NOTES

THE ADA’S LAST STAND?: STANDING AND THE AMERICANS WITH DISABILITIES ACT

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One who is sincerely interested in human communication and cooperation, in being genuinely helpful, will pay only so much attention to the disability as is necessary to give the other the help he needs and wants, will not call undue attention to it by extravagant gestures of sympathy and elaborate offers of undesired help, will give such help as is asked for or indicated in a matter-of-course way, neither evading nor emphasizing the fact of the disability, and will in general keep his companionship with the other on a basis that will keep communication and companionship between the handicapped and the unhandicapped as nearly normal as possible.¹

INTRODUCTION

(No Pain, No Standing)

A wheelchair-bound woman is suffering from a painful cavity.² She makes an appointment with a newly-arrived but reputable dentist in her small home town, only to find that the dentist’s office and parking lot are not wheelchair accessible. No one from the office offers her any help, and she cannot enter the office to see the dentist. Frustrated, she seeks legal advice.

At her meeting with a lawyer (in a wheelchair-accessible office), the woman learns that she may have a cause of action under the Americans with Disabilities Act.³ But the lawyer, having researched the relevant case law, offers some words of warning: “If you really

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want to take this case all the way, you're going to have to live with some pain. Whatever you do, don't get that cavity filled until the case has gone through trial and all possible appeals. And if you even think of seeing another dentist, don't tell anyone. If you do, your case could get dismissed for lack of standing."

A blind man in the same town has just completed his training with his first-ever seeing-eye dog. Eager to exercise this new-found independence, but wary of walking around town alone, he instead asks a friend to drive him to another town, about 75 miles away, for a day of shopping and dining out. Things go along smoothly, until the man attempts to take his dog into a restaurant for dinner. The restaurant’s host, angrily refuses to seat the two friends, and gives them the choice of either leaving or tying the dog to the bike stand outside. When the manager comes to the scene, she supports the host’s refusal. The blind man and his friend eat dinner elsewhere.

The blind man sues the restaurant under the Americans with Disabilities Act, and discovery begins. At his deposition, the blind man states that he does not wish to return to the restaurant whose employees treated him so rudely. In fact, by the time of trial two years later, the man has not even visited the town in which the restaurant is located. The restaurant, however, sticks to its “no dogs allowed” policy. At trial, the judge dismisses the case for lack of standing. “Plaintiff can’t seek injunctive relief,” the judge says, "because he has shown no intent to return to the restaurant and therefore he can't say that the restaurant is causing him harm now, or that it poses a threat of imminent future harm.”

These hypotheticals illustrate the legal barriers that many courts have constructed for plaintiffs seeking injunctive relief under Title III of the Americans with Disabilities Act (“ADA”). Many courts have relied on tenuous analogies to, and narrow interpretations of, judicially-created standing doctrine in deciding whether a plaintiff has standing under the ADA. Granted, the ADA’s remedial scheme does not expressly grant standing to private plaintiffs, but current standing jurisprudence leaves the issue of standing under the ADA open to interpretation. This Note advocates greater vigilance on the part of the courts to ensure that persons who suffer disability discrimination do have standing to bring their claims, and greater emphasis on the ADA as a civil rights statute to advance Congress’s

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4. This hypothetical statement is similar to the court's holding in DeLil v. El Torito Rests., Inc., No. C 94-3900, 1997 U.S. Dist. LEXIS 22788, at *11-14 (N.D. Cal. June 23, 1997), in which a wheelchair-bound plaintiff did not have standing under the ADA because she did not face a "real and immediate threat of future harm."


goal in creating the ADA—the elimination of disability discrimination.

Part I of this Note outlines the background and history of the ADA. The bipartisan political support that the statute has enjoyed since its enactment lends credibility to the congressional findings that the ADA was, and is, much-needed legislation. Part I then discusses Congress’s broad grant of standing to ADA plaintiffs and the apparent strength that the ADA gains through that grant. This part concludes with an overview of traditional standing doctrine and focuses on the two cases that courts most often invoke in applying standing doctrine to the ADA.

Part II explores the application of standing doctrine to Title III of the ADA. This part surveys the district court cases in which courts have invoked traditional standing doctrine to find that plaintiffs lacked standing to sue.

Part III begins with a discussion of the arguments for either a restrictive or a liberal view of standing that underlie the courts’ decisions. It suggests a “workable standard” for standing that gives the ADA “teeth” as a civil rights law.

I. THE ADA: THE FIRST TWELVE YEARS

Jubilant rhetoric accompanied the enactment of the ADA, but bitter reality followed soon thereafter. This part begins with a brief examination of the bipartisan support that led to the passage of the ADA, and discusses the provisions of Title III. Part I then outlines the remedial scheme that Congress enacted.

A. The Promise of the ADA

Signed into law on July 26, 1990, the ADA was hailed as “the most sweeping anti-discrimination measure since the Civil Rights Act of 1964.”7 At a bill-signing ceremony with an audience of some two-thousand individuals with disabilities,8 President George H. Bush compared the Act to the fall of the Berlin Wall, opening “a once-closed door to a bright new era.”9 Ten years later, the pride felt at the signing of the ADA still resounded in speeches by political leaders. On the tenth anniversary of the signing of the ADA,
President William Clinton remarked that the ADA had "liberated ... Americans with disabilities ... We are all a freer, better country because of the ADA ..." The following year President George W. Bush expressed pride that his father had supported the Act, and called the legislation "an unprecedented step forward in promoting freedom, independence, and dignity for millions of our people." He declared that he "remain[ed] committed to tearing down the remaining barriers to equality that face Americans with disabilities today.

One purpose of the ADA, as stated in the statute itself, is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress's findings showed that America's 43 million persons with disabilities have been, and continue to be, subjected to exclusion and segregation; social, educational, and economic disadvantages; and prejudice based on stereotypical assumptions. This prejudice, Congress found, denies disabled persons "those opportunities for which our free society is justifiably famous.

Title III of the ADA evidences a promise of sweeping change in the context of access to places of public accommodation:

12. Id.
14. See id. § 12,101(a).
15. Id. § 12,101(a)(9). While support for the rights of individuals with disabilities may be a political "no-brainer," the ADA has not escaped criticism. See, e.g., Roger Clegg, The Costly Compassion of the ADA, Pub. Int., Summer 1999, at 100, 104 ("Congress felt so sorry for the disabled that it was willing to force other people to help them, at considerable expense."); Symposium, Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 Berkeley J. Emp. & Lab. L. 1 (2000) (analyzing resistance to the ADA as evidenced by judicial decisions, academic and social commentary, and the media). Furthermore, although a divided Supreme Court appeared at first to endorse the broad sweep of Title III of the ADA, see Bragdon v. Abbott, 524 U.S. 624 (1998) (finding in favor of an HIV-positive plaintiff who had sued a dentist for refusing to fill plaintiff's cavity in his office, not addressing standing), the Court has narrowed the scope of Title I (the employment provisions) of the ADA in three recent cases: Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that the Eleventh Amendment of the United States Constitution bars suits under the ADA for money damages against a state employer who would not accommodate employees' disabilities), Toyota v. Williams, 122 S. Ct. 681, 691 (2002) (holding that, to qualify for ADA protection in the employment context, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"), and US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002) (holding that, in most cases, workplace seniority rules will trump the ADA).
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(a) General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.\textsuperscript{16}

Public accommodations—including hotels, restaurants, movie theaters, retail stores of many types, service establishments ranging from laundromats, hospitals, and lawyers' offices to museums, zoos, schools, day care centers, health spas, bowling alleys, and many others\textsuperscript{17}—that fail to make “reasonable modifications” (unless those modifications would “fundamentally alter the nature of such goods, services, . . . or accommodations”) have violated the ADA.\textsuperscript{18}

Title III of the ADA stands out among civil rights statutes because of the broad scope of covered entities.\textsuperscript{19} This broad scope, however, came at a price, as ADA proponents settled for limited remedies in exchange for extensive coverage of public accommodations.\textsuperscript{20} The model for the remedial provisions of Title III was the Civil Rights Act of 1964 (“CRA”), which provided only injunctive relief for private individuals.\textsuperscript{21} In fact, the text of the ADA refers to the enforcement provisions of the CRA and does not otherwise describe the type of relief available for private plaintiffs.\textsuperscript{22} However, the language of Title III does make clear whom the statute protects: Injunctive relief is available “to any person who is being subjected to discrimination,” and “[n]othing . . . shall require a person with a disability to engage in a futile gesture if such person has actual notice that [an entity] . . . does not intend to comply with [Title III].”\textsuperscript{23}

In addition, Title III of the ADA provides an avenue of relief through the United States Attorney General. This provision allows the Attorney General to bring suit against an entity if the Attorney General has reasonable cause to believe that “(i) any person or group of persons is engaged in a pattern or practice of discrimination under

\begin{footnotes}
\item[17] 42 U.S.C. § 12181(7). Title III also deals with public transportation services provided by private organizations. \textit{Id.} § 12184(a).
\item[18] \textit{Id.} §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A).
\item[19] In fact, previous civil rights statutes—particularly the Civil Rights Act of 1964 (“CRA”)—covered only a few types of public accommodations. See Colker, \textit{supra} note 7, at 378-79.
\item[20] \textit{Id.} at 378.
\item[21] 42 U.S.C. § 2000a-3(a) (1994). Title III of the ADA, therefore, allows only injunctive relief for private plaintiffs. 42 U.S.C. § 12188(a)(1); see Colker, \textit{supra} note 7, at 378 (discussing the history of the ADA and comparing the ADA to the CRA).
\item[22] The ADA, at 42 U.S.C. § 12188(a)(1), refers to the CRA, 42 U.S.C. § 2000a-3(a), in its delineation of the relief available to a private plaintiff.
\end{footnotes}
this [title]; or (ii) any person or group of persons has been discriminated against... and such discrimination raises an issue of general public importance.\textsuperscript{24} Under the Attorney General provision, a court may award monetary damages (but not punitive damages) and may assess a civil penalty of up to $50,000 for the first violation.\textsuperscript{25} Monetary remedies, therefore, are available only to ADA plaintiffs whose cases attract the attention of the Attorney General.

B. Standing: The ADA’s Strength?

The remedial provisions of the ADA, coupled with Congress’s statements of purpose—“to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities” and “to invoke the sweep of congressional authority... to address the major areas of discrimination faced day-to-day by people with disabilities”\textsuperscript{26}—depict a commitment to eradicating disability discrimination and utilizing the means necessary to achieve that end. Such compelling language would seem to indicate congressional intent to grant standing broadly to persons who suffer discrimination. Surely Congress wanted ADA plaintiffs to have a real—as opposed to theoretical—remedy for the violation of their rights, and surely Congress intended those remedies to provide public accommodations with the proper incentives to comply with the statute. Ironically, though, Title III plaintiffs have faced more than physical barriers in bringing their claims: through narrow interpretation of the doctrine of standing, many district courts have “denied access” to the courtroom door. Despite the plain language and apparent intent of the ADA, standing is one area where the courts have a chance to limit significantly the relief that Title III of the ADA offers. This section, therefore, considers general standing doctrine and its effects in the ADA context.

1. Standing: Some General Concepts

The doctrine of standing answers the questions who may invoke the jurisdiction of the federal courts and what is required to do so.\textsuperscript{27}

\textsuperscript{24} 42 U.S.C. § 12,188(b)(1)(B).
\textsuperscript{25} Id. § 12,188(b)(2), (b)(4).
\textsuperscript{26} Id. § 12,101(b)(2), (b)(4) (emphasis added).
\textsuperscript{27} See Richard H. Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1, 13-14 (1984). Standing has also been defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right,” Black’s Law Dictionary 1413 (7th ed. 1999), or as answering the question “whether [a] claim may be asserted by the particular party before the court,” Ronald A. Cass et al., Administrative Law 318 (3d ed. 1998). Fallon remarks “it long since has become commonplace to begin any discussion of the doctrine of standing by decrying the confusion which persists in this area of the law.”
Standing limitations come from three sources: the language of Article III that limits the power of the federal courts to "cases and controversies," judge-made "prudential principles," and legislative enactments. Because standing is a limitation on judicial power, a federal court may inquire into standing at any stage of a suit and, if it finds the plaintiff lacks standing, dismiss the case.

The text of Article III of the Constitution provides the foundation for, but does not mandate, standing doctrine. Article III does not explicitly refer to "standing," but does limit the power of federal courts to "Cases" and "Controversies." Standing doctrine simply did not exist in the eighteenth century, and doctrines approximating standing did not emerge until the 1920s and 1930s. In fact, the Supreme Court only began to refer to "standing" as an Article III limitation in 1944, and the "explosion of judicial interest" in the doctrine did not occur until 1970. However, "there had always been a question whether the plaintiff had a cause of action, and this was indeed a matter having constitutional status. Without a cause of action, there was no case or controversy and hence no standing." The focus of what is now the standing issue was, rather, who had a right to sue, a right that Congress or any other source of law could grant. Without such a grant, a plaintiff had no case or controversy; a federal court could not hear the plaintiff's claim because the claim did not satisfy the requirements of Article III.

Fallon, supra, at 15 (internal quotation omitted). For a general overview of the doctrine of standing, see Cass, supra, at 318-72.

28. See Cass, supra note 27, at 318-19. However, "the relation of the differing principles derived from each limitation are [not entirely] clear." Id. at 319. The implications of the overlap between the sources may lead to significant separation of powers issues, for if Congress may legislatively grant standing outside of Article III requirements, the power of Article III may be diminished. Id. at 319-20. Because of the provision of ADA's Title III, this Note focuses on standing through legislative enactment and the role of Article III in limiting (or not limiting) such legislative enactments.

29. See Fallon, supra note 27, at 15.

30. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . ."); Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 168 (1992) (noting that "Article III contains no explicit constitutional requirement of 'standing'").

31. See Sunstein, supra note 30, at 170, 179.

32. Id. at 169 & n.23 (referring to Stark v. Wickard, 321 U.S. 288 (1944)).

33. Id.

34. Id. at 170. A cause of action encompassed such actions as the qui tam, which allowed citizens to "bring civil suits to help in the enforcement of the federal criminal law," id. at 175, and thus was not necessarily limited to actions against the government.

35. See id. at 170.

36. Id. at 170-71.
Standing doctrine began to emerge in its own right in the early twentieth century, when intense debate surrounded the issue of "the constitutional legitimacy of the emerging regulatory state." Indeed, standing doctrine in its twentieth-century sense has been almost entirely devoted to the area of administrative law. The "early architects" of the doctrine—Justices Brandeis and Frankfurter—sought to "insulate" New Deal legislation and administrative action from "frequent judicial attack," especially in cases where "citizens at large [attempted] to invoke the Constitution to invalidate democratic outcomes." The Court used the doctrine we now call standing to hold that the plaintiffs in these cases lacked a "personal stake" and thus could not invoke federal judicial power. The Supreme Court clung to the notion that one had a right to sue (i.e., standing) only if some source of law had conferred such a right, and these plaintiffs could not point to such a source of law.

Common law or statutory interests remained the shibboleths for standing doctrine after the enactment of the Administrative Procedure Act. "standing [existed] for people whose common law or statutory interests were at stake, as well as for people expressly authorized to bring suit under statutes other than the APA." Not until 1970 did a significant "conceptual break" occur in the law of standing. In Data Processing Organizations, Inc. v. Camp, the Court abandoned the notions of "legal interest" or "legal injury," by which a plaintiff needed to show that common law or statutory interests were at stake to establish standing. Instead, the Court created the "injury-in-fact" test, theoretically a simplification, by which factual harm, rather than legal injury, would satisfy standing requirements. The injury-in-fact test has become an important part

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37. Id. at 179.
38. See id. at 170-97; Cass, supra note 27, at 318 ("Who may obtain review of agency action generally is referred to as a question of 'standing.'" (emphasis added)).
40. Id. at 180.
41. Id. The Court rejected the constitutional claims in these cases because the constitutional provisions at issue did not create private rights, but rather created duties that run to the public at large. Id.; cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992) (noting that generalized grievances do not give rise to a case or controversy).
43. Sunstein, supra note 30, at 182.
44. Id. at 185.
46. Sunstein, supra note 30, at 185.
47. Id. at 181-82, 185.
48. Id. at 185, 188. Sunstein notes, "One might well ask: What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes." Id. at 185. A complete discussion of the criticisms of the injury-in-fact test is beyond the scope of this Note. However, it is important to highlight Professor Sunstein's suggestion that an "injury [solely] in fact" is impossible, because it "inevitably relies on some standard that is normatively laden and independent of
of the Supreme Court's standing jurisprudence, and it plays a significant role in ADA decisions. The following sub-sections discuss the two Supreme Court decisions that have had the most influence on courts deciding ADA Title III cases, both of which revolve around the injury-in-fact test.

2.a. *City of Los Angeles v. Lyons*\(^{49}\)

Courts deciding whether a plaintiff has standing under Title III of the ADA often rely on *City of Los Angeles v. Lyons*, which involved the choking of an African-American man to unconsciousness by Los Angeles Police Department ("LAPD") officers who had pulled him over because of a burned-out tail light.\(^{50}\) In eight years, sixteen people had died from the use of a chokehold by LAPD officers.\(^{51}\) The Court, in a five-to-four decision,\(^{52}\) dismissed Lyons's constitutional claims\(^{53}\) for an injunction banning the use of chokeholds on standing grounds.\(^{54}\) Relying on prior cases that refused to grant standing where plaintiffs alleged only "[p]ast exposure to illegal conduct... [without] any continuing, present adverse effects,"\(^{55}\) the Court, speaking through Justice White, determined that Lyons had not established a threat of being stopped again, or of being choked by LAPD officers if he were stopped.\(^{56}\) Moreover, Lyons' allegation that the City allowed police chokeholds when deadly force was not threatened by the perpetrator failed to satisfy the requirements of standing, because, for example, chokeholds that were allowed to thwart escape would be a threat to Lyons only in the event that Lyons would have an encounter with an officer and would attempt to escape.\(^{57}\)

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\(^{49}\) 461 U.S. 95 (1983). For an extensive discussion of *Lyons* and its implications for the doctrine of standing, see Fallon, *supra* note 27.

\(^{50}\) *Lyons*, 416 U.S. at 114-15 (Marshall, J., dissenting).

\(^{51}\) *Id.* at 115-16 (Marshall, J., dissenting). Before the court decided the case, the LAPD prohibited one of the two types of chokeholds at issue and imposed a moratorium on the other chokehold. *Id.* at 99-100.

\(^{52}\) *Id.* at 96.

\(^{53}\) Lyons alleged impairment of First, Fourth, Eighth, and Fourteenth Amendment rights. *Id.* at 98.

\(^{54}\) *Id.* at 113 (Marshall, J., dissenting). Justice Marshall, joined by three other justices, dissented. *Id.* (Marshall, J., dissenting).

\(^{55}\) *Id.* at 102 (quoting O'Shea v. Littleton, 414 U.S. 488 (1974)). Commentators have questioned the applicability of *O'Shea* to the facts in *Lyons*. See Fallon, *supra* note 27, at 38-39.

\(^{56}\) *Lyons*, 461 U.S. at 105.

\(^{57}\) *Id.* at 106.
In its discussion, the Court conceded that “past wrongs” might demonstrate “a real and immediate threat of repeated injury.”58 The threat of future injury as a result of future criminal conduct was the problematic issue for the Court: the anticipation of future criminal violations did not create an adequate basis for standing.59 The Court “assumed that [plaintiffs] will conduct their activities within the law and so avoid . . . exposure to the challenged course of conduct.”60 In some ways, this holding makes perfect sense. One cannot overlook the absurdity involved in a plaintiff’s alleging his own future criminal activity in order to establish standing.61 In other ways, this holding makes no sense at all, because, following its logic, no plaintiff, whether law-abiding or not, can seek to enjoin harmful activity on the part of the police force.62

Federalism issues form an interesting coda to the Lyons opinion. The “proper balance between state and federal authority” made the Court reluctant to enjoin state law enforcement practices “in the absence of irreparable injury which is both great and immediate.”63 Instead, the Court stated that “principles of equity, comity, and federalism” should control, and that federal courts should account for the delicate balance “between federal equitable power and State administration of its own law.”64 The Court was not concerned about deterrence of police misconduct, because Lyons could seek remedies for damages under other federal statutes which the Court recognized as adequate deterrents to future wrongdoing.65

2.b. Lujan v. Defenders of Wildlife66

Lujan is perhaps the Court’s most significant standing decision in recent years.67 In this case against the Secretary of the Interior under the Endangered Species Act,68 the Court, per Justice Scalia, emphasized the requirement of an “‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical’”—as an

58. Id. at 102 (quoting O’Shea, 414 U.S. at 496).
59. See id., 461 U.S. at 103.
60. Id. (quoting O’Shea, 414 U.S. at 497).
61. The Court appears to have been sensitive to this view. See id.
62. See id. at 113 (Marshall, J., dissenting) (“Since no one can show that he will be choked in the future, no one . . . has standing to challenge the continuation of the policy.”).
63. Id. at 112.
64. Id. (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).
65. Id. at 112-13.
68. Lujan, 504 U.S. at 557-58.
“irreducible constitutional minimum of standing.”69 The Court also enunciated two additional elements in a three-part test to guarantee that a case or controversy exists: a plaintiff must also show that a causal connection exists between the injury and defendant’s conduct, and that the injury may be redressed by the court’s action.70 In an attempt to satisfy the injury-in-fact portion of the test, the plaintiff organization submitted affidavits of its members who had observed the habitats of particular endangered species overseas before the commencement of the government projects at issue and who hoped to do so again in the future.71 However, would-be plaintiffs’ assertion of a desire to visit areas that might be harmed by government action was not enough to satisfy the Court: “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”72

However, the Lujan Court refused to backtrack on previous Supreme Court opinions that had determined that “the... injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”73 In the same paragraph, the Court indicated that Congress may “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.”74 The opinion in Lujan, therefore, does not foreclose the possibility of standing pursuant to a statutory grant.

The Lujan opinion is particularly applicable to suits against the government. The opinion contains several explicit references to the standing requirements for plaintiffs who challenge government action, as opposed to plaintiffs who sue private actors.75 The Court also

69. Id. at 560 (citations omitted).
70. Id. at 560-61. This Note focuses on the first element. See infra note 83. Insofar as the Lujan test for standing ensures that a plaintiff has suffered an actual injury that the court has the power to remedy, the test answers the purposes of standing doctrine. See Roberts, supra note 67, at 1220-21. In this sense, standing serves as a means of judicial self-restraint. Id. However, not all commentators accept the injury-in-fact test as an appropriate method for determining the existence of standing. See Sunstein, supra note 30, at 188-91; Nichol, supra note 48, at 1154-59.
71. Lujan, 504 U.S. at 563-64.
72. Id. at 564. But see Pierce, supra note 67, at 1177 (discussing the triviality of this holding). Furthermore, the Court analogized the affiants’ past travel to the injuries in Lyons, as both were examples of “[p]ast exposure to illegal conduct.” Lujan, 504 U.S. at 564; see also supra note 55 and accompanying text.
73. Lujan, 504 U.S. at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
74. Id.
75. See id. at 561-62 (“When the suit is one challenging the legality of government action... standing depends considerably upon whether the plaintiff is himself an object of the action... at issue.” (emphasis added)); id. at 573-74 (“We have consistently held that a plaintiff raising only a generally available grievance about government... does not state an Article III case or controversy.” (emphasis added)); id. at 578 (“[I]t is clear that in suits against the Government, at least, the concrete
contrasts two different types of plaintiffs in the *Lujan* opinion—those who are objects of government action and those whose injury "arises from the government's allegedly unlawful regulation... of someone else."76 As the Court described the plight of plaintiffs in the second category: "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."77 In deciding this case brought against the Secretary of the Interior,78 the Court did not discuss the threshold for standing in suits against private parties.

The *Lujan* Court also pointed to separation of powers as a rationale for its standing jurisprudence. According to Justice Scalia, had the Court ignored the injury-in-fact requirement, it would have "discard[ed] a principle fundamental to the separate and distinct constitutional role of the Third Branch,"79 and enabled Congress to permit the courts to monitor executive action.80 The injury-in-fact requirement serves to protect the executive power from encroachment by the courts:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."81

Thus, by limiting the federal courts' jurisdiction to those cases in which the plaintiff has suffered an injury in fact, the *Lujan* Court attempts to preserve the separation of powers that is a fundamental part of the federal system.

The restrictive standing doctrine enunciated in *Lyons* and *Lujan* has had a significant impact on standing jurisprudence in general and on ADA cases in particular. Together, these two cases form the backbone of the standing analysis in cases brought under Title III of the ADA. The *Lyons* requirement of a "real and immediate threat"82 informs courts' decisions regarding whether a plaintiff has established an "injury in fact"—that is, whether a plaintiff has satisfied the first element of the *Lujan* test.83 The cases in the next section exemplify

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76. *Id.* at 562 (emphasis omitted).
77. *Id.* (emphasis added) (internal quotation omitted).
78. *Id.* at 559.
79. *Id.* at 576.
80. *Id.* at 577.
81. *Id.* (quoting U.S. Const. art. II, § 3).
83. *Lujan*, 504 U.S. at 560. Nearly every court that has considered *Lyons* and *Lujan* in the ADA context has found no "real or immediate threat." *See*, e.g., Deck v. Am. Haw. Cruises, Inc., 121 F. Supp. 2d 1292, 1298-99 (D. Haw. 2000) (holding that
the courts' treatment of *Lujan*, *Lyons*, and general standing doctrine in the ADA context.

II. STANDING UP TO STANDING: STANDING IN THE CONTEXT OF THE ADA

Compared to the other titles of the ADA, Title III has received very little attention from the courts. And, admittedly, many courts deciding Title III claims do not even address standing in their decisions. When courts do consider standing, though, an ADA plaintiff's chances of prevailing dwindle to almost zero, regardless of whether the defendants engaged in discrimination once, a few times, or several times. Instead, the determinative issue in these cases is whether the plaintiff intended to return to the establishment that performed the discriminatory acts. This part examines four threat to plaintiff of future harm is "merely conjectural and hypothetical" and collecting cases); Bravin v. Mount Sinai Med. Ctr., No. 97 Civ. 7034, 1999 U.S. Dist. LEXIS 4915 (S.D.N.Y. Apr. 14, 1999) (holding that plaintiff did not have standing because he did not show that he would use the defendant's services in the future); Davis v. Flexman, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that hearing-impaired patient did not have standing to sue a mental health clinic that refused to provide her with a sign language interpreter because she sought counseling services elsewhere); DeLil v. El Torito Rests., Inc., No. C 94-3900, 1997 U.S. Dist. LEXIS 22788 (N.D. Cal. June 23, 1997) (holding that one visit to non-wheelchair accessible restaurant in four years was not enough to give plaintiff standing); Hoepfl v. Barlow, 906 F. Supp. 317 (E.D. Va. 1995) (holding that HIV-positive plaintiff did not have standing to sue a surgeon who refused to treat her because she had received the needed treatment from another surgeon). See see Parr v. Waianae L & L, Inc., Civil No. 97-01177, 2000 U.S. Dist. LEXIS 7373, at *39-46 (D. Haw. May 16, 2000) (holding that plaintiff's intent to return to a restaurant satisfied part one of the *Lujan* test). Therefore, these courts either end the *Lujan* analysis with part one of the *Lujan* test, see, e.g., Bravin, 1999 U.S. Dist. LEXIS 4915, at *10-12, or state that only part one of the *Lujan* test is at issue, see, e.g., Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1333 (N.D. Cal. 1994). See see Hoepfl, 906 F. Supp. at 321 (suggesting that the *Lyons* analysis might logically fall under part two of the *Lujan* test, i.e., redressability).

84. Colker, supra note 7, at 377.
85. See, e.g., Johnson v. Gambrinus Co., 116 F.3d 1052, 1055-56 (5th Cir. 1997) (affirming district court's determination that defendant's no-animals policy violated the ADA and not addressing plaintiff's standing); Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 and CIV. S-93-1622 (renumbered No. CIV. S-93-505), 1994 U.S. Dist. LEXIS 21281, at *28 (E.D. Cal. June 28, 1994) (holding that defendant's categorical exclusion of all persons using wheelchairs from certain facilities violated the ADA because it resulted from "speculation, stereotypes, and generalizations," not addressing plaintiff's standing); Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Az. 1992) (finding that defendant's "absolute ban" on wheelchair-bound base coaches violated the ADA without addressing plaintiff's standing); see also Amy F. Robertson, *Standing to Sue Under Title III of the ADA*, Colo. Law., Mar. 1998, at 51, 51 (observing that "standing is raised only rarely in Title III cases" and collecting cases).

86. One exception is the District of Hawaii, which has done a *Lyons* and *Lujan* analysis and yet found for plaintiff. See Parr, 2000 U.S. Dist. LEXIS 7373.
87. An exception to this rule is a case where the defendant's actions were an aberration—a single violation by an unauthorized employee, for example—and were not likely to happen again. See O'Brien v. Werner Bus Lines, No. 94-6862, 1996 U.S.
representative cases—one in which the plaintiff experienced discrimination once, one in which the plaintiff experienced discrimination a few times, one in which the plaintiff experienced discrimination many times, and one in which the court discussed standing under the ADA in an unusually lucid manner. In each case, the courts performed a Lyons/Lujan analysis and uniformly found that the plaintiffs lacked standing.

A wheelchair lift with no one to operate it caused a wheelchair-bound plaintiff to sue in Delil v. El Torito Restaurants.88 In this case, plaintiff entered the restaurant on one occasion, but was unable to use the wheelchair lift that led to the dining area without first searching for the manager, the only person who kept a key to the lift.89 However, because plaintiff visited the restaurant only once in four years,90 and because she lived and worked one hundred miles from the restaurant,91 the court granted summary judgment to the defendant on the grounds that plaintiff lacked standing.92 Even though plaintiff did re-enter the restaurant four years after the original incident—an act the court rejected as “[a] patently . . . belated effort to bolster her standing to assert injunctive relief”—and made “numerous declarations . . . [that] attempt[ed] to show that the discrimination she allegedly experienced . . . was pervasive and continuing,” she did not show that she was likely to return.93 Therefore, the court said, plaintiff faced only a minimal risk of discrimination in the future.94

88. 1997 U.S. Dist. LEXIS 22788. The courts in Freydel v. New York Hospital and Aikins v. St. Helena Hospital, cases in which defendant hospitals on a single occasion denied deaf individuals a sign-language interpreter, also found that the plaintiffs did not demonstrate a real and immediate threat of future injury sufficient to satisfy the Lyons requirements. Freydel v. N.Y. Hosp., No. 97 Civ. 7926, 2000 U.S. Dist. LEXIS 9, at *2-4, 9-10 (S.D.N.Y. Jan. 3, 2000), aff’d, No. 00-7108, U.S. App. LEXIS 31862 (2d Cir. Dec. 13, 2000); Aikins, 843 F. Supp. at 1332, 1333-34. For other “one-time-only” Title III cases that discuss standing, see Deck, 121 F. Supp. 2d at 1299 (D. Haw. 2000) (finding that plaintiff’s desire to take another cruise, which was conditioned upon her mother’s health and her own financial situation, was insufficient to confer standing); Adelman v. Acme Mkt., No. 95-4037, 1996 U.S. Dist. LEXIS 4152, at *6 (E.D. Pa. Apr. 2, 1996) (noting that pro se plaintiff who had requested compensatory and punitive damages, which are not available under Title III of the ADA, lacked standing because he had not alleged an intent to return to the defendant store; but dismissing without prejudice to allow plaintiff to bring an appropriate claim for injunctive relief); Atakpa v. Perimeter Ob-Gyn Assocs., 912 F. Supp. 1566, 1573-74 (N.D. Ga. 1994) (determining that plaintiff, after facing discrimination at defendant clinic and seeking treatment elsewhere, lacked standing because she failed to allege that she would seek defendant’s services in the future).


90. Id. at *12.

91. Id. at *3.

92. Id. at *14-15.

93. Id. at *4, 15. The content of these declarations, and the identities of the person(s) who gave them, are not mentioned in the opinion.

94. Id. at *15.
In *Naiman v. New York University*, a hearing-impaired plaintiff was a patient at defendant hospital four times in three years. During each visit, plaintiff requested a sign language interpreter, but defendant did not provide an interpreter, or did not provide an interpreter "in a timely manner," or provided a person with minimal sign language ability who could not help plaintiff communicate with his doctors or with hospital staff. Despite the court's finding that plaintiff's four visits were "sufficient, for pleading purposes, to demonstrate that, if [plaintiff] were to go to [the hospital] again, it would again fail to provide him with effective communication," plaintiff did not satisfy his "burden to demonstrate standing." To establish standing, the court noted, plaintiff would need to show a "'real or immediate threat' that he will require the services of [the hospital] in the future." The court suggested that a recurring medical condition or the proximity of the hospital to plaintiff's home or workplace would satisfy the "real or immediate threat" requirement.

Similarly, in *Bravin v. Mount Sinai Medical Center*, a deaf man who communicated through sign language attended Lamaze classes with his wife at defendant hospital before the birth of their baby. Plaintiff requested a sign language interpreter so that he could

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95. No. 95 Civ. 6469, 1997 U.S. Dist. LEXIS 6616 (S.D.N.Y. May 12, 1997). A related case is *Schroedel v. New York University Medical Center*, in which defendant failed to provide a hearing-impaired plaintiff with a sign-language interpreter, but plaintiff was found to lack standing because defendant hospital was not the nearest medical center to either plaintiff's residence or her workplace, and plaintiff had used the hospital only three times in sixteen years. 885 F. Supp. 594, 596, 599 (S.D.N.Y. 1995). Therefore, plaintiff had "not established a real and immediate threat of repeated injury sufficient to confer standing for injunctive relief." *Id.* at 599. The cases are related in that the plaintiff in *Naiman* sought to intervene as a class plaintiff in *Schroedel*. *Naiman*, 1997 U.S. Dist. LEXIS 6616, at *8. The court denied the *Naiman* plaintiff's motion to intervene on the grounds that he lacked standing. *Id.* at *9-10.

96. *Naiman*, 1997 U.S. Dist. LEXIS 6616, at *1. Each visit at issue occurred after 1990, the year in which the ADA was enacted. *Id.*

97. *Id.* at *2-3 (internal quotations omitted).

98. *Id.* at *14.

99. *Id.*

100. *Id.* at *14 & n.4. The court did grant plaintiff leave to amend the complaint, and even offered some hints as to what allegations might be sufficient to establish standing. See *id.*

101. No. 97 Civ. 7034, 1999 U.S. Dist. LEXIS 4915 (S.D.N.Y. Apr. 14, 1999). Another Title III case with similar facts is *Davis v. Flexman*, in which the court dismissed plaintiff's claims against a clinic for lack of standing even though plaintiff had been denied a sign-language interpreter during six months of psychological counseling. 109 F. Supp. 2d 776, 780-81, 784 (S.D. Ohio 1999). Plaintiff had begun meeting with her counselor outside the clinic, and told the counselor that she did not want to schedule any more meetings at the clinic. *Id.* at 781. The court found, therefore, that plaintiff did not face "a real and immediate threat of future discrimination." *Id.* at 784.

understand the classes, but the hospital denied the service because plaintiff was not a "patient." 103 Immediately after the baby's birth at the hospital, the hospital transferred the baby to its neo-natal intensive care unit. 104 Plaintiff again requested an interpreter following the transfer, but the hospital again denied him interpretation services. 105

Even though the court observed that plaintiff's complaint was "sufficient, for pleading purposes, to demonstrate that if the [plaintiffs] were to go to [the hospital] again, it would fail to provide [plaintiff] with effective communication," 106 the risk of future discrimination was not enough: "The [plaintiffs] must show that there is a likelihood that they will require the services of [the hospital] in the near future." 107 Yet, despite the holding of no standing under Title III of the ADA, the court found defendant liable for its failure to provide an interpreter for the Lamaze classes, and granted plaintiff's motion for summary judgment on that issue. 108 In response to defendant's argument that the plaintiff in this case was not entitled to accommodation for the Lamaze classes, the court remarked as follows:

While [the hospital] is undoubtedly correct that [plaintiff] could not attend the classes by himself, neither could [plaintiff's wife] attend the classes by herself. She was required to have a "birthing partner," and, like many, if not most women in her position, she chose her husband. Accordingly, it would appear that in order to allow [plaintiff] to participate in and benefit from the service being provided, [the hospital] was required to make some reasonable accommodation for [plaintiff]. 109

However, because the ADA does not provide for damages for individual plaintiffs, 110 the court's finding that defendant failed to meet the ADA standard for public accommodations but that plaintiff could not bring a claim for injunctive relief for lack of standing, is not particularly helpful in the ADA context. 111

103. Id. at *5. Defendant did "agree to provide an interpreter for the birth process." Id.
104. Id.
105. Id. at *5-6. Three days after his request was denied, plaintiff moved, by order to show cause, for a preliminary injunction requiring the hospital to provide an interpreter. The hospital then agreed to provide an interpreter. Id. at *3-4.
106. Id. at *12-13.
107. Id. at *13. However, the court went so far as to call the hospital's actions a "policy," id. at *12, and granted plaintiff leave to replead. Id. at *20.
108. Id. at *38-39. The question before the court on this issue was "whether [plaintiff] was entitled to a qualified interpreter as a matter of law," the law being the ADA. Id. at *29. In effect, the court acknowledged that defendant had violated the ADA, but denied relief because plaintiff lacked standing.
109. Id. at *33.
111. Plaintiff did bring claims for damages under the predecessor to the ADA,
The HIV-positive plaintiff in *Hoepfl v. Barlow*\(^{112}\) spent more than six months seeking a doctor to remove ruptured breast implants.\(^{113}\) When plaintiff finally found a doctor, she disclosed her HIV-positive status, to which the doctor replied “he would ‘not touch an HIV patient with a ten-foot pole.’”\(^{114}\) Although the doctor made a belated effort to console the plaintiff by offering to perform the surgery if no one else would,\(^{115}\) plaintiff did find another doctor and the surgery was performed about four months after the unfortunate consultation with defendant.\(^{116}\)

By the time the case reached the court, plaintiff had moved to a different state.\(^{117}\) That move, along with plaintiff’s having received the needed surgery,\(^{118}\) laid the foundation for the court’s dismissal of the case for lack of standing.\(^{119}\) The court noted, “a plaintiff must show that her injury is both ‘real and immediate’ to establish the ‘personal stake in the outcome’ necessary for the proper resolution of important federal questions.”\(^{120}\) Furthermore, according to the court, “an injunction cannot remedy [plaintiff’s] past injury.”\(^{121}\)

*Hoepfl* is an important case because it is one of the few instances where a court discusses in detail some of the arguments for and against standing in the ADA Title III context. First, the court rejected plaintiff’s argument that standing is automatically established if Congress has authorized injunctive relief by statute.\(^{122}\) The court stated, “[h]er argument improperly equates a grant of standing to seek injunctive relief to qualified ADA plaintiffs with a blanket grant to all plaintiffs who can allege a past ADA discrimination.”\(^{123}\) Second, in response to the plaintiff’s argument that private suits for injunctive relief are the only means by which the purposes of the ADA could be fulfilled, the court said, “[n]othing in the ADA or its legislative history suggests an intent to allow individuals, in clear derogation of the Lyons principles, to obtain injunctions on the basis of past wrongdoing alone.”\(^{124}\) An argument to the contrary, according to the

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Rehabilitation Act. See 29 U.S.C. § 794 (1999 & Supp. 2002); Bravin, 1999 U.S. Dist. LEXIS 4915, at *1. Therefore, establishing defendant’s liability may have been useful to the plaintiff in his claim for damages.

113. Id. at 318.
114. Id.
115. Id.
116. Id. at 319.
117. Id. at 318.
118. Id. at 322. (“It is difficult at best to see how an injunction directed to [defendant] in his Virginia office would be of any benefit to [plaintiff] in North Carolina who no longer needs his services.”).
119. Id. at 322-23.
120. Id. at 321.
121. Id.
122. Id.
123. Id.
124. Id.
court, would be an argument "that the common law rules on standing should not apply in ADA cases." 125

Third, the Hoepfl court addressed the language of the ADA, and embraced the view that, even if Congress had the authority to expand standing radically, Congress chose not to exercise that authority. 126 For the court, the phrase "is being subjected to discrimination" 127 was dispositive. The use of the progressive verb indicated continuing, ongoing action, and therefore "reflect[ed] Congress's intent that the ADA not be used as a vehicle for private plaintiffs to obtain injunctive relief on the basis of past discrimination alone." 128

Finally, the court pointed to the provisions of the ADA that give enforcement powers to the United States Attorney General in support of its view that private plaintiffs who do not suffer from ongoing and future discrimination do not have standing to bring an ADA claim. 129 This opportunity for "lawsuit[s] on behalf of the public good" refers to discrimination that occurred in the past, 130 and thereby offers a remedy for plaintiffs who cannot allege ongoing discrimination. 131 Although a plaintiff like Hoepfl "may reasonably regard this avenue of relief as impractical or unrealistic for obvious reasons," the court nevertheless called the Attorney General provision "an appropriate avenue and the one Congress chose to enact." 132

All of the plaintiffs in these cases experienced discrimination on the basis of their disabilities. All of the courts recognized that plaintiffs had suffered injury, and, most important, all of the courts admitted that defendants had violated the ADA. The strict interpretation of Lujan and Lyons to which the courts adhered, however, rendered the plaintiffs' claims useless, because none of the plaintiffs could demonstrate the necessary intent to return (Lujan) that would establish an imminent threat of future harm (Lyons) and, therefore, standing. Furthermore, the plaintiffs could not seek monetary damages, as the ADA allows monetary damages only where the Attorney General brings a suit on a plaintiff’s behalf. 133 The plaintiffs, therefore, were left without any practical remedy, and the defendants were given free rein to continue their discriminatory practices.

Part III demonstrates why this narrow view of standing doctrine is inappropriate in the ADA context. It argues that strict, formalistic application of Lujan and Lyons is not uniformly appropriate in the

125. Id.
126. Id. at 323.
129. Id.; see 42 U.S.C. § 12,188(b)(1)(B); see also supra notes 24-25 and accompanying text (discussing the Attorney General provisions of the ADA).
131. Id.
132. Id.
133. See 42 U.S.C. § 12,188(a)-(b).
ADA Title III cases; it addresses Congress's ability to grant standing through statutory enactment, and Congress's intent to do so in the ADA. Next, it examines the common-sense arguments in favor of broader standing for ADA plaintiffs.

Part III then offers a suggestion—a workable standard that may solve some of the issues that arise in applying standing doctrine to the ADA. This standard retains the principles of current Article III jurisprudence, but shifts the focus of the analysis to congressional intent and common-sense outcomes. Part III then applies the workable standard to the cases outlined above, and suggests different outcomes for some of the cases.

III. TAKING A STAND: ALTERNATIVE ANALYSES AND A NEW STANDARD FOR STANDING

Most district courts that have ruled on standing in the ADA context have adhered to a strict interpretation of standing doctrine, and this approach is not entirely unreasonable. The cases or controversies requirement comes straight from the Constitution, Lujan is the law insofar as it is the Supreme Court's most recent ruling on the requirements of standing, and Lyons fleshes out those requirements for standing when a plaintiff seeks injunctive relief. Even within this jurisprudential framework, however, the doctrine of standing does not necessarily bar ADA Title III claims. This section offers some alternative arguments in favor of standing in the context of the ADA.

A. Fresh Alternatives

1. Article III, Lujan and Lyons

Article III requires "cases or controversies," but does not define those terms. Furthermore, as we have seen, standing doctrine is a twentieth-century phenomenon that would have been a foreign concept in the eighteenth century. Nowhere in the Constitution do we find a three-part test for standing, or a requirement of future injury to establish that a plaintiff has a case or controversy. Lujan and Lyons, therefore, need not be the last word on standing doctrine. Indeed, the intense criticism that these cases brought about suggests a need for a more flexible interpretation of Article III. Even assuming that Lujan and Lyons are unassailable interpretations of

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134. See supra Part II.
135. See supra Part II.
136. See supra note 30 and accompanying text.
139. See supra notes 31-33 and accompanying text.
140. See, e.g., Fallon, supra note 27; Sunstein, supra note 30.
Article III, those opinions themselves reveal subtleties that undercut their applicability to the ADA.

First, Lujan contains more nuances than the district court opinions suggest, and "strict" adherence to the language of the opinion may actually allow for some flexibility in the ADA context. As noted above, Lujan does not foreclose the possibility of statutory grants of standing.\textsuperscript{141} Rather, Lujan offers a more flexible approach if there is an express congressional grant of standing when a plaintiff has actually suffered an injury under such a grant.\textsuperscript{142} As a statute that elevates disability discrimination to a legally cognizable level, the ADA is a good candidate for this broad reading of Lujan.

A second rationale for a more flexible interpretation of Lujan is that Title III of the ADA applies only to private actors. In contrast, the Lujan Court focused on suits against the government and explicitly addressed standing in that context.\textsuperscript{143} The language of the Lujan opinion speaks particularly to suits against government agencies, and thus leaves open the possibility that requirements for standing might differ in different contexts.\textsuperscript{144}

Moreover, the federalism issues that are present in Lujan are absent in ADA Title III cases. While the Lujan Court feared usurpation of executive authority by Congress's converting generalized interests into individual rights,\textsuperscript{145} both of those fears are absent in ADA cases. First, the ADA does not "convert the undifferentiated public interest"\textsuperscript{146} into individual rights, but rather "elevat[es] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate [not legally punishable] in law,"\textsuperscript{147} because only those who are personally subjected to discrimination may sue under Title III of the ADA.\textsuperscript{148} Second, Title III plaintiffs sue private parties,\textsuperscript{149} not government actors, so the cases do not present the separation of powers issues that were present in Lujan.\textsuperscript{150}

\textsuperscript{141} See supra notes 73-74 and accompanying text.
\textsuperscript{142} Lujan, 504 U.S. at 578.
\textsuperscript{143} See supra notes 75-78 and accompanying text.
\textsuperscript{144} See Lujan, 504 U.S. at 578 ("[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain." (emphasis added)).
\textsuperscript{145} See supra notes 79-81 and accompanying text.
\textsuperscript{146} Lujan, 504 U.S. at 577.
\textsuperscript{147} Id. at 578.
\textsuperscript{149} Title III of the ADA is applicable only to public accommodations, which are defined as private entities. See 42 U.S.C. §§ 12,181(7), 12,182(a).
\textsuperscript{150} As Sunstein observes, "a large part of the Court's opinion [in Lujan] relies on the fear that, without a particularized injury, courts will be displacing executive power... This concern is entirely inapplicable when the executive is not even a party." Sunstein, supra note 30, at 231; see supra notes 37-38 and accompanying text; see also Cass, supra note 27, at 318 ("Who may obtain review of agency action generally is referred to as a question of 'standing,'" (emphasis added)).
In addition, one can distinguish the *Lujan* plaintiff, who had not yet suffered an injury, from ADA plaintiffs, who have suffered injuries. The *Lujan* plaintiffs had not experienced illegal conduct, having visited the affected habitats before the commencement of the government projects at issue.\(^{151}\) Therefore, the plaintiffs' non-specific, "some day" intent to return was not enough to establish the requisite injury.\(^{152}\) ADA plaintiffs, in contrast, have suffered discrimination.\(^{153}\) Thus, strict application of *Lujan*, without consideration of the injury that an ADA plaintiff has already experienced, may misconstrue the Court's opinion.

Even if *Lujan* does apply to suits brought under a statutory grant of standing, the injury-in-fact test may produce absurd results in ADA cases. As Professor Cass Sunstein notes, "[b]efore *Lujan*, requiring people to obtain a plane ticket or to make firm plans to visit the habitat of endangered species might well have been unnecessarily formalistic. Now such actions are apparently required."\(^{154}\) Commentators have not overlooked the triviality of this holding.\(^{155}\) In the ADA context, a strict requirement of concrete plans to visit an establishment does not take into account Congress's findings that, because of the prevalence of disability discrimination, individuals with disabilities are less likely to make use of such services in the first place.\(^{156}\) Furthermore, the amount of planning required should vary from one public accommodation to the next: The plans one makes to travel on a cruise line are quite different from the plans one makes to visit the emergency room.\(^{157}\)

*Lyons* is another governing Supreme Court decision on the issue of standing when a plaintiff seeks injunctive relief.\(^{158}\) Because injunctive

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151. *See Lujan*, 504 U.S. at 564. Although the Court refers to "past exposure to illegal conduct," *id.* (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)), one could argue that the *Lujan* plaintiffs had not been exposed to past illegal conduct at all, because their visits had occurred before the government action had begun.

152. *See id.*

153. Courts that analyze a Title III plaintiff's standing almost always find that plaintiff has suffered an injury. *See supra* Part II. Also, one must recall that the ADA offers only injunctive relief for private plaintiffs—no monetary relief is available unless plaintiff can persuade the Attorney General to pursue the claim on plaintiff's behalf. 42 U.S.C. § 12,188(a)(1). Therefore, an ADA plaintiff who fails the *Lyons/Lujan* test will often go without any remedy.


155. *See Pierce, supra* note 67, at 1177. Justice Kennedy, in his concurring opinion, also found the airline ticket requirement "trivial." *See Lujan*, 504 U.S. at 579 (Kennedy, J., concurring).

156. *See 42 U.S.C. § 12,101(a).* Persons with disabilities are therefore less likely to establish those patterns of using services which help establish intent to return and, hence, standing.


158. *See City of Los Angeles v. Lyons, 461 U.S. 95, 102-05 (1983); see also Lujan*, 504 U.S. at 560 (citing *Lyons* with approval).
relief is the only relief afforded to private plaintiffs under Title III of the ADA. 159 District courts deciding ADA Title III cases reach for Lyons as a logical focus for determinations of standing. The courts that interpret Lyons in the ADA context, however, overlook the fact that the plaintiff in Lyons would have had to allege future criminal activity in order to establish a threat of future harm. 160 The Lyons Court, on the other hand, paid much attention to this fact. 161

The applicability of Lyons in the ADA context is, therefore, problematic. As one commentator notes,

Courts that have applied Lyons to ADA Title III cases have applied the doctrine too stringently and have arguably misconstrued the nature of these Title III actions. ADA Title III cases do not involve extreme situations in which only a plaintiff’s criminal conduct could cause future discrimination to occur. Instead, these are cases in which plaintiffs represent a class of litigants who repeatedly face instances of discrimination as a result of their own... lawful conduct. 162

In fact, in a pre-ADA case, the Supreme Court distinguished the Lyons principles from situations in which a plaintiff faces future discrimination on the basis of disability. 163

Another area in which courts might exercise some flexibility while remaining faithful to the Lyons and Lujan analyses is the use of an exception to the mootness doctrine: a claim may be capable of repetition but evade review. 164 The most familiar example of the Supreme Court’s use of this exception is Roe v. Wade. 165 In that case, the Court noted that a “pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.” 166 Likewise, strict construction of an intent-to-return test unnecessarily limits ADA plaintiffs’ chances of having their cases

159. See supra notes 21-23 and accompanying text.
160. See Lyons, 461 U.S. at 105-06.
162. Colker, supra note 7, at 397.
163. See Honig v. Doe, 484 U.S. 305, 320-22 (1988) (upholding lower court’s injunction that prevented a school district from unilaterally expelling an emotionally disturbed (and therefore disabled within the meaning of the Education of the Handicapped Act) student; finding that the case was not moot because the student could not control his behavior and, therefore, was reasonably likely to be subjected to another unilateral attempt at expulsion); Colker, supra note 7, at 397-98 (describing Honig).
164. Colker, supra note 7, at 396.
166. Id. at 125.
heard before a court. If bearing children is capable of repetition,\textsuperscript{167} then filling cavities\textsuperscript{168} and going to the emergency room\textsuperscript{169} also ought to be encompassed by the exception and a more liberal administration of the intent-to-return test should prevail.

2. Congressional Intent, Cases and Controversies, and the Plain Language of the ADA

Courts that have found that a plaintiff does not have standing to sue under Title III of the ADA have used more than \textit{Lujan} and \textit{Lyons} to support their holdings. Some courts have questioned Congress's ability to grant standing through statutory enactment.\textsuperscript{170} Others have observed that, even if Congress had such ability, the ADA's legislative history might undo the congressional grant.\textsuperscript{171} Finally, the language and structure of the ADA have been used against it as evidence that Congress did not exercise any powers that it might have to grant broad standing.\textsuperscript{172}

Commentators, however, have roundly attacked the first of these arguments and urge that an express congressional grant creates standing.\textsuperscript{173} These commentators focus on the "key question": whether Congress (or some other relevant source of law) has created a cause of action. Without a cause of action, there is no standing; there is no case or controversy; and courts are without authority to hear the case under Article III."\textsuperscript{174} Furthermore, even the \textit{Lujan} opinion does not expressly limit Congress's power to grant standing to

\textsuperscript{167} Such a change might necessitate a different holding in \textit{Bravin v. Mt. Sinai Medical Center}, No. 97 Civ. 7034, 1999 U.S. Dist. LEXIS 4915 (S.D.N.Y. Apr. 14, 1999), which held that Lamaze classes and subsequent neo-natal care were not enough to confer standing on the father, a deaf man, absent allegations that he would return to the hospital in the future.

\textsuperscript{168} See \textit{Bragdon v. Abbott}, 524 U.S. 624, 629 (1998). The plaintiff in \textit{Bragdon} apparently did not have her cavity filled before the case moved through the appellate process. See Colker, supra note 7, at 398 n.114. In any event, because the Supreme Court could have raised the issue of standing \textit{sua sponte}, the Court may not have considered standing to be an issue. See supra note 15 (discussing \textit{Bragdon}); see also \textit{Deck v. Am. Haw. Cruises Inc.}, 121 F. Supp. 2d 1292, 1300 (D. Haw. 2000) ("[I]t is entirely possible that Plaintiff [in \textit{Bragdon}] explicitly stated that she wanted the very same cavity filled in the defendant's office that the defendant had refused to fill—and the Supreme Court did not mention this fact because standing obviously was not an issue.").


\textsuperscript{170} See supra notes 79-81, 122-23 and accompanying text.


\textsuperscript{172} See supra notes 126-32 and accompanying text.

\textsuperscript{173} See Sunstein, supra note 30, at 166; Nichol, supra note 48, at 1157, 1160-62.

\textsuperscript{174} Sunstein, supra note 30, at 222.
persons who suffer concrete injuries under a federal statute\textsuperscript{175} and who bring suit against private actors.\textsuperscript{176} Thus, a congressional grant of standing should satisfy the requirements of Article III.

In fact, the language of the ADA lends support to the view that Congress did intend to create a broad grant of standing. Specifically, the notions that "\textit{any person} who is being subjected to discrimination" has an ADA remedy,\textsuperscript{177} and that "\textit{nothing} shall require \ldots a futile gesture" on the part of a person who knows that a public accommodation will discriminate against him or her\textsuperscript{178} indicate Congress's intent to give broad standing to plaintiffs.\textsuperscript{179} The provisions for injunctive relief as the sole ADA remedy for private plaintiffs\textsuperscript{180} support this broad reading of the statute. While plaintiffs seeking injunctive relief normally must allege an ongoing threat of injury, the "no futile gesture" language coupled with the limited means of relief available to plaintiffs indicate less restrictive requirements for standing.\textsuperscript{181}

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\textsuperscript{175} See supra notes 73-74 and accompanying text.
\textsuperscript{176} See supra notes 75-78 and accompanying text.
\textsuperscript{178} Id.
\textsuperscript{179} The language "\textit{is being subjected} to discrimination," 42 U.S.C. § 12,188(a)(1) (emphasis added), has caused at least one court to dismiss a case for lack of standing. See Hoenpl v. Barlow, 906 F. Supp. 317, 323 (E.D. Va. 1995). The phrase, the court said, indicates current, ongoing action. See id. at 323. However, just one discriminatory act has "continuing, \ldots adverse effects," City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983), to the extent that a single act limits a disabled person's ability to choose the public accommodations he or she will frequent. See Colker, supra note 7, at 398 ("[T]he right to choose [a personal service provider] is reinforced in the ADA . . . . To preserve that right, an injunction is absolutely essential as a remedy."). Commentators have also criticized courts' tendencies to equate "plain language" with narrow interpretation in the ADA context:

Despite judicial claims that the courts are simply applying the 'plain meaning' of the statute, the courts are choosing narrow readings over broad ones, even in the face of expansive administrative interpretation and strong evidence that Congress intended the statute to be interpreted broadly . . . .

But the text [of the ADA] does not mandate the narrow approach that the courts have taken.

Diller, supra note 7, at 21.

\textsuperscript{180} See 42 U.S.C. § 12,188(a)(1) (referring to 42 U.S.C. § 2000a-3(a) (1994), which allows injunctive relief as the exclusive remedy for private causes of action). The usefulness of this limited avenue of relief in the ADA context, as opposed to the Civil Rights Act context, is debatable: "The threat of injunctive relief is not sufficient to create compliance, because compliance requires a more proactive step than merely removing a 'whites only' sign and may entail what is perceived to be a significant expense." Colker, supra note 7, at 395. When courts further limit the avenues of relief by imposing strict standing requirements, defendants' incentives for compliance are further reduced. See Colker, supra note 7, at 379-80, 394-95.

\textsuperscript{181} Indeed, this view countenances a "derogation of the \textit{Lyons principles}" which some courts have avoided. See supra note 124 and accompanying text. Such "derogation, " however, might be perfectly appropriate, as the applicability of \textit{Lyons} in the ADA context is problematic. See supra note 162 and accompanying text.
\end{flushleft}
The intent of Congress to grant broad standing dovetails with the goals of the ADA. The point of the Act, as expressed in the legislative findings and statements of purpose, is to bring to an end the "unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."\textsuperscript{182} However, courts that take a strict view of standing frustrate this goal, especially in those cases where a court acknowledges ongoing discrimination that would likely recur should the plaintiff again visit the public accommodation, but nevertheless finds a lack of standing for failure to state explicitly an intent to return to the public accommodation.\textsuperscript{183}

3. Absurd Results and a Dose of Common Sense

In addition, common sense may support more liberal standing requirements for ADA plaintiffs. To begin with, requiring likely return in order for a plaintiff to have standing "allow[s] an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice."\textsuperscript{184} This requirement therefore weakens the ADA, allows unlawful conduct, and frees defendants from accountability.\textsuperscript{185} In effect, the hardest, most crabbed discriminators would take a free ride: If the discrimination were bad enough, what potential plaintiff would ever wish to return?\textsuperscript{186}

In addition, demanding a likelihood of return in order to establish the injury requisite for injunctive relief eviscerates the ADA and undermines its goals. As one author observed, "[i]n the context of personal services, it is unlikely that anyone would engage the services of a provider again after the provider had engaged in blatant discrimination, since other providers are usually available."\textsuperscript{187} To require a plaintiff to allege that he or she would return to the discriminatory establishment in order to have standing, therefore, "makes no sense."\textsuperscript{188}

The author also appealed to the power of the courts:

If a court has the power to require affirmative action—which benefits individuals in the future who were not a party to the original

\textsuperscript{185} Id. at *43-44.
\textsuperscript{186} This incentive to make any discrimination egregious further weakens the ADA's already weak incentives for Title III compliance. See supra note 179 and accompanying text.
\textsuperscript{187} Colker, supra note 7, at 398.
\textsuperscript{188} Id.
litigation—it is hard to see how a court does not have the power to
grant injunctive relief to a named plaintiff who theoretically could seek to use the service she was denied in the future. \(^{189}\)

Furthermore, persons with disabilities may find themselves in a double bind, as they are less likely to have made use of public accommodations in the past and therefore cannot establish patterns of use that would demonstrate an intent to return to a given public accommodation. \(^{190}\) Finally, to require a plaintiff to organize his or her life around the standing issue—by waiting to get a cavity filled or continuing to seek pediatric care at the hospital that would not provide accommodations during pregnancy and time spent in the neonatal unit, for example \(^{191}\)—makes the ADA’s coverage of personal services largely ineffective and thereby undermines all congressional aims. \(^{192}\)

Indeed, many countervailing arguments in favor of broad standing—arguments of formalism, intent, applicability, and common sense—present themselves to courts deciding issues of standing in the ADA Title III context. Thus, the manner in which many district courts have handled Title III cases is, perhaps not surprisingly, awkward at best and blatantly unfair at worst. The next section, therefore, suggests a solution to the problems of standing in the ADA context: a middle ground that accounts for factors on both sides of the standing arguments.

**B. Proposal**

The near-impossible hurdles that courts create for ADA plaintiffs both frustrate congressional intent and leave ADA plaintiffs without any practical remedy—a sadly ironic result in light of the high-flown

\(^{189}\) *Id.* at 399. Denial of injunctive relief on the basis of standing, therefore, undermines congressional purpose and intent. *Id.* Colker also notes that class actions are difficult to maintain under the ADA, because different discriminatory practices may affect different types of disabilities. *Id.* at 379 n.19.

\(^{190}\) See 42 U.S.C. § 12101(a)(3) (1994) (finding discrimination in access to public services); 134 Cong. Rec. S5197-08 (1988) (noting that, as late as 1988, a zookeeper “refused to admit children with Down’s Syndrome because he feared they would upset the chimpanzees”).

\(^{191}\) This may be more than mere example: the plaintiff in *Bragdon* apparently did not have the cavity filled in order to preserve her standing to seek an injunction. See Colker, *supra* note 7, at 398 n.114.

\(^{192}\) *Id.* at 398. Again comparing the ADA with the Civil Rights Act of 1964, Colker concludes

“[t]his kind of problem rarely arose under CRA Title II, because plaintiffs in those cases were likely to want to return to the restaurant or hotel in question (or at least could claim they had an interest in returning). Since CRA Title II does not cover personal service situations, it does not cover *Bragdon*-like fact patterns.”

*Id.* at 399.
rhetoric that accompanied the passage of the ADA. These holdings, however, are not inevitable. This Note advocates a better-tempered interpretation of standing doctrine in the ADA Title III context that advances Congress’s goals.

1. A Workable Standard for Standing

Courts need not discard *Lyons* and *Lujan* when deciding issues of standing. Even though the applicability of these cases in the ADA context is not entirely clear, *Lyons* and *Lujan* do help make easy work of the easy cases, in which the defendant’s discriminatory behavior is anomalous or in which the defendant changes a discriminatory policy in light of the discriminatory treatment toward the plaintiff. In these cases, the goal of Title III of the ADA—to end disability discrimination in public accommodations—is met without the courts’ intervention. Therefore, neither injunctive relief nor standing in general is necessary to fulfill congressional intent.

However, courts should keep this concern for congressional intent in mind whenever they apply the *Lyons* and *Lujan* standards. Instead of applying a strict approach to the requirement of real and imminent future harm, which focuses mainly on plaintiff’s future conduct, courts should focus on defendant’s conduct and the likelihood that, were plaintiff to return, he or she would again face discrimination. The actual likelihood of plaintiff’s return to the public accommodation, therefore, should play a secondary role in the standing analysis, and should vary with the circumstances. For this second part of the standard, courts should consider the plaintiff’s relationship with the defendant, and to this end should take into account the type of relationship, the length of the relationship, and the frequency of plaintiff’s visits to the public accommodation. Next, courts should consider the nature of the public accommodation itself and assess the likelihood of return based on normal usage patterns for that type of public accommodation. This accords with Article III’s

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193. See *supra* notes 7-12 and accompanying text.
194. See *supra* Part III.A.1.
195. See *supra* note 87 and accompanying text.
197. See *supra* note 162 and accompanying text.
198. Thus, for example, plaintiffs who seek relief from discriminatory health care services would have a better chance at acquiring an injunction when the relationship with the health care provider has gone on for some time. Of course, courts should also consider the possibility that a plaintiff, because of her disability, may not have had the opportunity to establish a long-term relationship with a particular public accommodation. See *supra* note 194.
199. Such normal usage patterns would include the frequency with which individuals normally visit the public accommodation, and the amount of preparation and advance planning required to visit such accommodation.
requirement of a case or controversy, and plaintiff surely has a case against a defendant who has engaged in discrimination.

This assessment of the standing issue in ADA cases advances the goals of the ADA by removing from plaintiff's shoulders the burden of proving, at the pleading stage, something that may be impossible to prove: plaintiff's intent to return to an establishment that had discriminated against plaintiff in the past.\footnote{200} Instead, the assessment allows courts to consider plaintiff's likelihood of return under a given set of circumstances, and to allow those standards to inform the determination of the standing issue.\footnote{201} Establishing such a likelihood of return, in many ADA cases, is justified. This is especially so in those cases where the courts have not questioned the existence of defendant's discriminatory practice, but have nevertheless found that a plaintiff lacks standing because the plaintiff did not show an intent to return. More importantly, shifting the focus to defendant's conduct, both before and after the alleged discriminatory activity, ensures that only those cases where an injunction would, in fact, provide relief go forward. The next section demonstrates the use of the tempered intent-to-return test in several factual scenarios.

2. The Workable Standard for Standing: Application

The workable standard for standing would not significantly alter the outcomes of those ADA cases in which defendant's behavior was a single aberration or in which the defendant changed its antidiscrimination policies or otherwise demonstrated that the discrimination plaintiff suffered would not happen again.\footnote{202} In those situations, application of the first part of the standard would preclude further inquiry. Defendant's anomalous (or changed) behavior would render an injunction useless, as there would be no likelihood that defendant would discriminate against plaintiff in the future. The likelihood of plaintiff's return would, therefore, be an unnecessary inquiry, as plaintiff's aims—and the aims of the ADA—would be met.

The "borderline" cases—those in which plaintiff had experienced discrimination only a few times and in which defendant had not

\footnote{200} In fact, the intent-to-return test, when strictly applied, may have perverse results. Those accommodations to which plaintiffs would reasonably want to return are likely those accommodations which have discriminated in a minimal way. However, plaintiffs are much less likely to want to return to those places that have engaged in egregious discrimination. Therefore, under a strict intent-to-return regime, those places with minor infractions might be more likely to face a federal injunction than those places practicing blatant discrimination.

\footnote{201} The distinction between intent to return and likelihood of return may seem overly fine, but are the courts not drawing similar distinctions when they base a holding of no standing on plaintiff's purchase of airline tickets? See supra notes 71-72 and accompanying text.

\footnote{202} See supra note 87.
changed discriminatory policies—would present some perplexities under the workable standard for ADA standing, but such challenges could be overcome by careful application of the standard to the facts of the case. Because the borderline cases present defendants who do not attempt to change allegedly discriminatory policies, there is a likelihood that plaintiff would suffer harm at the hands of the defendant, were the plaintiff to return to the establishment. The next step in the analysis, therefore, would be to assess the likelihood of return based on the past relationship between plaintiff and defendant. This is the problematic issue, because a defendant would argue that a plaintiff “just passing through” or a plaintiff who has never before visited the public accommodation lacks the sort of relationship with defendant that could bolster an argument for standing.

However, even in those cases where there is a “just passing through” relationship, or where a plaintiff is not “passing through” but had not established a pattern of use with the public accommodation, a court should still consider the nature of the public accommodation before concluding that plaintiff lacks standing. In those instances where infrequent visits would be the norm, such as use of an emergency room, plaintiff’s claim to have standing should not fail. In addition, for those public accommodations that are “destinations” in themselves (cruises, resorts, fine restaurants), courts should not conclude that plaintiff lacks standing merely because plaintiff had only visited the accommodation once.

Courts deciding cases with more egregious facts, such as those where plaintiff had experienced discrimination many times at the same public accommodation may also use the workable standard—in fact, the analysis in these cases is relatively simple. The “egregious” defendants have not altered their discriminatory policies, so the first part of the standard poses no problems. The second part—the relationship between plaintiff and defendant—is likewise easily resolved, as plaintiffs in these cases have established long-term relationships with defendant organizations despite the discriminatory treatment plaintiffs have suffered. Because these cases arise most frequently in the health care context, the likelihood of return once a relationship has been established is, for the most part, great. A court, therefore, need not consider the nature of the establishment, as plaintiff would have established a likelihood of return and, therefore, would have established standing.

203. See supra notes 88-100 and accompanying text.
204. See supra note 194 and accompanying text.
205. See supra notes 101-11 and accompanying text.
CONCLUSION

The public accommodations provisions of the ADA play an important role in furthering the goals of the statute: to eliminate the pervasive social problem of disability discrimination. By making sure that individuals with disabilities have equal access to professional services, personal services, private transportation services, lodging, restaurants, shops, and recreational facilities, Title III enables fuller and more active participation in community life and greater chances for independent living. As our society ages, these provisions become even more important. Although Title III of the ADA has taken a back seat to Titles I and II (the employment and public services provisions), no one, least of all the courts, should overlook its significance in the overall strategy of the ADA.

The broad grant of standing in Title III of the ADA should be one of the statute's strengths, but many courts have turned that strength into a weakness. By narrowly interpreting the Supreme Court's standing jurisprudence, without considering the context and nuances of the opinions, these courts have created legal barriers that deny access to some ADA plaintiffs. These plaintiffs have great difficulties proving that they would return to public accommodations that have discriminated against them, especially if they have fulfilled the need for that service elsewhere or if they have not used the service with frequency in the past.

A court does not need to abandon precedent, however, to achieve a just result in deciding standing for ADA plaintiffs. The language of Lujan and Lyons provide indications that different results might follow in the ADA context. Courts, therefore, can focus not on a plaintiff's intent to return to a specific public accommodation—an evaluation that relies on a plaintiff's volitional, and completely legal, activity—but focus on the discriminatory behavior of the defendant to determine whether the plaintiff is at risk of future discrimination. Rather than requiring specific intent to return, the courts should instead consider the likelihood of plaintiff's return based on all the circumstances. Courts may still bar cases that do not demonstrate a threat of future injury at the hands of the defendant, as well as cases where plaintiff's relationship with the public accommodation is simply too tenuous to make injunctive relief appropriate. But in some cases where relief has been denied, a shift of focus may allow a plaintiff an otherwise unavailable remedy and therefore might better serve the ends of the Americans with Disabilities Act.