.”¹¹ In conjunction with Section 504 of the Rehabilitation Act and the Fair Housing Amendments Act, Congress enacted Title II of the ADA to facilitate access to the benefits of public services, programs or activities for disabled, including mentally ill, Americans who qualify for such services.

The passage of the ADA was widely lauded. Many commentators saw it as an “emancipation proclamation” for people with disabilities.¹² Since its passage, however, courts have limited the scope of the ADA. For example, Katie Eyer writes that in *University of Alabama v. Garrett*,¹³ the Supreme Court found that Title I of the ADA did not validly abrogate the sovereign immunity of the states.¹⁴ The Court upheld Title II of the ADA three years later, in *Tennessee v. Lane*.¹⁵ However, it did so on an as-applied basis.¹⁶ While favorable to

⁹ National Institute of Mental Health, *supra* note 6.

¹⁰ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213).

¹¹ 42 U.S.C. § 12101(a)(3) (2000); *see also* *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (stating that “[i]n the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them ‘inadequate to address the pervasive problems of discrimination that people with disabilities are facing.’”) (citation omitted). An example of such discrimination can be found in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the constitutionality of state-imposed sterilization of the disabled). Justice Holmes expressed the views of society at that time when he wrote that it would be “better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Id.*

¹² Katie Eyer, Note, *Rehabilitation Act Redux*, 23 YALE L. & POL’Y REV. 271, 271 (2005) (quoting Sen. Edward Kennedy).

¹³ 531 U.S. 356, 360 (2001).

¹⁴ Eyer, *supra* note 12, at 271.

¹⁵ 541 U.S. at 533-34. This case has sparked widespread commentary. *See, e.g.*, Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005); Eyer, *supra* note 12; David J. Langeland, Note, *Misapplication of Precedent: The United States Supreme Court Ignores the Overbreadth of the ADA by Abrogating State Sovereignty in Tennessee v. Lane*, 38 CREIGHTON L. REV. 1065 (2005); Aaron Ponzo, Note, *Title II of the Americans with Disabilities Act Is a Valid Exercise of Congress’ Power to Abrogate State Sovereign Immunity: Tennessee v. Lane*, 43 DUQ. L. REV. 317 (2005).

¹⁶ Eyer, *supra* note 12, at 271.

individual litigants, *Lane's* approach allows for the possibility that some applications of Title II will be subject to a successful sovereign immunity defense.¹⁷

Most recently, the United States Court of Appeals for the Seventh Circuit issued a potentially devastating opinion to disabled Americans. In *Wisconsin Community Service, Inc. v. City of Milwaukee*, Judge Easterbrook ruled that a disabled person seeking "reasonable accommodation" does not have a cognizable cause of action under Section 504 of the Rehabilitation Act or Title II of the ADA.¹⁸ The Seventh Circuit granted Plaintiffs' petition for rehearing *en banc* and the full court will determine whether Title II of the ADA includes a right to reasonable accommodation.¹⁹

If the *en banc* court upholds Judge Easterbrook's decision, the implications will be far reaching. In order to recover for a public entity's discrimination in the provision of public services, programs, or activities, plaintiffs bringing a claim under Title II of the ADA will be forced to argue one of two theories. Plaintiffs can argue intentional discrimination, which occurs when a public entity intentionally denies a public service or benefit on the basis of disability, or disparate impact, which occurs when a public entity applies neutral rules or regulations in a manner that adversely affects the disabled differently from the non-disabled. Simply put, the disabled will have no recourse for a public entity's failure to accommodate their special needs. Thus, for example, HIV-positive patients will have no recourse if they cannot take advantage of a city's AIDS program because the city failed to put in place certain features they need for access.²⁰ Moreover, a city would be under no duty to exempt a group of wheelchair-bound people from its zoning rules so that those people could live together in a group home.²¹ This outcome would deal a devastating blow to disabled people's quality of life.

This article reviews Judge Easterbrook's decision and argues that it is contrary to established law. We begin by outlining the overview of the case, including the factual background, the district court's ruling, Judge Easterbrook's decision, and Judge Wood's dissenting opinion. Next, we explain the legislative history behind Congress's enactment of

¹⁷ *Id.*

¹⁸ 413 F.3d 642, 648 (7th Cir. 2005), *vacated, reh'g granted en banc*, No. 04-1966, 2005 U.S. App. LEXIS 19033 (7th Cir. Aug. 31, 2005).

¹⁹ *Id.*

²⁰ *See* *Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425 (E.D.N.Y. 2000).

²¹ *See, e.g.,* *Dr. Gertrude A. Barber Ctr., Inc., v. Peters Twp.*, 273 F. Supp. 2d 643 (W.D. Pa. 2003).

Section 504 of the Rehabilitation Act and Title II of the ADA. Part IV of this article analyzes Judge Easterbrook's decision in light of the legislative history and case law from the Supreme Court, the Seventh Circuit, and other circuits that have considered whether Title II recognizes a duty to reasonably accommodate qualified disabled persons. Finally, we conclude in Part V that Judge Easterbrook's opinion is contrary to established law and urge the Seventh Circuit *en banc* to overturn the *Wisconsin Community Service* decision.

II. OVERVIEW OF THE CASE

A. Factual and Procedural Background

The story is typical. Wisconsin Community Service ("WCS") is a private, non-profit organization that operates an outpatient mental health clinic in the City of Milwaukee (the "City").²² Without WCS, many of these patients would not receive the necessary health services. The vast majority of WCS's 400 patients are disenfranchised – currently in or just released from the criminal justice system and suffering from mental illness and/or drug and alcohol problems.²³ The clinic provides, among other things, "psychiatric treatment, counseling, medication monitoring, financial monitoring, housing assistance, employment assistance, grocery shopping and transportation services" to its clients.²⁴ Most of WCS's clients live in the area where both the present and proposed facilities are located.²⁵ In 1998, WCS decided to relocate to a larger facility in order to serve the needs of its expanding client base and alleviate the effects of overcrowding.²⁶ Limited space posed a serious problem because many clients could not cope with the stimuli associated with overcrowding.²⁷ Moreover, WCS relied heavily on regular one-on-one sessions between clients and therapists, and the lack of space compromised the privacy necessary for effective sessions.²⁸

²² *Wisconsin Cmty. Serv., Inc. v. City of Milwaukee*, 309 F. Supp. 2d 1096, 1098 (E.D. Wis. 2004), *vacated*, 413 F.3d 642, 648 (7th Cir. 2005).

²³ *See id.*; Wisconsin Community Services, Inc., *WCS Program Descriptions*, <http://www.wiscs.org/ProgramDescriptions.aspx?ProgramID=33>;
<http://www.wiscs.org/ProgramDescriptions.aspx?ProgramID=9> (last visited Mar. 30, 2006).

²⁴ *Wisconsin Cmty. Serv. Inc.*, 309 F. Supp. 2d at 1099.

²⁵ *Id.* at 1099-1100.

²⁶ *Id.* at 1098, 1100.

²⁷ *Id.* at 1100.

²⁸ *Id.*

After searching for more than three years for an adequate space, WCS purchased an 81,000 square foot property approximately one mile west of its old location.²⁹ WCS planned to use only 20,000 square feet of the property for its clinic and rent out, to commercial and non-commercial entities, the remaining 61,000 square feet.³⁰ In order to operate a health clinic at the newly purchased property, however, the City's zoning laws required WCS to obtain a special use permit, which the City denied.³¹

WCS appealed the decision to the Board of Zoning Appeals ("BOZA"), arguing that it satisfied the City's four criteria for granting a special use permit³² and, alternatively, that the ADA entitled WCS to a permit as a reasonable accommodation.³³ On May 9, 2001, BOZA denied WCS's request for a special use permit, stating that WCS had not met the necessary criteria.³⁴

On June 6, 2001, WCS filed suit in the district court and the judge remanded the case to BOZA to determine whether WCS should be granted a special use permit as a reasonable accommodation under the ADA and the Rehabilitation Act.³⁵ On December 27, 2002, BOZA denied WCS's request, determining that the accommodation was neither reasonable nor necessary in this situation.³⁶ WCS appealed the denial to federal court once again.

B. The District Court's Ruling

The district court ruled in WCS's favor, explaining that "the sole issue is whether the City discriminated against WCS's clients on the basis of their disability."³⁷ The court began its analysis by noting that WCS could prove discrimination under any one of three theories under Title II of the ADA: 1) intentional discrimination; 2) disparate impact; or 3) failure to make a reasonable accommodation.³⁸ In granting WCS's motion for summary judgment, the district court addressed only the

²⁹ *Id.* at 1098.

³⁰ *Id.* at 1107. Two non-commercial entities, the Social Security Administration and the Milwaukee office of the National Alliance for the Mentally Ill, leased space in the building at the time WCS purchased it. *Id.*

³¹ *Id.* at 1098.

³² The City's criteria for obtaining a special use permit were: (1) protection of public health, safety and welfare; (2) protection of property; (3) traffic and pedestrian safety; and (4) consistency with the City's comprehensive plan. *Id.* at 1098 n.3.

³³ *Id.* at 1099.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1101.

³⁷ *Id.* at 1104.

³⁸ *Id.*

reasonable accommodation theory because it found that theory to be dispositive of the issue in the case.

The court reasoned that the ADA and the Rehabilitation Act mirror the Fair Housing Amendments Act (“FHAA”), which requires public entities to change neutral rules, policies, practices or services when necessary to reasonably accommodate qualified individuals with disabilities.³⁹ Although Title II of the ADA does not contain the same language as the FHAA, the court recognized that the regulations promulgated by the U.S. Department of Justice to implement Title II, contain a reasonable accommodation provision.⁴⁰ Similarly, the Rehabilitation Act “requires reasonable accommodation unless it creates ‘undue financial or administrative burdens’ or ‘requires a fundamental alteration in the nature of the program.’”⁴¹ The court found that the language from the regulations of the agency entrusted with implementing Title II, the Department of Justice, along with similar language in the Rehabilitation Act, suggested that both acts imposed a duty of reasonable accommodation on public entities.

Applying Title II’s implementing regulations, the district court recognized that the duty to reasonably accommodate does not merely require public entities to grant disabled persons the same access to public services as non-disabled persons; Title II also protects the special needs of disabled individuals.⁴² Thus, because the special needs of disabled individuals are protected, where those needs are not shared by the general public “it makes little sense to inquire whether the disabled are entitled to equal opportunity to such services.”⁴³ The court then conducted a burden-shifting analysis, finding that “in order to prevail, WCS must show only that its requested accommodation is reasonable and necessary” and “if it makes such a showing, the City must then demonstrate unreasonableness or undue hardship in the particular circumstances.”⁴⁴

³⁹ *Id.* The FHAA definition of discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B) (2000).

⁴⁰ *Wisconsin Cmty. Serv. Inc.*, 309 F. Supp. 2d at 1104. At 28 C.F.R. § 35.130(b)(7), the implementing regulations provide that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.”

⁴¹ *Wisconsin Cmty. Serv. Inc.*, 309 F. Supp. 2d at 1104.

⁴² *Id.*

⁴³ *Id.* at 1105.

⁴⁴ *Id.*

The district court reasoned that “an accommodation is reasonable if the benefit that it will provide to the disabled . . . outweighs the cost to the public entity to implement it.”⁴⁵ The court found that the presence of a WCS clinic at the new site would not prevent a commercial entity from locating there since WCS only intended to use about 25% of the space in the building for its clinic.⁴⁶ Further, two non-commercial enterprises, the Social Security Administration and the local office of the National Alliance for the Mentally Ill, already leased space in the building at the time WCS bought it. The court held, therefore, that requiring the City to grant WCS a special use permit was “reasonable.”⁴⁷

Next, the district court determined whether accommodation was necessary. To establish this, the court found that “a plaintiff . . . need only show that it made a good faith effort to find an alternative to the accommodation but was unable to do so.”⁴⁸ The court held that the evidence showed that WCS had made a good faith effort to find a suitable property that did not require a special use permit. It also rejected the City’s argument that the search might have been more successful if it had hired a buyer’s broker.⁴⁹ Finally, the district court found that the City failed to make a showing that granting WCS a special use permit would cause undue hardship.⁵⁰ Consequently, it ordered the City to grant WCS a special use permit.⁵¹

C. Judge Easterbrook’s Panel Decision

Judge Easterbrook, writing for the Seventh Circuit panel majority, overturned the district court decision, holding instead that “[n]either Title II of the ADA nor the Rehabilitation Act, 29 U.S.C. § 794, contains a general accommodation provision.”⁵² Conceding that “[a]n accommodation requirement has been added to Title II by regulation and to the Rehabilitation Act by judicial gloss plus another regulation,” Judge Easterbrook nevertheless ruled that “Title II . . . lacks the sort of

⁴⁵ *Id.*

⁴⁶ *Id.* at 1106-07.

⁴⁷ *Id.* at 1107.

⁴⁸ *Id.* at 1108.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Wisconsin Cmty. Serv., Inc. v. City of Milwaukee*, 413 F.3d 642, 645 (7th Cir. 2005), *vacated, reh’g en banc granted*, No. 04-1966, 2005 U.S. App. LEXIS 19033 (7th Cir. Aug. 31, 2005).

accommodation requirement to be found in Title III (or for that matter Title I).”⁵³

Judge Easterbrook reasoned that the FHAA does not require municipalities to depart from their zoning codes to reduce the cost at which disabled persons can acquire housing or mental-health services.⁵⁴ Based on his reading of the FHAA, Judge Easterbrook found that the act only imposes a duty of reasonable accommodation on public entities where disabled persons are denied the same opportunity as non-disabled individuals to obtain housing.⁵⁵ According to Judge Easterbrook, the FHAA assures only “equal opportunity” which means “freedom from the adverse effects of local laws and rules that affect disabled persons because of that disability, yet do not pose problems for equivalent but non-disabled persons.”⁵⁶ Judge Easterbrook noted that Milwaukee’s zoning rules, and its stated criteria for special-use permits, treat mental-health and dental-health clinics identically.⁵⁷ Thus, Judge Easterbrook reasoned that in the absence of disparate impact there is no need for accommodation under the FHAA, and by implication, Title II.⁵⁸

Judge Easterbrook also addressed the Seventh Circuit’s ruling in *Good Shepherd Manor Foundation, Inc. v. City of Momence*, where the court wrote that “[f]ailure to reasonably accommodate is an alternative theory of liability.”⁵⁹ However, “[t]o say that reasonable accommodation is an ‘alternative theory of liability’ is not . . . to say that it is a theory *independent* of both intentional discrimination and disparate impact.”⁶⁰ In other words, Judge Easterbrook ruled that reasonable accommodation is a remedy for disparate impact or intentional discrimination but it is not a cognizable theory of liability under Title II of the ADA.⁶¹ Judge Easterbrook conceded, however, that

⁵³ *Id.*

⁵⁴ *Id.* at 646.

⁵⁵ *Id.*

⁵⁶ *Id.* at 647.

⁵⁷ *Id.*

⁵⁸ *Id.* at 646.

⁵⁹ *Id.* (internal quotations omitted) (citing *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003)).

⁶⁰ *Id.*

⁶¹ According to Judge Easterbrook, WCS would likely be unable to make a showing of intentional discrimination or disparate impact because:

A requirement that imposes equal cost on all persons does not have such a disparate impact. Just as everyone (disabled or not) needs housing and would prefer to pay less, so everyone (disabled or not) needs medical care and would prefer to pay less. If Milwaukee applies the same rules to mental-health clinics and dental-health clinics, there is neither discrimination nor disparate impact. The statutes do not require a city to be

if Title II of the ADA does require the City to make reasonable accommodations then granting WCS a special-use permit would be reasonable in this case.⁶²

D. Judge Wood's Dissent

In his dissent, Judge Wood found that the regulations implementing Title II unambiguously answer the question of whether reasonable accommodation constitutes a cognizable theory of liability independent of intentional discrimination or disparate impact in the affirmative.⁶³ Judge Wood noted that the “regulation says nothing about an antecedent need to prove pre-existing intentional discrimination or disparate impact” before advancing a theory of reasonable accommodation.⁶⁴ In so finding, Judge Wood cited to the Supreme Court’s ruling in *U.S. Airways, Inc. v. Barnett*,⁶⁵ which required reasonable accommodation in the employment discrimination (Title I) context, because the language of the Department of Justice’s regulation is “substantively identical” to the language at issue in *Barnett*.⁶⁶

Judge Wood explained further that the “problem is that there are many services and facilities that are of interest only to disabled people, such as the ramps and the audible elevator announcements In those situations, there would never be a way to prove either individual animus or disparate impact, unless the latter theory were applied far more broadly than it normally is.”⁶⁷

Judge Wood concluded that the district court’s decision focused on the rules, practices, et cetera, that hurt WCS and its clients because of their mental disabilities, as opposed to their lack of money or other characteristics that they share with many members of the general public.⁶⁸ Unlike affordable housing, mental health services are uniquely important for people with mental disabilities.⁶⁹ Judge Wood thus found that Title II of the ADA imposed on the City an affirmative duty of reasonable accommodation, the requested accommodation was

more forgiving when mental health clinics want to bend the rules than when dental health clinics make the same request.

Id.

⁶² *Id.* at 648.

⁶³ *Id.* at 649 (Wood, J., dissenting).

⁶⁴ *Id.* at 649.

⁶⁵ 535 U.S. 391 (2002).

⁶⁶ *Wisconsin Cmty. Serv.*, 413 F.3d at 650 (Wood, J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Id.* at 651 (citing *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999)).

⁶⁹ *Id.*

reasonable and necessary, and the City should have granted WCS's request for a special use permit.⁷⁰

III. LEGISLATIVE HISTORY

As Judge Easterbrook pointed out in his decision, neither the Rehabilitation Act nor Title II of the ADA explicitly make reasonable accommodation a cause of action.⁷¹ Reasonable accommodation, therefore, does not exist under a plain reading of the statutes. However, the legislative history of the two statutes reveals that Congress apparently intended reasonable accommodation to be a cause of action under both statutes.

A. Section 504

In 1973, Congress passed the Rehabilitation Act, the first federal handicap discrimination statute.⁷² Under Section 504: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her 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."⁷³ Thus, Section 504 bars discrimination against disabled persons in the administration of programs conducted by state and local government⁷⁴ and requires that programs or activities operated by a federally funded entity be readily accessible to persons with disabilities.⁷⁵ Section 504's regulations generally require that the disabled have equal opportunities to achieve the same benefits as non-disabled persons. Each federal agency has promulgated regulations for

⁷⁰ See *id.* at 652 (agreeing with the lower court's holding in *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 309 F. Supp. 2d 1096, 1108 (E.D. Wis. 2004)).

⁷¹ *Id.* at 645 (majority opinion).

⁷² Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. § 701 et seq.). Although Section 504 was passed in 1973, drafting and promulgation of Section 504's regulations took an exceedingly long time. As a result it did not go into effect until 1976 after President Ford had left office. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1093-95 (1995) (tracing history of passage of the Rehabilitation Act).

⁷³ 29 U.S.C. § 794(a) (2000).

⁷⁴ 28 C.F.R. § 42.520 (2006).

⁷⁵ *Id.* § 42.521(a).

recipients of federal funding under its purview.⁷⁶ Although there are minor differences, the regulations are largely identical.⁷⁷

The Supreme Court has recognized that there is a duty to reasonably accommodate under the Rehabilitation Act.⁷⁸ In *Southeastern Community College v. Davis*, a hearing impaired plaintiff sued the defendant's nursing program for discriminating against her by not providing the facilities she needed to attend the school.⁷⁹ The Court refused to recognize the discrimination claim, reasoning that Congress did not intend Section 504 of the Rehabilitation Act to include an affirmative action requirement.⁸⁰ Instead, the Court found that Section 504 protects only those handicapped individuals who are "otherwise qualified," a term which the court interpreted as "able to meet all of a program's requirements in spite of [a] handicap."⁸¹ The Court, however, recognized that reasonable accommodation may require an employer to alter a program's requirements because "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."⁸² The *Davis* Court found that there was no duty to reasonably accommodate under the facts of that case.⁸³

Later, in *Alexander v. Choate*⁸⁴ and *School Board of Nassau County v. Arline*,⁸⁵ the Court held that an employer does not have a duty to take affirmative action but does have "an affirmative obligation to make reasonable accommodation for a handicapped employee."⁸⁶ In *Choate*, the Court upheld a Medicaid plan that imposed an annual limit on days of Medicaid-covered hospitalization, even though that plan had a greater negative impact on persons with disabilities than other

⁷⁶ See BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW, app. B (1991) (listing regulations promulgated under § 504).

⁷⁷ Compare 28 C.F.R. pt. 35 (implementing regulations of Title II by DOJ), with 49 C.F.R. pts. 27, 37, 38 (Titles II and III Department of Transportation), 29 C.F.R. pts. 1630, 1602 (Title I, Equal Employment Opportunity Commission), and 47 C.F.R. §§ 64.601-.608 (Title IV, Federal Communications Commission).

⁷⁸ See, e.g., L.D. Clark, Shields v. City of Shreveport: *Federal Grantees Under the Rehabilitation Act Escape Duty of Reasonable Accommodation Toward Alcoholics*, 66 TUL. L. REV. 603 (1991); Robert B. Fitzpatrick & E. Anne Benaroya, *Advanced Employment Law and Litigation Reasonable Accommodation and Undue Hardship Under the ADA: Selected Issues*, C669 ALI-ABA 389 (1991) (discussing the duty of reasonable accommodation under the Rehabilitation Act).

⁷⁹ 442 U.S. 397, 402 (1979).

⁸⁰ *Id.* at 410-11.

⁸¹ *Id.* at 406.

⁸² *Id.* at 412-13.

⁸³ *Id.* at 413.

⁸⁴ 469 U.S. 287 (1985).

⁸⁵ 480 U.S. 273 (1987).

⁸⁶ *Id.* at 289 n.19.

possible Medicaid plans would have had, and lacked a justification to make it superior to other forms of budget control with a lesser impact.⁸⁷

The Court, however, was careful to distinguish the adverse impact in *Choate* from the adverse impact that created architectural barriers and had the affect of discriminating against the disabled in transportation, job qualification, and education and recognized that Section 504 did reach adverse impacts in these areas.⁸⁸ Most importantly, the Court clarified the distinction made in *Davis* between reasonable accommodation and affirmative action, holding that *Davis* meant to exclude from the requirements of Section 504 only fundamental alterations in programs.⁸⁹

B. Title II of the ADA

Twelve years after Congress enacted the Rehabilitation Act, President George H.W. Bush signed the ADA into law.⁹⁰ The purpose of the ADA was to establish “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”⁹¹ and was to “be broadly construed to effectuate its purpose.”⁹² Title II of the ADA restates Section 504 in its general terms: “Subject 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.”⁹³ Title II thus prohibits public service entities from discriminating against disabled individuals.⁹⁴

⁸⁷ See *Choate*, 469 U.S. at 308-09.

⁸⁸ See *id.* at 296-99. The Court held that § 504 must be kept within manageable bounds.

⁸⁹ *Id.* at 300-01 & n.20. The Court further developed this reasoning in *Arline*, 480 U.S. at 287 n.17, which distinguished the affirmative obligation to make reasonable accommodations from affirmative action as used in other contexts. See Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1231-48 (2000) (explaining the difficulties making this distinction).

⁹⁰ “In comparison to the battle fought over the Rehabilitation Act of 1973 and the section 504 regulations, the process that led to title II of the ADA and its regulations was easy.” Weber, *supra* note 72, at 1095. Section 504 already covered most governmental units, and Title II was perceived as merely extending that coverage a small degree. *Id.*

⁹¹ 42 U.S.C. § 12101(b)(1) (2000).

⁹² *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 780 (D. Md. 2001) (internal citations omitted).

⁹³ 42 U.S.C. § 12132 (2000). The ADA statute defines a “public entity” as “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.” *Id.* § 12131(1). The statute,

The chief difference between the statutes is that Section 504 applies to all entities that receive federal financial assistance⁹⁵ whereas Title II covers “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁹⁶

Title II’s language, combined with the legislative history of the ADA, suggests that Congress intended this prohibition against discrimination to cover a broad range of state and local governmental actions.⁹⁷ For example, in the legislative history of Title II, the congressional committees held out *Choate* as the definitive interpretation of Section 504 and Title II.⁹⁸ *Davis*, in contrast, was never mentioned. Similarly, a few other cases, all sympathetic to the claims of persons with disabilities, appear as examples of what Congress wanted Title II to accomplish.⁹⁹

Title II, however, has clear limits on its application. For example, Congress and the regulators adopted the idea that the law would not require fundamental alterations in programs before a duty to accommodate persons with disabilities arose.¹⁰⁰

Rather than provide greater specificity on employment, program accessibility, or other matters, Title II requires that the Attorney General promulgate regulations consistent with Section 504’s regulations.¹⁰¹ For employment, regulations regarding the accessibility of new facilities must be consistent with those developed by the

however, fails to define the phrase “services, programs or activities.” Weber, *supra* note 72, at 1100. The term “benefit” includes the “provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct).” 28 C.F.R. § 42.540(i) (2006).

⁹⁴ See 42 U.S.C. §§ 12131-12133 (2000) (describing the prohibition against discrimination in the provision of public services). See also William H. Grogan, *The Tension Between Local Zoning and the Development of Elderly Housing: Analyzing the Use of the Fair Housing Act and the Americans with Disabilities Act to Override Zoning Decisions*, 33 SUFFOLK U. L. Rev. 317, 334-37 (2000).

⁹⁵ 29 U.S.C. § 794 (2000).

⁹⁶ 42 U.S.C. § 12131(1) (2000).

⁹⁷ See H.R. REP. NO. 101-485, pt. 2, at 84 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 367 (stating that Title II extends to all state and local governmental actions).

⁹⁸ “[I]t is . . . the Committee’s intent that section 202 also be interpreted consistent with *Alexander v. Choate*.” *Id.*

⁹⁹ See, e.g., *id.* at 50, 1990 U.S.C.C.A.N. at 473 (citing with approval the concurrence in *ADAPT v. Skinner*, 881 F.2d 1184, 1203 (3d Cir. 1989), a case that approved a separate but equal transportation service for persons with disabilities).

¹⁰⁰ 28 C.F.R. § 35.150(a)(3) (2006).

¹⁰¹ See Weber, *supra* note 72, at 1117 (“It can be said that Title II’s legislative history is, in reality, a form of subsequent legislative history for Section 504.”).

Department of Justice (“DOJ”) in its role coordinating the implementation of Section 504 for other federal agencies.¹⁰²

The DOJ regulations implementing Title II are, therefore, entitled to controlling weight.¹⁰³ In promulgating these regulations, the DOJ interpreted Title II to prohibit a broad range of discrimination by public entities.¹⁰⁴ The regulations expressly apply to “all services, programs, and activities provided or made available by public entities.”¹⁰⁵ The regulations also state that the statute applies to all state and local governmental services, programs and activities and contain a reasonable accommodation provision.¹⁰⁶

The implementing regulations are also directly applicable to *Wisconsin Community Service, Inc. v. City of Milwaukee*. In discussing when a municipality may be required to make a reasonable accommodation under the ADA, the DOJ’s ADA Technical Assistance Manual specifically utilizes a municipal zoning ordinance as an illustration of when such a requirement may arise, indicating that the DOJ interprets the ADA as extending to zoning ordinances and decisions.¹⁰⁷

IV. COMMON LAW ANALYSIS

In addition to the legislative history, an analysis of precedent reveals that courts have repeatedly found that reasonable

¹⁰² 42 U.S.C. § 12134(b) (2000).

¹⁰³ *See, e.g.*, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996); *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (“Because Title II was enacted with broad language and directed the Department of Justice to promulgate regulations . . . the regulations which the Department of Justice promulgated are entitled to substantial deference.”).

¹⁰⁴ *See* 28 C.F.R. § 35.130(b) (2006) (listing several categories of activities that constitute discrimination by public entities).

¹⁰⁵ 28 C.F.R. § 35.102(a) (2006).

¹⁰⁶ *See* 28 C.F.R. § 35.102(a) (stating Title II applies to “all services, programs, or activities” by public entities). Title II prohibits discrimination in “all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies.” 28 C.F.R. pt. 35, app. A (1999); 28 C.F.R. §35.130(b)(7) (explaining that Title II, like Title I and Title III, also contains a reasonable accommodation provision).

¹⁰⁷ *See* U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL, II-3.6100 (1993) (utilizing zoning ordinance as example of when municipality required to make reasonable modification); *see also* *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) (applying the FHAA to zoning and noting that the “requirements for reasonable accommodation under the ADA are the same as those under the FHAA”); *Reg’l Econ. Cmty. Action Program, Inc., v. City of Middletown*, 294 F.3d 35, 45-46 (2d Cir. 2002).

accommodation is a cause of action under both the Rehabilitation Act and the ADA.

A. Supreme Court Decisions Imply that There Is a Duty of Reasonable Accommodation in Title II of the ADA

The Supreme Court has implied that Title II of the ADA contains an affirmative duty of reasonable accommodation. In *Tennessee v. Lane*,¹⁰⁸ for example, the Court discussed the broad scope of Title II. The Court recognized that because “failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to [program] accessibility.”¹⁰⁹ Going further, the Court stated that Title II’s “duty to accommodate” requires “‘reasonable modifications’ that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.”¹¹⁰

Joined by Justices Souter and Breyer, Justice Ginsburg noted in a concurring opinion that: “Including individuals with disabilities among people who count in composing ‘We the People,’ Congress understood in shaping the ADA, would sometimes require *not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.*”¹¹¹ Justice Ginsburg stated that in *Olmstead v. Zimring*, the Court “responded with fidelity to the ADA’s accommodation theme.”¹¹² Justice Ginsburg explained that: “Congress, the Court [has] observed, advanced in the ADA ‘a more comprehensive view of the concept of discrimination,’ one that embraced failures to provide ‘reasonable accommodations.’ The Court [in *Lane*] is similarly faithful to the Act’s demand for reasonable accommodation to secure access and avoid exclusion.”¹¹³

In *Olmstead*, the Court analyzed Title II’s reasonable accommodation requirement in the context of the deinstitutionalization of mentally ill individuals. The Court held that Title II of the ADA is meant to be consistent with § 504 of the Rehabilitation Act, which provides for reasonable accommodation unless “the accommodation would impose an undue hardship on the operation of its program.”¹¹⁴

¹⁰⁸ 541 U.S. 509 (2004).

¹⁰⁹ *Id.* at 531.

¹¹⁰ *Id.* at 532.

¹¹¹ *Id.* at 536 (Ginsburg, J., concurring) (emphasis added).

¹¹² *Id.* at 537.

¹¹³ *Id.* (quoting *Olmstead v. Zimring*, 527 U.S. 581, 598 (1999), which rejected the Eleventh Circuit’s strict construction of the reasonable modification requirement).

¹¹⁴ 527 U.S. at 606 n.16 (citation omitted).

Although the Court required a balancing of the reasonableness of the requested accommodation with the City's available resources, it recognized that an affirmative duty of accommodation existed in Title II.¹¹⁵

In *U.S. Airways, Inc. v. Barnett*,¹¹⁶ the Supreme Court ruled that the reasonable accommodation requirement of the ADA imposes an affirmative duty on public entities to waive a rule that would not be waived for a non-disabled individual. Although *Barnett* involved a claim of employment discrimination under Title I of the ADA, the Court found the language in Title I to be nearly identical to the language in Title II. The Court explained that:

The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same . . . opportunities that those without disabilities automatically enjoy. By definition any special 'accommodation' requires the [entity] to treat [individuals] with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an [entity's] disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.¹¹⁷

The Supreme Court, therefore, implicitly acknowledged that Title II of the ADA contains a duty to reasonably accommodate the needs of the disabled.

B. Other Courts Have Also Recognized that Title II of the ADA Includes the Failure to Reasonably Accommodate as a Theory of Recovery

In *McPherson v. Michigan High School Athletic Ass'n*,¹¹⁸ the United States Court of Appeals for the Sixth Circuit outlined its analysis for Title II claims. In comparing Section 504 of the Rehabilitation Act and Title II of the ADA, the court noted that "[i]t is well-established that the two statutes are quite similar in purpose and scope" and since "the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other."¹¹⁹

¹¹⁵ See Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 684 n. 224 (2005) (citing *Olmstead*, 527 U.S. at 605-07).

¹¹⁶ 535 U.S. 391 (2002).

¹¹⁷ *Id.* at 397-98.

¹¹⁸ 119 F.3d 453 (6th Cir. 1997).

¹¹⁹ *Id.* at 459-60. (citations omitted).

With respect to whether the requirements of Title I and Title III apply to Title II of the ADA, the court stated that “most of the law that has been made in ADA cases has arisen in the context of employment discrimination claims, but we have no doubt that the decisional principles of these cases may be applied to this [Title II] case.”¹²⁰ The court held that “there are two methods that would allow the plaintiff[s] to demonstrate that . . . actions were taken *because of* [their] disability: either (1) by offering evidence that . . . disabilities were actually considered . . . in formulating or implementing the . . . rule, or (2) by showing that the [entity] could have reasonably accommodated [the plaintiffs’] disability, but refused to do so.”¹²¹ Although the court found the requested accommodation to be unreasonable in that case, it nevertheless ruled that lack of reasonable accommodation was a cognizable theory of recovery under Title II of the ADA.

The United States Court of Appeals for the Second Circuit has employed a similar analysis for Title II claims. In *Regional Economic Community Action Program, Inc., v. City of Middletown*, for example, the court held that the FHA, the Rehabilitation Act, and the ADA all apply to zoning decisions.¹²² Moreover, the court stated that “[p]laintiffs who allege violations under the ADA, the FHA, and the Rehabilitation Act may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable accommodation.”¹²³

Furthermore, in *Pathways Psychosocial v. Town of Leonardtown*¹²⁴ a mental health clinic argued that the town’s denial of an occupancy permit constituted unlawful discrimination under the ADA. The court found that “the ADA must be broadly construed to effectuate its purpose”¹²⁵ and recognized four different theories of recovery “under the ADA: 1) intentional discrimination; 2) disparate impact resulting from a facially neutral policy; 3) failure to provide a

¹²⁰ *Id.* at 460.

¹²¹ *Id.*; *see also* *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) (holding that “Title II demands that, in certain instances, public entities take affirmative actions to provide qualified disabled individuals with access to public services.”).

¹²² 294 F.3d 35, 45-46 (2d Cir. 2002); *see, e.g.*, *Nevels v. W. World Ins. Co.*, 359 F. Supp. 2d 1110, 1120-21 (W.D. Wash. 2004); *Dr. Gertrude A. Barber Ctr., Inc., v. Peters Twp.*, 273 F. Supp. 2d 643, 652 (W.D. Pa. 2003) (applying the reasonable accommodation provision of the FHA to zoning decisions).

¹²³ 294 F.3d at 48; *see also* *Powell v. Nat’l Bd. of Med. Examiners*, 364 F.3d 79 (2d Cir. 2004); *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565 (2d Cir. 2003).

¹²⁴ 133 F. Supp. 2d 772 (D. Md. 2001).

¹²⁵ *Id.* at 780 (citing *Civic Ass’n of Deaf of New York City v. Giuliani*, 915 F. Supp. 622, 633 (S.D.N.Y. 1996)).

reasonable accommodation; and 4) impermissible segregation of mental health services for people with mental illness.”¹²⁶ The court ruled that “based on the plain language of the [Department of Justice’s] regulation as well as precedent, the proper standard for determining a reasonable accommodation is to first inquire whether it is 1) reasonable and 2) necessary.”¹²⁷

C. Seventh Circuit Case Law

In *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*,¹²⁸ the Seventh Circuit compared the requirements of the FHAA to those imposed by Title II of the ADA. The court noted that “[l]ike the FHAA, the ADA ‘provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’”¹²⁹ The court in *Oconomowoc* found that the “requirements for reasonable accommodation under the ADA are the same as those under the FHAA.”¹³⁰ The court stated that under both the FHAA and the ADA, “a public entity *must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, or services when needed.*”¹³¹ Moreover, the “term ‘reasonable accommodation’ in the FHAA is often interpreted by analogy with the same phrase in the Rehabilitation Act” and “the definition of ‘reasonable accommodation’ in the Rehabilitation Act is the same as that in the ADA.”¹³²

The Seventh Circuit in *Oconomowoc* held that the FHAA, and by implication the ADA, “requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling.”¹³³ The court held that an “accommodation is reasonable if it is both efficacious and proportional to the costs to implement it.”¹³⁴ An accommodation is necessary, according to the Seventh Circuit, if “the desired accommodation will affirmatively enhance a disabled plaintiff’s quality

¹²⁶ *Id.*

¹²⁷ *Id.* at 789; *see also* Behavioral Health Servs., Inc. v. City of Gardena, 2003 WL 21750852 (C.D. Cal. Feb. 26, 2003); Buchanan v. Maine, 366 F. Supp. 2d. 169 (D. Me. 2005) (recognizing a Title II reasonable accommodation claim).

¹²⁸ 300 F.3d 775 (7th Cir. 2002).

¹²⁹ *Id.* at 782 (citing 42 U.S.C. § 12101(b)(1)).

¹³⁰ *Id.* at 783.

¹³¹ *Id.* at 782-83 (emphasis added).

¹³² *Id.* at 783 (internal citations omitted).

¹³³ *Id.*

¹³⁴ *Id.* at 784.

of life by ameliorating the effects of the disability.”¹³⁵ Once the plaintiffs show that the accommodation they seek is reasonable, the “defendant must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances.”¹³⁶

The Seventh Circuit noted the similarities between Title II of the ADA and the FHAA again in *Dadian v. Village of Wilmette*.¹³⁷ According to the court in *Dadian*, the “overall focus should be on whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.”¹³⁸ The court concluded that “the methods of proving discrimination under Titles I and III should also apply to Title II.”¹³⁹

In *Washington v. Indiana High School Athletic Ass’n*, the Seventh Circuit noted that “this and other circuits interpret § 504 of the Rehabilitation Act and Title II of the ADA as coextensive.”¹⁴⁰ The court ruled that:

In our view, the Sixth Circuit outlined correctly . . . the various methods of proof in § 504 Rehabilitation Act or Title II ADA claims: discrimination under both acts may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.¹⁴¹

The Seventh Circuit held that “it is possible to demonstrate discrimination on the basis of disability by a defendant’s refusal to make a reasonable accommodation.”¹⁴²

In *Hemisphere Building Co., Inc., v. Village of Richton Park*,¹⁴³ the Seventh Circuit analyzed a claim for reasonable accommodation under the FHAA. The court held that the “duty of reasonable accommodation [applies] . . . to rules, policies, etc. that hurt handicapped people *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing.”¹⁴⁴

¹³⁵ *Id.*

¹³⁶ *Id.* at 783.

¹³⁷ 269 F.3d 831, 837 (7th Cir. 2001).

¹³⁸ *Id.* at 838-39 (internal quotations omitted).

¹³⁹ *Id.* at 841 (internal citations omitted).

¹⁴⁰ 181 F.3d 840, 846 (7th Cir. 1999).

¹⁴¹ *Id.* at 847.

¹⁴² *Id.* at 848.

¹⁴³ 171 F.3d 437 (7th Cir. 1999).

¹⁴⁴ *Id.* at 440.

Lastly, in *Good Shepherd Manor Foundation, Inc., v. City of Momence*, the plaintiff sought relief for alleged discrimination under the FHAA and the ADA under the theories of “discriminatory intent and impact and under a theory that the city failed to provide reasonable accommodations.”¹⁴⁵ The court held that “the requirements for showing failure to reasonably accommodate are the same under the ADA and the FHAA.”¹⁴⁶ The court provided the following example of how a reasonable accommodation claim works:

[I]f a city required all houses to have narrow doorways, and the city failed to waive this requirement, this might harm people in wheelchairs by reason of the fact that they are in wheelchairs . . . Th[e] requirement to reasonably accommodate would exist regardless of the motivation behind the narrow-doorway rule . . . The error in the city’s logic is all the more clear when we consider that reasonable accommodation is . . . an alternative theory of liability.¹⁴⁷

D. Critique of Judge Easterbrook’s Reasoning

We contend that Judge Easterbrook’s reading of the relevant statutory texts is flawed. To start, where a statute such as the ADA is to be broadly construed, “textualism does not provide the tools necessary to arrive at the deterministic conclusion that textualists desire.”¹⁴⁸ This is because the statute will often contain ambiguities that force a textualist to go outside the confines of the act. For example, Judge Easterbrook limits the Seventh Circuit’s holding in *Good Shepherd* by finding that the FHAA’s reasonable accommodation provision applies only when a showing of disparate impact has been made. Yet the texts of the FHAA, the Rehabilitation Act and Titles I and III of the ADA do not articulate an antecedent need to show disparate impact. Nor do they suggest that reasonable accommodation is merely a remedy for disparate impact, rather than an independent theory of recovery. Only by looking outside the text could Judge Easterbrook have found that a claimant must prove disparate impact or intentional discrimination before the reasonable accommodation provision applies.

Next, although Title II does not contain a reasonable accommodation provision, it does direct the Attorney General to enact regulations to resolve any ambiguities contained in its text. The DOJ’s

¹⁴⁵ 323 F.3d 557, 560 (7th Cir. 2003).

¹⁴⁶ *Id.* at 561.

¹⁴⁷ *Id.* at 561-62.

¹⁴⁸ Cooper, *supra* note 89, at 1255.

regulations unambiguously recognize a cause of action for failure to provide reasonable accommodations wholly separate from a claim of intentional discrimination or disparate impact.¹⁴⁹ The text of Title II, therefore, which calls on the DOJ to clarify its meaning, imposes a duty of reasonable accommodation on public entities.

Going further, even if Judge Easterbrook's contention that the ADA requires merely equal access to public services for disabled individuals is correct, an affirmative duty of reasonable accommodation would be the only way to ensure equal access for WCS's clientele. Every individual, for instance, needs dental health services, regardless of whether he or she is disabled. A denial of a special use permit to a dental health facility, therefore, could not be based on any disability of the facility's clientele because all of the facility's clientele, disabled and non-disabled alike, would be denied access to the services it provides by the decision to deny a permit.

Disabled individuals, however, need reasonable accommodations to access certain services precisely *because* they are disabled. For example, only the mentally ill need the services of a mental health clinic. Denying a special use permit to a mental health clinic, therefore, would only affect the mentally ill's ability to gain access to necessary health services. Because the services provided by WCS are intended for the sole benefit of the mentally ill, there is no comparable group of non-disabled people with whom to place the mentally ill on equal footing.

In addition, building owners are required to build ramps to allow wheelchair-bound people to gain access to the services provided inside the building, such as dental health services, which presumably both disabled and non-disabled people need. The ramp ensures equal access to the building for both disabled and non-disabled individuals because both groups require the services provided inside the building. But since only the mentally ill require mental health services, comparing dental health clinics to mental health clinics is like comparing apples to oranges.

Title II's duty of reasonable accommodation is meant to cover precisely this situation. BOZA could not deny WCS a permit because WCS's clients are mentally ill. That would constitute intentional discrimination. Moreover, if WCS could show that the City's neutral zoning rules have a disparate impact on its clients as compared to non-disabled people because of their mental illnesses,¹⁵⁰ it could properly

¹⁴⁹ See 28 C.F.R. § 35.130(b)(7).

¹⁵⁰ Since denial of a dental health permit would still leave people with plenty of other options to obtain dental health care in the City whereas WCS is one of the *only* providers of mental health treatment to non-institutionalized individuals, the denial of

state a claim of disparate impact under the ADA. Reasonable accommodation, however, is a theory of recovery wholly separate from disparate impact because it applies to situations where there is no group of non-disabled people to measure the affects of a neutral rule or procedure against. As Judge Wood noted in his dissenting opinion, Judge Easterbrook's approach "risks having the unfortunate effect of barring the disabled from relief just when they need it most: when a public entity is failing to provide a service that only the disabled would need, under circumstances where intentional discrimination and disparate impact would be impossible to prove as a practical matter."¹⁵¹

Since a showing of "reasonableness" and "necessity" is fairly easy to make, reasonable accommodation shifts the burden to the City to show why accommodating the request of WCS would be an undue hardship, i.e., financial, violates their plan for the area, et cetera. The City maintains the authority to deny the permit, but it must show why the accommodation request is unreasonable in order to do so, instead of basing its decision solely on the determination that WCS failed to meet the City's zoning criteria for obtaining a permit.

Judge Easterbrook's decision, therefore, is problematic because it eliminates the one avenue of recovery that those in need of special services have to pursue their claims. WCS, for example, could not show intentional discrimination because the City's zoning rules are facially neutral. Moreover, it would be extremely difficult for WCS to make a showing of disparate impact because only the mentally ill require mental health treatment. Thus there is no comparable class or group of non-disabled persons against whom to compare the affects of the City's neutral zoning rules. Only under a theory of failure to provide a reasonable accommodation could WCS show that the City's denial of a special use permit was unreasonable under the facts of this case. Without the right to pursue a reasonable accommodation claim, WCS's clientele are effectively denied access to *any* non-institutionalized mental health treatment in the City of Milwaukee.

V. CONCLUSION

The plain language of the FHAA and Section 504 of the Rehabilitation Act imposes an affirmative duty of reasonable accommodation on public entities. Likewise, Title I and Title III of the ADA recognize reasonable accommodation as a theory of recovery in

the permit leaves its clients with virtually no options for non-institutionalized mental health care.

¹⁵¹ Wisconsin Cmty. Serv., Inc. v. City of Milwaukee, 413 F.3d 642, 651 (Wood, J., dissenting).

the contexts of employment and public accommodations discrimination. The Department of Justice's regulations, which implement Title II, unambiguously extend the affirmative duty of accommodation to public entities in the context of zoning.

Moreover, the case law interpreting Title II, from the Supreme Court, to the courts of other circuits, to the Seventh Circuit's own rulings in *Oconomowoc*, *Dadian*, *Washington*, and *Good Shepherd*, supports claims for a public entity's failure to provide reasonable accommodations to otherwise qualified disabled individuals. Judge Easterbrook's decision, therefore, goes against precedent, legislative history and the implementing regulations of Title II.

However, Judge Easterbrook's analysis is not without basis. Judge Easterbrook arrived at his decision through the widely accepted textualist method of statutory interpretation. As one commentator noted, the "textualist judge approaches this mechanistic process by consulting the statutory text, related statutory provisions, and standardized external sources . . . such that the judge might consistently arrive at an interpretation that reasonably fulfills the commands of the text."¹⁵² As Judge Easterbrook explained, although Title I and Title III of the ADA (which address discrimination in employment and public accommodations) contain explicit reasonable accommodation provisions, Title II of the ADA contains no such language. The text of Title II, therefore, does not impose a duty of reasonable accommodation on public entities.

Moreover, other courts have supported Judge Easterbrook's finding that Title II does not require public entities to meet the special needs of disabled individuals. The Second Circuit, for example, has held that the ADA requires merely "evenhanded treatment" in relation to non-disabled people rather than the provision of additional benefits to the disabled.¹⁵³ Judge Easterbrook notes that Milwaukee requires all health clinics, whether they provide services to the general public or services geared specifically towards disabled individuals, to obtain a special use permit in the area where WCS's proposed facility is located. Under this view, since the City's zoning ordinance applies equally to clinics serving the disabled and the non-disabled, the City is under no duty to "bend the rules" for a mental health service provider like WCS simply because its clientele are considered disabled under the ADA.

¹⁵² Cooper, *supra* note 89, at 1211-12.

¹⁵³ See *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998) (internal citations omitted); see also *Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425, 431 (E.D.N.Y. 2000) (citing *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999)).

Moreover, a lack of financial resources affects both disabled and non-disabled people alike. In *Hemisphere Building*, for example, the Seventh Circuit held that a public entity was under no duty to grant a special use permit to a developer in order to make the wheelchair-accessible homes he planned to build more affordable for the disabled because a limited amount of money is something disabled people have in common with non-disabled people.¹⁵⁴ Therefore, the developer's potential customers were not entitled to a reasonable accommodation in *Hemisphere Building* because non-disabled people's housing options are also limited by a lack of financial resources.¹⁵⁵

Finally, Judge Easterbrook's contention that reasonable accommodation is merely a remedy for a claim of disparate impact instead of an independent cause of action is not without merit. In *Good Shepherd*, for example, the Seventh Circuit ruled that "reasonable accommodation is a theory of liability separate from intentional discrimination" so that plaintiffs could make a claim under the ADA even where a city's actions were not motivated by a discriminatory animus.¹⁵⁶ This ruling could be construed as merely recognizing a disparate impact claim, which applies where neutral rules, unmotivated by discriminatory intent, nevertheless harm disabled individuals more than non-disabled individuals by reason of their disability. In Judge Easterbrook's view, the *remedy* for disabled individuals disparately impacted by the facially neutral rules of a public entity is reasonable accommodation. Proof of disparate impact is thus necessary before a public entity must provide a reasonable accommodation.

There is, therefore, a real danger that the Seventh Circuit sitting *en banc* will affirm Judge Easterbrook. If it does there would be a split in the circuit courts and the case will eventually make its way to the Supreme Court. Given the current structure of the court, the Court may side with Judge Easterbrook.

In anticipation of this outcome, it is essential that attorneys arguing for reasonable accommodation lay out proper and strong legal reasoning. We hope that this article helps in this endeavor.

¹⁵⁴ 171 F.3d 437, 440 (7th Cir. 1999).

¹⁵⁵ *Id.*

¹⁵⁶ 323 F.3d 557, 562 (7th Cir. 2003).