

2020

## Towards an Urban Disability Agenda

Samuel R. Bagenstos

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### Recommended Citation

Samuel R. Bagenstos, *Towards an Urban Disability Agenda*, 47 Fordham Urb. L.J. 1335 (2020).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol47/iss5/7>

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# TOWARDS AN URBAN DISABILITY AGENDA

*Samuel R. Bagenstos\**

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## INTRODUCTION

The overwhelming majority of Americans with disabilities live in metropolitan areas.<sup>1</sup> Yet those areas continue to contain significant barriers that keep disabled people from fully participating in city life.

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\* Frank G. Millard Professor of Law, University of Michigan Law School. Thank you to the *Fordham Urban Law Journal* for hosting the symposium at which I delivered the initial version of this piece and for terrific work through the editorial process. Thank you as well to my co-panelists, Elizabeth Emens and Nestor Davidson, for an engaging discussion that has enriched this Essay.

1. See Christiane von Reichert et al., *The Geography of Disability in America: On Rural-Urban Differences in Impairment Rates*, INDEP. LIVING & CMTY. PARTICIPATION 3 (Aug. 2014), [https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1006&context=ruralinst\\_independent\\_living\\_community\\_participation](https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1006&context=ruralinst_independent_living_community_participation) [https://perma.cc/STS5-BKYZ] (finding that 29.3 million of the nation's 36.5 million disabled residents lived in metropolitan areas). Note that the rate of disability is substantially higher in rural communities. See *id.*; see also Rayna Sage et al., *Transitory and Enduring Disability among Urban and Rural People*, 35 J. RURAL HEALTH 460, 460 (2019).

Although political and social debate has periodically turned its attention to urban issues or problems — or even the so-called “urban crisis” — during the past several decades, it has too rarely attended to the issues of disability access. When political debate has focused on disability issues, it has tended to address them in a nationally uniform way, without paying attention to the particular concerns of disabled people in cities. Even when city leaders have focused attention directly on the impact of disability policy on their municipalities — for example, Philadelphia Mayor Ed Rendell’s attacks in the mid-1990s on the Americans with Disabilities Act’s (ADA) requirement to install curb cuts — they have done so as part of a more general attack on mandates on state and local governments, in and out of the disability context.<sup>2</sup>

This symposium is a welcome exception to these trends. By focusing specifically on the intersection between disability and the city, the papers from this conference will spur discussion of these important questions. In this contribution, I ask what we should want from an urban disability agenda. I begin by setting out some principles that should guide such an agenda. I then highlight some of the key barriers, in existing law and politics, for achieving those principles. In the last Section, a brief conclusion, I speculate on the prospects for addressing those barriers and ask whether the COVID-19 pandemic has made effective action on this front more or less likely.

I offer this contribution as an exercise in issue spotting. My goal is not to set forth a detailed critique of any current urban policy, nor is it to offer any particular path forward. Rather, it is to identify some key considerations for policymakers to address as they construct a truly inclusive urban agenda.

### I. PRINCIPLES

In this Part, I offer four principles that should guide an urban disability agenda: independence, integration, democratic participation, and full access to economic, educational, and recreational opportunities. I derive these principles from two sources: the goals central participants in the American disability rights movement articulated, and the positive values that urbanists argue cities can provide. Entire books have been written to articulate, defend, complicate, and challenge these principles. In this brief Essay, I cannot offer a full defense or even elaboration myself. I offer these principles simply as a set of plausible guideposts for a policy agenda.

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2. See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 41–42 (2003).

I should emphasize that these are *ideal principles* against which we might judge disability policy, and urban policy, and the intersection of the two. Of course, current practice fails to meet those ideals in any number of ways. Part II of this Essay discusses the ways in which cities fall short in achieving these ideals for people with disabilities. But we cannot forget the ways in which our system fails to achieve these ideals for many nondisabled people as well. In particular, the structure of cities and local government law often rests on and reinforces racial and socioeconomic segregation, in ways that directly conflict with the principles of integration, democratic participation, and full and equal access to opportunities.<sup>3</sup> I take it as a given that any urban agenda should seek to fight those harmful tendencies and achieve the valuable ideals that push in the other direction, in and out of the disability context.

This Essay focuses on the disability slice of the problem, because that is the topic of this symposium. An urban disability agenda, in my view, should be part of a broader democracy-and-equality agenda. And that broader agenda may appropriately push to expand the power of other levels of government — federal,<sup>4</sup> state,<sup>5</sup> or regional<sup>6</sup> — over cities. But to

3. See, e.g., Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 791 (1969); Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 1, 25 (2018); see also Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 958 (2019) (“[A]s much as local governments can advance economic fairness, social justice, and policy innovation, they can — and often do — use their power as a tool of exclusion, reinforcing racial and socioeconomic inequality.”); Olatunde C. A. Johnson, “*Social Engineering*”: *Notes on the Law and Political Economy of Integration*, 40 CARDOZO L. REV. 1149, 1164 (2019) (“The logic of state and local government organization is that communities should compete to have the least amount of poor people and people of color.”). See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847 (1994).

4. See, e.g., David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 380 (2001) (arguing that federal intervention in local government may promote the values associated with localism by preventing one local government from limiting the autonomy of neighboring local governments).

5. See, e.g., Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6 (1990) (“Integrating a state focus, state regulation and state financial support with a proper attention to local particularities and with the opportunities for popular political participation that local governments provide are far more desirable than any undifferentiated ideological affirmation of localism.”); see also Davidson, *supra* note 3, at 960–62 (arguing for a role for the state judiciary in enforcing equality and general-welfare norms to limit local action).

6. See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1991 (2000) (arguing that “the normative values which are offered in support of local government, including citizen participation and efficiency, are not well served by the localist paradigm” but instead “are best vindicated in a regionalist model in which local governments exist

the extent that cities continue to have an important role in our politics and society, they should pursue the following principles in addressing disability. Those who seek to promote what Richard Schragger has called “a revived urban liberalism”<sup>7</sup> should think of disability — and the principles below — as a key part of that program.

### A. Independence

In previous works, I have argued that one overarching principle helped to unite disparate strands of the United States’ disability rights movement as it coalesced in the 1970s and 1980s. That principle was “independence.” Independence is an ideal with a strong resonance in American culture. But disability rights activists offered their own distinct spin on that ideal. They did not define independence as rugged individualism or negative liberty. Rather, they understood the concept “in terms of agency, freedom from paternalistic institutions, and the ability to live a full life in the community.”<sup>8</sup> Importantly, these activists recognized that assistance and support might be necessary to enable disabled individuals to experience independence. One student of the independent living philosophy put the matter particularly pithily: “A person who can get dressed in fifteen minutes with human assistance and then be off for a day of work is more independent than the person who takes two hours to dress and then remains homebound.”<sup>9</sup> Consistent with this view, most American disability rights activists have sought policy interventions that enable people with disabilities to make effective “choices concerning how to live their lives, what services to receive, and how and where to receive them.”<sup>10</sup>

An urban disability agenda should strive to promote this sort of independence. It should seek to eliminate those physical, policy, and attitudinal barriers that prevent disabled people in urban settings from making choices that control their own lives. And it should support the services that will enable individuals with disabilities to make such effective choices.

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but administer a smaller domain of local powers and in which grassroots processes are used to build support for powerful regional governance structures”).

7. Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL’Y REV. 231, 233 (2013).

8. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 25 (2009) [hereinafter BAGENSTOS, LAW AND THE CONTRADICTIONS].

9. Gerben DeJong, *Defining and Implementing the Independent Living Concept*, in INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE 4, 24 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983).

10. BAGENSTOS, LAW AND THE CONTRADICTION, *supra* note 8, at 25.

### B. Integration

Integration, too, should be a goal of an urban disability agenda. As with independence, American disability rights activists generally strongly support integration as a policy goal. The history of disability in this country has been one of separation and exclusion. At least until the efforts of the disability rights movement began in earnest, disabled people were frequently sequestered in separate institutions out of the mainstream of American life. The result, for people with disabilities, was substandard services,<sup>11</sup> exclusion from important opportunities in the community, and increased stigma.<sup>12</sup> In a vicious cycle, separating disabled people from the community reinforced societal prejudice, which fed efforts to maintain the separation.<sup>13</sup>

Disability rights activists have thus sought “the full integration of people with disabilities into all areas of public, civic, and community life.”<sup>14</sup> Integration is important because it provides disabled people access to opportunities and because it reduces stigma and prejudice.

The city is a key location in which integration can take place — both in and out of the disability context. As political theorist Iris Marion Young argues, integration is — ideally, though too often not in practice — a key component of city life: “Different groups dwell in the city

11. See Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. 157, 162–63 (2007).

12. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 441–42, nn.336–38 (1991) (collecting studies showing that segregation of people with disabilities from society at large increases prejudice against them); Martha A. Field, *Killing “the Handicapped” — before and after Birth*, 16 HARV. WOMEN’S L.J. 79, 117 (1993) (“One reason many people are so fearful of — even repulsed by — persons with handicaps, and so unaware of their humanity, is that they have never known such persons and have not seen them functioning in the community.”). The Supreme Court has recognized this dynamic by noting that institutionalization leads to disability stigma: “[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Olmstead v. L. C.* by Zimring, 527 U.S. 581, 600 (1999).

13. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 440–42 (2000) [hereinafter Bagenstos, *Subordination*]. On the effects of stigma, see Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 841–42 (2003) [hereinafter Bagenstos, “*Rational Discrimination*”]. For a recent argument complicating the integrationist agenda of disability rights activists, see Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 903 (2019).

14. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 8 (2004); see also Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. 13, 14–17 (2016) (describing integrationist background of the ADA).

alongside one another, of necessity interacting in city spaces.”<sup>15</sup> City life thus can be well-positioned to “instantiate[] social relations of difference without exclusion.”<sup>16</sup> Local government law scholar Gerald Frug argues that cities can help reap important benefits of building community by “foster[ing] their citizens’ engagement with otherness.”<sup>17</sup> A disability urban agenda should ensure that the “otherness” in which city residents engage reaches across the disabled-nondisabled divide.

### C. Democratic Participation

The city has long been understood as a vehicle for self-governance — one that is more accessible to the public than state or federal governments. This point goes back to Tocqueville or even the Greek city-states. But the notion of the city as “the hope of democracy” has many modern adherents.<sup>18</sup> Frug, for example, argues: “Reestablishing the definition of political democracy as popular involvement in the decisionmaking process, rather than as merely providing a choice of candidates at an election, is possible only at the local level.”<sup>19</sup> Law professor Yishai Blank summarizes an extensive literature showing that “[p]opular participation in the political process is often more equitable, more accessible, and less expensive in local settings. And lay participation in local government and politics — much more prevalent than in state or federal institutions — creates the opportunity for people to participate in decisionmaking, and breeds good democratic citizenship.”<sup>20</sup> Even those who do not endorse Frug’s intensely participatory understanding of democracy can agree that in a smaller polity, it is easier for individual citizens to affect the outcomes of elections and participate in pluralist bargaining.<sup>21</sup> A disability urban agenda, therefore, should aim to ensure

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15. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 227 (1990).

16. *Id.*

17. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 118 (1999) [hereinafter FRUG, CITY MAKING].

18. See generally FREDERIC C. HOWE, THE CITY: THE HOPE OF DEMOCRACY (1905).

19. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1069 (1980).

20. Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 390 (2019).

21. See, e.g., ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 41–42 (1973). Nadav Shoked notes that recent empirical work bears the view that, “[c]ontrolling for all other variables, there is an inverse relationship between participation and size — average participation rates decline in larger places.” Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1380 (2014) (emphasis omitted). But he also notes the increased participation value may go away if the polity is too small or homogeneous: “[H]omogeneity — political, economic, or racial — diminishes political participation — for example, voting, attending board meetings, or contacting officials.” *Id.*

that the avenues of democratic participation are open to those with disabilities.

Ensuring that disabled people can participate in urban governance has distinct benefits, whatever one's understanding of democracy. First, it provides them the opportunity to participate in the bargaining in which municipal policy is made. If any group is shut out of that process, their interests are unlikely to be considered in political decisionmaking.<sup>22</sup> And indeed, scholars have shown the exclusion of disabled voices from urban planning processes has led to decisions that have ill served the interests of people with disabilities.<sup>23</sup>

But participation in local government has deeper benefits as well. As Frug explains, local democracy can respond to “what Hannah Arendt has called the need for ‘public freedom’: the ability to participate actively in the basic societal decisions that affect one’s life.”<sup>24</sup> Exercising this public freedom does not just enable people to ensure they have a stake in pluralist bargaining. When “disparate strangers . . . work together to solve common problems,” the process “can change not only their relationship with each other but their understanding of their own self-interest.”<sup>25</sup> Working together in this way can break down stigma and prejudice that divides groups from one another and reinforce the positives of integration.<sup>26</sup> Ensuring that disabled people can participate in the local democratic process thus benefits them, as well as the rest of the populace.

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22. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). In her work on “underbounded,” or selectively-annexed, urban areas — geographic areas that are in every sense a part of a city but are kept just outside its municipal borders, often in ways that track racial and socioeconomic disadvantage — Michelle Wilde Anderson shows how the exclusion of a group of people from the city’s voter base ensures that city policy fails to take account of that group’s interests. See Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 *STAN. L. REV.* 931, 937 (2010). Although there are many differences between racial minorities, socioeconomically disadvantaged individuals, and disabled individuals (groups that, it bears emphasis, overlap), the disenfranchisement of individuals with disabilities has similar effects to this type of “underbounding.”

23. See, e.g., ROB IMRIE, *DISABILITY AND THE CITY: INTERNATIONAL PERSPECTIVES* 143–64 (1996).

24. FRUG, *CITY MAKING*, *supra* note 17, at 20.

25. *Id.* at 22.

26. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L.J.* 1, 24 (2000) (observing that “research has yielded a broad consensus that intergroup contact will reduce prejudice . . . when (a) there is equality of status among the individuals in contact, (b) they meet in a situation of cooperative interdependence, and (c) . . . there is normative support for friendly intergroup relations”) (internal quotations omitted). For a very smart, recent piece highlighting some limits to the contact hypothesis in the disability context, see Harris, *supra* note 13.



#### D. Full Access to Economic, Educational, and Recreational Opportunities

Americans with disabilities have long lagged behind their nondisabled counterparts in employment and economic independence.<sup>27</sup> They have frequently been denied equal — or even adequate — education, which has of course compounded the economic problem.<sup>28</sup> And disabled people also often lack the opportunity to engage in the same cultural and recreational activities in which the rest of the community engages.<sup>29</sup> In one of the foundational texts of disability rights law, the great scholar-activist Jacobus tenBroek argued that the policy of integrationism implied a “right to live in the world” — that individuals with disabilities were entitled to “full participation in the life of the community” and should be “encourag[ed] and enabl[ed]” to do so.<sup>30</sup>

An urban disability agenda should focus on providing full access to these opportunities. That is true because of the economic and experiential benefits they provide to people with disabilities, as well as the broader effects that access has in reinforcing integration and democratic participation. As employment law scholar Cynthia Estlund argues, the workplace is a crucial domain for integration.<sup>31</sup> It is one in which people engage in common projects across axes of difference, and thus helps to break down prejudice and stigma. Access to the “public spaces” in which recreational and cultural activities occur also helps reinforce the values of integration.<sup>32</sup> And as Frug observes, it is only in “public space” like

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27. See, e.g., Press Release, U.S. Dep’t of Lab., Bureau of Lab. Stat., Persons with a Disability: Labor Force Characteristics — 2019, at 2 (Feb. 26, 2020), <https://www.bls.gov/news.release/pdf/disabl.pdf> [https://perma.cc/XX3Y-ZAZK] (reporting that “across all age groups, persons with a disability were much less likely to be employed than those with no disability,” and that “[i]n 2019, the employment-population ratio for persons with a disability between ages 16 to 64 edged up to 30.9 percent, while the ratio for persons without a disability in the same age group increased to 74.6 percent”).

28. See *id.* (“Persons with a disability are less likely to have completed a bachelor’s degree or higher than those with no disability.”); see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 191 (1982) (noting that at the time of the Education for All Handicapped Children Act of 1975’s passage, millions of disabled “children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers”).

29. See, e.g., James H. Rimmer et al., *Fitness Facilities Still Lack Accessibility for People with Disabilities*, 10 DISABILITY & HEALTH J. 214, 214 (2017) (“[I]ndividuals with disabilities encounter substantial obstacles to participating in health-promoting activities due to physical and social environments that limit fitness and recreation opportunities, including inaccessible parks, trails, sidewalks, and fitness facilities.”).

30. See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966).

31. See generally Estlund, *supra* note 26.

32. See YOUNG, *supra* note 15, at 240.

public parks and streets in which “people come into contact with the diversity that characterizes our metropolitan areas in the ordinary course of daily life.”<sup>33</sup> Access to these spaces has important democratic benefits: “Politics, the crucial activity of raising issues and deciding how institutional and social relations should be organized, crucially depends on the existence of spaces and forums to which everyone has access.”<sup>34</sup>

## II. PROBLEMS

Our current urban policies are far from living up to these principles. There are a variety of reasons for this failure. In this Section, I highlight five key problems: the legacy of inaccessible design of buildings and infrastructure, the inaccessibility of public transportation, the exclusionary aspects of new technological developments, legal and practical limits on the power of cities to raise revenue and impose mandates on developers, and the disenfranchisement of people with disabilities. The first three of these problems impose direct barriers to disabled individuals who seek to experience what cities have to offer. The last two present barriers to rectifying the other problems.

### A. The Legacy of Inaccessible Design

In 1966, tenBroek argued: “If the disabled have the right to live in the world, they must have the right to make their way into it and therefore must be entitled to use the indispensable means of access, and to use them on terms that will make the original right effective.”<sup>35</sup> In particular, he regarded the right “to the use of the streets, walks, roads and highways” as “a rock-bottom minimum” for people with disabilities.<sup>36</sup>

Too often, however, city streets and sidewalks are not accessible to disabled people. As the journalist Anna Clark wrote in 2016, “[a] generation after the Americans with Disabilities Act, cities across the United States are still broadly inaccessible to many who live in them. Broken sidewalks and steep curbs endanger people who are blind or use wheelchairs.”<sup>37</sup> In 2019, the City of New York entered into a consent decree to resolve an ADA lawsuit originally filed in 1994, challenging

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33. FRUG, *CITY MAKING*, *supra* note 17, at 60.

34. YOUNG, *supra* note 15, at 240.

35. tenBroek, *supra* note 30, at 848.

36. *Id.*

37. Anna Clark, *Suing for Sidewalks*, NEXT CITY (June 13, 2016), <https://nextcity.org/features/view/ada-compliance-accessible-design-cities-lawsuits-doj> [<https://perma.cc/E8FX-SFCU>].

inaccessible sidewalks and curb ramps throughout the municipality.<sup>38</sup> Before seeking additional relief in 2014, the plaintiff disability rights organization conducted a survey that found 75% of the curb ramps in lower Manhattan were not in compliance with the statute.<sup>39</sup> A special master appointed by the judge in the case issued a report in 2017 that found “about 80% of the curb ramps in place in the City [were] not compliant with ADA Standards.”<sup>40</sup> Similar litigation has been filed in recent years throughout the country, including in large cities such as Los Angeles, Atlanta, Seattle, and Portland.<sup>41</sup> Even Philadelphia, which famously was forced to make its curb ramps accessible in the early days of the ADA,<sup>42</sup> found itself back in court in 2019. That year, disability rights advocates filed a new lawsuit alleging that obstructed, uneven, and unrepaired sidewalks across the city prevented disabled people from having full access to them.<sup>43</sup>

Inaccessible sidewalks are not a mere inconvenience. As tenBroek explained, when people with disabilities lack access to the outside world, they are denied the basic liberty of movement — their confinement is akin to “house arrest.”<sup>44</sup> In the New York lawsuit, the special master described the harms of inaccessibility in detail:

Though often not recognized as such, our cities’ curbs can be dire “walls of exclusion” for many people with disabilities. The immediate direct effect of inaccessible pedestrian crossings is to make it difficult and frequently impossible for a person with a mobility disability to use public walkways to get from one place to another — a particular address, residence, park, transportation station, taxi stand, hospital, coffee shop, restaurant, museum, gym, place of worship, government building, etc. — giving verity to the old humorous quip that “you can’t get there from here,” and negating whatever work, business, social

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38. See Elizabeth Kim, *NYC Agrees to Make All Sidewalk Curbs Accessible to the Disabled*, GOTHAMIST (Mar. 21, 2019, 4:16 PM), <https://gothamist.com/news/nyc-agrees-to-make-all-sidewalk-curbs-accessible-to-the-disabled> [<https://perma.cc/HV4L-3YDK>].

39. See Jeanmarie Evely, *In Settlement Win for Disabled NYers, City Agrees to Fix Inaccessible Sidewalks*, CITY LIMITS (July 24, 2019), <https://citylimits.org/2019/07/24/nyc-sidewalks-accessibility-disabled-settlement/> [<https://perma.cc/D22D-VJZP>].

40. *E. Paralyzed Veterans Ass’n v. City of New York*, No. 94-CV-0435 (GBD), at \*1, \*5 (S.D.N.Y. Aug. 1, 2017).

41. See Adina Solomon, *Crumbling Sidewalks Become a Legal Battleground*, CITYLAB (Aug. 16, 2018), <https://www.citylab.com/transportation/2018/08/crumbling-sidewalks-become-a-legal-battleground/567562/> [<https://perma.cc/8LAQ-ANL7>].

42. See *supra* text accompanying note 2.

43. See Jason Laughlin, *Philly’s Sidewalks Are So Bad They Violate Federal Law Protecting People with Disabilities, Lawsuit Contends*, PHILA. INQUIRER (Aug. 26, 2019), <https://www.inquirer.com/news/disabled-access-ada-sidewalk-streets-philadelphia-curbs-20190826.html> [<https://perma.cc/G58Y-GJZC>].

44. See tenBroek, *supra* note 30, at 848.

contact, recreation, medical treatment, creative endeavors, and so on, that would have occurred at the destination.<sup>45</sup>

The special master went on to describe inaccessible sidewalks' effects in depriving disabled individuals of social opportunities (because they cannot visit friends, family, and places of entertainment or recreation), and in causing serious physical injuries when wheelchair users tip over obstacles or are hit by cars when forced to travel in the streets.<sup>46</sup>

The problem is not just sidewalks. Thirty years after the ADA, a large proportion of buildings and other physical facilities remain inaccessible to people with disabilities. Title III of the ADA, which bars discrimination by private retail enterprises, remains dramatically underenforced.<sup>47</sup> And even if it were fully enforced, the statute would still leave substantial barriers because it requires complete accessibility only in newly constructed or newly renovated facilities. For structures that existed before the statute's enactment, all that is required is the removal of barriers where doing so is "readily achievable" — defined as "easily accomplishable and able to be carried out without much difficulty or expense."<sup>48</sup>

Inaccessible buildings limit economic and educational opportunities. They also limit democratic participation. Although the COVID-19 pandemic may accelerate a trend towards increased voting by mail, most people vote in person on election day. For most nondisabled people, casting a ballot in a polling place allows voting in a location close to home, with the opportunity to consider the candidates' arguments in the campaign's final days. For many disabled people, however, inaccessible buildings translate to inaccessible polling places — and the inaccessibility may not be apparent until voters show up to cast a ballot and find they cannot make it inside.

A recent Second Circuit decision highlighted the problem. In *Disabled in Action v. Board of Elections*,<sup>49</sup> the court held the New York City Board of Elections denied disabled persons "meaningful access to its voting program."<sup>50</sup> "[Y]ear after year," the court explained, "more than 80% of poll sites that are inspected contain at least one barrier that may prevent

45. *E. Paralyzed Veterans Ass'n*, No. 94-CV-0435 (GBD), at \*4.

46. *See id.* at \*4–5.

47. For my own discussion of the underenforcement of the ADA's public accommodations title, its causes, and its effects on the shape of litigation and the doctrine, see Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 *UCLA L. REV.* 1 (2006).

48. 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv).

49. 752 F.3d 189 (2d Cir. 2014).

50. *Id.* at 199.

a person with a disability from accessing his or her assigned polling place.”<sup>51</sup> The barriers included “dangerous ramps at entrances deemed ‘accessible,’ inadequate signage directing voters with disabilities to accessible entrances or voting areas, blocked entryways or pathways, and inaccessible interior spaces inside voting areas.”<sup>52</sup> All of these problems stem from the legacy of inaccessible design.

Housing faces similar accessibility issues. The Fair Housing Act began requiring accessibility in new, multifamily housing construction only in 1988.<sup>53</sup> But many facilities are older than that. In 2017, the median age of an apartment building in New York City was 90 years.<sup>54</sup> New York is an extreme case, but the multifamily housing stock across the nation remains quite old. Three-quarters of rental units in the Northeast “were built before 1980, including 40 percent built before 1950. By comparison, the share of the stock that is at least 40 years old is considerably lower in the Midwest (63 percent), the West (53 percent), and the South (44 percent).”<sup>55</sup> Not surprisingly, newer units — particularly those built after 1990 — are far more likely to have accessibility features than older ones.<sup>56</sup>

The widespread problem of inaccessible housing in urban areas has triggered litigation across the country under the disability discrimination laws, with mixed results. In *Louis v. New York City Housing Authority*,<sup>57</sup> the United States District Court for the Southern District of New York held that a public housing authority had no obligation under the ADA to find an accessible unit in which the plaintiffs could use their vouchers under the federally funded Section 8 program the city administered.<sup>58</sup> Section 8 provides low-income individuals with a voucher they can use to pay their rent, but only if they can find a willing landlord who offers

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51. *Id.*

52. *Id.*

53. 42 U.S.C. § 3604(f)(3)(C).

54. See Michael Kolomatsky, *Does a Building's Age Affect the Rent?*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/realestate/does-a-buildings-age-affect-the-rent.html> [<https://perma.cc/ECR2-CQ39>].

55. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., AMERICA'S RENTAL HOUSING 2020, at 15 (2020), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2020.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf) [<https://perma.cc/RH59-UX7F>].

56. See U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH., ACCESSIBILITY OF AMERICA'S HOUSING STOCK: ANALYSIS OF THE 2011 AMERICAN HOUSING SURVEY (AHS) 28 (2015), <https://www.huduser.gov/portal/sites/default/files/pdf/accessibility-america-housingStock.pdf> [<https://perma.cc/WNT5-7TF7>].

57. 152 F. Supp. 3d 143 (S.D.N.Y. 2016).

58. See *id.* at 155.

housing the individuals find suitable.<sup>59</sup> The Section 8 program, the court explained, “does not supply housing, but instead provides subsidies to low-income families who find their own units to rent from private landlords.”<sup>60</sup> The private rental stock’s inaccessibility, the court concluded, was thus not the housing authority’s problem.<sup>61</sup> By contrast, recently in *Smith v. City of Oakland*,<sup>62</sup> a federal district court refused to dismiss an ADA claim brought against the city’s rent control program.<sup>63</sup> Because the city exempted all buildings constructed after January 1, 1983, from that program, and virtually all accessible housing in the municipality had been built after that date, the court held the plaintiffs stated a claim that they had been denied the benefits of rent control because of their disabilities.<sup>64</sup>

Because accessible housing tends to be newer, it is often built far from educational, employment, shopping, and recreational opportunities. The result is to make these basic amenities and services inaccessible to disabled residents who lack adequate public transportation options.<sup>65</sup> As Young writes:

The separation of functions and the consequent need for transportation to get to jobs and services also contributes directly to the increased marginality of old people, poor people, disabled people, and others who because of life situation as well as limited access to resources are less able to move independently in wide areas.<sup>66</sup>

There are several reasons, beyond the legacy of past decisions, why these barriers persist. Below, I discuss some crucial structural reasons, such as our nation’s skewed system of municipal finance, which makes it difficult for municipalities to raise revenue or impose mandates on real estate developers — as well as the general disenfranchisement of Americans with disabilities. Negative attitudes toward disabled people and toward accessible construction play a role as well. NIMBYism remains a powerful force when disability-friendly developments are

59. See *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUS. & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/M5TQ-LSP4>] (last visited Sept. 7, 2020).

60. *Louis*, 152 F. Supp. 3d at 146.

61. See *id.* at 153.

62. 2020 WL 2517857 (N.D. Cal. Mar. 4, 2020).

63. See generally *id.*

64. See *id.* at \*6–11.

65. See John Malcolm Phillips, *Overcoming Distance as a Barrier*, in *INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE* 113, 118–19 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983).

66. YOUNG, *supra* note 15, at 246.

proposed.<sup>67</sup> Additionally, architects continue to resist accessibility.<sup>68</sup> Architects “see access as a separate issue, as an additional design requirement which they think just compromises what they’re trying to do.”<sup>69</sup>

But one should not ignore that it may be legitimately difficult to provide accessible features in old, dense urban spaces. City streets and other infrastructure were designed without disabled people in mind, as the ubiquity of stairs and curbs demonstrates (this has been a central contention of the American disability rights movement).<sup>70</sup> The result of this historic neglect is that it is often quite complex to undo design decisions of the past and provide accessible infrastructure.<sup>71</sup> Even if the will were there — and it too often has not been — correcting the legacy of inaccessible design would not be easy.

### B. The Unavailability of Public Transportation

The problem is not just inaccessible *buildings* and *sidewalks*. It is also inaccessible *transportation*. Everyone relies on some means of transportation to get from home to work, shopping, health care, and recreational opportunities. Even in cities where much is within walking distance for nondisabled individuals, not everything is. The issue is more

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67. For a classic definition of NIMBYism, see Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS’N 288, 289 (1992):

In plain language, NIMBY is the motivation of residents who want to protect their turf. More formally, NIMBY refers to the protectionist attitudes and oppositional tactics adopted by community groups facing an unwelcome development in their neighborhood. Such controversial developments encompass a wide range of land-use proposals, including many human service facilities, landfill sites, hazardous waste facilities, low-income housing, nuclear facilities, and airports. Residents usually concede that these “noxious” facilities are necessary, but not near their homes, hence the term “not in my back yard.”

68. See IMRIE, *supra* note 23, at 77.

69. *Id.* (internal quotations omitted) (quoting an access officer for the City of San Francisco); see also Justin Davidson, *New York City Is Still a Disaster for the Disabled*, INTELLIGENCER (July 15, 2019), <http://nymag.com/intelligencer/2019/07/new-york-city-is-still-a-disaster-for-the-disabled.html> [<https://perma.cc/S25B-N59E>] (quoting a landscape designer saying that “[m]ost designers have a negative attitude towards accessibility” and “think of it as something you have to do, using as little square footage as possible”).

70. See Bagenstos, *Subordination*, *supra* note 13, at 441–42.

71. See SANDLER & SCHOENBROD, *supra* note 2, at 36 (“Progress [in adding curb cuts] is slow partly because traffic signals, fire alarm boxes, underground utilities, or vaults make some street corners much more expensive to ramp than others. Narrow sidewalks lack the space for a ramp engineered the standard way. A poorly engineered ramp stops the flow of water, causing a puddle in summer and an icy hazard in winter.”).

acute for people with disabilities. Because of the lack of accessible facilities in dense older sections of cities, many disabled people are forced to live in locations that are farther from important community institutions and goods and services providers.<sup>72</sup> Many also have conditions that limit their ability to walk. These individuals rely on motorized transportation to get around, or they simply cannot live in the community.<sup>73</sup> And because people with disabilities are on average poorer than those without, they are disproportionately unable to afford their own automobiles.<sup>74</sup> What John Malcolm Phillips wrote nearly 40 years ago thus remains true today: “Most disabled people are not so mobile” as nondisabled people, and many “must rely on public transportation.”<sup>75</sup>

American disability rights activists have therefore long focused significant efforts on seeking accessible public transportation. The most aggressive American disability rights organization goes by the acronym ADAPT, which originally stood for “Americans Disabled for Accessible Public Transportation.”<sup>76</sup> From the 1970s onward, ADAPT and other movement organizations fought to ensure that public buses, subways, and other forms of mass transit would be made accessible to individuals with disabilities.<sup>77</sup> After the enactment of the Architectural Barriers Act of 1968 and the Rehabilitation Act of 1973, “disabled individuals and groups filed lawsuits across the nation” seeking to ensure that public transit systems would become accessible to them.<sup>78</sup> These included a well-publicized lawsuit against the then-new Washington, D.C. metro system, which resulted in a court order barring the subway from opening “any

72. *See supra* text accompanying notes 65–66.

73. “Without means of transportation to educational, vocational, cultural, recreational, and commercial facilities in the community, it is virtually impossible for most severely disabled people to live outside an institutional environment.” Frank Bowe, *Accessible Transportation*, in *INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE* 205, 205 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983). The problem is compounded, but not entirely caused, by the inaccessibility of sidewalks. *See supra* text accompanying notes 37–46.

74. *See, e.g.*, NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 11 (2017), [https://ncd.gov/sites/default/files/NCD\\_A%20Progress%20Report\\_508.pdf](https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf) [<https://perma.cc/9Z4Y-L79L>] (“[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities.”).

75. *See Phillips, supra* note 65, at 113.

76. *See SHARON BARNARTT & RICHARD SCOTCH, DISABILITY PROTESTS: CONTENTIOUS POLITICS, 1970–1999*, at 97 (2001).

77. For a good compilation of contemporaneous reports from movement sources, see *TO RIDE THE PUBLIC’S BUSES: THE FIGHT THAT BUILT A MOVEMENT* (Mary Johnson & Barrett Shaw eds., 2001).

78. *See ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* 155 (1986).



station that lacked wheelchair access.”<sup>79</sup> When Congress adopted the ADA in 1990, the statute included extensive and carefully negotiated provisions that mandated accessibility in public transit systems.<sup>80</sup>

Yet those provisions have not succeeded in guaranteeing accessible public transit. Take the example of New York City. Since long before the ADA, the city’s subways have been inaccessible to people with many disabilities. And since the dawn of disability rights law in the 1970s, those subways have been the subject of litigation. Back in 1984, then-Mayor Ed Koch blocked a settlement that would have required many of the city’s subway stations to become accessible.<sup>81</sup> The cycle of inaccessibility and litigation continues today.<sup>82</sup> The problem persists throughout the country.<sup>83</sup>

A key problem here is that state and local governments have not fully committed to making their transit systems accessible. That problem, however, is compounded by another: federal, state, and local governments have not committed to funding public transit to a degree commensurate with the need from disabled or nondisabled users. To the contrary, “state and federal governments have, by building highways to suburbs with minimal or nonexistent public transportation and through a variety of other policies encouraging migration to suburbs, redistributed jobs and other civic opportunities to those suburbs.”<sup>84</sup> As Michael Lewyn argues, these actions have “redistribut[ed] development to areas without effective public transit” and thereby “systematically excluded . . . transit-dependent Americans” — including those with disabilities — “from employment, shopping, and other opportunities.”<sup>85</sup> In the early 1990s, as the ADA was being implemented, the federal

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79. See ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* 143 (2006).

80. For a summary of the ADA’s transportation provisions, see Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 467–68 (1991).

81. See *Koch Blocks Accord on Subway Access for Disabled People*, N.Y. TIMES (June 22, 1984), <https://www.nytimes.com/1984/06/22/nyregion/koch-blocks-accord-on-subway-access-for-disabled-people.html> [<https://perma.cc/T7ME-SQK6>].

82. See Eli Rosenberg, *New York City’s Subway System Violates Local and Federal Laws, Disability Groups Say*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/nyregion/new-york-subway-disability-lawsuit.html> [<https://perma.cc/JYW5-S2KS>].

83. See, e.g., Jill L. Bezyak et al., *Public Transportation: An Investigation of Barriers for People with Disabilities*, 28 J. DISABILITY POL’Y STUD. 52 (2017).

84. See Michael E. Lewyn, “*Thou Shalt Not Put A Stumbling Block before the Blind*”: *The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037, 1038 (2001).

85. *Id.*

government reduced operating subsidies to public transit by 40%.<sup>86</sup> But the problem is not limited to a particular budgetary decision. As Gregory Shill argues with great force, the law pervasively subsidizes automobiles at the expense of public transit.<sup>87</sup>

By underinvesting in public transportation, law and policy inflict a double harm on disabled individuals. First, because those individuals are disproportionately transit dependent, they bear a disproportionate burden when transit is shortchanged. Second, because those individuals require (sometimes costly) modifications to facilities and equipment to enable them to use public transit, starving transit systems of funds makes it more difficult to ensure accessibility.

### C. The Inaccessibility of New Technology

So far, the issues I have discussed are old problems. City infrastructure, facilities, and buildings aren't designed with people with disabilities in mind. And cities don't invest in sufficient accessible public transit — or sufficient public transit at all — to even begin to compensate for the transportation barriers. I could have written the same thing about these issues decades ago. Indeed, the problem of inaccessible design has gotten *better* in meaningful ways since the adoption of disability discrimination laws, though the progress is still quite limited.

But there is a new problem. Cities are increasingly relying on advanced technology as a means of interacting with the public. The social isolation protocols instituted in response to the COVID-19 pandemic have accelerated this trend, but the problem is one that dates back a number of years. The increasing reliance on technology is often described using the fuzzy concept of “smart cities.”<sup>88</sup> Smart cities heavily employ the internet, and internet-of-things technology, to enhance and direct the provision of services in the physical world and provide opportunities for democratic participation.<sup>89</sup> For example, a city may offer a smartphone

86. *Id.* at 1086–88.

87. See Gregory M. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. (forthcoming 2020).

88. See Mila Gasco-Hernandez & J. Ramon Gil-Garcia, *Is It More Than Using Data and Technology in Local Governments? Identifying Opportunities and Challenges for Cities to Become Smarter*, 85 UMKC L. REV. 915, 915 (2017). See generally ANTHONY M. TOWNSEND, *SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA* (2013).

89. See, e.g., Kelsey Finch & Omer Tene, *Welcome to the Metropticon: Protecting Privacy in a Hyperconnected Town*, 41 FORDHAM URB. L.J. 1581, 1582 (2014) (describing smart city initiatives as “[d]riven by the technological promise of the Internet of Things (the increasing array of objects and devices that communicate with each other over the network) and the intelligent planning systems of big data (the enhanced ability to collect, store, and process massive troves of information),” and as “thriv[ing] on constant,

app or an interactive kiosk that provides maps to city facilities or attractions, along with updated transit information.<sup>90</sup> Another “city might employ an app that lets citizens report potholes or other road hazards for expedited repair.”<sup>91</sup> Or, a municipality might share its own internal data with the public to “empower citizens to accomplish civic projects or allow business to better inform their work. For example, advocacy groups might be able to track patterns of discriminatory housing practices, or local entrepreneurs may build an app for better real-time traffic updates.”<sup>92</sup>

These initiatives open up new opportunities for residents to benefit from city services or participate in municipal governance and civil society activities. Indeed, “smart city” initiatives can provide an opportunity for cities to make a fresh start on some accessibility problems and build the interests of disabled people into their programming from the very beginning.<sup>93</sup> For many people with disabilities, however, there is a major barrier: websites, mobile devices, and mobile applications are too often inaccessible to disabled individuals. Blake Reid summarizes the issue this way:

The nearly fifty-million Americans who are deaf or hard of hearing, many of whom have speech disabilities, face limited outlets for real-time communication, a glut of Internet-delivered video programming with missing or poor-quality captions, and an increasingly large array of devices with inaccessible voice-operated interfaces. The more than seven million Americans who are blind or visually impaired have witnessed the revolution of web and mobile applications pass with

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omnipresent data flows captured by cameras and sensors placed throughout the urban landscape,” which can then direct the provision of city services); Ellen P. Goodman, “Smart Cities” Meet “Anchor Institutions”: *The Case of Broadband and the Public Library*, 41 FORDHAM URB. L.J. 1665, 1668 (2014) (“The term [“smart cities”] frequently refers to the use of ubiquitous sensors within urban infrastructure to generate data about usage patterns and service needs.”); Jesse W. Woo, *Smart Cities Pose Privacy Risks and Other Problems, but That Doesn’t Mean We Shouldn’t Build Them*, 85 UMKC L. REV. 953, 955 (2017) (“A smart city is one that integrates information and communication technologies (ICTs) and the Internet of Things (IoT) to manage the city’s assets and delivery of services.”).

90. See Finch & Tene, *supra* note 89, at 1584–87.

91. Woo, *supra* note 89, at 955.

92. *Id.*

93. See, e.g., Leila McNeill, *Before Cities Become Smart, They Must Become Accessible*, MOBILITY MGT. (Mar. 1, 2019), <https://mobilitymgmt.com/articles/2019/03/01/accessibility.aspx> [<https://perma.cc/V4YC-BU3X>] (“With accessibility obstacles embedded in current transportation systems and infrastructure, smart cities have an opportunity to integrate anew the needs of people with disabilities to ensure they are included in future urban landscapes.”).

inconsistent, broken, or missing support for screen readers and a dearth of video content with audio descriptions. The estimated two-and-a-half million to nearly twelve-million Americans with intellectual and cognitive disabilities routinely face complex user interfaces designed without considering cognitive load and a dearth of content delivered in plain language. And millions more have motor and physical disabilities that prevent them from interacting with a variety of Internet-enabled devices and applications, including the “smart” vehicles, homes, and clothing that constitute the “Internet of Things.”<sup>94</sup>

Just as the “smart city” is creating new opportunities for *some* residents, it may be exacerbating existing inequalities that track the axis of disability.<sup>95</sup> When New York City instituted its “LinkNYC kiosks” to provide information to people on the streets, for example, those kiosks did not include screen readers or audible instructions for individuals with vision impairments.<sup>96</sup> The city made them accessible only after a lawsuit.<sup>97</sup> Autonomous electric vehicles are often designed with large batteries in their floors, where they cannot be moved to accommodate space for a wheelchair.<sup>98</sup> And even if that problem is solved, the ride-hailing apps that will summon those vehicles may not be accessible, and disabled individuals may not be able to ride in them without assistance in securing their wheelchairs.<sup>99</sup>

Although the new “smart city” developments may offer promise for individuals with disabilities, in practice they often deepen the current divides. As these developments grow in their centrality to service provision and civic participation, they will become increasingly major barriers to achieving the principles outlined above.

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94. Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 592 (2020) (footnotes omitted).

95. See McNeill, *supra* note 93 (“Despite the position that smart cities are in to provide better infrastructure and technology for people with disabilities, most smart cities do not seem to be accommodating people with disabilities much better than current cities.”). The problems aren’t limited to those excluded because of disability. Michal Saliternik argues that “disadvantaged populations who have a relatively small influence on big data-based health policymaking are usually the ones who have the greatest interest in public health policy,” and that “the same is true of those excluded from big data-based urban planning.” Michal Saliternik, *Big Data and the Right to Political Participation*, 21 U. PA. J. CONST. L. 713, 744 (2019).

96. See Elizabeth Woyke, *Smart Cities Could Be Lousy to Live in If You Have a Disability*, MIT TECH. REV. (Jan. 9, 2019), <https://www.technologyreview.com/2019/01/09/137899/smart-cities-coule-be-lousy-if-you-have-a-disability/> [<https://perma.cc/M3ZG-LFGV>].

97. See *id.*

98. See McNeill, *supra* note 93.

99. See *id.*

#### D. Legal and Practical Limits on Cities

So why don't cities just fix the problems I have just described? Why don't they reconstruct buildings and infrastructure to make them accessible? Why don't they invest in public transportation — and in vehicles and systems that disabled people can use? And why don't they ensure their emerging smart-city technologies embrace people with disabilities as full and equal users?

The easy answer is simply a lack of political will — which the next Section explores. But even if the will were there, cities often lack the means to solve these problems. When it requires retrofitting existing structures, accessibility is costly. And cities usually lack the legal and practical power to raise the necessary funds themselves or to require others to pay.

So long as accessibility is incorporated in the initial design of the facility, the expense is relatively small. However, when a city must retrofit old buildings and structures, the cost can be quite high.<sup>100</sup> This is especially true in older construction in dense areas, where creating accessibility will require tearing down and rebuilding many features. In these dense areas, every dollar spent on retrofitting will come from some other project that may be of value to the city and its residents. Ross Sandler and David Schoenbrod described the issue a number of years ago, in the context of a mandate to reconstruct sidewalks to install curb ramps:

More money for curb ramps has to come from somewhere, and \$32 million a year buys a lot, even in New York City. With the same money, the New York City Department of Transportation could annually fill every pothole in the streets, thereby preventing the accidents and injuries they cause.<sup>101</sup>

The reasons cities lack resources are widely discussed and debated in the literature, going back at least to Paul Peterson's 1980 book, *City Limits*.<sup>102</sup> State rules governing the raising of revenues, state and federal mandates that require the spending of large portions of those revenues,

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100. See, e.g., Bagenstos, "Rational Discrimination," *supra* note 13, at 867–69 (drawing a distinction between the typical case in which accommodation is cheap and the case in which, perhaps because of a requirement to retrofit old facilities, accommodation is costly). On the difference in cost between including accessibility from the initial design and retrofitting to add new accessibility features to an old facility, see Thomas Hall, *Inclusive Design and Elder Housing Solutions for the Future*, 11 NAELA J. 61, 66 (2015); see also Carlie J. Boos, *GAO Versus LIHTC: The Showdown That Wasn't*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 23, 28 (2019) ("[O]lder buildings are significantly less accessible to persons with disabilities, and retrofitting them to today's standards would likely wipe out any cost savings.").

101. SANDLER & SCHOENBROD, *supra* note 2, at 43–44.

102. See, e.g., PAUL E. PETERSON, *CITY LIMITS* (1980).

and interlocal competition for population and investment all limit cities' legal and practical ability to spend money to fix accessibility problems.<sup>103</sup>

Budgets are limited in part because of the system of municipal finance. Cities provide benefits to those outside their corporate limits, but they are often severely constrained as a matter of law in imposing extraterritorial taxes. Cities also often face state and federal mandates that require them to spend their scarce revenues in particular ways. Recall, perhaps ironically, that then-Mayor Rendell criticized the ADA as one of those mandates.<sup>104</sup> More recently, Professor Lewyn has argued that the statute's transportation-access mandates have the perverse effect of making public transit more expensive for cash-strapped municipalities.<sup>105</sup> But cities face many other mandates as well, notably for employee benefits payments.<sup>106</sup> And cities are in competition with each other for population and investment. As a result, they face pressure to lower taxes and impose fewer obligations on businesses. Although some, notably Richard Schragger, argue the effects of these dynamics have been overblown,<sup>107</sup> there is no doubt they play a significant role in limiting cities' freedom of action — particularly in “the declining cities of the Rust Belt and elsewhere.”<sup>108</sup>

Even if cities had the will to fix the problems I have sketched, then, many just could not do so given the constraints under which they operate.

### E. The Disenfranchisement of Disabled People

Too often, as well, the will to address problems of inaccessibility simply does not exist. Municipal bureaucracies, even those that are responsible for making their cities accessible, are often unresponsive to people with

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103. For a good discussion of the limits on cities' abilities to raise revenue, and of spending mandates imposed on them, see GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 75–98 (2008). On interlocal competition, see generally Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 *J.L. & POL.* 397, 399–402 (2005); Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 *YALE L.J. POCKET PART* 203, 206 (2006); PETERSON, *supra* note 102.

104. See SANDLER & SCHOENBROD, *supra* note 2, at 41–42.

105. See Lewyn, *supra* note 84, at 1038–39.

106. See, e.g., FRUG & BARRON, *supra* note 103, at 96.

107. See generally RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* (2016).

108. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 *HARV. L. REV.* 482, 537 (2009).

disabilities.<sup>109</sup> The lack of responsiveness stems in part from paternalism towards disabled people.<sup>110</sup> It also stems in part from general social stigma and devaluation of disability.<sup>111</sup> But it also results, concretely, from the lack of participation by people with disabilities in the political process.<sup>112</sup>

Disabled voter turnout is significantly lower than nondisabled voter turnout, and the percentage of Americans with disabilities who vote has dropped in each of the past two presidential elections.<sup>113</sup> Inaccessible polling places remain a barrier — and there are troubling indications that the problem is getting worse.<sup>114</sup> A lack of accessible transportation to the polls imposes an obstacle as well, as does the failure to provide sufficient training to election workers.<sup>115</sup> And some disabled people — those under guardianship — are formally disenfranchised by state law.<sup>116</sup>

The disenfranchisement of people with disabilities makes it more difficult to address all of the problems I have described. If disabled people have no electoral power, government agencies will not be fully or equally responsive. The result will be that the barriers to full participation in the community remain. This is, unfortunately, a vicious circle, as those barriers are a significant part of what disenfranchises individuals with disabilities in the first place.

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109. See IMRIE, *supra* note 23, at 98 (“[T]he socio-institutional structures within which access practices and policies are being conceived are reinforcing expertism and clientism and the idea that people with disabilities are somehow a group ‘to be dealt with.’”).

110. On bureaucrats’ paternalism toward disabled people, see, for example, Samuel R. Bagenstos, *Disability, Universalism, Social Rights, and Citizenship*, 39 CARDOZO L. REV. 413, 424 (2017).

111. On the effects of stigma on government officials’ treatment of people with disabilities, see, for example, *id.*

112. For a comprehensive recent analysis of obstacles to voting by disabled people, see Rabia Belt, *Contemporary Voting Rights Controversies through the Lens of Disability*, 68 STAN. L. REV. 1491 (2016).

113. See Lisa Schur & Douglas Kruse, *Fact Sheet: Disability and Voter Turnout in the 2016 Elections*, RUTGERS SCH. MGMT. & LAB. RELS., [https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/kruse\\_and\\_schur\\_-\\_2016\\_disability\\_turnout.pdf](https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/kruse_and_schur_-_2016_disability_turnout.pdf) [https://perma.cc/8VZ5-QVSM] (last visited Sept. 7, 2020).

114. See U.S. GOV’T ACCOUNTABILITY OFF., *VOTERS WITH DISABILITIES: OBSERVATIONS ON POLLING PLACE ACCESSIBILITY AND RELATED FEDERAL GUIDANCE* (2017), <https://www.gao.gov/assets/690/687556.pdf> [https://perma.cc/BJ2S-7CR4].

115. See NORMAN ORNSTEIN & KRISTINA KOPIĆ, RUDERMAN FAM. FOUND., *THE RUDERMAN WHITE PAPER ON VOTING ACCESSIBILITY FOR PEOPLE WITH DISABILITIES* (2016), [https://rudermanfoundation.org/wp-content/uploads/2017/08/Voting-Accessibility-White-Paper-final\\_final.pdf](https://rudermanfoundation.org/wp-content/uploads/2017/08/Voting-Accessibility-White-Paper-final_final.pdf) [https://perma.cc/Y8KD-8AYR].

116. For a discussion, see Bagenstos, *Disability, Universalism, Social Rights, and Citizenship*, *supra* note 110, at 423–24.

**CONCLUSION: SPECULATIONS ON THE PROSPECTS FOR ACTION**

As I said at the outset, this Essay is an exercise in issue-spotting. I have sought to sketch the ways that cities are inaccessible to disabled people, the reasons why we should care about that problem, and the obstacles to solving the problem. At this point, the logical question to ask is: How should the legal and political system address the issues I have spotted?

At a pure policy level, this is not an especially difficult question. If the problem is a legacy of inaccessible buildings, infrastructure, and transportation, let's commit the resources to retrofit them and make them fully and equally usable by people with disabilities. If the problem is inaccessible web- and app-based technology, let's ensure that we take access seriously when designing and implementing smart cities. If the problem is the disenfranchisement of disabled people, let's commit to truly enforcing the ADA's requirements of accessible voting, as well as making aggressive and targeted efforts to register and turn out disabled voters. And if the problem is our system of municipal finance, or restrictions on city power that force them into a destructive interlocal race to the bottom, let's reform those rules of local government law. We might have interesting debates over just how to craft and implement any of these changes to existing practice — and, indeed, the literature is full of such debates — but when we take a sufficiently broad perspective, we have a clear enough sense of what sorts of policies we should adopt.

The harder question is one of politics. To create accessible cities will require a substantial investment of money. Because of the limitations on municipal finance, that money will have to come from actions by the state or federal governments. But the politics in many states are skewed against the interests of urban areas.<sup>117</sup> And the federal government — which overrepresents rural areas in the Senate and the Electoral College — may be even worse.<sup>118</sup> Even if people with disabilities could persuade political actors to devote new municipal resources to accessibility rather

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117. See, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

118. See, e.g., WILL WILKINSON, NISKANEN CTR., *THE DENSITY DIVIDE: URBANIZATION, POLARIZATION, AND POPULIST BACKLASH* 77–78 (2019), <https://www.niskanencenter.org/wp-content/uploads/2019/09/Wilkinson-Density-Divide-Final.pdf> [<https://perma.cc/26Y8-L95X>]; Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> [<https://perma.cc/US7B-XQ2C>]. See generally JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019).



than other projects, the prospect that cities will receive those new resources does not seem great.

Does the COVID-19 pandemic affect this prospect? Almost certainly, but the direction is unclear. On the one hand, the pandemic and accompanying freeze of economic activity has devastated state and local revenue. As with the Great Recession a decade earlier, the federal government's response, at least initially, to the devastation has been indifferent at best.<sup>119</sup> On the other hand, the economic collapse has given renewed momentum to calls for massive federal investment in infrastructure construction<sup>120</sup> — proposals that may well be adopted following the presidential election. *If* that comes to pass, and *if* advocates can succeed in ensuring that every dollar of infrastructure spending advances rather than impedes accessibility for people with disabilities, we may have an opportunity to make progress on the issues identified in this Essay.

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119. See, e.g., Eric Levitz, *Send Money to the States Already*, INTELLIGENCER (June 18, 2020), <https://nymag.com/intelligencer/2020/06/congress-must-send-coronavirus-stimulus-aid-to-states-now.html> [<https://perma.cc/FVA9-4266>].

120. See, e.g., Karl W. Smith, *Invest in Public and Private Infrastructure Right Now*, BLOOMBERG (June 25, 2020, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2020-06-25/covid-crisis-calls-for-infrastructure-investment> [<https://perma.cc/58CK-LGSE>].