

Public Enforcement and Disability Law: A United States-South Korea Comparison

JOONGHAN (JOSEPH) JO[†]

The Americans with Disabilities Act (ADA) was enacted with the hope that it would solve issues regarding discrimination against the disabled. However, the outcome fell short of its aspirations. Many people with disabilities still suffer from ongoing discrimination. This Note argues that the ADA's heavy reliance on private enforcement is the main reason for this shortcoming. This Note analyzes the effectiveness of public enforcement in South Korea under the Act on the Prohibition of Discrimination Against Persons with Disabilities, Remedy Against Infringement of Their Rights (Korean Disability Discrimination Act). This Note then argues that civil law country-style public enforcement based on a non-adversarial process can be a solution to this problem.

[†] J.D., 2023, University of California College of the Law, San Francisco; Former Senior Production Editor, Hastings Law Journal; J.D., 2016, Chonnam National University Law School; LL.B., 2012, Dankook University. I would like to express my sincere gratitude to Professor Stuart Seaborn for his insightful guidance and constructive feedback throughout this project. I am deeply grateful to my wife and parents for their unwavering support in this project as well as throughout my legal education. Lastly, I appreciate the hard work the UC Law Journal team put into this Note.

TABLE OF CONTENTS

INTRODUCTION	201
I. HISTORICAL BACKGROUND OF PRIVATE ENFORCEMENT OF THE ADA	205
A. HISTORICAL BACKGROUND OF THE PRIVATE ATTORNEY GENERAL	206
B. THE END OF THE GOLDEN ERA FOR PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS	208
C. PROBLEMS WITH PRIVATE ENFORCEMENT OF THE ADA	209
1. <i>Overview of the ADA</i>	209
2. <i>Shortcomings in Private Enforcement of the ADA</i>	210
D. LIMITATIONS OF PUBLIC ENFORCEMENT OF THE ADA	211
II. REVIEW OF THE KOREAN DISABILITY DISCRIMINATION ACT	213
A. OVERVIEW OF THE KOREAN DISABILITY DISCRIMINATION ACT	213
B. PUBLIC ENFORCEMENT OF THE KOREAN DISABILITY DISCRIMINATION ACT	215
1. <i>Complaints Processed by the NHRCK</i>	215
2. <i>The Imposition of Criminal Penalty</i>	217
3. <i>Debate over Public Enforcement</i>	217
4. <i>The Effects of Public Enforcement</i>	218
III. CONSTITUTIONAL ISSUES REGARDING PUBLIC ENFORCEMENT OF THE ADA	220
A. THE ANTI-COMMANDEERING DOCTRINE	221
B. THE ELEVENTH AMENDMENT IMMUNITY	224
C. DUE PROCESS	226
IV. PROPOSED SOLUTION	227
A. INTRODUCTION OF BUREAUCRATIC PROCEDURE	227
1. <i>A Unified Federal Agency to Govern ADA Cases</i>	227
2. <i>Cooperative Federalism</i>	229
B. INTRODUCTION OF CRIMINAL SANCTION	230
CONCLUSION	231

INTRODUCTION

Sixty-one million American adults, comprising twenty-six percent of the adult American population, live with a disability.¹ The Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) (collectively referred to herein as “ADA”) regulate discrimination against the disabled.² The Americans with Disabilities Act was enacted in 1990, and it became a source of pride for Americans along with other federal civil rights statutes, including the Rehabilitation Act of 1973, Titles II and VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, and the Fair Housing Act (FHA).³ However, in spite of the expectation that the ADA would bring great social change,⁴ its outcome was seen as a shortcoming.⁵ Inefficient enforcement of the ADA resulted in continuing and prevalent discrimination against people with disabilities.⁶ Efficient enforcement is essential because “[e]ven the most far-reaching and thoughtfully drafted statutes” are unable to produce a meaningful impact without proper enforcement.⁷

As with other civil rights statutes, private litigants play a significant role in enforcing the ADA.⁸ The role of the federal executive branch as an enforcer is

1. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=61%20million%20adults%20in%20the,Graphic%20of%20the%20United%20States> (last visited Feb. 11, 2022).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

3. See Presidential Statement on Signing the Americans with Disabilities Act of 1990, 2 Pub. Papers 1068 (July 26, 1990) (George H.W. Bush stated that the Americans with Disabilities Act is “the world’s first comprehensive declaration of equality for people with disabilities”); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 435 (2007).

4. See Gabriella A. Davi, *A Progression Toward Freedom: Protecting the Disabled Under the Ku Klux Klan Act*, 20 CARDOZO L. REV. 1019, 1031 (1999) (explaining that the Americans with Disabilities Act “was widely applauded for its breadth and ingenuity”).

5. See Waterstone, *supra* note 3, at 447 (arguing the ADA is a prime example of the private attorney general’s limitations); Michelle Maroto, *Twenty-Five Years After the ADA: Situating Disability in America’s System of Stratification*, 35 DISABILITY STUD. Q. (Sept. 30, 2015), <https://dsq-sds.org/article/view/4927/4024> (suggesting that “the ADA has failed to improve employment and earnings outcomes among people with disabilities”); SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 117 (2009) (indicating the ADA “has failed significantly to improve the employment position of people with disabilities”); see also Davi, *supra* note 4, at 1061–63.

6. R. Cameron Saenz, Book Note, *Enforcing the ADA and Stopping Serial Litigants: How the Commercial Real Estate Industry Can Play This Key Role*, 6 TEX. A&M J. PROP. L. 171, 172 (2020); see also Waterstone, *supra* note 3, at 447–48 (explaining that “the ADA is heavily dependent on private enforcement” but private attorney general enforcement has not been effective for a myriad of reasons).

7. Waterstone, *supra* note 3, at 435.

8. See *id.* at 447; H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); S. REP. NO. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the

limited in the United States,⁹ and any real impact of the ADA heavily depends on private litigants.¹⁰ The first three Titles of the ADA describe the specific regulations of private enforcement.¹¹ Specifically, Title I regulates employment discrimination.¹² Under Title I, an individual who receives a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC) may file a lawsuit and can recover compensatory and punitive damages.¹³ Title II of the ADA applies to public entities.¹⁴ An aggrieved plaintiff may file a lawsuit for compensatory, but not punitive, damages.¹⁵ Title III applies to public accommodation and services operated by private entities.¹⁶ Under Title III, an individual cannot claim compensatory damages¹⁷ and can only receive injunctive relief and attorney's fees.¹⁸

The execution of private enforcement of the ADA has fallen short of the expectations of people with disabilities.¹⁹ Even though an individual is allowed to recover compensatory and punitive damages under Title I, people with disabilities often face challenges in finding attorneys to assist them.²⁰ Furthermore, courts have used a narrow standard with regard to compensatory damages, making it difficult for disabled people to obtain compensatory

Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”).

9. Casey L. Raymond, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 TEX. J. C.L. & C.R. 235, 250 (2013).

10. *Id.*

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

12. 42 U.S.C. § 12112(a) (2020).

13. *Id.* § 12117(a) (2020); *Id.* § 2000e-5(f) (2020).

14. *Id.* § 12132 (2020).

15. *See Id.* § 12133 (2020); *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (“Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA . . .”). Compensatory damages are “designed to make plaintiff as well off as he would have been if he never had been wronged.” LAYCOCK & HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 3 (Rachel E. Barkow et al. eds., 5th ed. 2019). Punitive damages are “designed to punish wrongdoers” and increase deterrence. *Id.* at 3, 4. Punitive damages are awarded when “a defendant’s conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for others’ rights, or even more deplorable behavior.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 472 (2008).

16. 42 U.S.C. § 12182(a) (2020).

17. *Id.* § 12188(a) (2020); *see also* James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 441 (2000) (“Titles II and I may be enforced through a private cause of action for injunctive, declaratory, and monetary relief (as well as attorney’s fees, costs, and litigation expenses) or through a Department of Justice enforcement action Title III of the ADA extends the principles of Section 504 and Title II to the private sector, except that damages are not recoverable in a private cause of action.”).

18. 42 U.S.C. § 12188(a) (2020).

19. Waterstone, *supra* note 3, at 447.

20. *See* Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 596, 631–47 (2005).

damages.²¹ This difficulty has been coupled with Supreme Court rulings that expanded sovereign immunity.²² Meanwhile, plaintiffs cannot recover damages under Title III, resulting in its being the least-used provision under which plaintiffs bring claims.²³ In addition, the ADA has not contributed to people with disabilities finding employment.²⁴ Most empirical analyses indicate the employment rates of disabled people have not increased “significantly” since the statute was passed.²⁵

Public enforcement of the ADA is also inefficient because of the limited authority of the EEOC.²⁶ The EEOC is tasked with receiving and investigating complaints related to violations of the ADA.²⁷ In spite of its investigative powers, the EEOC cannot issue enforceable orders and can only file lawsuits against wrongdoers.²⁸ The EEOC’s limited authority has made it ineffective in addressing discrimination against people with disabilities, resulting in criticism.²⁹

Considering the shortcomings of the ADA’s execution, this Note explores public and private enforcement of the ADA and recommends that the federal government take on a more active role in enforcing the ADA.³⁰ In South Korea, the government plays a significant role in enforcing disability law.³¹ In 2007, South Korea enacted the Act on the Prohibition of Discrimination Against

21. Some circuits have held that plaintiffs should prove deliberate indifference. *See, e.g.*, *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138–39 (9th Cir. 2001); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999); *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 156 F.3d 321, 331 (2d Cir. 1998).

22. *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001); *see also* *Tennessee v. Lane*, 541 U.S. 509, 510 (2004) (“Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.”).

23. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1868 (2005).

24. *See generally* Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010) (reviewing SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)).

25. *Id.*; *see also* BAGENSTOS, *supra* note 5, at 117 (“Much more data exist regarding the effects of the ADA on employment. There, any discussion must begin with a striking fact, which virtually no knowledgeable observer disputes: the statute has failed significantly to improve the employment position of people with disabilities. Indeed, by virtually all reports the employment rate for Americans with disabilities has declined over the time the statute has been on the books.”).

26. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 688 (2013); Patricia Barnes, *Is the EEOC Protecting Workers or Discriminatory Employers?*, FORBES (Sept. 4, 2019, 4:16 PM), <https://www.forbes.com/sites/patriciabarnes/2019/09/04/is-the-eeoc-protecting-workers-or-discriminatory-employers/?sh=bf173f15407e>.

27. 42 U.S.C. § 2000e-5 (2020).

28. *Filing a Lawsuit*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-lawsuit> (last visited Apr. 12, 2022).

29. *See* Barnes, *supra* note 26.

30. Waterstone, *supra* note 3, at 436.

31. *See generally* Zoonil Yi, *hanguk jangaeinchabyeolgeumjibeobui beopjeok jaengjeom* [Legal Issues on the Disability Discrimination Act of Korea], 34 ANAM L. REV. 101 (2011) (S. Kor.).

Persons With Disabilities, Remedy Against Infringement of Their Rights (hereinafter, “Korean Disability Discrimination Act”).³² The Korean Disability Discrimination Act includes public enforcement clauses, including one that designates civil administrative actions as a means of enforcing it.³³ As soon as a victim files a petition, the Korean executive branch investigates the facts and makes a decision under an inquisitorial process, which is different from an adversarial process in which the complainant and complainees compete for the truth.³⁴ During civil administrative actions and before a trial, the Minister of Justice can order entities to perform an act or stop performing an act by issuing a corrective order.³⁵ Entities³⁶ that fail to comply with the corrective order are subject to monetary sanctions.³⁷ Even though such entities can challenge corrective orders through litigation,³⁸ they are usually under a great deal of pressure to acquiesce to the order due to the possibility of costly and lengthy litigation with the government and of damage to their reputation. In addition, the Korean Disability Discrimination Act includes a clause that criminally punishes

32. See generally Nat'l Assemb. S. Kor. 6179, 265th Cong. (2007) (S. Kor.), https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Y0D7B0Y2E2G2X1V7N3C7U5W1E1P7V2 (including the date of enactment of the Korean Disability Discrimination Act).

33. Jangaeinchabyeolgeumji mit gwolliguje deunge gwanhan beomnyul [Jangaeinchabyeolgeumjibeop] [Act on the Prohibition of Discrimination Against Persons with Disabilities, Remedy Against Infringement of Their Rights] art. 43 (S. Kor.), translated in Korean Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

34. See generally Gukgaingwonwiwonhoebeop [National Human Right Commission of Korea Act] art. 30–50 (S. Kor.), translated in Korean Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/main.do (search required) (outlining the methodology the commission utilizes to inquire into petitions).

35. Jangaeinchabyeolgeumjibeop, art. 43. A corrective order is similar to an injunction in the American Legal system. *Id.* Minister of Justice can require entities to (1) cease the discriminatory behavior, (2) compensate for the damage received by the complainant, (3) take measures to prevent further recurrence of discrimination, or (4) “take other measures necessary for rectifying discriminatory acts.” See *id.*

36. The Minister of Justice can issue corrective orders to governmental organizations, including local governments, because governmental organizations can be subject to administrative acts such as corrective orders. See JEONG-SUN HONG, HAENGJEONGBEOBONNON(SANG) [KOREAN ADMINISTRATIVE LAW I] 122 (21st ed. 2013) (S. Kor.); see also Huiyong Kim, *Beommubu, suwonsie seungganggi seolchi sijeongmyeongnyeong* [Ministry of Justice Issues Corrective Order to Suwon City Regarding Elevator Installation] KBS NEWS (Sept. 28, 2012, 3:41 PM) (S. Kor.), <https://www.ilyoseoul.co.kr/news/articleView.html?idxno=69992> (stating “. . . the Minister of Justice shall apply for the victim's request. However, it is possible to issue a corrective order to a person who has committed a discriminatory act ex officio.”). Note, however, that Korean local governments lack sovereignty, unlike American states. The concept of an administrative act, which has its roots in German administrative law, is a fundamental principle in Korean administrative law. See generally HONG, *supra* at 296–307. An administrative act is a sovereign measure taken unilaterally by an administrative agency to enforce the regulation of a particular case in the sphere of public law. See HONG, *supra* at 297; MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 32 (2013). Administrative acts encompass most actions that are taken by administrative authorities and have an impact on the legal rights of individuals or entities. SINGH, *supra* at 32; see also HONG, *supra* at 297–307.

37. Jangaeinchabyeolgeumjibeop, art. 43.

38. *Id.* art. 44.

any individual who discriminates against the disabled with malice.³⁹ Violation of this clause can result in fines or imprisonment.⁴⁰

This Note evaluates the effectiveness of public enforcement in South Korea and explores how the adoption of civil law public enforcement of the ADA would contribute to solving the problem of ongoing discrimination against people with disabilities in the United States. Part I reviews the historical background of private enforcement of the ADA. It then details the problems of private enforcement. Part II reviews disability law in South Korea and analyzes how public enforcement has alleviated discrimination against people with disabilities. Part III reviews the constitutionality of adopting administrative orders and criminalizing discrimination against the disabled. It then analyzes issues raised under the anti-commandeering doctrine and Commerce Clause of the U.S. Constitution. Finally, Part IV proposes amendments to the ADA's statutory framework that would adopt public enforcement to improve the ADA's execution and reduce the burden of litigation imposed by the current framework on people with disabilities.

I. HISTORICAL BACKGROUND OF PRIVATE ENFORCEMENT OF THE ADA

The main feature of the American legal system is “adversarial legalism.”⁴¹ Adversarial legalism refers to “policymaking, policy implementation, and dispute resolution by means of party-and-lawyer dominated legal contestation.”⁴² Unlike other countries that have civil law systems,⁴³ the United States mainly depends on private attorneys and courts to realize its public interests.⁴⁴ Private litigants play a more critical role than the government in implementing public policies.⁴⁵ By contrast, many other countries utilize public enforcement.⁴⁶ They carry out dispute resolution through the bureaucratic administration or the judgments of political authorities.⁴⁷ Of course, the United States also uses public enforcement. However, unlike civil law countries, the American public enforcement system operates “in the shadow of the legal structures of adversarial legalism.”⁴⁸ Part I of this Note discusses the rise of

39. *Id.* art. 49.

40. *Id.*

41. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2019).

42. *Id.*

43. Civil law means “legal tradition which has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed in Continental Europe and around the world.” William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 683 (2000).

44. See KAGAN, *supra* note 41, at 3.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* For the problems of ADA's public enforcement, see discussion *infra* Part I.D.

private enforcement in the United States, problems regarding private enforcement, particular issues regarding private enforcement of the ADA, and the limitations of its public enforcement under the current framework.

A. HISTORICAL BACKGROUND OF THE PRIVATE ATTORNEY GENERAL

The private attorney general is an important feature of American adversarial legalism.⁴⁹ The term “private attorney general” implies the implementation of governmental policies by private lawyers.⁵⁰ Its historic origin goes back to the *qui tam* action in England’s statutes in the fourteenth century.⁵¹ Under these *qui tam* suits, private parties were able to bring an action on the government’s behalf, even if they had no interest in the controversy, in which the private parties shared in “the damages or civil penalties paid by the defendant.”⁵² In the United States, *qui tam* suits “date at least from the first years of the Union.”⁵³ For example, Congress passed the False Claims Act with a *qui tam* provision in 1863.⁵⁴ The Act allows unrelated private parties to sue on the government’s behalf people who defraud the federal government.⁵⁵ In 1943, Judge Jerome Frank coined the term “private attorney general.”⁵⁶ He explained this concept:

Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorneys General.⁵⁷

49. See Bryant G. Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 353 (1988).

50. Garth et al., *supra* note 49, at 354.

51. Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 775 (2000). *Qui tam* comes from the Latin phrase meaning “who pursues this action on our Lord the King’s Behalf as well as his own” (*qui tam pro domino rege quam pro se ipso in hac parte sequitur*). *Id.* at 768 n.1 (citing 3 William Blackstone, Commentaries *160).

52. Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 600 (2005).

53. *Id.*

54. See False Claims Act of 1863, H.R. 60, 37th Cong. (1863); 31 U.S.C. §§ 3729–3732 (2020).

55. 31 U.S.C. § 3730(b) (2020).

56. Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943); see Morrison, *supra* note 52, at 590, 599.

57. *Associated Indus. of New York State*, 134 F.2d at 704.

Traditionally, American private attorneys have not brought civil rights cases to court for just themselves.⁵⁸ They have done so to implement policies that Congress has “considered of the highest priority.”⁵⁹ For example, when the Civil Rights Act of 1964 was enacted, the United States counted on private litigations by private attorneys general “as a means of securing broad compliance with the law.”⁶⁰ Lawmakers from both sides of the political spectrum recognized the importance of private attorneys general and thus supported them.⁶¹ Republicans who preferred to minimize the role of the federal government favored private attorneys general because of their privatization of enforcement.⁶² Democrats supported private attorneys general because they “freed up civil rights enforcement from any conservative political agenda or administration.”⁶³

Particularly, the 1970s saw the start of the golden era for private enforcement of civil rights.⁶⁴ During this period, private attorneys general vigorously enforced civil rights laws.⁶⁵ The principal procedural mechanism they chose was the class action suit.⁶⁶ A balance existed between a “public-interest-minded attorney general and the judicial and political systems.”⁶⁷ Private enforcement of civil rights heavily relied on attorney’s fee awards. The American private attorney general system made by Congress heavily relies on attorney’s fee awards.⁶⁸ For example, if victims of civil rights violations always had to bear the burden of their own attorneys’ fees, only a few victims who could afford attorney’s fees would file civil rights lawsuits.⁶⁹ Many civil rights lawsuits seek nonmonetary relief or monetary relief that is small or nonexistent, so private attorneys cannot be fully compensated through these remedies.⁷⁰ Victims of civil rights violations often seek “nonmonetary relief, such as institutional reform or a policy change.”⁷¹ This nonmonetary relief would benefit society, even though it does not pay an attorney.⁷² In addition, there are civil

58. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

59. *Id.*; *See also* H.R. REP. NO. 88-914, pt. 1, at 18 (1963); S. REP. NO. 88-872, pt. 1, at 11, 24 (1964).

60. *Newman*, 390 U.S. at 401.

61. Garth et al., *supra* note 49, at 353.

62. Waterstone, *supra* note 3, at 442; *see also* Garth et al., *supra* note 49, at 353.

63. Waterstone, *supra* note 3, at 442; *see also* Garth et al., *supra* note 49, at 353.

64. *Id.* at 442–43.

65. *See id.*

66. *See* Garth et al., *supra* note 49, at 355 (“The class action suit is the principal procedural mechanism characteristic of the private attorney general.”); *see* Waterstone, *supra* note 3, at 443.

67. *Id.* at 443.

68. *See* Waterstone, *supra* note 3, at 442.

69. *Newman*, 390 U.S. at 402.

70. 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, 1090 (2007).

71. *Id.*

72. *Id.* at 1091.

rights cases in which monetary relief is small or nonexistent, but where the success of which would also confer broad benefits to society.⁷³ Congress recognized the importance of attorney fees by enacting fee-shifting statutes to promote the private enforcement of civil rights laws.⁷⁴ Congress explicitly noted that fee awards would allow private citizens “to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.”⁷⁵ These fee-shifting statutes encouraged the private enforcement of civil rights statutes by motivating private attorneys to take on expensive and time-consuming civil rights claims.⁷⁶

B. THE END OF THE GOLDEN ERA FOR PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS

Unfortunately, this golden era soon came to an end.⁷⁷ There were several reasons for this. First was the decision of the United States Supreme Court. In 2001, the Supreme Court made it difficult for private attorneys to receive compensation through civil rights cases. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Court rejected the “catalyst theory,”⁷⁸ which “allows an award of attorneys’ fees to a plaintiff when the pressure of a lawsuit causes a defendant’s ‘voluntary’ change of illegal conduct.”⁷⁹ Instead, it held that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees” under the aforementioned fee-shifting statutes.⁸⁰ Before this decision, the plaintiffs were entitled to attorney’s fees as prevailing parties in a lawsuit that acted as “a catalyst for voluntary change in the defendant’s conduct.”⁸¹ This decision discouraged private attorneys general from “tak[ing] on paradigmatic public interest cases, such as class actions seeking injunctive relief.”⁸²

73. *Id.* at 1090–91.

74. *Id.* at 1088.

75. S. REP. NO. 94-1011, at 2 (1976) (discussing the role of private attorneys general in supporting rights of the highest priority through private enforcement).

76. Albiston & Nielsen, *supra* note 70, at 1090–91.

77. *Id.*

78. *See* 532 U.S. 598, 604 (2001).

79. William J. Pinilis, *The Catalyst Theory: Alive in State Court; Dead in Federal Court—or Is It?*, 293 N.J. LAW., April 2015, at 73, 98 (“The catalyst theory would allow attorneys’ fees to a litigant suing under a remedial fee-shifting statute because the lawsuit served as the impetus for a defendant to change its illegal conduct prior to a court order mandating such a change.”).

80. *See Buckhannon*, 532 U.S. at 604.

81. Albiston & Nielsen, *supra* note 70, at 1089.

82. *Id.* at 1087.

Another reason for the demise of the golden era of private attorneys general was the changes regarding the Legal Services Corporation (LSC).⁸³ Many civil rights attorneys were financed by the LSC, but many civil rights organizations later decreased funding for these attorneys.⁸⁴ In addition, Congress passed the Omnibus Consolidated Receptions and Appropriations Act of 1996, which “was devastating to the LSC’s ability to prosecute large cases on the public’s behalf.”⁸⁵

Some scholars have pointed out that the concept of the private attorney general is problematic in itself, indicating that it is not feasible to rely on private enforcement of public policy.⁸⁶ They have argued that private attorneys general are “individuals and organizations acting on specific ideological or financial incentives, using the private attorney general’s mantle to advance their own interests.”⁸⁷ The critics blamed private attorneys general for raising frivolous claims and “extract[ing] settlements from defendants eager to avoid the risks of a full trial.”⁸⁸

C. PROBLEMS WITH PRIVATE ENFORCEMENT OF THE ADA

I. Overview of the ADA

The definition of “disability,” which was broadened by the ADAAA,⁸⁹ is “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁹⁰

Each title of the ADA addresses a different aspect of discrimination, such as employment discrimination, discrimination in public services, and discrimination in public accommodations and services.⁹¹ Title I (discrimination in employment) covers entities that employ at least fifteen persons.⁹² It states that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training,

83. See Waterstone, *supra* note 3, at 445.

84. See *id.*

85. See *id.* (“Congress enacted a series of restrictions on the LSC, including prohibiting organizations that receive funding from the Corporation from bringing class actions.”); see also Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 53 (1996). The class action restriction is found in section 504(a)(7) of the Act. *Id.*

86. See Waterstone, *supra* note 3, at 446–47.

87. Morrison, *supra* note 52, at 610.

88. *Id.* at 610–11.

89. The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009).

90. 42 U.S.C. § 12102(1) (2020).

91. RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION* 16 (8th ed. 2013).

92. 42 U.S.C. § 12111(5)(A) (2020).

and other terms, conditions, and privileges of employment.”⁹³ Title II (discrimination in public services) covers “any state or local government, the National Railroad Passenger Corporation, and any commuter authority.”⁹⁴ It states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”⁹⁵ Title III (discrimination in public accommodations and services provided by private entities) covers any “public accommodation,” or “commercial facility.”⁹⁶

2. *Shortcomings in Private Enforcement of the ADA*

Congress still trusted in private attorneys general when it enacted the ADA, even though “courts and the public had turned against” them.⁹⁷ However, the ADA is a classic example of the limitations of private enforcement.⁹⁸ It is criticized for not meaningfully improving the “overall socioeconomic status of persons with disabilities.”⁹⁹

The first three titles of the ADA describe the regulations related to private enforcement.¹⁰⁰ Under Title I, an individual who receives a right-to-sue letter from the EEOC may file a lawsuit and recover compensatory and punitive damages.¹⁰¹ However, people with disabilities often face challenges in finding attorneys to assist them.¹⁰² According to almost all empirical analyses, the employment rates of the disabled have not increased “significantly since the statute’s passage.”¹⁰³ The gap in employment rates between people with work-limiting disabilities and those without widened from 37.7 percent in 1988 to 62.3

93. *Id.* § 12112(a).

94. *Id.* § 12131(1).

95. *Id.* § 12132.

96. *Id.* §§ 12181–12182.

97. Waterstone, *supra* note 3, at 447.

98. *Id.*

99. Stein et al., *supra* note 24, at 1658.

100. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327–328 (1990) (codified as amended in scattered sections of 42 U.S.C.).

101. See 42 U.S.C. § 12117(a) (2020); see *id.* § 2000e-5(f) (2020).

102. Rulli & Leckerman *supra* note 20, at 631–47.

103. Stein et al., *supra* note 24, at 1658; see also BAGENSTOS, *supra* note 5, at 117 (“Much more data exist regarding the effects of the ADA on employment. There, any discussion must begin with a striking fact, which virtually no knowledgeable observer disputes: the statute has failed significantly to improve the employment position of people with disabilities. Indeed, by virtually all reports the employment rate for Americans with disabilities has declined over the time the statute has been on the books.”).

percent in 2014.¹⁰⁴ As a result, scholars and policymakers have questioned “the ADA’s ability . . . to achieve true equality for Americans with disabilities.”¹⁰⁵

Title II of the ADA applies to public entities.¹⁰⁶ An aggrieved plaintiff may file a lawsuit for compensatory, but not punitive, damages.¹⁰⁷ The Second and Eighth Circuits have used a narrow standard with regard to compensatory damages, making them difficult for people with disabilities to obtain.¹⁰⁸ The Second Circuit requires plaintiffs to prove “discriminatory animus or ill will,” while the Eighth Circuit requires “deliberate indifference.”¹⁰⁹ In addition, the doctrine of state immunity limits the ability of plaintiffs to seek damages. When plaintiffs seek compensatory damages against a state actor, the state can assert Eleventh Amendment immunity,¹¹⁰ which has been expanded by Supreme Court rulings.¹¹¹

Under Title III, an individual cannot claim compensatory damages¹¹² and can only receive injunctive relief.¹¹³ The recent *Buckhannon Board & Care Home, Inc.* decision made it more difficult for plaintiffs with Title III claims to find private attorneys to assist them.¹¹⁴ Not surprisingly, this Title has the lowest number of cases.¹¹⁵

D. LIMITATIONS OF PUBLIC ENFORCEMENT OF THE ADA

Public enforcement in the United States differs from that in civil law countries in that American public enforcement operates “in the shadow of the legal structures of adversarial legalism.”¹¹⁶ The role of public enforcement in the

104. Maroto, *supra* note 5, (“[I]n 1988, 87.6 percent of people without disabilities were employed and 49.9 percent of people with disabilities had employment. The corresponding rates for 2014 were 84.2 percent and 21.9 percent.”).

105. Stein et al., *supra* note 24, at 1658–59; see also *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 61 (2000) (discussing practical issues with the ADA).

106. 42 U.S.C. § 12132.

107. See *id.* § 12133; *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (“Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA . . .”).

108. See e.g., *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98, 115 (2d Cir. 2001); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).

109. *Garcia*, 280 F.3d at 115 (holding “proof of discriminatory animus or ill will” is required to obtain Title II damage); *Meagley*, 639 F.3d at 389 (holding proof of “deliberate indifference” is required to obtain Title II damage).

110. *Raymond*, *supra* note 9, at 251.

111. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

112. See 42 U.S.C. § 12188(a); see also *Harrington*, *supra* note 17, at 441 (explaining that “damages are not allowed in a private cause of action” under Title III of the ADA).

113. See 42 U.S.C. § 12188(a).

114. *Albiston & Nielsen*, *supra* note 70, at 1087.

115. *Waterstone*, *supra* note 23, at 1853.

116. See *KAGAN*, *supra* note 41, at 3.

United States is limited and unsuccessful, especially in the context of the ADA. The ADA, like other federal civil rights statutes, follows the concept of adversarial legalism¹¹⁷ and heavily relies on private enforcement.¹¹⁸ The EEOC is an exemplar of the failure of American public enforcement.¹¹⁹ In federal anti-discrimination laws, including the ADA, victims are required “to file a complaint first with the EEOC before they could proceed to federal court.”¹²⁰ Particularly, the EEOC receives complaints regarding ADA violations,¹²¹ investigates complaints, and files lawsuits when it finds evidence of a violation.¹²² However, the EEOC has limited authority in these proceedings, compared to government agencies in civil law countries. Even though it spends a significant amount of time and money investigating cases, all the EEOC can do is put the cases in the hands of a court and wait for the court’s decision.¹²³ After completing investigations, the EEOC cannot issue enforceable orders.¹²⁴ This indicates Congress’s deference to traditional adversarial legalism. Congress wants attorneys and courts rather than the executive branch to implement public policies.¹²⁵ The authority of agencies in civil law countries, on the other hand, is much broader.¹²⁶ For instance, the Korean executive branch has the power to issue an order to stop continuing violations of the Korean Disability Discrimination Act during disability law complaint procedures.¹²⁷ Korean employers and entities that do not comply with such an order are fined.¹²⁸

In the United States, Congress’s intent was to encourage employers to voluntarily comply with anti-discrimination laws such as the ADA through the EEOC system “rather than forcing compliance on employers through litigation.”¹²⁹ The EEOC, however, has not met Congress’s expectations due to

117. Raymond, *supra* note 9, at 250.

118. *Id.*

119. Barnes, *supra* note 26.

120. *Id.*

121. 42 U.S.C. § 2000e-5.

122. *Id.*

123. See generally *Filing a Lawsuit*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-lawsuit> (last visited Apr. 12, 2022).

124. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 688 (2013).

125. During the 1960s and 1990s, Congress mobilized “private lawsuits at the expense of administrative action.” *Id.* at 691–95; SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 94–128 (2010).

126. See KAGAN, *supra* note 41, at 3.

127. Jangaeinchabyeolgeumjibeop, art. 43.

128. *Id.* art. 50.

129. Barnes, *supra* note 26.

its limited authority.¹³⁰ The EEOC prosecutes approximately two percent of job discrimination suits, while ninety-eight percent of those cases rely on private enforcement.¹³¹ The EEOC “failed to find discrimination in 87 percent of the almost 1.9 million cases filed by discrimination victims over the 21-year period” from 1997 to 2018.¹³² The EEOC has also been criticized for “discourag[ing] workers from taking discriminatory employers to court” due to its inefficiency.¹³³

The ADA’s shortcomings call for a new framework beyond litigation to ensure effective enforcement. Under such an alternative, the federal executive branch would enforce the ADA more aggressively and powerfully rather than wait for a court decision.¹³⁴ South Korea provides an example of how this could work, as it is a civil law country in which the executive branch plays a more significant role in enforcing the Korean Disability Discrimination Act. Part II of this Note discusses how public enforcement has alleviated discrimination against people with disabilities in South Korea.

II. REVIEW OF THE KOREAN DISABILITY DISCRIMINATION ACT

A. OVERVIEW OF THE KOREAN DISABILITY DISCRIMINATION ACT

Historically, South Korea’s legal system follows the German model.¹³⁵ During Japanese rule over Korea from 1910 to 1945, Japan abolished the entire Korean legal system and instituted the Japanese legal system, which was modeled after German law.¹³⁶ In the 1990s, scholars advocated for a Korean version of the ADA.¹³⁷ In 2003, fifty-eight non-profit organizations established a united organization in South Korea,¹³⁸ initiating the movement to establish the

130. See *id.* Civil rights advocates, in 1964, worked on proposing the EEOC with strong authority, but “conservative Republicans stripped the EEOC of the strong administrative powers initially proposed by advocates of the job discrimination title, and provided instead for private lawsuits with economic incentives for enforcement, including attorney fee awards for prevailing plaintiffs.” Burbank et al., *supra* note 124, at 691–92.

131. FARHANG, *supra* note 125, at 3.

132. Barnes, *supra* note 26.

133. *Id.*

134. Waterstone, *supra* note 3, at 436.

135. See Junhyouk Choi, *Dogilbeobi hanguge michin yeonghyang* [*Influence of the German Legal System on South Korea*], 14 INHA L. REV. 191, 193–94 (2011) (S. Kor.); Jong Dae Bae, *Uri beopagui naagal gil hyeongbeopageul jungsimeuro* [*The Way Korean Law Should Go, with a Focus on Criminal Law*], 1 KOR. L. & SOC’Y ASS’N 220, 233 (1989) (S. Kor.).

136. See Choi, *supra* note 135, at 193–95; Bae, *supra* note 135, at 232–34.

137. Jongun Park, NAT’L HUM. RTS. COMM’N KOR., *Jangaeinchabyeolgeumjibeobui juyo naeyonggwa uiui* [*Purpose and important issues of the Korean Disability Discrimination Act*], in 7 JANGAEINCHABYEOLGEUMJIBEOBUI JEJEONG UIUIWA JANGAEIN JEONGCHAEGUI BANGHYANG [PURPOSE OF THE KOREAN DISABILITY DISCRIMINATION ACT AND THE DIRECTION OF ITS POLICY] (Kyunghwan An ed. 2007) (S. Kor.), <https://www.humanrights.go.kr/site/program/board/basicboard/view?&boardtypeid=19¤tpage=26&menuid=001003001004&pagesize=10&boardid=555621>.

138. *Id.*

Korean Disability Discrimination Act.¹³⁹ After long and exhaustive discussions and negotiations between interested parties,¹⁴⁰ the National Assembly of the Republic of Korea finally enacted the Korean Disability Discrimination Act in 2007.¹⁴¹

The Korean Disability Discrimination Act has six chapters.¹⁴² Chapter I regulates general provisions such as the Act's purpose and its definition of "disability."¹⁴³ It states that "[t]he purpose of this Act is to prohibit discrimination on the basis of disability in all aspects of life, and to effectively safeguard the rights and interests of individuals discriminated against on the ground of disability, thus enabling them to fully participate in society and establish their right to equality which will ensure their human dignity and sense of value."¹⁴⁴ This chapter defines disability as "a physical or mental impairment or loss of function that substantially limits an individual's personal or social activities for an extended period of time."¹⁴⁵ Chapter II covers the prohibition of discrimination regarding a diverse range of areas, including employment,¹⁴⁶ education,¹⁴⁷ use of goods and services,¹⁴⁸ judicial procedures and service,¹⁴⁹ administrative procedures and service,¹⁵⁰ political rights,¹⁵¹ parental rights,¹⁵² and sexual rights.¹⁵³ Chapter III offers special protection to women with disabilities,¹⁵⁴ children with disabilities,¹⁵⁵ and people with mental disabilities.¹⁵⁶ Chapter IV regulates public enforcement,¹⁵⁷ and Chapter V

139. *Id.* at 9; see also Gangwon Kim, *Jigeum, jangaeinchabyeolgeumjibeobeul gaejeonghaeya hal ttae* [Now, When We Need to Amend Act on the Prohibition of Discrimination Against Persons with Disabilities, Remedy Against Infringement of Their Rights], COWALKNEWS (Feb. 1, 2021) (S. Kor.), https://www.cowalknews.co.kr/bbs/board.php?bo_table=HB41&wr_id=166&page=2 (discussing the origin of the 2003 movement supporting the enactment of the ADA).

140. Park, *supra* note 137, at 8.

141. See Nat'l Assemb. S. Kor. 6179, 265th Cong. (2007) (S. Kor.), https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Y0D7B0Y2E2G2X1V7N3C7U5W1E1P7V2.

142. See *Jangaeinchabyeolgeumjibeop*, art. 1.

143. *Id.* art. 1, para. 2.

144. *Id.* art. 1.

145. *Id.* art. 2.

146. *Id.* art. 10–12.

147. *Id.* art. 13–14.

148. *Id.* art. 15.

149. *Id.* art. 26.

150. *Id.*

151. *Id.* art. 27.

152. *Id.* art. 28.

153. *Id.* art. 29.

154. *Id.* art. 33–34.

155. *Id.* art. 35–36.

156. *Id.* art. 37.

157. *Id.* art. 38–45.

discusses private enforcement.¹⁵⁸ Finally, Chapter VI covers criminal penalties¹⁵⁹ and administrative fines.¹⁶⁰

B. PUBLIC ENFORCEMENT OF THE KOREAN DISABILITY DISCRIMINATION ACT

There are two types of public enforcement of the Korean Disability Discrimination Act: complaints processed by the National Human Rights Commission of Korea (NHRCK) and the imposition of criminal penalties.¹⁶¹

1. Complaints Processed by the NHRCK

The NHRCK covers all kinds of discrimination, including discrimination based on gender, age, race, and disability.¹⁶² An individual who has been discriminated against on the basis of disability can file a complaint with the NHRCK.¹⁶³ Unlike the United States, where the EEOC requires disability discrimination complaints to relate to employment,¹⁶⁴ the NHRCK accepts complaints related to any type of disability-based discrimination.¹⁶⁵ Any person or organization that is aware of such discrimination can also file a complaint with the NHRCK.¹⁶⁶ The NHRCK may conduct an *ex officio* investigation of a discrimination complaint.¹⁶⁷ Like the EEOC's complaint process,¹⁶⁸ the NHRCK's investigative process is non-adversarial.¹⁶⁹ An investigator with broad discretion collects evidence regardless of each party's position.¹⁷⁰ The investigator implements a wide range of investigative methods, including requests for production, examinations of parties, interrogations, and requests for information from third parties related to relevant matters.¹⁷¹

The NHRCK refuses to review discrimination complaints that do not meet its requirements, such as those that are filed more than one year after the

158. *Id.* art. 46–48.

159. *Id.* art. 49.

160. *Id.* art. 50.

161. *See id.* art. 38–45, 49–50.

162. Gukgaingwonwiwonhoebeop, art. 30, para. 2, subpara. 3.

163. Jangaeinchabyeolgeumjibeop, art. 38.

164. 42 U.S.C. § 2000e-5(b) (2020).

165. Gukgaingwonwiwonhoebeop, art. 30, para. 2, subpara. 3.

166. Jangaeinchabyeolgeumjibeop, art. 38.

167. *Id.* art. 39.

168. EQUAL EMP. OPPORTUNITY COMM'N, EQUAL EMP. OPPORTUNITY MGMT. DIRECTIVE FOR 29 C.F.R. PART 1614 (EEO-MD-110) 6-4 (2015), https://www.eeoc.gov/sites/default/files/migrated_files/federal/directives/md-110.pdf.

169. *See generally* Gukgaingwonwiwonhoebeop, art. 30–50 (stating the NHRCK's procedure and guidelines).

170. *Id.* art. 36–37.

171. *Id.*

occurrence of discrimination or complaints whose content is manifestly false.¹⁷² The NHRCK may also suggest a settlement between a complainant and complainee.¹⁷³ In addition, like the EEOC,¹⁷⁴ the NHRCK has a mediation program, under which a mediation committee helps parties to negotiate a resolution.¹⁷⁵ If the parties are unable to reach an agreement, the complaint procedure resumes. If the NHRCK is unable to find any solid evidence of discrimination after completing its investigation, it dismisses the case.¹⁷⁶ However, if the NHRCK finds that the conditions for discrimination have been met, it can recommend that the complainee take certain measures, including cessation of discriminatory behavior, compensation for damage and other necessary remedies, and measures necessary to prevent the recurrence of the same or similar discriminatory behavior.¹⁷⁷

If the complainee, without reasonable grounds, fails to implement such recommendations, and if the disobedience greatly damages the interests of the victim and of society, the Minister of Justice may issue a corrective order at the request of the victim or *ex officio*.¹⁷⁸ Before issuing a correction order, the Minister of Justice must allow the complainee to state their opinions.¹⁷⁹ Due to the fact that the complainant has this opportunity after the investigation ends, they would not be able to argue facts efficiently, and they would focus on legal arguments. A victim, complainant, or interested third party can also provide the Minister of Justice with any relevant materials or opinions.¹⁸⁰ A corrective order can only be issued in certain circumstances, such as when there is discrimination against multiple victims, repetitive discriminatory behavior, or retaliation.¹⁸¹ In a case where a corrective order has been issued, the Minister of Justice may require the complainee to (1) cease the discriminatory behavior, (2) compensate for the damage received by the complainant, (3) take measures to prevent further recurrence of discrimination, or (4) “take other measures necessary for rectifying discriminatory acts.”¹⁸² A corrective order is only available in complaint proceedings related to disability,¹⁸³ and becomes final in thirty days unless a disagreeing party files a lawsuit against the order.¹⁸⁴ Any complainees who fail

172. *Id.* art. 32.

173. *Id.* art. 40.

174. See EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 168, at 3-6, 3-10.

175. Gukgaingwonwiwonhoebeop, art. 41-43.

176. *Id.* art. 39.

177. *Id.* art. 44.

178. See Jangaeinchabyeolgeumjibeop, art. 43.

179. *Id.* art. 43-2.

180. *Id.*

181. *Id.* art. 43, para. 1.

182. *Id.* art. 43, para. 2.

183. Park, *supra* note 137, at 30.

184. Jangaeinchabyeolgeumjibeop, art. 44.

to comply with a final corrective order are subject to administrative fines not exceeding thirty million won.¹⁸⁵

2. *The Imposition of Criminal Penalty*

The Korean Disability Discrimination Act prohibits intentional discrimination against someone who has a disability, and anyone who does so with an evil motive will be punished by imprisonment for up to three years or a fine not exceeding thirty million won.¹⁸⁶ Such an “evil motive” is determined by the following factors: (1) intent, (2) continuation and repetition of discrimination, (3) retaliation against the victim of discrimination, and (4) substance and scope of loss suffered from discrimination.¹⁸⁷ The prong of “evil motive,” which is narrower than intent, has been criticized for making prosecution against discrimination on the basis of disability difficult.¹⁸⁸

3. *Debate over Public Enforcement*

Some scholars have criticized the corrective order and criminal penalties provisions of the Korean Disability Discrimination Act for these provisions’ reliance on compulsive means rather than encouraging parties to settle by themselves.¹⁸⁹ They have pointed out that it is unfair for complainees to bear such burdens.¹⁹⁰ They argue some complainees would comply with corrective orders issued in non-adversary procedures even if they do not agree with them, simply in order to avoid lengthy and exhaustive lawsuits.¹⁹¹

However, negotiation and mediation were available forms of settlement prior to the enactment of the Korean Disability Discrimination Act.¹⁹² Even though negotiation and mediation may be more effective and cost-efficient, they were not enough to solve the widespread problem of discrimination against people with disabilities in Korean society.¹⁹³ Similar patterns of discrimination

185. *Id.* art. 50. Thirty million won is approximately twenty-four thousand U.S. dollars.

186. *Id.* art. 49, para. 1.

187. *Id.* art. 49, para. 2.

188. Jaewang Kim, *Jangaeinchabyeolgeumjibeop pangyeol bunseok* [Analysis of Court Decisions on the Act on the Prohibition of Discrimination Against Persons with Disabilities, Remedy Against Infringement of Their Rights], 7 SOC. SECURITY L. REV. 1, 3, 35–37 (2018) (S. Kor.). Note that intent is one factor of evil motive, and mere intentional discrimination does not amount to an evil motive.

189. *See Yi, supra* note 31, at 133, 136.

190. *See id.* at 133.

191. *See id.*

192. National Human Right Commission of Korea Act was enacted in 2001. *See* Gukgaingwonwiwonhoebeop [National Human Right Commission of Korea Act], amended by Act. No. 6481, May 24, 2001 (S. Kor.). This Act covered discrimination on basis of disabilities and provided negotiation as well as mediation. *See id.* art. 2, 30, 40, 42–43.

193. Min Baek, *Jangaein hyeomo ilsang sok manyeon, haegyeolhaeya hal sukje* [The Widespread Discrimination Against People with Disabilities Needs to be Addressed], ABLENEWS (Oct. 30, 2020) (S. Kor.), <http://www.ablenews.co.kr/news/articleView.html?idxno=90941>.

against people with disabilities continued in South Korea regardless, and civil lawsuit victories did not meaningfully change this situation.¹⁹⁴ Considering this context, the National Assembly of the Republic of Korea included the now-present corrective order and penalty provisions in the Korean Disability Discrimination Act.¹⁹⁵ They were the valuable results of intense negotiations achieved by people with disabilities.¹⁹⁶ Furthermore, Koreans with disabilities generally lack education¹⁹⁷ and access to an attorney,¹⁹⁸ resulting in weaker bargaining positions than complainers, such as employers and landlords. The corrective order and penalty provisions have strengthened the weakened positions of the disabled during negotiations. In addition, complainants who need urgent relief can quickly recover damages or benefits from changes in complainers' policies coerced by corrective orders.¹⁹⁹

4. *The Effects of Public Enforcement*

Some empirical studies conclude that the Korean Disability Discrimination Act has improved the workplace environments of people with disabilities,²⁰⁰ and has decreased the gap between employment rates of the disabled and non-disabled.²⁰¹ This is a particularly meaningful outcome considering the ADA's insignificant effect on the employment rate in the United States.²⁰² The biggest

194. See Nat'l Assembly S. Kor. 6179, 265th Cong. (2007), https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Y0D7B0Y2E2G2X1V7N3C7U5W1E1P7V2.

195. *Id.*

196. Park, *supra* note 137, at 30.

197. See Sangu Noh, *Jangaein, jungjol ihaga jeolban isang... "jangaeindo gyoyukbadeul gwalliga itda" [Over Half of the Disabled Only Have a Middle School Diploma or Less Education. People with Disabilities Have the Right to Education]*, KUKINEWS (Apr. 21, 2021) (S. Kor.), <https://www.kukinews.com/newsView/kuk202104200208>.

198. See Hyemi Lee, *Cheonggakjangaeine gajang nopeun 'sahoe jangbyeok'eun beomnyul seobiseu [The Most Significant Barrier to People with Hearing Impairments is Access to Legal Services]*, HANKOOKILBO (Aug. 10, 2020) (S. Kor.), <https://www.hankookilbo.com/News/Read/201908080897390104>; Jaehyeok Lee, *Beomnyul doum mot banneun baldaljangaein [People with Developmental Disabilities Have No Access to Legal Services]*, MDTODAY (Oct. 19, 2022) (S. Kor.), <https://mdtoday.co.kr/news/view/1065595296855654>.

199. See Yi, *supra* note 31, at 133.

200. See JOOYUNG WOO, JONGGUN KANG & SEOKJIN YOON, KOR. LEGIS. RSCH. INST., JANGAEINCHABYEOLGEUMJI MIT GWOLLIGUJE DEUNGE GWANHAN BEOMNYURE DAEHAN IPBEOP-PYEONGGA [EVALUATION OF LEGISLATION ON THE ANTI-DISCRIMINATION AGAINST AND REMEDIES FOR PERSONS WITH DISABILITIES ACT] 247–48 (2009); Jee Soo Lee & Jeonghee Seo, *Jjangaechabyeolgeumjibeobi jangaein goyonggyuje michineun yeonghyang [The Effects of the Disability Anti-Discrimination Law on the Job Tenure of Disabled Workers: Focusing on the Mediating Effects of Job Satisfaction]*, 24 DISABILITY & EMP. 67, 88–90.

201. See Ukchan Oh, *Jangaechabyeolgeumjibeobui goyonghyogwae daehan bigyoyeongu: Jangae jeonguiwa hamnajeok pyeonuijegong uimuui yeokareul jungsimeuro [A Comparative Study on the Employment Impact of Disability Anti-discrimination Laws: Assessing the Role of the Definition of Disability and Reasonable Accommodation Duty]* (Feb. 2016) (Ph.D. dissertation, Seoul National University) at 191, <https://s-space.snu.ac.kr/bitstream/10371/120464/1/000000132713.pdf>. The Korean Disability Discrimination Act narrowed the gap to 3.5% between the disabled and non-disabled's employment rates. *Id.* See also Lee & Seo, *supra* note 200, at 88–90.

202. Oh, *supra* note 201, at 191.

difference between the ADA and the Korean Disability Discrimination Act is that the latter includes a complaint procedure handled by the NHRC as well as criminal penalties. This implies that the public enforcement system in South Korea has at least partially contributed to the differing results in both countries, irrespective of other factors that potentially affect employment rates.

A bureaucratic procedure like the NHRCK's complaint procedure is also used in European countries.²⁰³ This approach is more effective and cost-efficient compared to adversarial legalism.²⁰⁴ Of course, American adversarial legalism has many advantages.²⁰⁵ It is "flexible" and "open to new kinds of justice claims and political movements" and also "provides a channel for addressing serious social problems or injustices that legislatures neglect or are too politically deadlocked to resolve."²⁰⁶ However, one significant disadvantage is "an inefficient and costly method of governance and dispute resolution."²⁰⁷ In addition, coupled with the problems of private attorneys general, "the complexity, expense, and unpredictability" of this system often cause citizens with meritorious legal claims to give up.²⁰⁸ Because of this, scholars are calling for alternative, less litigious ways of solving social problems, which would require "a reversal of the anti-authority spiral—to get less adversarial legalism, we must somehow reconstitute governmental authority."²⁰⁹ A bureaucratic system like the NHRCK's complaint procedure could be such an alternative. An effective bureaucratic system would need to include powerful authority on the part of government agencies²¹⁰ as well as a process that fosters settlements and mediation.²¹¹

Congress has recognized the usefulness of the bureaucratic system and criminal penalties with regard to deterring bad behaviors and has introduced them to environmental statutes²¹² such as the Clean Water Act (CWA).²¹³ Environmental problems are unquestionably high priority in that they can

203. See KAGAN, *supra* note 41, at 4.

204. *Id.*

205. *Id.* at 3–4.

206. *Id.* at 3.

207. *Id.* at 4.

208. *Id.*

209. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369, 398 (1991).

210. *Id.*

211. Robert A. Kagan pointed out the problem of American bureaucratic procedure. See KAGAN, *supra* note 41, at 4 ("Legal scholars, for example, call for an administrative process based more on informal discussion and debate, a search for shared values, a spirit of compromise and cooperation. They criticize a body of administrative law that squeezes policymaking through a court-like litigation mold. Instead, they call for decision-making methods . . .").

212. Tori Osler, *Environmental Protection Agency's Enforcement Mechanisms After Sackett v. EPA*, 50 IDAHO L. REV. 65, 71 (2014).

213. 33 U.S.C. § 1319.

significantly and negatively affect people's lives.²¹⁴ Water, air, and soil pollution can cause health problems like respiratory diseases, heart disease, and some types of cancer.²¹⁵

However, discrimination is also harmful to people's health. It can cause higher levels of stress, poor cognitive function, anxiety, depression, adverse physical health problems, and substance use.²¹⁶ People with disabilities have continuously suffered discrimination due to the inefficiency of private enforcement.²¹⁷ Congress should introduce the bureaucratic procedure established by the Korean Disability Discrimination Act and criminal penalties for intentional disability discrimination similar to in order to reduce discrimination against the disabled in the United States as it did to environmental statutes. Part III of this Note discusses the constitutional issues by implementing a bureaucratic process, while Part IV discusses how the corrective order and criminal penalties could be adopted into the ADA.

III. CONSTITUTIONAL ISSUES REGARDING PUBLIC ENFORCEMENT OF THE ADA

Congress, in enacting the ADA, claimed that it was exercising its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment.²¹⁸ The United States Constitution grants Congress the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²¹⁹ Section 5 of the Fourteenth Amendment "authorizes the Congress to pass definitive legislation to protect Fourteenth Amendment rights."²²⁰ Congress, under the Commerce Clause and Section 5 of the Fourteenth Amendment, would be able to incorporate the corrective order system and imposition of criminal penalties into the ADA and enforce them

214. *Environmental Health: Overview and Objectives*, U.S. DEPT. HEALTH & HUM. SERVS., <https://health.gov/healthypeople/objectives-and-data/browse-objectives/environmental-health#:~:text=Environmental%20pollutants%20can%20cause%20health,and%20some%20types%20of%20cancer.&text=People%20with%20low%20incomes%20are,health%20problems%20related%20to%20pollution.> (last visited Apr. 5, 2022).

215. *Id.*

216. Kristen Rogers, *Discrimination of Any Kind Can Lead to Much Higher Risk of Mental and Behavioral Issues for Young People, Study Finds*, CNN (Nov. 8, 2021, 12:56 AM), <https://www.cnn.com/2021/11/08/health/ageism-racism-sexism-discrimination-mental-health-effects-wellness/index.html>; David R. Williams, Jourdyn A. Lawrence, Bridgette A. Davis & Cecilia Vu, *Understanding How Discrimination Can Affect Health*, 54 HEALTH SERV. RES. 1374, 1377 (2019).

217. Saenz, *supra* note 6, at 608.

218. Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 35 (2001). Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b).

219. U.S. CONST. art. I, § 8, cl. 3.

220. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 680 (1966).

upon non-state actors.²²¹ However, this inclusion would raise several constitutional issues.

When Congress drafted Titles I and III of the ADA, it did so with great care to ensure their constitutionality under the Commerce Clause for non-state actors.²²² Title I defines an employer as a “person engaged in an industry that affects commerce.”²²³ In order for Title III to apply to private entities, their operations must “affect commerce.”²²⁴ As for matters of non-state actors, Titles I and III have survived constitutional challenges since the enactment of the ADA.²²⁵ The introduction of the corrective order system and imposition of criminal penalties to the ADA for non-state actors would likely not create further constitutional issues apart from due process concerns.²²⁶ States, on the other hand, have sovereignty in the United States and enjoy special constitutional protections against the enforcement of federal regulations and policies.²²⁷

As a result, this Note focuses on constitutional issues concerning state actors. Issuing a corrective order to or imposing a criminal penalty on a state could trigger issues regarding anticommandeering doctrine, immunity under the Eleventh Amendment, and due process. ADA enforcement against states has been ineffective since its enactment.²²⁸ Part III of this Note will discuss whether public enforcement as carried out in South Korea could be constitutionally applied against individual states of the United States.

A. THE ANTI-COMMANDEERING DOCTRINE

The introduction of the corrective order and criminal penalties in the United States would also apply those measures to the individual states. With corrective orders and criminal penalties, the federal government would be able to coerce a state into enforcing its federal programs. This would raise a Tenth Amendment issue as the amendment states, “[t]he powers not delegated to the

221. Jaelyn A. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and Its Impact on People with Disabilities*, 9 AM. U. J. GENDER SOC. POL’Y & L. 663, 678–85 (2001).

222. See 42 U.S.C. §§ 12101, 12181.

223. *Id.* § 12101.

224. *Id.* § 12181.

225. See *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993); *Abbott v. Bragdon*, 912 F. Supp. 580, 594 (D. Me. 1995); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000); *United States v. Morvant*, 898 F. Supp. 1157, 1167 (E.D. La. 1995).

226. For due process concerns, see discussion *infra* Part III.C.

227. Constitution reserves states “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.” *Alden v. Maine*, 527 U.S. 706, 714 (1999). State sovereignty is based on “broadening the states’ sovereign immunity; protecting states from federal ‘commandeering’; restricting federal court equitable authority; and invalidating recent Commerce Clause enactments.” Timothy Zick, *Are the States Sovereign?*, 83 WASH. UNIV. L. Q. 229, 248 (2005) (explaining the contentions of Professor Steve Gey, whose work focused on religious liberties and free speech).

228. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CAL. L. REV. ONLINE 308, 313 (2020).

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²²⁹ Accordingly, general principles of federalism and the Tenth Amendment limit Congress’s legislative power.²³⁰ In *New York v. United States*²³¹ and *Printz v. United States*,²³² the U.S. Supreme Court invalidated federal statutes based on the anti-commandeering doctrine.²³³

In *New York v. United States*, Congress passed the Low-Level Radioactive Waste Policy Amendments Act (LLRWPA), which included a take-title provision.²³⁴ The provision offered “state governments a ‘choice’ of either accepting ownership of waste or regulating according to the instructions of Congress.”²³⁵ Under the take-title provision, state governments had no choice but to implement the LLRWPA.²³⁶ The Court explained that in this provision Congress had “crossed the line distinguishing encouragement from coercion.”²³⁷ The Court held the LLRWPA unconstitutional because it required states to legislate according to federal standards.²³⁸

In *Printz*, Congress passed the Brady Handgun Violence Prevention Act (Brady Act), according to which “state and local law enforcement personnel must do background checks before issuing a permit for firearms.”²³⁹ The Court held that this provision of the Brady Act was unconstitutional because, under the Tenth Amendment, Congress cannot conscript state officers directly.²⁴⁰ The Court explained that direct conscription of the state’s officers unconstitutionally circumvents the prohibition of *New York v. United States*, where the Court held that “Congress cannot compel the States to enact or enforce a federal regulatory program.”²⁴¹

The Court limited the scope of the anti-commandeering doctrine in *Reno v. Condon*.²⁴² To summarize the principle in *Reno*, “[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”²⁴³ In *Reno*, Congress passed the Driver’s Privacy Protection Act (DPPA), restricting “the disclosure and resale

229. U.S. CONST. amend. X.

230. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 216 (6th ed. 2020).

231. 505 U.S. 144 (1992).

232. 521 U.S. 898 (1997).

233. *New York v. United States*, 505 U.S. at 188; *Printz*, 521 U.S. at 935.

234. *New York v. United States*, 505 U.S. at 153–54.

235. *Id.* at 175.

236. *Id.*

237. *Id.*

238. *Id.* at 188.

239. *Printz v. United States*, 521 U.S. 898, 902 (1997).

240. *Id.* at 935.

241. *Id.*

242. 528 U.S. 141 (2000).

243. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

of personal information contained in the records of state DMVs.”²⁴⁴ The DPPA established “several penalties to be imposed on States and private actors that fail to comply with its requirements,”²⁴⁵ evenhandedly regulating activity by states and private actors.²⁴⁶ However, “[t]he DPPA does not require the States in their sovereign capacity to regulate their own citizens.”²⁴⁷ The Court held that DPPA is constitutional because it does not regulate “the manner in which States regulate private parties” but instead regulates a state activity.²⁴⁸ The Court distinguished *Reno* from *New York v. United States* and *Printz*, explaining that the DPPA does not require a state “to enact any laws or regulations”²⁴⁹ or “state officials to assist in the enforcement of federal statutes regulating private individuals.”²⁵⁰ The Court pointed out that “state officials had to devote substantial effort”²⁵¹ in order to comply with the DPPA, but this is “an inevitable consequence of regulating a state activity.”²⁵²

By using corrective orders and criminal penalties, the federal government can coerce states into enforcing federal laws. Firstly, would the ADA be in violation of anti-commandeering doctrine if it introduced corrective orders and criminal penalties? The answer would depend on the permitted scope of a corrective order. Requiring a state “to discontinue the discrimination”²⁵³ or “to compensate the damage of the complainant”²⁵⁴ would not violate the anti-commandeering doctrine. Like the DDPA in *Reno*, the ADA evenhandedly regulates state and private actors.²⁵⁵ Like *Reno* where states and private actors who violate the DPPA are subject to compulsory measure, a criminal penalty,²⁵⁶ states and private actors who violate the ADA would be subject to compulsory measures as a corrective order. Like *Reno*, a state is not required to enact regulations and state officials are not required to assist in enforcing federal statutes regulating private individuals under the compulsory measures, a corrective order. On the other hand, ordering a state to take measures to prevent further recurrence of discrimination²⁵⁷ or other measures necessary for rectifying discriminatory acts²⁵⁸ would be allowable to the extent that they do not violate

244. *Reno*, 528 U.S. at 143.

245. *Id.* at 146.

246. *Murphy*, 138 S. Ct. at 1478.

247. *Reno*, 528 U.S. at 146.

248. *Id.* at 150.

249. *Id.* at 151.

250. *Id.*

251. *Id.* at 150 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

252. *Id.*

253. Jangaeinchabyeolgeumjibeop, art. 43.

254. *Id.*

255. *Murphy*, 138 S. Ct. at 1478.

256. *Reno*, 528 U.S. at 146.

257. Jangaeinchabyeolgeumjibeop, art. 43.

258. *Id.*

the anti-commandeering doctrine. For example, requiring states to enact certain types of regulations to prevent further recurrences of discrimination or to rectify discriminatory acts would be unconstitutional.

Criminalizing states raises another anticommandeering issue since states are more coerced than when the regulation simply requires them to act but does not punish them. The criminal penalties to be introduced in the ADA would be quite similar to that of the DPPA. Like with the DPPA, the criminal penalty under the ADA would only regulate state activity and equally punish state and private actors.²⁵⁹

B. THE ELEVENTH AMENDMENT IMMUNITY

The introduction of corrective orders presents another issue. When issuing a corrective order, the federal government would be deciding a case and ordering a state to pay damages or take certain measures, like a defendant who has lost a trial. This may implicate Eleventh Amendment state immunity. The Eleventh Amendment provides that, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”²⁶⁰ The Eleventh Amendment thus insulates a state from suits by citizens of different states and by its own citizens²⁶¹ unless some exceptions are met.²⁶² If the NHRCK’s bureaucratic procedure, including the corrective order, is introduced to the ADA, complaints would be processed not by citizens but by a federal administrative agency. The involvement of a federal agency would raise two questions: first, whether the Eleventh Amendment applies to federal administrative agency proceedings and second, if it does, whether the NHRCK’s bureaucratic procedure would be considered a federal administrative agency proceeding.

The U.S. Supreme Court has already answered the first question. In *Federal Maritime Commission v. South Carolina State Ports Authority*,²⁶³ the Supreme Court held that states are immune from federal administrative-agency proceedings based on the Eleventh Amendment. South Carolina Maritime Services, Inc. (Maritime Services) requested that the South Carolina State Ports Authority (SCSPA) permit it “to berth a cruise ship . . . at the SCSPA’s port facilities in Charleston.” The SCSPA denied it, to which Maritime Services filed a complaint with the Federal Maritime Commission (FMC).²⁶⁴ The FMC is a

259. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478–79 (2018).

260. U.S. CONST. amend. XI.

261. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72–73 (2000).

262. *Id.* at 73; Anita R. Brown-Graham, *When You Can’t Sue the State: State Sovereign Immunity*, POPULAR GOV’T, Summer 2000, at 2, 6.

263. 535 U.S. 743 (2002).

264. *Id.* at 747–48.

federal agency “charged with the responsibility of administering the Shipping Act.”²⁶⁵ An administrative law judge (ALJ) was assigned to the complaint and dismissed it on the basis that state sovereign immunity extends to administrative proceedings.²⁶⁶ The FMC reviewed the ruling of the ALJ and concluded that the Eleventh Amendment immunity does not extend to “proceedings before judicial tribunals.”²⁶⁷ The Court held that the SCSPA is immune from the complaint because the administrative tribunal of FMC bears overwhelming similarities with judicial tribunals,²⁶⁸ such similarities including pleadings, discovery, and the role of judges.²⁶⁹ It pointed out that the “proceeding ‘walks, talks, and squawks very much like a lawsuit.’”²⁷⁰

This Note argues that the doctrine of state sovereign immunity does not cover the NHRCK’s bureaucratic procedure because of overwhelming dissimilarities between its process and tribunals held by federal agencies or judiciaries. Unlike administrative and judicial tribunals, the NHRCK’s bureaucratic procedure is a non-adversarial proceeding. Rather, it is an inquisitorial system in which NHRCK investigates to determine the facts as opposed to an adversarial system where complainer and complainee compete to determine the truth.²⁷¹ Thus, it is similar to administrative orders issued by the Environmental Protection Agency (EPA).²⁷² One example of such an order is a compliance order in the CWA.²⁷³ If someone violates the CWA, EPA officers can notify the person and their state of residence of the violation.²⁷⁴ The officers can issue a compliance order if the state does not take enforcement action within thirty days.²⁷⁵ Under this order, the EPA officers can require the violator to take measures to comply with the CWA and follow a compliance schedule.²⁷⁶ Like

265. Elizabeth Herlong Campbell, *U.S. Supreme Court Reinforces the Armor of the States’ Sovereign Immunity — Federal Maritime Commission v. South Carolina State Ports Authority*, Decided May 28, 2002, 14 S.C. LAW. 49, 50 (2002).

266. *Fed. Mar. Comm’n*, 535 U.S. at 749.

267. *Id.* at 750.

268. *Id.* at 759.

269. *Id.* at 757–59.

270. *Id.* at 751.

271. See generally Gukgaingwonwiwonhoebeop, art. 30–50 (stating the NHRCK’s procedure and guidelines). However, note that South Korea recently modified the Korean Disability Discrimination Act, and the Minister of Justice must give the complainee an opportunity to state its opinion before it issues corrective orders. See also Jangaeinchabyeolgeumjibeop, art. 43-2 (indicating that the complainer can also state its opinion). Nonetheless, the complainer would be unable to argue facts effectively and would likely focus on legal issues since it occurs after the investigation ends. As a result, NHRCK’s procedure is still classified as an inquisitorial system.

272. Osler, *supra* note 212, at 71.

273. 33 U.S.C. § 1319(a) (2020).

274. *Id.* § 1319(a)(1).

275. *Id.*

276. Osler, *supra* note 212, at 76.

with corrective orders in South Korea,²⁷⁷ a person who violates a compliance order is “subject to a civil penalty not to exceed \$25,000 per day for each violation.”²⁷⁸ Like with NHRCK’s bureaucratic procedure, this procedure is inquisitorial; the EPA actively investigates to determine the facts and makes a decision. The violator later has “a reasonable opportunity to be heard and to present evidence”²⁷⁹ in a hearing during the administrative penalties process. The administrative compliance order system was created to help “EPA officers to respond quickly to ongoing violations of major environmental laws without becoming immediately entangled in litigation”²⁸⁰ and to “avoid the necessity of lengthy fact finding, investigations, and negotiations.”²⁸¹ In establishing this system, Congress compromised with the American adversarial system to handle environmental issues efficiently.

Considering the overwhelming similarities between corrective orders and compliance orders, the doctrine of state sovereign immunity would likely not extend to corrective orders. However, even if the Eleventh Amendment immunity were to apply to corrective orders, it would be governed by the recent Supreme Court Eleventh Amendment immunity cases. In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court held that states are immune from suits in federal court filed by state employees to seek money damages under Title I of the ADA.²⁸² In *Tennessee v. Lane*, the Court held that Title II of the ADA abrogated state sovereign immunity through Section Five of the Fourteenth Amendment when the fundamental right of access to the courts is involved.²⁸³ In *United States v. Georgia*, the Court held that Title II of the ADA validly abrogates state sovereign immunity where a state “creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment.”²⁸⁴ Thus, state immunity would not be an issue even if it applied.

C. DUE PROCESS

Introduction of the corrective order also raises due process considerations. Procedural due process requires that the government must provide “notice of the charges or issue, the opportunity for a meaningful hearing, and an impartial

277. Jangaeinchabyeolgeumjibeop, art. 50.

278. 33 U.S.C. § 1319(d) (2020).

279. *Id.* § 1319(g)(2)(A).

280. Osler, *supra* note 212, at 77.

281. S. Rep. No. 92-414, at 64 (1972).

282. 531 U.S. 356, 360 (2001).

283. 541 U.S. 509, 533–34 (2004).

284. 546 U.S. 151, 159 (2006).

decision maker”²⁸⁵ when it deprives a person’s “life, liberty, or property.”²⁸⁶ Corrective orders can require a complainee to compensate a victim or take a certain measure.²⁸⁷ This would constitute depriving a person of their liberty or property. NHRCK’s bureaucratic procedure does not offer the opportunity for a meaningful hearing.²⁸⁸ The complainant has no opportunity to state its opinion when NHRCK makes a decision.²⁸⁹ While the Minister of Justice provides the complainant with the opportunity to present an opinion before issuing corrective orders, it happens after the investigation has been completed, limiting the complainant’s opportunity to argue facts.²⁹⁰ However, the complainee can file a lawsuit against the corrective order.²⁹¹ This would allow the corrective order system to survive due process challenges. The Supreme Court held that the compliance order system in the CWA does not violate due process unless the CWA precludes judicial review of the compliance order.²⁹² Thus, the corrective order system would not violate due process.

IV. PROPOSED SOLUTION

It would be in Congress’s interest to introduce to the ADA the bureaucratic procedure established by the Korean Disability Discrimination Act as well as criminal penalties for intentional disability discrimination. The ADA has been criticized as a classic example of the limitations of private enforcement. Congress placed its trust in private attorneys general when it enacted the ADA, however this mode of enforcement has fallen short of aspirations. The introduction of a more efficient and effective means of enforcement is essential but not unprecedented, as Congress has already done so in adopting administrative compliance orders and criminal sanctions in its environmental statutes.

A. INTRODUCTION OF BUREAUCRATIC PROCEDURE

1. *A Unified Federal Agency to Govern ADA Cases*

This Note argues that Congress should establish or allow an existing federal agency to govern all complaints related to civil rights laws or at least to handle all complaints regarding the ADA. This federal agency would handle all

285. CHEMERINSKY, *supra* note 230, at 1162.

286. U.S. CONST. amends. V, XIV.

287. Jangaeinchabyeolgeumjibeop, art. 43.

288. *See generally* Gukgaingwonwiwonhoebeop, art. 30–50 (stating the NHRCK’s procedure and guidelines).

289. *Id.*

290. Jangaeinchabyeolgeumjibeop, art. 43–2.

291. *Id.* art. 44.

292. *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

ADA cases and issue corrective orders. In the current system, complaints regarding the ADA are governed by several agencies, including the Equal Employment Opportunity Commission and the Department of Justice. It would be better for the federal government to issue corrective orders based on the unified standard of a single federal agency. Multiple federal agencies issuing corrective orders based on their own standards would confuse parties subject to the ADA, resulting in less efficient enforcement.²⁹³ In addition, the current, multi-agency system makes it challenging for people with disabilities to figure out which federal agency would govern their ADA complaints, especially without the assistance of an attorney. A single federal agency governing all disability-related complaints would lessen the confusion that Americans would experience when filing ADA complaints, as has been the case in South Korea.

Prior to 2006, South Korea had a number of agencies handling discrimination complaints, which made the overall complaint system inefficient and confusing for laypeople about where to file complaints.²⁹⁴ In order to address this problem, South Korea transferred the power to handle discrimination cases from these agencies to the NHRCK in 2005, which then took over all discrimination-related complaints.²⁹⁵ The increased efficiency of this system has greatly increased the number of complaints filed as a result.²⁹⁶

293. Having a unified discrimination agency allows the government to efficiently handle a diverse range of discriminations with a unified standard. See SEONYEONG PARK, EUNKYUNG KIM & JUHEE LEE, KOREAN WOMEN'S DEVELOPMENT INSTITUTE, CHABYEOLSJEONGGIGUUI GUKJEBIGYO MIT JEONGCHAEKJEOK HAMUI [COMPARATIVE STUDY OF THE NATIONAL INSTITUTIONS THAT ENFORCE ANTI-DISCRIMINATION LAWS AND THE IMPLICATIONS OF THEIR POLICIES] 164 (2004) (S. Kor.), <https://www.kwdi.re.kr/inc/download.do?ut=A&upIdx=114431&no=1>.

294. Gyeongrak Kim, *Gakjong chabyeolsijeonggigu, gukgaingwonwiwonhoero tonghap* [The NHRCK Has Become an Agency Governing All Discrimination-Related Complaints], PRESSIAN (Jan. 18, 2005, 2:17 PM) (S. Kor.), <https://www.pressian.com/pages/articles/9124>.

295. *Id.*

296. SUJEONG SEO, CHANSIK KIM & INYOUNG KANG, NAT'L HUM. RTS. COMM'N KOR., SEONGCHABYEOL.SEONGHUIRONG SJEONGEOMMU INGWONWI IRWONHWA 5NYEON [FIVE YEARS AFTER THE AUTHORITY TO HANDLE COMPLAINTS REGARDING GENDER DISCRIMINATION AND SEXUAL HARASSMENT WAS TRANSFERRED TO THE NHRCK] 1 (2010) (S. Kor.), <https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=185&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=597646>. For example, the number of complaints regarding gender discrimination increased from 29 in 2004 to 270 in 2009 in South Korea. *Id.*

European countries, such as France,²⁹⁷ the Netherlands,²⁹⁸ Ireland,²⁹⁹ and Sweden,³⁰⁰ have also recognized the benefits of and established a single, unified agency to handle discrimination cases.³⁰¹ In addition, such a system would maximize the efficiency of cooperative federalism,³⁰² a system that would be introduced to the ADA and which will be discussed in the next section. It would be easier for states to communicate with one single federal agency rather than multiple ones in order to comply with federal programs.

2. Cooperative Federalism

Congress may promote the enforcement of the ADA through cooperative federalism. It would be burdensome for one federal agency to cover all ADA complaints and issue all corrective orders, considering its limited resources. Congress may opt for a similar type of cooperative federalism it has used to overcome similar issues that the EPA has faced.³⁰³ Under this type of cooperative federalism, Congress creates standards in federal environmental statutes and then “allows the states to determine how to meet them”³⁰⁴ by permitting “the EPA to delegate enforcement authority to the states for the standards issued under these laws.”³⁰⁵ Under this system, states are free to “use more flexible and innovative techniques to find solutions to environmental

297. Loi 2011-333 du 29 mars 2011 relative au Défenseur des droits [Law 2011-333 of Mar. 29, 2011 on the Defender of Rights], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 30, 2011 (Fr.); see also *DEFENDER OF RIGHTS*, EUROPEAN NETWORK OF EQUALITY BODIES, <https://equineteurope.org/author/france-dr/> (last visited Apr. 19, 2022) (noting that the Défenseur des droits is a constitutionally-independent authority).

298. Wet College voor de rechten van de mens van 1 Januari 2020, Stb. 2023 (Neth.); see also *NETHERLANDS INSTITUTE FOR HUMAN RIGHTS*, EUROPEAN NETWORK OF EQUALITY BODIES, https://equineteurope.org/author/netherlands_etc/ (last visited Apr. 19, 2022) (indicating that the Netherlands Institute for Human Rights explains, promotes, and increases the awareness of human rights in the country).

299. Irish Human Rights and Equality Commission Act 2014 (Act No. 24/2014) (Ir.), <https://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>; see also *IRISH HUMAN RIGHTS AND EQUALITY COMMISSION*, EUROPEAN NETWORK OF EQUALITY BODIES, https://equineteurope.org/author/ireland_ea/ (last visited Apr. 19, 2022) (stating that the Irish Human Rights and Equality Commission is the national human rights and equality institution).

300. Diskrimineringslag (Svensk författningssamling [SFS] 2022:848) (Swed.); see also *EQUALITY OMBUDSMAN*, EUROPEAN NETWORK OF EQUALITY BODIES, https://equineteurope.org/author/sweden_co/ (last visited Apr. 19, 2022) (noting that the Equality Ombudsman is an independent agency tasked with compliance and promoting equal rights and opportunities).

301. SEONHWA KIM, NATIONAL ASSEMBLY RESEARCH SERVICE, YUREOP CHABYEOLGEUMJIBOEPIEWA SISAJEOM [EUROPEAN ANTI-DISCRIMINATION LAWS AND THEIR IMPLICATIONS] 15–16 (2021) (S. Kor.), <https://www.nars.go.kr/report/view.do?cmsCode=CM0043&brdSeq=36946>.

302. See discussion *infra* Part IV.A.2.

303. Alex P. Abrams, *Why “Underfiling” by States Can and Should Be Used to Enforce Environmental Regulations*, 31 B.C. ENVTL. AFF. L. REV. 403, 406 (2004).

304. *Id.*

305. *Id.*

problems and violations,”³⁰⁶ and the federal government oversees states to ensure a uniform enforcement of federal standards.³⁰⁷ Even after delegating authority to administer a federal program to the states, the EPA can withdraw this authority if the EPA finds that the state’s program does not comply with the federal one.³⁰⁸

Like with the EPA, a federal agency implementing the strategy of cooperative federalism would be able to enforce the ADA more efficiently, given its limited federal resources. The introduction of cooperative federalism to environmental statutes has turned out to be a great decision. The willingness of states to participate has been remarkable. For example, forty-seven states are currently participating in the NPDES program under the CWA.³⁰⁹ States now serve as the nation’s “primary environmental protection agencies”³¹⁰ in that they administer significant portions of “the major federal delegable environmental program.”³¹¹ Introducing cooperative federalism to the ADA could lead to better results in its implementation than not having it as it did in the CWA.

B. INTRODUCTION OF CRIMINAL SANCTION

This Note proposes that if Congress introduces criminal sanctions to the ADA, it should omit the prong of “evil motive” that exists in the Korean Disability Act.³¹² This prong has been an obstacle to enforcing the Korean Disability Act efficiently.³¹³ The determination of an evil motive relies on various factors, including intent, the persistence of discrimination, retaliation against victims, and the extent of harm caused by the discrimination. Intent alone does not satisfy the evil motive prong.³¹⁴ This prong, narrower in scope than intent, has faced criticism for creating challenges in prosecuting cases of disability discrimination.³¹⁵ The burden of demonstrating evil motive places a

306. *Id.*

307. *Id.*

308. 33 U.S.C. § 1342(c)(1) (2020).

309. *National Pollutant Discharge Elimination System (NPDES)*, EPA, <https://www.epa.gov/npdes/about-npdes#:~:text=Currently%2047%20states%20and%20one,to%20implement%20the%20NPDES%20program>. (last updated June 21, 2023).

310. CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 19 (2003).

311. *Id.*; see also Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1632 (2012) (noting that “75 percent of the major environmental programs” are administered by states).

312. Jangaeinchabyeolgeumjibeop, art. 49.

313. Kim, *supra* note 188, at 3, 35–37.

314. *Id.*

315. *Id.*

heavy evidentiary burden on complainants, making it difficult to establish liability and secure convictions in cases of disability discrimination.³¹⁶

A criminal sanction under the ADA should be imposed only when disability discrimination is intentional. For example, in the employment sector, Congress should only punish discrimination based on disparate treatment rather than discrimination based on disparate impact. Unlike discrimination based on disparate treatment, discrimination based on disparate impact does not consider an employer's discriminatory intent. Facially neutral employment practices may still constitute discrimination based on disparate impact. However, imposing criminal sanctions on unintentional disability discrimination would result in overcriminalization, which would bring strong backlash. Furthermore, people bringing unintentional disability discrimination claims can be protected by corrective orders, making criminal sanctions for disparate impact unnecessary.

CONCLUSION

The execution of the ADA has demonstrated the shortcomings of private attorneys general and the limitations of the ADA's public enforcement. In addition, inefficient enforcement of the ADA has resulted in prevalent and continuing discrimination against people with disabilities, with no meaningful increase in their employment rates. Congress, as it did with environmental statutes, must take more efficient measures to overcome the limitations of the American adversarial system. The Korean Disability Discrimination Act has established a robust system of public enforcement through the National Human Rights Commission of Korea (NHRCK), providing complaint processing, corrective orders, and the imposition of criminal penalties. These features have led to a comprehensive and effective enforcement framework.

This Note strongly recommends that the United States introduce into the provisions of the ADA the corrective order, as found in the Korean Disability Discrimination Act, as well as criminal penalties for intentional disability discrimination. The United States should also create a single federal agency to govern all complaints related to the ADA. The introduction of the corrective order and criminal sanctions to the ADA would not violate constitutional principles, including anticommandeering doctrine, immunity under the Eleventh Amendment, and due process. Instead, this introduction would further relieve disability-based discrimination in American society.

316. *Id.*
