# The Check That Cannot Collect:

# Disability Rights, Remedial Retrenchment, and the Limits of the Federal Executive

Travis Gilly* ❧ August 2026 (v0.6)

**Abstract**

A new answer is circulating in separation of powers scholarship. To the fear that the demise of agency independence concentrates all federal enforcement in the President, the answer points to the enforcers Congress has always kept outside Article II: state governments and private attorneys general. On this account, most recently developed by Ernest Young, the implementation and enforcement of national law were never the President's alone, and the actors who hold the residual authority can check an executive that stands down. This Article tests that answer against the field where it should work best, and shows that it fails there for a reason the account's own diagnostic cannot detect. Disability rights is among the most privatized enforcement fields in federal law, yet its private channel has been defunded from the remedies side while its standing side stayed open: no damages at all under ADA Title III, no catalyst fees after *Buckhannon*, no emotional distress damages under Section 504 and Section 1557 after *Cummings*, and the *Cummings* rule extended to Title II by the Second, Ninth, and Eleventh Circuits. Because the diffusion account measures the health of private enforcement through standing doctrine alone, it reports a healthy channel where the channel is starved. The state channel fares no better: Congress has deputized state attorneys general across consumer protection statutes, and never in the ADA. The federal channel, meanwhile, traded a mandatory complaint-processing duty for prosecutorial discretion in the 2026 reorganization. The Article proposes three repairs within the diffusion account's own logic, and offers the 2012 disability treaty ratification record as interpretive support for the first of them.

*Keywords:* civil rights; administrative law; private enforcement; private attorney general; parens patriae; enforcement discretion; statutory damages; *Cummings v. Premier Rehab Keller*; disability discrimination; accessibility; separation of powers; cooperative federalism.

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## I. Introduction

On June 16, 2026, the Department of Education announced that it would move the Office of Special Education and Rehabilitative Services to the Department of Health and Human Services and place the investigative work of the Office for Civil Rights with the Department of Justice.[1] The administration described the moves as housekeeping that changed no substantive rights.[2] Whatever else the reorganization did, it accomplished one structural change that the housekeeping label conceals. The Office for Civil Rights operated under a case processing manual that obligated it to evaluate every complaint it received.[3] The Civil Rights Division of the Department of Justice operates on enforcement discretion, a discretion the Supreme Court has held presumptively unreviewable.[4] A family that files a disability discrimination complaint after June 2026 files it into a system in which no one is required to look at it.[5]

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1. Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Additional Partnerships to Strengthen Coordination for Individuals with Disabilities Programs, Bolster Civil Rights Enforcement (June 16, 2026), `https://www.ed.gov/about/news/press-release/us-department-of-education-announces-additional-partnerships-strengthen-coordination-individuals-disabi` (last visited Aug. 23, 2026) (announcing four interagency agreements moving special education and rehabilitative services functions to the Department of Health and Human Services and civil rights enforcement functions to the Department of Justice). The Department's interagency agreements in this series recite the Economy Act, 31 U.S.C. § 1535, among their authorities, and the Department retains nominal ownership of both programs. *See, e.g.*, Interagency Agreement Between the U.S. Department of Education and the U.S. Department of Health and Human Services, Administration for Children and Families, Relating to the CCAMPIS Program 1 (Sept. 30, 2025) (reciting 31 U.S.C. §§ 1501, 1535), `https://www.ed.gov/media/document/ed-and-hhs-interagency-agreement-ccampis-partnership-september-30-2025-113003.pdf` (last visited Aug. 23, 2026).

2. *See* sources cited *supra* note 1. The characterization matters because both offices sit where they sit by statute rather than by administrative convenience. *See* 20 U.S.C. § 3413 (establishing the Office for Civil Rights within the Department of Education by the Department of Education Organization Act of 1979); 20 U.S.C. § 1402(a) (locating the special education office within the Department).

3. U.S. Dep't of Educ., Off. for C.R., Case Processing Manual § 101 (version in effect June 2026) (on file with author) (obligating the office to evaluate each complaint to determine whether it states a claim within OCR's jurisdiction). The manual is a public processing commitment rather than a statute, but it bound the agency's intake in a way no comparable instrument binds the Department of Justice.

4. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (holding that an agency's decision not to take enforcement action is presumptively immune from judicial review under the Administrative Procedure Act); *see also* United States v. Texas, 599 U.S. 670, 678–79 (2023) (holding that plaintiffs lacked standing to challenge federal enforcement priorities, and describing the Executive's enforcement discretion over whom to prosecute as a core Article II function).

5. The point is structural rather than predictive. Nothing in the interagency agreements imports the Case Processing Manual's mandatory evaluation duty into the Civil Rights Division, and the Division's charging discretion is the background rule. *See supra* notes 3–4.

The reorganization was one event in a season of federal withdrawal from disability rights enforcement. In April 2026, seven days before the compliance deadline of the first comprehensive web accessibility rule ever issued under Title II of the Americans with Disabilities Act, the Department of Justice extended that deadline by a year through an interim final rule issued without notice and comment.[6] Weeks later, the Office of Legal Counsel issued an opinion asserting that *Olmstead v. L.C.* imposes no integration mandate, a position the opinion frames as correcting what it describes as the federal courts' misreading of the decision.[7] Each move was lawful or contested on its own terms. Together they describe an executive branch electing, across regulation, interpretation, and complaint processing, to enforce the disability rights statutes less.[8]

Separation of powers scholarship has an answer ready for this situation, and it is a good one. In a recent essay, Ernest Young argues that the anxiety produced by *Trump v. Slaughter*, which extinguished removal protection for officers exercising executive power, rests on a mistaken premise: that the President ever held a monopoly on the enforcement of federal

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6. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 89 Fed. Reg. 31,320 (Apr. 24, 2024) (codified at 28 C.F.R. pt. 35) (setting an April 2026 compliance date for large public entities); Extension of Compliance Dates for Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 91 Fed. Reg. (Apr. 20, 2026) (Doc. No. 2026-07663) (filed for public inspection Apr. 17, 2026; effective Apr. 20, 2026), `https://www.federalregister.gov/documents/2026/04/20/2026-07663/extension-of-compliance-dates-for-nondiscrimination-on-the-basis-of-disability-accessibility-of-web` (last visited Aug. 23, 2026) [hereinafter 2026 Interim Final Rule] (extending the compliance date for public entities of 50,000 or more from April 24, 2026 to April 26, 2027, and for smaller entities and special districts to April 26, 2028).

7. Off. of Legal Couns., U.S. Dep't of Just., Application of the Rehabilitation Act and Americans with Disabilities Act to State Institutionalization of Patients with Severe Mental Illness or Disabilities (slip op. June 18, 2026), `https://www.justice.gov/olc/media/1446701/dl` (last visited Aug. 23, 2026) (concluding that neither Section 504 nor Title II imposes an integration mandate and that *Olmstead* did not establish one); *cf.* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999) (holding that unjustified institutional isolation of persons with disabilities is a form of discrimination under Title II). On July 20, 2026, the Department followed with a Federal Register notice disclaiming reliance on its longstanding *Olmstead* enforcement guidance and describing that guidance as unenforceable. *See* The Arc, *DOJ Opinion on Olmstead Threatens the Right of People with Disabilities to Live in the Community* (updated July 20, 2026) (reporting the Department's July 20, 2026 Federal Register notice), `https://thearc.org/blog/doj-opinion-on-olmstead-threatens-the-right-of-people-with-disabilities-to-live-in-the-community/` (last visited Aug. 23, 2026).

8. For the argument that the relocations themselves exceed statutory authority under the Administrative Procedure Act, see *infra* note 31 and accompanying text.

law.[9] Congress, Young shows, has always delegated the implementation and enforcement of national law to actors outside Article II entirely: to the states, through cooperative federalism and express enforcement authorizations, and to the people, through private rights of action.[10] These delegations, on his account, supply both democratic accountability and a check on presidential aggrandizement, and they survive *Slaughter* untouched because state officers and private plaintiffs do not exercise the executive power of the United States.[11] The essay closes on reassurance: even if Congress never acts again, the states and the private bar already hold broad discretionary authority to enforce federal law against an executive that stands down.[12]

This Article takes the diffusion account seriously enough to test it, and it tests it where the account should be strongest. Disability rights is, by the account's own criteria, a showcase field. Its statutes carry private rights of action across every title.[13] Its founding remedial decisions built the modern private attorney general.[14] Its public enforcer has been structurally secondary for decades.[15] If private enforcement can substitute for a withdrawing executive anywhere, it should substitute here.

It cannot, and the reason is the finding of this Article. The private enforcement channel in disability rights has been constricted from the remedies side while its standing side stayed open.

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9. Ernest A. Young, *The Unitary Executive and Congress's Options in Delegating Power to Enforce Federal Law* 2–5 (Aug. 6, 2026) (unpublished manuscript), `https://ssrn.com/abstract=7244920` [hereinafter Young, *Federal Executive*]; *see* Trump v. Slaughter, 146 S. Ct. 2283 (2026) (overruling Humphrey's Executor v. United States, 295 U.S. 602 (1935), and holding that officers exercising executive power serve at the President's pleasure).

10. Young, *Federal Executive*, *supra* note 9, at 11–22. The scholarly foundations are extensive. *See, e.g.*, Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

11. Young, *Federal Executive*, *supra* note 9, at 22–35 (answering the Article II objections to state enforcement and to private attorneys general).

12. *Id.* at 35–36 (describing the states as the truly independent implementing agencies and private plaintiffs as the truly independent enforcement agencies).

13. *See infra* Part IV.B (tracing the private enforcement architecture of Section 504, ADA Title II, and ADA Title III).

14. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam) (describing a civil rights fee plaintiff as a private attorney general vindicating a policy Congress considered of the highest priority); *infra* Part IV.A.

15. *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 9 (2006) (documenting the small size of the federal disability enforcement apparatus relative to its statutory portfolio).

Title III of the ADA has never permitted a private damages recovery.[16] *Buckhannon* removed the catalyst theory that let fee awards fund enforcement that produced voluntary compliance.[17] *Cummings* removed emotional distress damages from Section 504 and Section 1557, the remedy that matched the characteristic injury of discrimination.[18] The circuits then carried *Cummings* into Title II; no court of appeals has held otherwise, and the district courts describe the extension as uniform.[19] None of these decisions narrowed who may sue. Every one of them narrowed what a winning plaintiff collects.

That distinction is what the diffusion account cannot see, because the account measures the health of private enforcement through standing doctrine. Young's defense of the private attorney general runs through *Lujan*, *TransUnion*, and the Article II standing literature, and it concludes that the injury in fact requirement leaves the vast majority of private federal enforcement intact.[20] As a statement about standing, that is correct. Disability plaintiffs hold paradigm injuries in fact.[21] But an enforcement channel is a market as well as a doctrine. Its volume is set by what plaintiffs and counsel can recover, and Congress builds private enforcement regimes precisely by setting those recoveries.[22] A doctrine that removes the recoveries while leaving the courthouse door open produces exactly what the disability field now

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16. 42 U.S.C. § 12188(a)(1) (limiting private Title III plaintiffs to the remedies of 42 U.S.C. § 2000a-3(a), which provides injunctive relief); *see infra* Part V.D.

17. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001) (rejecting the catalyst theory of prevailing party status under federal fee-shifting statutes).

18. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) (holding emotional distress damages unavailable in private actions under the Spending Clause antidiscrimination statutes).

19. *See* Doherty v. Bice, 101 F.4th 169 (2d Cir. 2024); A.W. *ex rel.* J.W. v. Coweta Cnty. Sch. Dist., 110 F.4th 1309 (11th Cir. 2024); Payan v. L.A. Cmty. Coll. Dist., 169 F.4th 971 (9th Cir. 2026); *infra* Part V.B.

20. Young, *Federal Executive*, *supra* note 9, at 25–28, 33–35 (engaging Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992), and TransUnion LLC v. Ramirez, 594 U.S. 413 (2021), and concluding that plaintiffs with concrete private injuries face no Article II obstacle).

21. *See infra* Part V.F.

22. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662 (2013) (cataloging the functions of private enforcement regimes, each of which operates through the incentives litigation offers); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010) (documenting that Congress deliberately engineers private enforcement through damages multipliers and fee awards); *infra* Part V.E.

displays: a channel that passes every standing test the diffusion account administers, and cannot pay its enforcers.[23]

The state channel fares no better, for a simpler reason. Congress knows how to deputize state attorneys general to enforce federal law, and it has done so across the modern consumer protection code: the Clayton Act, the Children's Online Privacy Protection Act, the HITECH amendments to HIPAA, the Consumer Financial Protection Act, the CAN-SPAM Act, the Telemarketing Act.[24] The Americans with Disabilities Act contains no such provision. Its public enforcement sections name the Attorney General of the United States and stop.[25] When the federal enforcer withdraws from disability rights, there is no state attorney general standing in the statute behind it. What states enforce instead is their own law, which means the geography of disability protection tracks state legislative choice rather than federal right.[26]

One structure survives, and it is the exception that proves the design. The Individuals with Disabilities Education Act runs on a working cooperative architecture in which state educational agencies carry mandatory duties, including a regulation obligating the state agency to resolve any complaint, from any person, within sixty days.[27] The mandatory processing duty that vanished from the federal level in June 2026 persists at the state level, held by officials the President can neither appoint, direct, nor remove.[28] That is the diffusion account working exactly as advertised, in the one corner of disability law where Congress built the structure the account describes.

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23. *See infra* Part V.E (running the incentive accounting against the post-*Cummings* remedy set).

24. 15 U.S.C. § 15c(a)(1) (Clayton Act parens patriae authority); 15 U.S.C. § 6504(a) (COPPA); 42 U.S.C. § 1320d-5(d) (HIPAA, as amended by HITECH); 12 U.S.C. § 5552(a)(1) (Consumer Financial Protection Act); 15 U.S.C. § 7706(f)(1) (CAN-SPAM); 15 U.S.C. § 6103(a) (Telemarketing and Consumer Fraud and Abuse Prevention Act); *see* Lemos, *supra* note 10, at 712 (documenting the proliferation of state enforcement provisions across recent Congresses).

25. 42 U.S.C. § 12188(b) (authorizing civil actions by the Attorney General for Title III pattern or practice violations); *infra* Part VI.B.

26. *See infra* Part VI.B (describing the concentration of enforcement in states whose statutes attach damages, principally California under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51–52).

27. 34 C.F.R. § 300.152(a) (2026) (requiring each state educational agency to include in its complaint procedures a sixty day time limit to investigate and issue a written decision addressing each allegation); *see infra* Part VI.C.

28. *Cf.* Printz v. United States, 521 U.S. 898, 922 (1997) (observing that state officers implementing federal law operate without meaningful presidential control); Young, *Federal Executive*, *supra* note 9, at 20 (making the comparative independence point as to state officials generally).

The Article proceeds in seven further parts. Part II documents the withdrawal: the delegation and its duty asymmetry, the regulatory retreat, the interpretive retreat, and the electoral check that remains for this class. Part III states the diffusion account fairly and isolates its diagnostic. Part IV establishes disability rights as the account's natural showcase, the most privatized enforcement field the account never examines. Part V is the core: it traces the remedial retrenchment from *Pennhurst* through *Barnes*, *Buckhannon*, and *Cummings* to the circuit extensions, runs the incentive accounting, and shows why a standing-based diagnostic reports health where the channel is starved. Part VI shows the state channel unbuilt, and the IDEA exception that survived. Part VII proposes repair within the diffusion account's own logic: a clear statement remedial statute, a parens patriae provision modeled on the consumer protection code, damages for Title III, and the 2012 ratification record as interpretive support. Part VIII concludes.

## II. The Withdrawal

### *A. The Delegation and the Duty Asymmetry*

The June 2026 reorganization was executed through interagency agreements rather than legislation.[29] The instrument matters. The Economy Act permits one agency to purchase services from another when doing so serves the government's interest; it is a procurement statute, and it presupposes that the ordering agency retains the function it is paying to have performed.[30] The Department of Education accordingly retains statutory ownership of civil rights complaints and of the special education programs, while the investigative labor moves to the Department of Justice and the programmatic labor to Health and Human Services.[31]

29. *See supra* note 1.

30. 31 U.S.C. § 1535(a) (authorizing interagency orders where the head of the ordering agency decides the order is in the government's best interest); *see also id.* § 1535(b) (requiring payment on an actual cost basis, the machinery of a services purchase rather than a transfer of function).

31. *See supra* note 1. The retention is compelled rather than chosen: Congress located both offices inside the Department by statute. 20 U.S.C. § 3413 (Office for Civil Rights); 20 U.S.C. § 1402(a) (special education office). An agreement that concedes the Department must keep leadership and management of the programs concedes that the law requires the programs to stay, which converts the housekeeping defense into an admission that the substance moved while the statute's placement did not. The relocations are therefore reviewable as agency action in excess of statutory authority, 5 U.S.C. § 706(2)(C), a challenge this Article brackets in favor of the enforcement question.

Bracket the vesting question and attend to what changed operationally. Before June 2026, the Office for Civil Rights bound itself to evaluate every complaint received.[32] The duty was procedural rather than substantive: it guaranteed no outcome, only that a filed complaint would be read, assessed against jurisdictional criteria, and answered.[33] That guarantee is what a delegation to the Civil Rights Division cannot carry. The Division's enforcement model is discretionary by design and by doctrine.[34] Nothing in the Administrative Procedure Act or the interagency agreements obligates the Division to evaluate what OCR was obligated to evaluate.[35] The reorganization therefore effected a downgrade that no rights-focused review would catch, because no right was repealed. What was repealed was a duty of attention.[36]

Two features of this change bear on the argument to come. First, the change is invisible to litigation. A complainant cannot compel the Division to investigate, because *Chaney* stands in the way, and cannot challenge the priorities that deprioritize her, because *United States v. Texas* stands in the way.[37] Second, the change is exactly the kind of enforcement withdrawal the Supreme Court's separation of powers jurisprudence treats as the President's to make. The Court has described the discretionary decision to seek or withhold judicial relief as a core executive function,[38] and its removal decisions rest on the premise that electoral accountability, rather than internal structure, disciplines that function.[39] On that jurisprudence's own terms, the

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32. *See supra* note 3.

33. U.S. Dep't of Educ., Off. for C.R., Case Processing Manual §§ 101–110 (version in effect June 2026) (on file with author) (prescribing evaluation, dismissal criteria requiring written notice, and opening standards).

34. *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (grounding the presumption against reviewability in the agency's need to balance priorities, resources, and the likelihood of success); United States v. Texas, 599 U.S. 670, 678–79 (2023).

35. The agreements published no successor processing manual, and the presumption of *Chaney* fills the silence. *See supra* note 4.

36. The distinction between rights and processing duties is familiar from the IDEA context, where the state complaint regulations impose exactly such a duty of attention. *See infra* Part VI.C.

37. Heckler v. Chaney, 470 U.S. 821, 831 (1985); United States v. Texas, 599 U.S. 670 (2023).

38. Trump v. Slaughter, 146 S. Ct. 2283, 2305 (2026) (describing the discretionary power to seek judicial relief as lying at the core of executive authority (quoting Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam))).

39. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020) (reasoning that without removal power the President could not be held fully accountable for subordinates' discharge of his responsibilities (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010))); Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026).

family whose complaint now sits in a discretionary queue has one remedy: the next presidential election.[40]

### *B. The Regulatory Retreat*

The second front is regulatory. In April 2024 the Department of Justice issued the first comprehensive technical accessibility standard for the web content and mobile applications of state and local governments, closing a gap that had persisted for the entire life of Title II.[41] The rule gave large public entities two years to comply.[42] Seven days before that deadline arrived, the Department extended it by a year through an interim final rule, invoking the good cause exception to bypass notice and comment.[43] The mechanism deserves attention alongside the outcome. An interim final rule takes effect immediately and gathers comments afterward, which means the population protected by the deadline learned of its suspension as an accomplished fact.[44] Deadline extension is enforcement withdrawal by other means: the substantive standard survives on paper while the date on which anyone must obey it recedes.[45]

### *C. The Interpretive Retreat*

The third front is interpretive. On June 18, 2026, the Office of Legal Counsel issued an opinion asserting that *Olmstead* was a narrow decision and that neither the ADA nor Section 504 makes unnecessary institutionalization unlawful.[46] The opinion cannot overrule *Olmstead*; only the

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40. *See infra* Part II.D (assessing that remedy for this class).

41. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 89 Fed. Reg. 31,320 (Apr. 24, 2024) (codified at 28 C.F.R. pt. 35) (adopting WCAG 2.1 Level AA as the technical standard).

42. *Id.* (setting compliance dates keyed to population size, with the first cohort due in April 2026).

43. 2026 Interim Final Rule, *supra* note 6; *see* 5 U.S.C. § 553(b)(B) (permitting an agency to dispense with notice and comment upon a finding of good cause). The extension drew a prompt court challenge. *See* Lainey Feingold, *Now There's a Lawsuit (Tell the Federal Government Not to Change the Title II Accessibility Regulations)* (updated May 27, 2026), `https://www.lflegal.com/2026/03/title-ii-action-needed/` (last visited Aug. 23, 2026).

44. *See* 5 U.S.C. § 553(b)(B), (d)(3); *cf.* 89 Fed. Reg. at 31,320 (reflecting the years of notice and comment that produced the deadline the interim final rule suspended in seven days).

45. The technique is not unique to this rule; it is the regulatory analogue of the intake discretion described *supra* Part II.A, and it produces the same result, an obligation without a moment of obligation.

46. *See supra* note 7.

Court can do that.[47] What it can do is fix the litigating position of the United States, withdraw the federal government from integration enforcement, and signal to funded entities that the enforcer has changed its reading of what it will enforce.[48] Interpretation, regulation, and intake are three different levers. Between April and June of 2026 the executive pulled all three in the same direction.[49]

### *D. The Remaining Check*

The Court's answer to concentrated enforcement discretion is electoral. The constitutional strategy, as the Chief Justice has described it, divides power everywhere except the Presidency and renders the President accountable through regular elections.[50] Whatever the general force of that answer, its force for this class is worth stating precisely, without constitutional embroidery. Disabled Americans are numerous but electorally diffuse; the interests at stake in complaint processing, compliance deadlines, and integration enforcement are administered in instruments that never appear on a ballot; and the withdrawal documented above was executed through an interagency agreement, an interim final rule, and an internal legal opinion, three forms selected for the speed with which they take effect and the difficulty with which they are seen.[51] A quadrennial plebiscite is a coarse instrument for disciplining decisions engineered to be invisible by the time it arrives. If checks exist for this field, they will have to come from somewhere other than the ballot. The diffusion account says they do. The next Part states that account.

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47. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999); *see also* Tennessee v. Lane, 541 U.S. 509 (2004) (sustaining Title II's abrogation of sovereign immunity as applied to the fundamental right of access to the courts, and treating Title II as enforceable prophylactic legislation).

48. An OLC opinion binds the executive branch's own conduct and litigation posture. The practical consequence for this Article's purposes is a third instance of the same event: the public enforcer announcing, in advance and in general, what it will decline to pursue. *Cf.* Heckler v. Chaney, 470 U.S. 821, 831 (1985).

49. A fourth instance from an adjacent field completes the pattern and supplies Part VI's model statute: on February 25, 2026, the Federal Trade Commission announced a discretionary non-enforcement policy under the Children's Online Privacy Protection Rule for operators collecting personal information solely for age determination. Fed. Trade Comm'n, Policy Statement on COPPA Rule Enforcement Discretion (Feb. 25, 2026). Congress anticipated Commission inaction in that statute and deputized the states for exactly that event. *See infra* Part VI.A.

50. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020).

51. *See supra* Parts II.A–II.C. The point is practical rather than doctrinal; this Article does not rest anything on heightened scrutiny for the class. *Cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (declining quasi-suspect status for the class while invalidating the ordinance at hand).

## III. The Diffusion Answer

### *A. The Two Channels*

Young's essay reopens a debate the 1990s started and abandoned: what the pervasive delegation of national enforcement to states and private actors means for the separation of powers.[52] Its descriptive claim is that the executive power over national law is federal in Madison's sense, a composition of national and non-national elements rather than a unitary column.[53] Two channels carry the non-national share.

The first is the states. Nearly every consequential federal program runs on cooperative federalism, in which state agencies implement and enforce federal law under federal parameters, with discretion that is real and officials the President cannot touch.[54] Beyond implementation, Congress sometimes hands states the sword directly, authorizing state attorneys general to sue under federal statutes as parens patriae for their residents.[55] And states litigate against the federal executive itself, enforcing statutes and structure when enforcement policy injures their interests.[56] The constitutional answer to the unitary objection is that state officers enforcing federal law exercise the executive power of their own state, conferred by their own constitution, and never

52. Young, *Federal Executive*, *supra* note 9, at 6 (collecting the earlier round); *see* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990); Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997).

53. Young, *Federal Executive*, *supra* note 9, at 3–4 (quoting THE FEDERALIST NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961), describing the Constitution as "a composition of both").

54. Young, *Federal Executive*, *supra* note 9, at 11–16; *see* Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1333 (2023) (describing the shared template of federal parameters, state proposals, and joint concurrence); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

55. *See* 15 U.S.C. § 15c(a)(1); Lemos, *supra* note 10, at 712; Young, *Federal Executive*, *supra* note 9, at 15 (offering the Clayton Act provision and a twelve state parens patriae merger challenge as the worked example).

56. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (state standing to press a rulemaking petition against the federal executive); Young, *Federal Executive*, *supra* note 9, at 15–16.

the executive power of the United States; federal law is law in the several states, and the state's executive power extends to it.[57]

The second channel is the people. Federal law relies pervasively on private rights of action, express and implied, to enforce public regulatory schemes: securities, antitrust, environmental law, civil rights.[58] Private enforcement multiplies resources, moves the cost of regulation off public budgets, exploits private information, and insures the statute against the capture or abandonment of its public enforcer.[59] The constitutional answer here runs through the public rights line: a private plaintiff vindicating her own concrete injury is not exercising the executive power, however much the public interest rides along, and only the assertion of undifferentiated public rights transfers the take care function to the courts.[60]

Together the channels are offered as the answer to the dilemma *Slaughter* sharpened. If democratic accountability requires presidential control of national enforcement, and presidential control threatens aggrandizement, then enforcement lodged outside Article II supplies accountability through different electorates and checks through different hands.[61] The essay closes with a reform agenda, extending cooperative structures, enacting express rights of action where implied ones falter, adjusting fee shifting to sharpen private incentives, and with reassurance that even absent reform, the residual enforcers already hold their authority.[62]

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57. Young, *Federal Executive*, *supra* note 9, at 28–32 (building on Claflin v. Houseman, 93 U.S. 130, 136–37 (1876), and Testa v. Katt, 330 U.S. 386, 390–91 (1947)); *cf.* Printz v. United States, 521 U.S. 898, 922 (1997) (pressing the contrary separation of powers worry about state execution of federal law).

58. Young, *Federal Executive*, *supra* note 9, at 16–18; *see* Nitisha Baronia, Jared Lucky & Diego A. Zambrano, *Private Enforcement at the Founding and Article II*, 114 CALIF. L. REV. 131, 140 (2026) (observing that Congress has adopted private enforcement regimes in almost every area of public law); William B. Rubenstein, *On What a "Private Attorney General" Is, and Why It Matters*, 57 VAND. L. REV. 2129 (2004).

59. Burbank, Farhang & Kritzer, *supra* note 22, at 662; *see* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183–84 (1992) (tracing citizen suit provisions to fear of agency capture).

60. Young, *Federal Executive*, *supra* note 9, at 32–35; *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992) (framing the conversion of the public interest in lawful administration into an individual right as a transfer of the President's take care duty); TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021) (stating that a regime of freely authorized unharmed plaintiffs would infringe Article II).

61. Young, *Federal Executive*, *supra* note 9, at 18–21; *see* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 467 (2012).

62. Young, *Federal Executive*, *supra* note 9, at 35–36.

### *B. The Diagnostic*

Every account that certifies a channel as healthy needs an instrument for measuring health, and the instrument the diffusion account uses for private enforcement is standing doctrine. The move is visible in the essay's structure. The threat to private attorneys general is framed as the Article II critique that runs from Justice Scalia's standing opinions through the modern literature,[63] and the answer given is that the critique reaches only plaintiffs without private injury: *Lujan* and *TransUnion* require concrete harm, concrete harm is what the vast majority of private federal enforcers can show, and so the channel survives.[64] On its own terms the answer is right, and this Article adopts it. Nothing below quarrels with the proposition that a disabled plaintiff denied access holds an injury in fact.[65]

The diagnostic choice nonetheless has a consequence. Standing measures who may enter the courthouse. It says nothing about what the statute pays the plaintiff who wins, and it is the payment schedule, not the doorway, through which Congress engineers private enforcement and through which courts have lately disassembled it.[66] The account registers this lever on the way in, listing fee shifting adjustments among its reforms and quoting the incentive literature for what private enforcement can do.[67] It never runs the lever in reverse. The essay's one sustained claim about enforcement stability, that consistent private incentives smooth the policy swings between

63. Young, *Federal Executive*, *supra* note 9, at 25–28; *see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009); Elliot M. Setzer, Note, *Against the Article II Theory of Standing*, 77 STAN. L. REV. 521 (2025).

64. Young, *Federal Executive*, *supra* note 9, at 33–35 (concluding that the standing cases' injury requirement separates private from executive enforcement without crippling the former); *see also id.* at 34 (answering the argument that TransUnion hobbled congressional reliance on private enforcement by noting how readily most regulatory plaintiffs allege actual harm).

65. *See infra* Part V.F.

66. *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 784–90 (2011) (cataloging damages multipliers, minimum recoveries, and fee awards as the levers of legislated enforcement incentives); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) (documenting the judicial retrenchment of private enforcement through procedure and remedy rather than through substantive repeal).

67. Young, *Federal Executive*, *supra* notes 59, 62.

administrations, assumes the incentives are there.[68] Part V examines the field where they were removed.

## IV. The Most Privatized Field

### *A. The Genealogy*

The private attorney general was named in a disability adjacent setting and built in civil rights. When the Supreme Court held in 1968 that a prevailing Title II plaintiff under the Civil Rights Act ordinarily recovers attorney's fees, it explained that a plaintiff who obtains an injunction under the statute "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[69] Congress generalized the design. The Civil Rights Attorney's Fees Awards Act extended fee shifting across the civil rights code,[70] the Rehabilitation Act carried its own fee provision,[71] and the ADA carried another.[72] The private right of action arrived by the same era's implication doctrine: *Cannon* found a private right in Title IX's funding condition language,[73] Section 504 was drafted on the same Title VI template and has been privately enforceable on *Cannon*'s reasoning ever since,[74] and *Franklin* supplied the remedial presumption: where a right of action exists, all appropriate remedies are presumed available unless Congress says otherwise.[75] The scholarship that later asked what a private attorney general is drew its central cases from exactly this corpus.[76]

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68. Young, *Federal Executive*, *supra* note 9, at 21 (arguing that delegations to non-federal actors smooth policy variation across administrations because private incentives persist while public priorities change).

69. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam).

70. 42 U.S.C. § 1988(b).

71. 29 U.S.C. § 794a(b).

72. 42 U.S.C. § 12205.

73. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

74. *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984) (entertaining a private damages action under Section 504 and holding its coverage not limited to programs receiving aid for employment purposes).

75. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 66 (1992).

76. *See* Rubenstein, *supra* note 58; Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (identifying the private attorney general as the load-bearing enforcement design of the civil rights statutes, and *Sandoval* and *Buckhannon* as its disarmament).

### *B. The Architecture*

The disability statutes distribute enforcement across the diffusion account's channels with a thoroughness few fields match, and they do it through a distinctive drafting technique: remedies by cross reference. Section 504 prohibits disability discrimination in every program or activity receiving federal financial assistance,[77] and gives private plaintiffs the remedies of Title VI by incorporation.[78] Title II of the ADA reaches every public entity regardless of funding, and gives private plaintiffs the remedies of Section 504 by incorporation, which is to say the remedies of Title VI at one further remove.[79] Title III reaches private public accommodations and gives private plaintiffs the remedies of Title II of the Civil Rights Act of 1964: preventive relief.[80] The Individuals with Disabilities Education Act completes the set with an express private civil action following administrative process,[81] a process parents may navigate and litigate without counsel,[82] and whose exhaustion requirement does not bar claims seeking relief the IDEA cannot supply.[83]

The cross reference design deserves a sentence of its own, because it is the mechanism of everything in Part V. When four statutes share one remedial root, a single decision about the root propagates through all of them without any court ever construing three of the four. The architecture that made disability rights the most broadly privatized enforcement field also made it the field most efficiently retrenched.[84]

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77. 29 U.S.C. § 794(a).

78. 29 U.S.C. § 794a(a)(2) (providing that the remedies, procedures, and rights of Title VI of the Civil Rights Act of 1964 shall be available to persons aggrieved under Section 504); *see* Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334 (11th Cir. 2012) (tracing the chain).

79. 42 U.S.C. § 12133; *see* A.W. *ex rel.* J.W. v. Coweta Cnty. Sch. Dist., 110 F.4th 1309 (11th Cir. 2024) (holding that the remedies available under Title VI are the remedies available under the Rehabilitation Act and Title II).

80. 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)); *see infra* Part V.D.

81. 20 U.S.C. § 1415(i)(2)(A).

82. Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) (holding that parents may prosecute IDEA claims on their own behalf pro se).

83. Perez v. Sturgis Pub. Schs., 598 U.S. 142 (2023) (holding that § 1415(l) does not require exhaustion where the plaintiff seeks compensatory damages unavailable under the IDEA); *see also* Fry v. Napoleon Cmty. Schs., 580 U.S. 154 (2017) (keying the exhaustion requirement to the gravamen of the complaint).

84. *See infra* Part V.B (tracing the propagation of *Cummings* through § 12133 and § 794a(a)(2)).

### *C. The Structurally Secondary Public Enforcer*

Public enforcement was never the field's engine. The Department of Justice's disability rights apparatus has been small relative to its portfolio for as long as scholars have counted it,[85] and the scholarship urging a larger public role has framed itself, revealingly, as a corrective to a field that runs on private suits.[86] The courts of appeals say the same thing from the bench: because private Title III plaintiffs cannot recover damages, most enforcement arrives through a small population of repeat plaintiffs, and the statute's compliance gains ride on their persistence.[87]

Assemble the pieces and the field reads as the diffusion account's showcase. Private rights of action across every title; a fee architecture built to fund them; a pro se pathway for the family cases; a public enforcer that was always the junior partner; and now, after June 2026, a public enforcer in open withdrawal.[88] If the residual enforcers can hold a field when the executive stands down, this is the field they should hold. What follows is why they cannot.

## V. Remedial Retrenchment

### *A. The Contract Turn*

The retrenchment begins with a metaphor. *Pennhurst* described Spending Clause legislation as "much in the nature of a contract": in return for federal funds, recipients agree to comply with conditions, and the legitimacy of the conditions rests on whether the recipient accepted them knowingly.[89] The figure was coined for a question about the existence of obligations. Two

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85. Bagenstos, *supra* note 15, at 9 (documenting the modest complement of federal lawyers responsible for enforcing the ADA against state and local governments and private entities alike); *see also* Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 108–13 (2004) (describing the Disability Rights Section's capacity constraints).

86. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2007) (arguing that public enforcers should carry more of the disability rights docket precisely because private enforcement had been left to carry nearly all of it).

87. *See* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1061–62 (9th Cir. 2007); Langer v. Kiser, 57 F.4th 1085 (9th Cir. 2023); Shayler v. 1310 PCH, LLC, 51 F.4th 1015 (9th Cir. 2022).

88. *See supra* Part II.

89. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

decades later it was redeployed for a question about their price. *Barnes v. Gorman* held punitive damages unavailable in private actions under Section 504 and Title II, reasoning that a funding recipient is on notice only of remedies traditionally available for breach of contract, and punitive damages are not among them.[90] Justice Souter, joined by Justice O'Connor, concurred with a caution that reads today as prophecy: the contract analogy, he wrote, should not be extended past the point where it holds, because Spending Clause legislation is unlike a contract in ways that matter.[91]

*Cummings* extended it anyway. The petitioner, who is deaf and legally blind, requested an American Sign Language interpreter from a physical therapy provider that received federal funds; the provider refused; she sued under Section 504 and Section 1557 for the humiliation and distress the refusal caused; and the Court held that emotional distress damages are categorically unavailable, because such damages are not traditionally available for breach of contract and funding recipients therefore lack clear notice of exposure to them.[92] The dissent's objection was the obvious one: the characteristic injury of discrimination is precisely humiliation, indignity, and distress, so a remedial rule that excises emotional harm excises the harm the statutes exist to redress.[93] The majority did not dispute the description of the injury. It held the price term missing from the contract.[94]

Notice what kind of decision this is. *Cummings* narrowed no definition of disability, adopted no new causation standard, raised no pleading bar, and closed no courthouse door. Every plaintiff who could sue the day before could sue the day after. What changed is that the modal

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90. Barnes v. Gorman, 536 U.S. 181, 189 (2002).

91. *Id.* (Souter, J., concurring, joined by O'Connor, J.) (warning against mechanical extension of the contract law analogy). The majority fenced the figure itself, refusing to imply that Spending Clause suits are suits in contract or that contract principles apply to all issues they raise. *Id.* at 189 n.2.

92. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 222, 230 (2022).

93. *Id.* (Breyer, J., dissenting) (reasoning that discrimination's principal harm is the indignity it inflicts, and that contract law itself permits emotional distress recovery where the breach is of a kind particularly likely to cause it).

94. *See id.* at 212 (framing the question as one of remedies for which funding recipients had clear notice); *cf.* Sossamon v. Texas, 563 U.S. 277 (2011) (requiring unequivocal textual clarity before Spending Clause legislation exposes a recipient sovereign to damages).

disability discrimination plaintiff, whose injury is exclusion and its humiliation rather than a receipt, now wins a judgment worth nothing.[95]

### *B. The Extension*

The cross reference architecture then did its work. Because Title II's remedies are Section 504's, and Section 504's are Title VI's, a holding about the Spending Clause statutes propagates to a statute Congress enacted under different powers and without any funding condition at all.[96] The Second Circuit so held in *Doherty v. Bice*, affirming a district court that had observed that every federal court to consider the question had reached the same conclusion.[97][98] The Eleventh Circuit followed in *A.W. v. Coweta County*, reasoning that § 794a(a)(2) makes Title VI remedies the measure for the Rehabilitation Act and Title II alike, so emotional distress damages are unavailable under Title II because *Cummings* made them unavailable under Title VI.[99] The Ninth Circuit completed the set in the second *Payan* appeal, extending *Cummings* to Title II while preserving one lane the others had not articulated: compensatory damages for lost educational opportunities, treated as economic harm within the contract measure.[100] The propagation took two years and three published opinions, none of which purported to weigh what Title II's

95. *See* Bagenstos, *supra* note 15, at 3–5 (explaining, sixteen years before *Cummings*, that remedial limits do more than shrink case volume; they change which cases can be brought at all).

96. *See supra* notes 78–79 and accompanying text. The counterargument was pressed and has been uniformly rejected: plaintiffs contended that Title II is not Spending Clause legislation and that incorporating the Rehabilitation Act's remedies does not incorporate a notice rationale addressed to funding recipients, and the courts answered that § 12133's cross reference makes the Rehabilitation Act's remedial ceiling Title II's own whatever the enacting power. *See* Payan v. L.A. Cmty. Coll. Dist., 169 F.4th 971, 977 (9th Cir. 2026) (acknowledging that Title II is a non-Spending Clause statute and extending *Cummings* through the statutory cross reference); Faller v. Two Bridges Reg'l Jail, No. 2:21-cv-00063 (D. Me. Nov. 2, 2022) (rejecting the same argument).

97. Doherty v. Bice, No. 7:18-cv-10898 (S.D.N.Y. Aug. 9, 2023), *aff'd*, 101 F.4th 169 (2d Cir. 2024).

98. Doherty v. Bice, 101 F.4th 169 (2d Cir. 2024) (affirming dismissal of a Title II emotional distress claim as foreclosed by *Cummings*).

99. A.W. *ex rel.* J.W. v. Coweta Cnty. Sch. Dist., 110 F.4th 1309 (11th Cir. 2024).

100. Payan v. L.A. Cmty. Coll. Dist., 169 F.4th 971, 977–79 (9th Cir. 2026) (holding emotional distress damages unavailable under Title II, *id.* at 977, while preserving compensatory damages for lost educational opportunities as economic harm, *id.* at 978–79); *see also* Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729 (9th Cir. 2021) (earlier appeal in the same litigation, holding disparate impact claims available under Title II and Section 504 in the Ninth Circuit).

remedial scheme should contain. Each read a chain of cross references, correctly, and passed the subtraction downstream.[101]

### *C. What Remains*

Take inventory of the remedies a Title II or Section 504 plaintiff retains after the extension, because the inventory is what a contingent fee market prices. Compensatory damages survive for economic harm, including the lost educational opportunity lane the Ninth Circuit preserved.[102] But any compensatory recovery at all passes through a second gate: the plaintiff must prove intentional discrimination, which the circuits measure by deliberate indifference.[103] Nominal damages survive, and after *Uzuegbunam* they will keep a completed injury justiciable.[104] Injunctions survive. Attorney's fees survive for a prevailing party, but *Buckhannon* defined prevailing to require a judgment or consent decree, so the defendant who complies once sued extinguishes the fee.[105] And the fee itself is negotiable away: a defendant may condition settlement on fee waiver, and ethical counsel may have to accept.[106]

Now price the modal case. A student is denied an interpreter; a patient is turned away; a rider is humiliated on a platform. The injury is real, concrete, and completed. The economic loss is often zero. The recovery is nominal damages, an injunction the plaintiff may no longer need, and a fee exposed to *Buckhannon* and *Jeff D.* No portfolio of such cases sustains counsel, which

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101. The pre-*Cummings* baseline shows the size of the subtraction: the Eleventh Circuit had held emotional distress damages available under the Rehabilitation Act after canvassing the circuits. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007), *abrogated by* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022).

102. Payan v. L.A. Cmty. Coll. Dist., 169 F.4th 971, 978–79 (9th Cir. 2026); *see supra* note 100.

103. Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 345 (11th Cir. 2012) (requiring intentional discrimination, established through deliberate indifference, for monetary recovery under Title II and the Rehabilitation Act).

104. Uzuegbunam v. Preczewski, 592 U.S. 279 (2021) (holding that a request for nominal damages satisfies redressability for a completed violation).

105. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001); *see* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1131–34 (2007) (documenting the decision's measured effects on civil rights enforcement organizations).

106. Evans v. Jeff D., 475 U.S. 717 (1986) (upholding fee waiver demands in civil rights settlements).

means the cases are not brought, which means the statute's commands go untested exactly where violation is cheapest.[107]

### *D. Title III by Design*

For public accommodations, the retrenchment required no retrenching, because the remedy was never conferred. Title III's private enforcement section incorporates the remedies of Title II of the Civil Rights Act of 1964, which are preventive: injunctions and, for prevailing parties, fees.[108] Damages enter Title III only when the Attorney General of the United States sues, and then flow at the Attorney General's election, alongside civil penalties.[109] The design was the price of passage: the damages remedy was traded away in 1990 to hold the coalition, a compromise the disability literature has described as fragile from the day it was struck.[110] The consequence is that the entire monetary weight of Title III hangs on the public enforcer whose withdrawal Part II documented.[111]

The courts that administer Title III have described the resulting enforcement market without euphemism. Because the ADA offers private plaintiffs no damages, most injured disabled people have no economic path to suit, and most Title III litigation is brought by a small number of serial plaintiffs; the Ninth Circuit has said in a published opinion that "it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA."[112] Bagenstos supplied the theory for what the courts observed: remedial limits do more than shrink enforcement, they select for the enforcers who can operate at volume, and then the litigation those enforcers produce becomes

107. *See* Lemos, *Special Incentives*, *supra* note 66 (the recovery schedule is the enforcement schedule); Bagenstos, *supra* note 15, at 3–5.

108. 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)); 42 U.S.C. § 12205 (fees).

109. 42 U.S.C. § 12188(b)(2)(B)–(C).

110. Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000).

111. *See supra* Part II; *supra* note 109.

112. Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007); *accord* Langer v. Kiser, 57 F.4th 1085 (9th Cir. 2023) (reaffirming the point and cautioning district courts against credibility discounts for serial ADA testers); Shayler v. 1310 PCH, LLC, 51 F.4th 1015 (9th Cir. 2022) (attributing high frequency litigation to the remedial structure).

the public face of the statute and the argument for narrowing it further.[113] The geography of enforcement completes the proof. Serial Title III litigation concentrates where state law adds what federal law withholds, above all in California, whose Unruh Civil Rights Act attaches statutory minimum damages of four thousand dollars per violation to ADA violations and thereby funds the enforcement market Congress declined to fund.[114] A federal civil right whose practical value varies by state of residence is not being enforced by a national channel. It is being enforced by the states that chose to pay for it, which is Part VI's subject approached from below.[115]

### *E. The Incentive Accounting*

The functions private enforcement is credited with, in the very literature the diffusion account quotes, each run through the remedy. Private suits multiply enforcement resources only if the suits are economically possible; they shift regulatory costs onto the private sector only if private counsel can carry them; they exploit private information about violations only if the informed have a reason to come forward; they insure the statute against its public enforcer's abandonment only if the insurance pays out when the abandonment occurs.[116] Congress understands this and legislates accordingly; the historical record shows fee shifting and damages enhancements deployed deliberately to construct private enforcement where public enforcement was distrusted.[117] And the judicial disassembly of such regimes proceeds, as Burbank and

113. Bagenstos, *supra* note 15, at 3–5, 23.

114. Cal. Civ. Code § 51(f) ("[a] violation of the right of any individual under the federal Americans with Disabilities Act of 1990 . . . shall also constitute a violation of this section"); *id.* § 52(a) (liability for actual damages up to treble "but in no case less than four thousand dollars ($4,000)," plus attorney's fees); *see* Molski, 500 F.3d at 1062 (locating the serial enforcement pattern in Title III's lack of damages and the resulting reliance on California state law recoveries).

115. *See infra* Part VI.B.

116. *See* Burbank, Farhang & Kritzer, *supra* note 22, at 662 (cataloging the functions); Lemos, *Special Incentives*, *supra* note 66 (cataloging the levers). Lemos's own catalog cautions that incentive enhancements do not always produce their intended effects, and the claim here is narrower than incentive determinism: whatever the marginal efficacy of an enhancement, a remedy set reduced to zero for the modal injury prices the modal case out of the market entirely. A weak positive and a zero are different quantities.

117. FARHANG, *supra* note 22 (documenting the deliberate legislative engineering of private enforcement in the civil rights acts).

Farhang documented across four decades, through exactly the instruments on display here: fee doctrine, remedial construction, and procedure, rather than substantive repeal.[118]

Against that ledger, the diffusion account's stability claim fails on this field's facts. The claim is that consistent private incentives smooth enforcement across changes in administration: when the public enforcer ramps down, the private channel holds the line.[119] In securities and antitrust, where treble damages and class aggregation keep the private bar capitalized, the claim is plausible and the account's examples are drawn from there.[120] In disability rights, 2026 ran the experiment. The public enforcer withdrew across intake, regulation, and interpretation in a single quarter.[121] The private channel could not surge to meet it, because surge capacity is priced, and the price had been removed: no damages in Title III by design, no emotional distress damages anywhere in the funded sector after *Cummings* and its extensions, no catalyst fee since *Buckhannon*.[122] A smoothing function with no funding is a flywheel with no mass.[123]

### *F. What the Diagnostic Cannot See*

Return now to the instrument. The diffusion account certifies the private channel by asking whether its plaintiffs survive Article III and the Article II standing critique, and this Article has stipulated that disability plaintiffs pass.[124] Their injuries are the concrete, particularized, historically cognizable kind: exclusion from a place, denial of a service, the dignitary harm of

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118. BURBANK & FARHANG, *supra* note 66; *see* Karlan, *supra* note 76 (reading *Sandoval* and *Buckhannon* together as the disarmament of the private attorney general); Alexander v. Sandoval, 532 U.S. 275 (2001) (holding disparate impact regulations under Title VI privately unenforceable).

119. Young, *Federal Executive*, *supra* note 68, at 21.

120. *See id.* (drawing the smoothing examples from securities and antitrust); 15 U.S.C. § 15(a) (treble damages); *cf.* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019) (defending aggregate private enforcement as regulation).

121. *See supra* Part II.

122. *See supra* Parts V.A–V.D.

123. The mechanism generalizes: wherever a private enforcement regime's remedy set has been stripped to injunctions and contingent fees, the regime insures against public withdrawal only for plaintiffs with economic losses. Which regimes those are is an empirical question the smoothing literature has not asked; this field supplies the first documented failure.

124. *See supra* note 64 and accompanying text.

discriminatory treatment personally suffered.[125] When the Supreme Court recently brushed against disability tester standing, it resolved nothing, dismissing the case as moot and leaving the lower courts' general receptivity in place.[126] Run the account's diagnostic over this field and every light shows green: rights of action everywhere, standing satisfied, no Article II infirmity, a fee statute on the books.[127]

The lights are wired to the wrong circuit. Standing doctrine measures entry; the retrenchment operated on exit. *Cummings* is not a standing case, *Buckhannon* is not a standing case, § 12188(a)(1) is not a standing rule, and none of them appears in an analysis that equates the Article II critique's failure with the channel's health.[128] This is the precise sense in which the diffusion account's reassurance misfires: the account is right that the private attorney general survived the standing wars, and it does not ask whether she survived the remedies wars, which is where this field lost.[129]

## VI. The State Channel Unbuilt

### *A. Congress Knows How to Deputize the States*

When Congress wants state attorneys general enforcing federal law, it says so, and it has said so with increasing frequency for four decades.[130] The Clayton Act authorizes any state attorney general to sue as parens patriae for treble damages on behalf of resident natural persons.[131] The

125. *See* TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) (treating harms with a close relationship to those traditionally recognized as concrete); *cf.* Allen v. Wright, 468 U.S. 737, 755 (1984) (recognizing stigmatic injury as judicially cognizable for those personally denied equal treatment).

126. Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (vacating as moot); *see* Recent Case, *Acheson Hotels, LLC v. Laufer*, 138 HARV. L. REV. 285 (2024).

127. *See supra* Parts IV.B, V.F.

128. *See supra* notes 20, 64.

129. The point is offered as a friendly amendment rather than a refutation of the account's structure. The account's own reform agenda includes fee shifting adjustments, *see supra* note 62, which concedes the lever's significance; what is missing is the recognition that for an identifiable class of statutes the lever has already been thrown the other way, so the residual enforcer the account relies upon is present in doctrine and absent in fact.

130. Lemos, *supra* note 10, at 712 (documenting that provisions for state enforcement have proliferated in virtually every recent Congress).

131. 15 U.S.C. § 15c(a)(1)–(2).

Children's Online Privacy Protection Act authorizes state parens patriae actions for injunctions, compliance, and damages.[132] The HITECH amendments deputized state attorneys general under HIPAA.[133] The Consumer Financial Protection Act, the CAN-SPAM Act, and the Telemarketing Act each carry the same design.[134]

The design detail that matters here is how these statutes handle the relationship between the state enforcer and a federal enforcer that stops enforcing. COPPA's answer is exemplary: the state must notify the Commission, the Commission may intervene, and the only statutory bar on the state action is the pendency of a Commission proceeding against the same defendant for the same violation.[135] Federal inaction is therefore the unlocked position. When the Commission announced in February 2026 that it would exercise enforcement discretion under the COPPA Rule, the announcement extinguished no one's rights; it cleared the statutory path for fifty state enforcers whose authority is conditioned on nothing except the federal enforcer's absence from the courthouse.[136] That is what a statute drafted for the world of *Heckler v. Chaney* looks like. Enforcement discretion at the center is answered by enforcement authority at the periphery, held by officials accountable to different electorates, exactly as the diffusion account prescribes.[137]

### *B. The ADA's Omission and Its Geography*

The Americans with Disabilities Act contains no such provision. Title III's public enforcement section runs to the Attorney General of the United States: certification consultations, pattern or practice suits, penalties, and discretionary damages, all federal.[138] Title II's administrative apparatus routes complaints to designated federal agencies under Justice Department

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132. 15 U.S.C. § 6504(a)(1).

133. 42 U.S.C. § 1320d-5(d).

134. 12 U.S.C. § 5552(a)(1); 15 U.S.C. § 7706(f)(1); 15 U.S.C. § 6103(a).

135. 15 U.S.C. § 6504(a)(2) (notice), (b) (intervention), (d) (pendency bar).

136. *See supra* note 49; 15 U.S.C. § 6504(d). The structural insight generalizes the diffusion account by one step: in these statutes federal nonenforcement is anticipated in the design, and the state channel is the statute's own contingency plan for the abandonment of its public enforcer.

137. *See* Young, *Federal Executive*, *supra* note 9, at 18–21; *supra* note 4.

138. 42 U.S.C. § 12188(b).

coordination.[139] Section 504's enforcement runs through each funding agency's Title VI machinery.[140] Nowhere in this architecture does a state attorney general appear.[141] The disability statutes were drafted with the two channel design of the 1960s civil rights acts, public enforcement plus private suits, and were never retrofitted with the state enforcement provisions Congress was writing into consumer protection law across the same decades.[142]

What states enforce instead is their own law, and the substitution has a geography. California pairs the federal right with state damages and hosts the nation's Title III docket.[143] States without an Unruh analogue leave their residents the federal remedy set: an injunction and a contested fee.[144] The diffusion account celebrates state enforcement as a second democratic channel, and for statutes with deputization provisions it is; for the ADA it is a lottery of residence.[145]

### *C. The IDEA Exception*

One disability statute was built the other way, and its behavior in 2026 is the natural experiment that proves the design margin. The IDEA is a Spending Clause cooperative program in the full sense: states accept funds, submit plans, and carry general supervisory responsibility for every

139. *See* 28 C.F.R. pt. 35 (Title II implementing regulation, providing an administrative complaint process administered through designated federal agencies under Department of Justice coordination).

140. 29 U.S.C. § 794a(a)(2) (routing Section 504 enforcement through each funding agency's Title VI machinery).

141. A qualification, stated to be answered: several district courts have entertained state parens patriae suits to enforce the ADA on general quasi sovereign standing, *see* New York *ex rel.* Vacco v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 149 (S.D.N.Y. 1995) (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)), while others have rejected state agency ADA enforcement for want of authorization, *see* Cheng v. Winco Foods, LLC, No. 3:14-cv-00483 (N.D. Cal. June 11, 2014). The qualification does not disturb the point. *Snapp* standing, where it succeeds, imports no damages authority for residents, changes nothing in the Part V remedy set, and must be relitigated defendant by defendant. Parens patriae standing is a doorway; deputization is a budget.

142. *Compare supra* notes 132–134 (consumer protection deputizations, 1976 through 2010), *with* 42 U.S.C. §§ 12133, 12188 (1990 architecture, federal and private only).

143. *See supra* note 114.

144. *See supra* Part V.D. The variation is the enforcement map: identical federal rights, radically different practical values, sorted by state legislative choice.

145. *Cf.* Young, *Federal Executive*, *supra* note 9, at 19–20 (state accountability channel). A channel that exists only where state legislatures independently created one is a description of federalism, and it is also a concession that the federal statute supplies no channel at all.

educational program for children with disabilities in the state.[146] Its implementing regulations then do something no other disability rights instrument does: they oblige the state agency to adjudicate. Any individual or organization may file a state complaint alleging a violation,[147] and the state educational agency must resolve it within sixty days of filing, through investigation where warranted, an opportunity for submissions on both sides, an independent determination, and a written decision addressing each allegation, with extensions confined to exceptional circumstances or agreed mediation.[148]

Set that beside Part II.A. In June 2026 the federal complaint channel traded a mandatory evaluation duty for prosecutorial discretion.[149] The state complaint channel kept its mandatory duty, because the duty is written into a regulation binding fifty state agencies whose personnel the President neither appoints, directs, nor removes, and whose obligations run with funds already accepted.[150] A parent in August 2026 who files with the Department of Justice has a discretionary hope; the same parent who files with her state educational agency has a sixty day clock, and behind it a pro se civil action the Supreme Court has unanimously preserved and an exhaustion rule the Court has confined.[151] This is the diffusion account operating exactly as written, in the single corner of disability law where Congress built the cooperative structure the account describes. The exception does not rescue the account for the field. It identifies the design features the rest of the field lacks, which is what Part VII proposes to supply.[152]

146. 20 U.S.C. § 1412(a) (state eligibility conditions); *id.* § 1412(a)(11) (state educational agency general supervision).

147. 34 C.F.R. § 300.153(a) (2026).

148. 34 C.F.R. § 300.152(a)–(b) (2026) (current through Aug. 20, 2026) (requiring each SEA to include in its complaint procedures "a time limit of 60 days after a complaint is filed" to investigate, review, determine, and issue a written decision addressing each allegation); *see supra* note 27. The duty is regulatory rather than statutory, and what rulemaking created rulemaking can rescind, though only through notice and comment and against the statute's command of general state supervision, 20 U.S.C. § 1412(a)(11). The observation belongs on Part VII's agenda rather than against the channel: a statutory codification of the sixty day duty would cost Congress a sentence.

149. *See supra* Part II.A.

150. *See supra* notes 146–148; *cf.* Printz v. United States, 521 U.S. 898, 922 (1997); New York v. United States, 505 U.S. 144 (1992).

151. *See supra* notes 82–83. The *Cummings* shadow falls even here: the damages a *Perez* plaintiff may pursue outside the IDEA are the post-retrenchment set described in Part V.C. The channel survives; the remedy question travels with it.

152. *See infra* Part VII.

## VII. Repair

The repairs proposed here are the diffusion account's own logic carried into the one field where its channels were never built or have been dismantled. Each is legislative, each is compatible with the strongest reading of *Slaughter*, and each has a working model already in the United States Code.

### *A. A Clear Statement Remedies Act*

*Cummings* is, by its own reasoning, an invitation. The holding rests on notice: funding recipients cannot be charged with remedies they lacked clear warning of when they took the money.[153] Notice is a thing Congress can give. A statute providing that acceptance of federal financial assistance constitutes agreement to liability for compensatory damages, expressly including damages for emotional distress, humiliation, and loss of dignity, in private actions under Section 504, Section 1557, and the statutes that incorporate their remedies, supplies the missing price term in exactly the currency the Court demanded, with the drafting precision the Spending Clause cases require.[154] Because Title II's remedies travel by cross reference, the same enactment closes the circuit split's aftermath in a sentence.[155]

There is field-specific precedent for precisely this move. In 1984, *Smith v. Robinson* held the Education of the Handicapped Act the exclusive avenue for mainstreaming claims and denied attorney's fees to prevailing special education parents.[156] Within two years Congress enacted the Handicapped Children's Protection Act, restoring fees and providing that the education statute

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153. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022); *see* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

154. *See* Sossamon v. Texas, 563 U.S. 277 (2011) (requiring express, unequivocal text before Spending Clause conditions expose recipients to damages liability); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 66 (1992) (the presumption of all appropriate remedies operates unless Congress directs otherwise, which entails that Congress may also direct inclusion). The Court's most recent word confirms that the analogy is a notice device rather than a straitjacket: in June 2026 it reiterated that it has consistently refused to imply that Spending Clause suits are suits in contract or that contract principles govern every issue they raise. Landor v. La. Dep't of Corr. & Pub. Safety, 609 U.S. 1 (2026) (quoting Barnes v. Gorman, 536 U.S. 181, 189 n.2 (2002)).

155. *See supra* Parts IV.B, V.B.

156. Smith v. Robinson, 468 U.S. 992 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796.

displaces no rights under the Constitution, the ADA's predecessors, or Section 504.[157] A judicial subtraction from the disability remedial scheme was identified, named, and legislatively reversed inside a single Congress. The mechanism is proven; only the occasion is new.[158]

### *B. A Parens Patriae Provision*

The second repair imports the consumer protection code's design. An amendment to the ADA and the Rehabilitation Act authorizing the attorney general of any state to bring a civil action as parens patriae on behalf of residents injured by violations, for injunctive relief, damages, and civil penalties, with notice to the Attorney General of the United States, a federal right of intervention, and a bar operative only during the pendency of a federal action against the same defendant for the same violation, would place behind the disability statutes the same contingency plan Congress placed behind children's privacy, health privacy, consumer finance, and antitrust.[159] Fifty enforcers with independent electorates would then stand behind a statute currently backed by one enforcer whose discretion is unreviewable and whose current posture is withdrawal.[160]

The constitutional ground for this repair is the diffusion account's own. State attorneys general suing under a federal deputization exercise the executive power of their states; they take nothing from Article II, and the strongest unitary executive holding leaves them exactly where it found them.[161] A Congress that cannot restore removal protection after *Slaughter* retains,

157. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(i)(3), (l)).

158. The occasion is also larger: the 1986 Act answered one decision about one statute, while the present subtraction spans four statutes through the cross reference chain. *See supra* Part V.B.

159. *See supra* notes 132–135 and accompanying text (the model provisions); 15 U.S.C. § 6504(a)–(d) (the cleanest template).

160. *See supra* Parts II, VI.A; Heckler v. Chaney, 470 U.S. 821, 831 (1985).

161. Young, *Federal Executive*, *supra* note 9, at 28–32; *see* Claflin v. Houseman, 93 U.S. 130, 136–37 (1876); Testa v. Katt, 330 U.S. 386, 390–91 (1947); *cf.* Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026) (addressing officers of the United States).

undiminished, the power to multiply the enforcers the President was never able to remove in the first place.[162]

### *C. Repricing Title III*

The third repair confronts the 1990 compromise directly: a federal statutory minimum damages provision for Title III, on the model of the state statute that currently funds the only functioning Title III enforcement market in the country.[163] The predictable objection is litigation abuse, and the answer has been in the literature for two decades: the abuse pattern is a product of the current remedy set, which selects for high volume, low investment filers because no other enforcement model is economically possible; a damages remedy calibrated to real encounters changes the character of the docket by making the meritorious individual case viable.[164] The path to avoid is equally well marked: notice and cure legislation, which conditions enforcement on a violation being pointed out and waited on, subsidizes noncompliance and has been the recurring congressional response to the serial litigation the remedy design itself created.[165] One design taxes violation; the other taxes complaint. A Congress choosing between them is choosing which behavior it wants less of.[166]

### *D. The Ratification Record*

A final consideration supports the first repair and belongs on the record of any court asked to extend the retrenchment further. Article 13 of the Convention on the Rights of Persons with Disabilities obligates parties to ensure effective access to justice for persons with disabilities on

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162. *See* Young, *Federal Executive*, *supra* note 12, at 35–36 (drawing the same conclusion at the level of general design).

163. *See* Cal. Civ. Code § 52(a) (statutory minimum damages); *supra* note 114. California has itself layered correction incentives onto the minimum, reducing statutory damages for defendants who promptly fix inspected or small business violations, which marks a calibrated middle path between an unpriced right and a notice and cure bar. *See* Cal. Civ. Code § 55.56(g).

164. Bagenstos, *supra* note 15, at 3–5, 23; *see* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007) (locating the serial pattern in the absence of damages).

165. *See* ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018) (passed by the House, Feb. 15, 2018) (conditioning Title III suits on notice and cure periods).

166. *Cf.* Lemos, *Special Incentives*, *supra* note 66 (remedial design as behavioral pricing).

an equal basis with others.[167] When the treaty came before the Senate in 2012, the executive branch's presentation rested on the representation that existing United States law, with the disability statutes and their remedial dimension at the center, already fulfilled the Convention's obligations, so that ratification would demand nothing new of the United States.[168] Those representations were made a decade before *Cummings* and describe a remedial regime in which the characteristic injury of discrimination was compensable. A construction of Section 504's remedies under which the deaf and blind patient turned away from treatment recovers nothing is in tension with the access to justice adequacy the government itself certified to the Senate; at minimum, the record is contemporaneous executive evidence of what the remedial scheme was understood to contain, and it weighs against every proposed extension of the subtraction to contexts the Court has not yet reached.[169]

## VIII. Conclusion

The diffusion account is right about the architecture and unfinished about the fuel. Congress has always kept enforcers outside Article II, and *Slaughter* cannot reach them; on that ground this Article stands with the account entirely. But a channel is certified by what it pays, and the account's diagnostic never asks. Run the question through the field this Article has examined and the answer arrives with dates attached: a private channel stripped of the remedy that matched its characteristic injury, a state channel Congress never wrote, a federal channel that traded its duty of attention for discretion in a single June, and one cooperative exception, sixty days wide, proving what the design can do when Congress builds it. The residual enforcers are real.

167. Convention on the Rights of Persons with Disabilities art. 13, Dec. 13, 2006, 2515 U.N.T.S. 3.

168. *The Convention on the Rights of Persons with Disabilities: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (executive branch testimony presenting existing federal disability law as satisfying the Convention's obligations); *see also* 158 CONG. REC. S7365–80 (daily ed. Dec. 4, 2012) (resolution of ratification failing 61 to 38, short of two thirds).

169. The argument is interpretive rather than obligational: the United States has not ratified the Convention, and nothing here treats it as binding. The claim is about the probative force of the executive's own certified understanding of domestic remedial adequacy, offered while seeking the Senate's consent. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (systematic executive practice and representation as a gloss on legal meaning).

For this field they have been handed a judgment they cannot cash. Congress wrote that check, and Congress can fund it: a price term *Cummings* itself invited, a deputization the consumer protection code has already drafted, and a Title III remedy the only working enforcement market in the country has already field tested. The separation of powers argument for doing so is the diffusion account's own last line: when the center stands down, the periphery must be able to stand up, and standing up costs money the current statutes do not provide.[170]

170. *See* Young, *Federal Executive*, *supra* note 12, at 35–36; *supra* Parts V–VII.

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