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ARTICLE

BAD DECISIONS MAKE BAD DECISIONS: *DAVIS, ARLINE*, AND IMPROPER APPLICATION OF THE UNDUE FINANCIAL BURDEN DEFENSE UNDER THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT*

Armen H. Merjian[†]

Is ADA affordable? Equality affordable in America? Would this question be asked about black, Hispanic, or Jewish people? The very question reveals an unconscious assumption of inequality. The very question demonstrates most dramatically the absolute necessity for a national mandate of equality. Not since the abolition of slavery has the principle of equality been negotiable for money in the United States of America.

But, yes, there is always the responsibility to implement equality as affordable as possible. ADA is not only affordable, we literally cannot afford not to have it. It is the status quo discrimination and segregation that are unaffordable, that are preventing persons with disabilities from becoming self-reliant, and that are driving us inevitably towards an economic and moral disaster of giant, paternalistic welfare bureaucracy.¹

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¹ *Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 19 (1989) (statement of Mr. Dart), reprinted in BERNARD D. REAMS, JR. ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990* PUBLIC LAW 101-336 (vol. 2 1992).

INTRODUCTION

This is the story of how unfounded dictum was turned into a "well-established principle," twisted into controlling language, and used generically by courts and advocates to limit erroneously the rights of the disabled² in ways Congress never intended. In the 1979 case of *Southeastern Community College v. Davis* ("Davis"),³ Justice Stevens mentioned undue financial burdens in an unsupported, passing dictum. The notion that undue financial burdens could constitute a general defense to a claim of discrimination under section 504 of the Rehabilitation Act⁴ was wholly unsupported in the statute, in its legislative history, and in its implementing regulations. Indeed, all of these support the conclusion that no such defense is generally available. Eight years later, however, in *School Board of Nassau County, Florida v. Arline* ("Arline"),⁵ Justice Brennan elevated this passing and unfounded comment to the status of a well-established principle, albeit in dictum and in a footnote. Again, the Court's comments with regard to financial burden were wholly without support.

In passing the Americans with Disabilities Act of 1990 (the "ADA"),⁶ Congress clearly rejected the limitation "established" in *Davis* and *Arline*, save in a few discrete circumstances. Nevertheless, in yet a further compounding of errors, advocates and courts alike continue to assert a general defense based upon undue financial burden under the ADA. In doing so, they misread the applicable regulations, misinterpret section 504 and the ADA as identical (despite their divergent histories and language), and continue to cite *Davis* and *Arline* for propositions that these cases do not support.

As this Article was being prepared, the Supreme Court ruled for the first time on the issues of cost under Title II of

² This Article will use the currently-preferred terminology when referring to disabilities, as described by Robert L. Burgdorf, except when quoting original materials. See Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 414 n.7 (1991).

³ 442 U.S. 397 (1979).

⁴ Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1985 and Supp. 1998)).

⁵ 480 U.S. 273 (1987).

⁶ 42 U.S.C. §§ 12101-12213 (1994 & Supp. 1997).

the ADA in *Olmstead v. Zimring*.⁷ Rather than correcting the litany of interpretive errors preceding its decision, the Court again compounded the errors. Indeed, the Court cited neither *Davis* nor *Arline*; instead, the Court cited the wrong enacting regulations to establish a cost-based defense where Congress explicitly directed that none should exist.⁸

It is hoped that the analysis provided in this Article will help to restore to the disabled the full protections that Congress intended in passing both section 504 and the ADA. This will not be easy. The error of Justice Brennan in *Arline* has been compounded by numerous circuit and district courts and was incorporated by the Department of Justice ("DOJ") in 1984 in drafting its own implementing regulations.⁹ Advocates and courts, therefore, face the daunting task of weeding through layers of precedent built upon unsupported precedent, which now includes the unequivocally flawed but formidable decision in *Olmstead*.

Advocates, moreover, must convince increasingly overburdened courts to examine carefully the relevant Congressional history and implementing regulations to demonstrate, for example, that the law applies different standards to new versus existing facilities and to employers versus universities and schools. Finally, advocates must prevail upon the courts not to view section 504 and the ADA as interchangeable. As we shall see, whatever the arguments under section 504, Congress expressly rejected the undue burdens defense under the ADA, except in limited, clearly enumerated circumstances.

⁷ No. 98-536, 1999 WL 407380 (U.S. June 22, 1999).

⁸ See discussion *infra* Part IV.

⁹ In 1984, when the Department of Justice ("DOJ") adopted this dictum into its regulations, many commentators wrote the DOJ to object to this codification of error. See *infra* Section I.C.1.a. In addition, a leading commentator persuasively argued this very point shortly after the *Arline* decision. See Timothy M. Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 LOY. L.A. L. REV. 1471 (1987) [hereinafter Cook(I)]. Unfortunately, these arguments were largely ignored, as was this commentator's subsequent, well-reasoned assertion that "Congress determined that the benefits of integration far outweighed the costs of compliance with the ADA." Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 457-65 (1991) [hereinafter Cook(II)]. By comprehensively tracing the genesis of the present folly from the bills leading up to the Rehabilitation Act to the most recent cases under the ADA, this article may assist courts and advocates to realize, and to amend, the error of their interpretation.

Fortunately, overwhelming evidence demonstrates Congress' rejection of cost as a defense to most claims under the statutes. This Article seeks to marshal that evidence, examining the relevant authority chronologically and sequentially to achieve greater clarity. Part I examines section 504 of the Rehabilitation Act. Section I.A. analyzes the language of the statute itself and its legislative history. The analysis demonstrates that Congress intended a broad, aggressive construction, precluding a general and constricting defense based upon undue financial burden. Section I.B. reviews the regulations promulgated by the Department of Health, Education, and Welfare that implement section 504. Section I.C. analyzes the Supreme Court cases of *Davis* and *Arline*, which spawned the defense of "undue financial and administrative burdens." This section reveals that the Court neither possessed nor cited any basis for its comments regarding undue financial and administrative burdens.

Part II examines Title II of the ADA. Section II.A. looks at the language and legislative history of Title II, in which Congress eschewed the Supreme Court's interpretation in *Davis* and expressly limited the undue financial burden defense under the statute. Section II.B. reviews the regulations promulgated by the DOJ to implement Title II, which reflect Congress' intentions in this regard. Part III then provides an analysis of several recent cases in which various courts have continued to misread the case law, statutes, and regulations, resulting in the misapplication of the undue burdens defense. Finally, Part IV briefly examines the Supreme Court's most recent decision in *Olmstead*, which, like the cases discussed in Part III, simply got it wrong. A brief Conclusion follows.

I. THE REHABILITATION ACT

A. *The Statute*

The Rehabilitation Act of 1973 (the "Act") represented the first major piece of civil rights legislation for the disabled.¹⁰

¹⁰ See, e.g., RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 3 (1984) ("Section 504 of the Rehabilitation Act of 1973 has been hailed as the first major civil rights legislation for disabled people."); Sharon Rennert, *All Aboard: Accessible*

The primary purpose of the Act was to improve the delivery by states of federally-subsidized vocational rehabilitation services to disabled individuals.¹¹ Section 504 of the Act,¹² however, sweepingly prohibits discrimination against the disabled by recipients of federal funding.¹³ The section broadly proclaims that the disabled shall not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"¹⁴

Although the significance of this section is now well known, it is unclear whether, in passing the Act, Congress fully appreciated its scope. Section 504 was inconspicuously inserted into the Act rather late in the process, "joined to three unrelated sections dealing with problems facing handicapped people outside the specific context of rehabilitation programs."¹⁵ Perhaps as a result, it appears to have generated no

Public Transportation for Disabled Persons, 63 N.Y.U. L. REV. 360, 366 (1988) (referring to Section 504 as "a civil rights mandate."); Ronald Bruce Hauben, Note, *A Campus Handicap? Disabled Students and the Right to Higher Education—Southeastern Community College v. Davis*, 9 N.Y.U. REV. L. & SOC. CHANGE 163, 163-64 (1979-80).

¹¹ See SCOTCH, *supra* note 10, at 3 ("This law provided for the continuation of the vocational rehabilitation program first established by the Smith-Fess Act of 1920, under which federal financial assistance was given to the states for vocational and other services to disabled people."); Mark F. Engebretson, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59, 61 (1979); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 114 n.9 (1990) ("The original purpose of the Rehabilitation Act was to provide research, training and vocational rehabilitation services to prepare the handicapped for employment, independence and self-sufficiency.") (citation omitted); see also *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 278 n.3 (1987) ("The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation").

¹² 29 U.S.C. § 794 (1985 & Supp. 1998). It reads, in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

¹³ See *id.*

¹⁴ *Id.*

¹⁵ Engebretson, *supra* note 11, at 61; accord SCOTCH, *supra* note 10, at 49 ("As it was initially drafted, the legislation did not include Section 504. Nor was Section 504 suggested at any of the hearings held on the proposed law. Rather, the section was conceived by Senate committee staff members and added to the bill at

controversy or debate in Congress¹⁶ or among the general public.¹⁷ As originally enacted, section 504 contained but a single sentence,¹⁸ with no indication of how its general pronouncement was to be implemented and interpreted.¹⁹ Unlike most legislation, and unlike the other provisions of the Act itself, Congress did not provide for the promulgation of implementing regulations for section 504.²⁰ Compounding this prob-

a relatively late point in the legislative process."); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHT MOVEMENT 65 (1993) ("Section 504 of the Rehabilitation Act of 1973 was no more than a legislative afterthought."); Brandfield, *supra* note 11, at 116 ("Staff members developed it late in the drafting of the Act out of concern that discrimination by employers would block the vocational rehabilitation of the handicapped.").

¹⁶ See SCOTCH, *supra* note 10, at 4 ("The legislative history of P.L. 93-112 indicates that Section 504 had no special significance at this point in its evolution. The section was not discussed in any of the hearings held prior to the law's passage, nor was it discussed when the bill was considered on the floors of the House and Senate. There was no public debate on the provision, and the lengthy House and Senate reports on P.L. 93-112 refer only briefly to Section 504 . . ."); SHAPIRO, *supra* note 15, at 65 ("There had been no hearings and no debate about section 504."); Rosalie K. Murphy, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1616 (1991) ("There was no legislative discussion or debate concerning section 504, nor was it explained in the reports accompanying the Rehabilitation Act.").

¹⁷ See, e.g., SCOTCH, *supra* note 10, at 57 (Section 504 "was an initiative of liberal congressional staff and not done at the request, suggestion, or demand of outside groups."); SHAPIRO, *supra* note 15, at 65 ("Professional and charitable groups representing disabled people were sophisticated in winning multibillion-dollar federal funding, but had not focused on civil rights legislation."); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 407 n.64 (1995) ("Even most groups concerned with disability issues did not take note of section 504 at the time of its enactment.").

¹⁸ The original sentence is quite similar to the current first sentence of Section 504: "No otherwise handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1985 & Supp. 1998)); see SCOTCH *supra* note 10, at 4 ("At the end of the law was an apparently minor section, Section 504, consisting of one sentence . . .").

¹⁹ See, e.g., Murphy, *supra* note 16, at 1616 ("The text of the statute itself provides no indication of what was meant by discrimination or whether equal treatment alone would be considered sufficient to eliminate discrimination."); Engbretson, *supra* note 11, at 60 ("Section 504 as enacted by the Congress contained no indication of how its provisions were to be implemented.").

²⁰ See, SCOTCH, *supra* note 10, at 60-61 ("Unlike the rest of the Rehabilitation Act and most other federal legislation, Section 504 contained no provision for its

lem, virtually no contemporaneous legislative history exists with which to divine Congress' intent in passing section 504.²¹

These facts are crucial to the analysis, for section 504's indeterminate language and lack of legislative history²² left it

own implementation. That is, Congress did not express its intentions as to which agency was to carry out the law, whether regulations were to be issued, and exactly who was to be subject to them."); Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 16 (1990) ("This statute as originally adopted did not contain any provisions calling for Federal agencies to promulgate implementing regulations."); Engebretson, *supra* note 11, at 63 ("No authority is delegated to any agency to promulgate or enforce regulations under the Act.").

²¹ See SCOTCH, *supra* note 10, at 53 ("The legislative history of the Rehabilitation Act contains only passing references to Section 504, stating simply that the section prohibits discrimination, without providing any rationale or predicting any impact."); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1002 (1984) [hereinafter *Employment Discrimination*] ("there is scant legislative history"); Engebretson, *supra* note 11, at 63 ("The complete absence of any legislative history for section 504 compounds the uncertainty created by the lack of statutory elaboration. The anti-discrimination provision passed without generating a written comment."); Epstein, *supra* note 17, at 407 n.64 (Section 504 "was also enacted without any definitive legislative history or guidance Indeed, not a word about this section was uttered by a single member of Congress in any of the hearings or floor debates which preceded its enactment."); see also *infra* notes 15-16 and accompanying text. It appears, in fact, that there are only two references to Section 504 in the legislative history of the Act, neither of which is instructive on the issue of cost as a defense under the Act. Compare Engebretson, *supra* note 11, at 63 n.17 ("The only mention of any proposal related to § 504 appears in the 1972 Senate hearings," wherein a student with cerebral palsy "incorporated a copy of his senior thesis in which he discussed the possibility of amending Title VI to prohibit discrimination based on handicap.") with Epstein, *supra* note 17, at 408 (explaining that the "only reference to § 504 in the legislative history of the Rehabilitation Act was an eloquent statement from a representative of the National Federation of the Blind at a subcommittee hearing."). As set forth below, however, legislative history preceding and following enactment of section 504 supports the assertion that Congress intended no general defense to a claim under section 504 based upon cost. See *infra* notes 27-33 and accompanying text. The Supreme Court has explicitly recognized the importance of this legislative history in interpreting section 504. See *infra* notes 70-72 and accompanying text.

²² Cook suggests that, in fact, the legislative history of the Act demonstrates that Congress enacted section 504 "with full knowledge of the substantial burdens it would entail," but provided no waiver for such burdens. Cook(II), *supra* note 9, at 460 n.443. Cook argues, "The legislative history of § 504 demonstrates Congress's belief that the evil of segregation and exclusion would economically and morally outweigh the financial burdens of integrating persons with disabilities." *Id.* For a more detailed presentation of this argument, see Cook(I), *supra* note 9, at 1472-79. None of the quotations upon which the author relies, however, was made with specific reference to section 504. In particular, Cook relies upon the statements made by Senator Humphrey and Representative Vanik in connection with

to administrative agencies and the courts to establish the parameters of its anti-discrimination mandate.²³ It should be

bills that they introduced predating the Act. These bills were certainly similar to, and apparently the genesis of, what would become section 504. Compare Cook(I), *supra* note 9, at 1473 n.11 ("Section 504 originated in these bills . . ."), and *Alexander v. Choate*, 469 U.S. 287, 295-96 n.13 ("The principle underlying these bills was reshaped in the next Congress and inserted as § 504 into . . . legislation then pending. Senator Humphrey and Representative Vanik indicated that the intent of the original bill had been carried forward into § 504."), with SCOTCH, *supra* note 10, at 57 (suggesting that section 504 "was an initiative of liberal congressional staff" and that the language was drafted by congressional staff during a meeting in late August 1972, based upon earlier civil rights statutes). However, "[n]o hearings were held on the bills, . . . and neither was brought to a vote in committee or on the floor of either house." SCOTCH, *supra* note 10, at 44. In addition, "President Nixon's veto of two earlier versions of the Act in 1972 and 1973 further obscured discussion of the implications of section 504." Engebretson, *supra* note 11, at 64. Cook's argument is quite persuasive for two reasons. First, it demonstrates that in the discussions leading up to the Act in general, Congress explicitly discussed the subject of costs yet provided no cost defense anywhere in the statute. See Cook(II), *supra* note 9, at 460 n.443; Cook(I), *supra* note 9, at 1472-79; see also 119 CONG. REC. 6497 (statement of Sen. Percy) ("But people are more important than cost."). Second, and more importantly, the Supreme Court has stated, "[g]iven the lack of debate devoted to § 504 in either the House or Senate when the Rehabilitation Act was passed in 1973 . . . the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to § 504 is a primary signpost on the road toward interpreting the legislative history of § 504." *Choate*, 469 U.S. at 295 n.13; accord *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 n.9. As Cook explains, an examination of the sponsor's intent supports the conclusion that "Congress desired that the costs of compliance with section 504 would not outweigh the right to meaningful access to federal and federally assisted programs." Cook(I), *supra* note 9, at 1525.

²³ See *Employment Discrimination*, *supra* note 21, at 999 ("The provision's indeterminate language devolves responsibility for policy choice on courts and administrative agencies and leaves them to make ad hoc selections from among competing conceptions of discrimination."); Cook(II), *supra* note 9, at 415 ("[S]ection 504 . . . was but a single sentence tacked on to vocational rehabilitation legislation. Clarification of its meaning was left largely to the Judiciary and Executive."); 42 Fed. Reg. 22,676 (1977) (codified at 45 C.F.R. §§ 84.1-84.61 (1998)) (statement of Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare ("HEW"), introducing HEW's regulations implementing section 504) [hereinafter Califano Statement] ("The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved."); see also *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transp. Auth.*, 718 F.2d 490, 494 (1st Cir. 1983) ("Because [section 504] is both ambiguous and lacking in specifics, its scope and effect have been an enigma since [it] was enacted."). Some authors have even suggested that Congress may not have had any specific intention at all in enacting section 504. See, e.g., SCOTCH, *supra* note 10, at 53 ("[T]here is little in the record to suggest what, if anything, members of Congress had in mind when Section 504 was enacted.") (emphasis added); *Employment Discrimination*, *supra* note 21, at 1002 ("In sum, the statute is open ended; indeed, it is even possible that

noted, however, that the plain language of the statute supports an expansive and uncompromising interpretation of the mandate.²⁴ Indeed, the statute—like the civil rights statutes on which it was modeled²⁵—provides no defense to charges of discrimination based on “undue financial burdens.”²⁶

This argument is buttressed by the fact that Congress expressly included an exception that permits exclusion of individuals who are not “otherwise qualified.”²⁷ As one commentator has observed, “although Congress deliberately allowed exclusion based on handicap-related inability, it included no similar express exception to permit exclusion based on handicap-related costs.”²⁸

This argument is also supported by the 1974 amendments to the Act.²⁹ In 1974, Congress amended the Act, revising the definition of the term “handicapped individual.”³⁰ Specifically,

Congress did not have an ‘intent.’”).

²⁴ See Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 450 (1984) (noting that, in the absence of legislative history, “[t]he terse language of section 504 itself must therefore provide the principal guidance” on the issue of cost as a defense under Section 504).

²⁵ These include Title VI (42 U.S.C. § 2000d (1994)) and Title IX (20 U.S.C. § 1681(a) (1990)). See S. REP. NO. 1297 at 39-40 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390 (“Section 504 was patterned after, and is almost identical to, the anti-discrimination language of [Title VI and Title IX].”); *Arline*, 480 U.S. at 278 n.2 (“Congress’ decision to pattern § 504 after Title VI is evident in the language of the statute”); Califano Statement, *supra* note 23 (“The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education amendments of 1972”); Engbretson, *supra* note 11, at 61-62 (“The language of section 504 parallels that of the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964,” and “also tracks the anti-discrimination provision of Title IX of the Education Amendments of 1972.”); Wegner, *supra* note 24, at 404 n.5 (“As originally enacted, the text of § 504 was closely modeled after other federal civil rights provisions prohibiting discrimination on the basis of race, color, national origin, and sex.”). Neither Title VI nor Title IX contains any such exculpatory language. See 42 U.S.C. § 2000d(d) (1994); 20 U.S.C.A. § 1681(a) (West 1990); see also *infra* note 184 and accompanying text.

²⁶ See SCOTCH, *supra* note 10, at 3 (“The mandate was unequivocal, without regard to cost or disruption to the recipients of federal funds.”); Crespi, *supra* note 20, at 15 (“Section 504 of the Rehabilitation Act is couched in general terms and does not specifically provide for an undue hardship defense.”).

²⁷ 29 U.S.C. § 794 (1985 and Supp. 1998).

²⁸ Wegner, *supra* note 24, at 450.

²⁹ See Pub. L. No. 93-516, 88 Stat. 1617 (1974).

³⁰ The term is “individual with a disability” in the current version of the Act.

Congress removed all references to employment to clarify that the broad mandate of section 504 prevents discrimination against all disabled individuals seeking services from federally-assisted programs, and not merely those seeking employment.³¹ In the legislative history accompanying the 1974 amendments, Congress expressed its intention that section 504 be accorded the same broad and uncompromising construction as other civil rights legislation:

Section 504 was patterned after, and is almost identical to, the anti-discrimination language of [Title VI and Title IX]. The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap.³²

This legislative history is particularly relevant in light of the Supreme Court's ruling that "as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the [1974] amendments and their history do shed significant light on the intent with which § 504 was enacted."³³ The clear intent evidenced by the amendments and their legislative history is that section 504, like other civil rights legislation, is to be construed broadly and aggressively to effectuate its anti-discriminatory purposes.³⁴ This intent is quite different from, and seem-

29 U.S.C. § 794 (1985 and Supp. 1998).

³¹ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 278-79 (1987); *Engelbreton*, *supra* note 11, at 64-65; *Rennert*, *supra* note 10, at 366 n.41.

³² S. REP. NO. 1297 at 39-40 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6390; see *Engelbreton*, *supra* note 11, at 65 ("This peculiar after-the-fact legislative history . . . declared that Congress had intended section 504 to be an aggressive piece of civil rights legislation.").

³³ *Alexander v. Choate*, 469 U.S. 287, 306 n.27 (1988).

³⁴ See *Rehabilitation Act Amendments of 1974: Hearings Before the U.S. Senate Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 93d Cong. 224 (1974) ("[HEW] fully intends to treat Section 504 as civil rights legislation that is remedial in design and to construe the legislation broadly to effectuate its purposes, to correct and alleviate conditions adversely affecting handicapped individuals in federally-assisted programs."); *Cook(I)*, *supra* note 9, at 1473 n.10 ("Like Title IX of the Education Amendments of 1972, . . . whose language it tracks, § 504 is to be accorded 'a sweep as broad as its language.'") (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)); *Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404, 1415 (6th Cir. 1995) ("[S]ection 504 is a civil rights statute, and as such, should be broadly construed.") (citations omitted); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996) ("It is a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its

ingly incompatible with, the adoption of sweeping limitations to section 504 based upon undue financial burden.

B. *The Implementing Regulations*

As the foregoing discussion indicates, section 504 contained no provisions calling for federal agencies to promulgate implementing regulations.³⁵ As a consequence, the first regulations, promulgated by the Department of Health, Education, and Welfare ("HEW"), were not issued until April of 1977, four years after the passage of the Act.³⁶ Even then, the regulations were issued only after sit-ins in Washington and San Francisco,³⁷ a federal lawsuit to force promulgation,³⁸ a change in presidential administrations, and an executive order compelling promulgation of the regulations.³⁹ On April 28,

purposes. This broad construction is also applied to civil rights statutes. Accordingly, a broad construction is given to both the Rehabilitation Act and the ADA.") (citations and internal quotations omitted); see also *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.13 (1983) ("For language as broad as that of § 504 cannot be read in isolation from its history and purposes.") (citations omitted).

³⁵ See *supra* note 20 and accompanying text.

³⁶ See 42 Fed. Reg. 22,676 (1977) (codified at 45 C.F.R. §§ 84.1-84.61 (1998)); see also SHAPIRO, *supra* note 15, at 69.

³⁷ See SCOTCH, *supra* note 10, at 5; SHAPIRO, *supra* note 15, at 68 ("The San Francisco sit-in marked the political coming of age of the disability rights movement."); Engebretson, *supra* note 11, at 59; Cook(I), *supra* note 9, at 1481 ("The disabled community had demonstrated at each of HEW's ten regional offices and had occupied Secretary Califano's office for twenty-eight hours and the offices of Region IX in San Francisco for twenty-two days.").

³⁸ In 1975, advocates filed suit in federal court to compel HEW to promulgate implementing regulations and enforce Section 504. In 1976, Judge John Smith of the District Court for the District of Columbia ruled in plaintiff's favor, finding that "the statute's discrimination prohibitions were certainly not intended to be self-executing," and that "Congress contemplated swift implementation of § 504 through a comprehensive set of regulations." *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976); see Epstein, *supra* note 17, at 409 ("Section 504 sat idly in the United States Code until the 1976 case of *Cherry v. Mathews*"). The court did not, however, compel promulgation by a set date. See *Cherry*, 419 F. Supp. at 924 ("Rather than establish a date by which final regulations must issue, the Court retains jurisdiction over this matter to assure that no further unreasonable delays affect the promulgation of regulations under § 504.").

³⁹ See Exec. Order No. 11,914, 3 C.F.R. 117 (1977). For a history of the events leading to the promulgation of the regulations, see SHAPIRO, *supra* note 15, at 66-69.

1976, President Ford issued Executive Order No. 11,914, directing HEW to promulgate regulations "to provide for consistent implementation within the Federal Government of Section 504"⁴⁰

The component agency of HEW charged with drafting the regulations—and interpreting section 504's antidiscrimination mandate—was the Office for Civil Rights ("OCR").⁴¹ The regulations to be drafted by OCR would serve a crucial role in providing specific and concrete meaning to the general prohibition contained in section 504.⁴² As we shall see, consistent with the broad language of section 504, the final regulations provide a defense based upon cost only in very limited circumstances.⁴³

In fact, it appears that if OCR had had its way, the regulations would not have included a cost defense at all. A leading commentator on the promulgation of the HEW regulations explained that OCR did not consider cost a factor in drafting the regulations:

The OCR staff did not consider factors affecting recipients such as cost, inconvenience, and disruption of existing programs to be legitimate reasons for failing to meet requirements of nondiscrimination Cost was not directly addressed in the draft regulation and was officially a "nonissue," one whose consideration was felt to be illegitimate by most of the OCR staff, including the key decision-makers⁴⁴

⁴⁰ Exec. Order No. 11,914, 3 C.F.R. 117 (1977).

⁴¹ See SCOTCH, *supra* note 10, at 64; Brandfield, *supra* note 11, at 116; Epstein, *supra* note 17, at 408.

⁴² See *infra* notes 67-79 and accompanying text.

⁴³ See *infra* notes 51-66 and accompanying text; see also Engebretson, *supra* note 11, at 67 (observing that the choice of OCR to promulgate the regulations "was to have a great effect on the substantive content of the final HEW regulations").

⁴⁴ SCOTCH, *supra* note 10, at 64, 75. An HEW report on the costs and benefits of the proposed regulations concluded:

[T]he benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs that will be incurred. The costs involved will not be as great as is widely thought and the compelling situation of some of the handicapped persons involved tips the balance in favor of proceeding with immediate implementation of the regulation.

Dave M. O'Neill, *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 Fed. Reg. 20,320 (1976).

Unlike section 504, however, the HEW regulations were controversial.⁴⁵ Furthermore, unlike Congress in crafting the very broad section 504, HEW was faced with the task of drafting individual regulations to fit several distinct factual contexts, i.e., to govern several different kinds of discrimination claims.⁴⁶ These included claims concerning employment practices; program accessibility; preschool, elementary, and secondary education; postsecondary education; and health, welfare, and social services.⁴⁷ As the U.S. Commission on Civil Rights observed, "this extremely diverse factual reality makes simple, universal rules impossible."⁴⁸ Accordingly, the law "assigns different legal consequences to the costs of accommodation in different societal areas."⁴⁹ The failure of courts and advocates alike to grasp this point is, as we shall see, a leading cause of the confusion surrounding interpretation of the Act and the ADA.⁵⁰

⁴⁵ See, e.g., SCOTCH, *supra* note 10, at 5 (referring to the regulations as "highly controversial"); U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 103 (1983) [hereinafter COMMISSION] (explaining that the regulations regarding mass transit systems were "controversial"); Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1093 (1995) ("Although [section 504] provoked no conflict—and, indeed, little attention—in Congress, a major battle nevertheless ensued over the promulgation of regulations enforcing it."). The proposed rules provoked more than 700 written comments, and HEW held 22 public hearings on the rules. See *id.* at 1094.

⁴⁶ See Califano Statement, *supra* note 23 ("The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.").

⁴⁷ See 45 C.F.R. §§ 84.11-84.55 (1998); see also Wegner, *supra* note 24, at 418-19 (noting that the regulations include "specific directives concerning actions recipients must take to avoid 'discrimination' in five distinct factual contexts").

⁴⁸ COMMISSION, *supra* note 45, at 104.

⁴⁹ COMMISSION, *supra* note 45, at 103.

⁵⁰ See *infra* Parts III and IV.

In the final regulations issued in 1977,⁵¹ then, OCR was compelled to account for financial burden in limited circumstances:

While disregard of costs was a major tenet of faith within OCR, inevitably some consideration of the financial burden for recipients was made. Requiring program accessibility rather than access to all parts of all facilities is the most important evidence of this, as were the exemptions ultimately granted small service providers. However, the Office for Civil Rights generally held to the doctrine that cost was not a valid excuse for discrimination against disabled people.⁵²

⁵¹ The 1977 regulations governed only recipients of HEW grants. See 45 C.F.R. § 84.2 (1998). In January of 1978, however, pursuant to Executive Order No. 11,914, 3 C.F.R. § 117 (1977), HEW promulgated prototype regulations to be used by all other federal agencies as a guideline for drafting their own regulations. 43 Fed. Reg. 2136 (1978) (codified at 45 C.F.R. §§ 85.1-85.58 (1980)) (current version at 28 C.F.R. §§ 41.1-41.58 (1997)). In 1979, following the division of HEW into two new agencies, the Department of Education and the Department of Health and Human Services ("HHS"), the HEW rule was recodified in identical form. See 34 C.F.R. §§ 104.1-104.61 (1979). Meanwhile, in 1980, President Carter issued Executive Order No. 12,250, transferring responsibility for coordination of the section 504 rules to the Attorney General. Exec. Order No. 12,250, 3 C.F.R. § 298 (1981). On August 11, 1981, the HEW prototype regulation was transferred (in identical form) to 28 C.F.R. §§ 41.1-41.58. Finally, following issuance of the prototype regulation, 54 additional federal agencies have promulgated regulations pursuant to section 504. See Epstein, *supra* note 17, at 409 n.75 (providing partial listing of citations to federal agencies that have promulgated such regulations). Because "the same interpretation of § 504 underlies both the HEW-specific rule and the HEW prototype regulations," Rennert, *supra* note 10, at 371, and because HEW was charged with promulgating the regulations implementing section 504, this article cites only the HEW-specific rule.

⁵² SCOTCH, *supra* note 10, at 77. As HEW Secretary Joseph A. Califano Jr. stated in his explanatory comments to the new HEW regulations:

[P]roviding equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 of this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

Califano Statement, *supra* note 23. As one commentator notes, "[a] cabinet Secretary's explanation of a regulation, when accompanied by the regulation's final promulgation is entitled to substantial deference, especially if the cabinet official publishing the regulation is also responsible for administering the underlying statute." Cook(II), *supra* note 9, at 460 n.442 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980)). The author also points out that "[t]he Supreme Court relied upon the explanatory comments of the Secretary of HEW accompanying the § 504 rule in three of its decisions." *Id.* (citations omitted).

Like the ADA regulations that would follow,⁵³ the regulations clearly distinguish between new and existing facilities in the context of program accessibility. Specifically, the regulations "do[] not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons,"⁵⁴ a partial concession to cost and burden. By contrast, the regulations plainly require that facilities constructed after the effective date of the regulations be designed and constructed in such manner as to be "readily accessible to and usable by handicapped persons."⁵⁵

In addition, the regulations exempt recipients with fewer than fifteen employees from complying with the mandates of program accessibility if doing so would result in "a significant alteration in its existing facilities."⁵⁶ The clearest concession to financial burden, however, and *the only other such concession in the regulations*, appears in the regulations governing employment practices.⁵⁷ These regulations provide that employers must "make reasonable accommodations to the known physical or mental limitations" of an "otherwise qualified" disabled employee "unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."⁵⁸ The regulations then list three factors to be used in determining whether an accommodation would impose an undue burden upon an employer, including "[t]he nature and cost of the accommodation needed."⁵⁹

Although "reasonable accommodations" has become a generic term in disability law and is typically used "to describe individualization of opportunities for handicapped people,"⁶⁰ it

⁵³ See *infra* Section II.B.

⁵⁴ 45 C.F.R. § 84.22(a) (1998).

⁵⁵ *Id.* § 84.23(a).

⁵⁶ *Id.* § 84.22(c).

⁵⁷ See *id.* §§ 84.11-84.14. It is, in fact, the only *express* concession to cost in the regulations.

⁵⁸ *Id.* § 84.12(a).

⁵⁹ 45 C.F.R. § 84.12(c)(3) (1998).

⁶⁰ COMMISSION, *supra* note 45, at 103. The Commission describes "reasonable accommodations" as "[a]djustments or modifications of opportunities to permit handicapped people to participate fully." *Id.* The concept of reasonable accommodation "is premised on the fact that society has been structured for the non-disabled" and "serves the ultimate goal of integrating disabled people into the social mainstream." Rennert, *supra* note 10, at 372-73; see also Bonnie P. Tucker, *Section 504*

is important to note that the phrase, with its concomitant defense of "undue hardship,"⁶¹ only refers to modifications in the employment context.⁶² Hence, the exculpatory defense of "undue hardship," with its consideration of "[t]he nature and cost of the accommodation needed," does not appear anywhere else in the regulations promulgated by HEW.⁶³ Of particular relevance to the analysis that follows, neither the "General Provisions" prohibiting discrimination⁶⁴ nor the regulations governing "Postsecondary Education"⁶⁵ provides any excuse or defense based on cost or undue burden.⁶⁶

The HEW regulations provide the most comprehensive interpretation of section 504 available and are of critical importance to interpreting section 504.⁶⁷ As the Supreme Court has explained, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."⁶⁸ Such deference to administra-

of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future, 4 U. ILL. L. REV. 845, 884 (1989) ("In simplistic terms, the relationship between the 'otherwise qualified' and 'reasonable accommodation' requirements under section 504 may be stated as follows: a handicapped individual is protected from discrimination under section 504 if he or she is able to perform in the job or program at issue under existing conditions or with the provision of reasonable accommodation by the employer or program administrator.").

⁶¹ Crespi, *supra* note 20, at 16 ("These HHS regulations [regarding employment discrimination] were the genesis of the undue hardship concept and language.").

⁶² See COMMISSION, *supra* note 45, at 105 ("In its original sense, then, reasonable accommodation referred only to modifications on the job . . .").

⁶³ 45 C.F.R. §§ 84.1-84.61 (1998). See Cook(I), *supra* note 9, at 1516 ("This undue hardship exception appears only in the employment subpart of the HEW rule.").

⁶⁴ 45 C.F.R. §§ 84.1-84.10.

⁶⁵ *Id.* §§ 84.41-84.47; see Donald J. Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 179 (1980) ("The regulation appears to impose a greater obligation on post-secondary educational institutions than upon employers to accommodate the handicapped. Educational institutions are not subject to a reasonable accommodation/undue hardship standard, as are employers; the implication is that cost is not a factor with regard to statutorily authorized modifications by educational institutions.").

⁶⁶ The same is true of the regulations governing Preschool, Elementary, and Secondary Education, see 45 C.F.R. §§ 84.31-84.39, and Health, Welfare, and Social Services. See *id.* §§ 84.51-84.55.

⁶⁷ See Wegner, *supra* note 24, at 417 (The HEW regulations "continue to provide one of the most comprehensive systematic interpretations of section 504, and, therefore, warrant close examination.").

⁶⁸ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); accord *Bragdon v. Abbot*, No. 97-156, 1998 WL 332958, at *14 (U.S. June 25, 1998); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1983)

tive construction is particularly important where, as here, there is little other guidance available.⁶⁹ Indeed, the Supreme Court has expressly recognized the importance of the HEW regulations. Although the Supreme Court initially indicated that HEW's reluctance in drafting the regulations "substantially diminishes the deference to be given to HEW's present interpretation of the statute,"⁷⁰ the Court eventually recognized that the regulations are "an important source of guidance on the meaning of § 504"⁷¹ and "are of significant assistance."⁷²

The HEW regulations are also entitled to considerable deference in light of Congress' actions in amending the Act in 1978.⁷³ Among other things, the 1978 amendments extended the scope of section 504 to cover programs operated by federal agencies and added a new section 505(a)(2), which provides that "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any

("This Court generally has deferred to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment.") (citation omitted); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1319 (E.D. Pa. 1994) ("In interpreting the meaning of a statute, substantial deference is due the interpretation given its provisions by the agency charged with administering that statute.") (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)).

⁶⁹ See *supra* notes 18-23 and accompanying text.

⁷⁰ *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979); see also Epstein, *supra* note 17, at 414 (stating that "in *Davis* the Court questioned the validity of the HEW regulations"); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1464 (1986) ("The contrast between these two unanimous decisions of the Court . . . are striking: *Davis* undertook only a limited analysis of the legislative history of the Act and minimized the significance of the federal agency regulations, while *Alexander* explored Congress' intent in some depth and gave great credence to federal agency interpretations."); Wegner, *supra* note 24, at 421 n.53 ("Because federal agencies were initially reluctant to adopt regulations implementing § 504, however, courts have accorded their administrative interpretation less deference.").

⁷¹ *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985).

⁷² *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987); accord *Bragdon*, 1998 WL 332958, at *6; *Darrone*, 465 U.S. at 634. For an excellent discussion of the Supreme Court's evolving treatment of the HEW regulations, see Cook(I), *supra* note 9, at 1504-10.

⁷³ See Crespi, *supra* note 20, at 16 n.48 ("The Rehabilitation Act was subsequently amended in 1978 to require Federal agencies to promulgate such regulations as necessary to implement the amendments made to it by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.").

person aggrieved by any act or failure to act by any recipient of Federal assistance or provider of such assistance under section 504."⁷⁴

Assessing the legislative history of the 1978 amendments, a leading commentator observed that in enacting the amendments, "Congress took *ten discrete*, legislative actions that indicated its awareness and approval of the waiverless HEW regulatory approach."⁷⁵ "[T]he ten distinct provisions," the author continues, "including section 504 coverage of the Executive, all of which suggested full congressional awareness of the HEW regulation, were enacted with near unanimity, as they had been earlier in the Senate."⁷⁶ The Supreme Court itself, moreover, subsequently recognized that "these [HEW] regulations were drafted with the oversight and approval of Congress"⁷⁷ and that "the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form."⁷⁸ Under such circumstances, the HEW regulations, with only a few discrete exceptions based upon cost, arguably should have the force of law.⁷⁹

The foregoing discussion provides the necessary statutory and regulatory background to the Supreme Court's decisions in *Davis*⁸⁰ and *Arline*.⁸¹ As the discussion indicates, at the time of the *Davis* decision in 1979, there was no basis in law for a general defense to a section 504 claim based upon undue financial burden. Neither Congress nor the agency charged with implementing section 504 provided any general exemption or defense based upon undue financial burden. In fact, quite the opposite was true. Congress did not provide a cost-based de-

⁷⁴ Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982, 2987 (1978).

⁷⁵ Cook(I), *supra* note 9, at 1510.

⁷⁶ *Id.* at 1500.

⁷⁷ School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987).

⁷⁸ Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). The Court also noted, "[i]n adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's [section 504] regulations into the statute." *Id.* at 634 n.15; see Cook(I), *supra* note 9, at 1505-06 (arguing that the Supreme Court "adopted the . . . view that the Congress had in the 1978 amendments approved the HEW regulation").

⁷⁹ See *infra* note 226 and accompanying text.

⁸⁰ 442 U.S. 397 (1979).

⁸¹ 480 U.S. 273 (1987).

fense of any kind in its statute. In the HEW regulations interpreting the statute, which were ratified in 1978, HEW indicated that cost is generally not a defense to a discrimination claim under section 504, apart from a few narrowly-tailored exceptions. Thus, if the Supreme Court were to establish such a limitation on the rights of the disabled, it would have to construct it out of whole cloth. That is precisely what the Court did.

C. *The Supreme Court Cases: Davis and Arline*

This section examines the two Supreme Court cases⁸² that have created much of the confusion: *Southeastern Community College v. Davis*⁸³ and *School Board of Nassau County, Florida v. Arline*.⁸⁴ As the discussion indicates, neither of these cases required an examination of the issue of cost in assessing the plaintiff's discrimination claim.⁸⁵ And, indeed, neither case examined the issue. In a footnote, however, *Arline* elevated to the status of "well established" doctrine a passing, unsupported comment in *Davis* regarding "undue financial and administrative burdens."⁸⁶ The deleterious effects of this error continue to be felt.⁸⁷

1. *Southeastern Community College v. Davis*

Davis presented the Supreme Court with its first opportunity to issue a comprehensive ruling on the Act, six years after its passage.⁸⁸ Unfortunately, *Davis* was a poor "test case" for advocates seeking an expansive reading of the Act.⁸⁹ As we

⁸² For the sake of brevity, with regard to the Act, this Article focuses upon the Supreme Court decisions in *Davis* and *Arline*, which provide the basis for the undue burdens defense examined herein, rather than lower court cases which either predate or merely compound the error of the Court.

⁸³ 442 U.S. 397 (1979).

⁸⁴ 480 U.S. 273 (1987).

⁸⁵ See *infra* notes 116, 121, 171, and 183 and accompanying text.

⁸⁶ See *infra* Section I.C.2.

⁸⁷ See *infra* Parts III, IV.

⁸⁸ See Department of Justice, Supplementary Information, 28 C.F.R. § 39.103 (1998) ("The *Davis* decision was the Supreme Court's first comprehensive view of Section 504, a major new civil rights statute.").

⁸⁹ See, e.g., Hauben, *supra* note 10, at 174 ("The holding in *Davis*, that Southeastern was not required to admit Davis to the Nursing Program, is reasonable

shall see, the plaintiff's case was relatively weak, which contributed to the unanimous decision in the defendant's favor.⁹⁰ This may explain why Justice Powell's confusing and mistaken assertions regarding "affirmative action,"⁹¹ and his unwarranted allusion to undue financial burdens,⁹² elicited neither dissent nor concurrence from Justices Brennan and Marshall.⁹³

The plaintiff, Francis B. Davis, sought admission to the Associate Degree Nursing Program of Southeastern Community College ("Southeastern"). Although Ms. Davis had a severe hearing impairment, she was an "excellent lip reader" and was "skillful in communicating with other people" as long as she wore a hearing aid and was allowed to see the person speaking to her.⁹⁴ Southeastern nonetheless rejected her application on the grounds that her severe hearing impairment would prevent her from completing her training and being licensed as a Registered Nurse.

At trial, the district court, crediting the testimony of Southeastern's expert, stated:

[I]n many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means.⁹⁵

given the extreme facts of the case."); Rennert, *supra* note 10, at 380 n.164 (noting that the facts "made *Davis* an unsympathetic case for requiring accommodation and could be seen as limiting the applicability of the holding"); Wegner, *supra* note 24, at 458 ("It is difficult to imagine a more unsympathetic case for requiring accommodation than that presented in *Davis*.").

⁹⁰ Justice Powell delivered the opinion for a unanimous Court. *See Davis*, 442 U.S. at 399.

⁹¹ *Id.* at 409-11; *see infra* note 111 and accompanying text.

⁹² *See Davis*, 442 U.S. at 412.

⁹³ Marshall would later attempt to undo some of the harm in his unanimous opinion in *Alexander v. Choate*, 469 U.S. 287 (1986). *See infra* Section I.C.1.b. Here, however, he did nothing. Brennan, joined by Marshall and all of his brethren, would compound Stevens' error in *Arline*. *See infra* Section I.C.2.

⁹⁴ *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1343 (E.D.N.C. 1976), *aff'd in part and vacated in part*, 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

⁹⁵ *Id.*

As a result, the court found that Ms. Davis would be unable to receive a license as a Registered Nurse upon graduation.⁹⁶ The court explained that the evidence demonstrated that "it would be difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program."⁹⁷ Accordingly, the court found Southeastern's decision to reject Ms. Davis both "reasonable and logical."⁹⁸ Notably, the issue of cost played no part in the decision.

Relying upon the newly-promulgated HEW regulations, the Fourth Circuit reversed,⁹⁹ explaining that the district court erred "by considering the nature of the plaintiff's handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the nursing program, rather than by focusing upon her academic and technical qualifications as required by the newly promulgated [HEW] regulations."¹⁰⁰ Rejecting the district court's "all or nothing" ruling, the court held that if plaintiff met the academic and technical qualifications for admission, she should not be rejected "simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers."¹⁰¹

Remanding the case to the district court, the Fourth Circuit instructed the lower court to "give close attention" to the plaintiff's claim that, under the HEW regulations, Southeastern should be required to modify its program to accommodate her disability.¹⁰² Once again, cost played no part in the decision. Expressing approval for plaintiff's claim for modifications, however, the court noted (in dictum) that "precedent . . . sup-

⁹⁶ *Id.* at 1344.

⁹⁷ *Id.* at 1345. The court noted that plaintiff elicited an admission on cross-examination that, "with special training and individual supervision, she could perform adequately in some selected fields of nursing." *Id.* at 1346. Because the court found that Ms. Davis could not safely perform in both the training program and in her profession, however, the court concluded that she was not "otherwise qualified" for admission. *Davis*, 424 F. Supp. at 1345.

⁹⁸ *Id.*

⁹⁹ See *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979). The HEW regulations were promulgated approximately six months after the district court's decision. See *id.* at 1161.

¹⁰⁰ *Id.* at 1161.

¹⁰¹ *Id.* at 1161 n.6

¹⁰² *Id.* at 1162. The court labeled this a claim for "affirmative relief." *Davis*, 574 F.2d at 1162.

ports the requirement of affirmative conduct on the part of certain entities under Section 504, *even when such modifications become expensive.*"¹⁰³ Unfortunately, the Supreme Court's subsequent dictum on the issue of cost was quite to the contrary, and was, by contrast, without the support of any precedent.¹⁰⁴

Setting forth the facts for a unanimous Court, Justice Powell fully credited, and emphasized, the testimony of Southeastern's expert, Mary McRee, that "respondent's hearing disability made it *unsafe* for her to practice as a nurse."¹⁰⁵ Critically, Justice Powell also echoed the expert's assertion that "it would be *impossible* for respondent to participate safely in the normal clinical training program, and those modifica-

¹⁰³ *Id.* (emphasis added) (citing *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415-16 (8th Cir. 1977)); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1281-84 (7th Cir. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W. Va. 1976)). The two circuit court cases cited by the court relied upon the new HEW regulations to find an "affirmative duty" to make urban transit equipment accessible to plaintiffs, implicitly, but not explicitly, addressing the issue of cost. *See United Handicapped*, 558 F.2d at 415-16; *Lloyd*, 548 F.2d at 1280-88. The district court cases, by contrast, explicitly rejected the defense of undue financial burden based solely upon the broad language of Section 504. *See Barnes*, 436 F. Supp. at 639 (sympathizing with defendant's fear that it would be forced to "shoulder a substantial financial burden" but rejecting this defense because "there has been no challenge to [section 504's] validity and this court is bound by law to give it effect."); *Hairston*, 423 F. Supp. at 184 ("School officials must make every effort to include such children within the regular public classroom situation, *even at great expense to the school system.*") (emphasis added).

¹⁰⁴ *See infra* notes 118-125 and accompanying text.

¹⁰⁵ *Southeastern Community College v. Davis*, 442 U.S. 397, 401 (1979) (emphasis added); *see also id.* at 401 n.1 ("McRee also wrote that respondent's hearing disability could preclude her practicing safely in 'any setting' allowed by 'a license as L[icensed] P[ractical] N[urse].'"). Powell carefully notes that, upon Ms. Davis' request for reconsideration, the entire nursing staff of Southeastern voted to deny Ms. Davis admission after "McRee repeated her conclusion that on the basis of the available evidence, respondent 'has hearing limitations which could interfere with her safely caring for patients.'" *Id.* at 402 (emphasis added). Finally, Powell quotes the district court's finding that "[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession Of particular concern to the court in this case is the potential of danger to future patients in such situations." *Id.* at 403 (quoting *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976)) (emphasis added). As the Third Circuit has explained: "*Southeastern's* holding was particularly stringent because the admission standards were designed to protect public health and safety, a concern that has been given considerable deference by the courts." *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1384 (3d Cir. 1991) (citation omitted).

tions that would be necessary to enable safe participation would prevent her from realizing the benefits of the program"¹⁰⁶ A finding of discrimination under such circumstances would be difficult indeed.

After delivering this loaded presentation of the facts, the Court noted that "on the present record it appears unlikely respondent could benefit from *any* affirmative action that the regulation reasonably could be interpreted as requiring."¹⁰⁷ The HEW regulations, the Court explained, explicitly exclude "devices or services of a personal nature" from the kinds of auxiliary aids a school is required to provide to disabled individuals.¹⁰⁸ "Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program."¹⁰⁹ Thus, the "curricular changes" and "individualized attention" that Ms. Davis required, the Court concluded, would constitute a "fundamental alteration" in the nature of defendant's program that "is far more than the 'modification' the regulation requires."¹¹⁰

¹⁰⁶ *Davis*, 442 U.S. at 401-02 (emphasis added).

¹⁰⁷ *Id.* at 409 (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 409-10.

If one weeds through the dictum and the puzzling discussion of the concept of affirmative action,¹¹¹ the Court's narrow holding is clear:

It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.¹¹²

¹¹¹ The Court, characterizing plaintiff's claim under the HEW regulations as a demand for "affirmative action," observed that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *Davis*, 442 U.S. at 411. The Court's discussion of the concept of affirmative action in conjunction with the requirement to make "reasonable accommodations" has been widely criticized. As one commentator observes:

Unfortunately, the Court's analysis of "accommodation" is confused and contradictory. The Court found that there was no duty of affirmative action in section 504. But affirmative action refers to a remedy for systemic discrimination, and involves a policy of active recruitment of members of a victimized group. Accommodation, on the other hand, refers to the modification of programs, facilities, or operations to allow disabled people to gain access. . . . By confusing these two concepts, the Court unfortunately created the impression that the duty of accommodation is limited.

Rennert, *supra* note 10, at 380 (1988); see also *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) ("[T]he very use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."); Murphy, *supra* note 16, at 1623 ("By mistakenly equating accommodation with affirmative action, the Court seemed to endorse the 'equal treatment' model of discrimination."); Weber, *supra* note 45, at 1113 ("The casual use of the loaded term 'affirmative action' for some modifications of program requirements suggested that courts would require few modifications of any kind."); Wegner, *supra* note 24, at 457 ("[The Davis Court] failed to recognize that 'affirmative action' is a term of art, referring to special steps that may be required to recruit victims of previous discrimination as participants in programs offering employment and educational opportunities. Because section 504 was intended to apply in a broader range of circumstances, it is not surprising that no such reference was included."). The Supreme Court moved decidedly away from this analysis in *Alexander v. Choate*, 469 U.S. 287 (1985). See also Rennert, *supra* note 10, at 386 ("Justice Marshall, writing for a unanimous Court, acknowledged the Davis Court's mistaken use of the term 'affirmative action' in discussing the accommodations required by section 504."); *infra* Section I.C.1.b.

¹¹² *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979); see Olenick, *supra* note 65, at 191 ("Despite the Court's broad pronouncements, the case can be limited to relatively narrow grounds and the unusual factual record presented to the Court."); Wegner, *supra* note 24, at 456 (noting that Court's holding was "rather narrow").

Indeed, in its concluding sentence, the Court reiterated that there was no "showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications imposed."¹¹³

Essentially, the Court found that short of fundamentally altering the standards of Southeastern's nursing program—standards adopted to ensure the safety of the public¹¹⁴—nothing could be done to accommodate plaintiff's disability; hence, there was no violation of the Act.¹¹⁵ Because the Court found that no reasonable modifications could be made to accommodate Ms. Davis, it had no reason to address the question of how much such modifications might cost, or whether such costs could be deemed "reasonable" under the statute.¹¹⁶ Such analysis would have required, at a minimum, an examination of the Act and its legislative history, a careful interpretation of the regulations governing postsecondary education, and a principled resolution of the difficult question whether and under what circumstances cost can constitute a valid defense to charges of discrimination.¹¹⁷ The Court avoided such analysis entirely.

Unfortunately, however, Justice Stevens did *mention* cost in discussing hypothetical situations in which a refusal to

¹¹³ *Davis*, 442 U.S. at 414.

¹¹⁴ See *id.* at 413 n.12 ("Southeastern's program . . . seeks to ensure that no graduate will pose a danger to the public . . . [N]othing in the Act requires an educational institution to lower its standards.").

¹¹⁵ See *Alexander*, 469 U.S. at 300 (1985) ("We held that the college was not required to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, and because the further modifications Davis sought . . . would have compromised the essential nature of the college's nursing program.") (citations omitted); *Dopico*, 655 F.2d at 652 ("In Davis a ruling in the plaintiff's favor would have required a change in the nature of the program, a reconstruction of the college's entire professional training process; in effect, it would have changed the accepted meaning of saying that a person had undergone training as a registered nurse.") (emphasis omitted); Burgdorf, *supra* note 2, at 443 ("The Court concluded that there were no modifications that the college could reasonably make in its program to enable Ms. Davis to participate successfully in the program."); *Olenick*, *supra* note 65, at 185 ("Nothing in the record before the Supreme Court indicates that there were any modifications consistent with section 504 that could have enabled Davis to perform safely and effectively in the nursing program.").

¹¹⁶ See Weber, *supra* note 45, at 1113 ("The school was not asked to demonstrate the real costs of modifying its program or allowing the student to substitute other forms of training experience.").

¹¹⁷ See *supra* notes 51-66 and accompanying text.

accommodate might constitute discrimination under the Act. The relevant passage must be quoted at length in order for the reader to understand the casual, theoretical, and gratuitous context in which the fateful words were set forth.¹¹⁸

It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing *undue financial and administrative burdens* upon a state. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.¹¹⁹

To characterize the Court's reference to "undue financial and administrative burdens" as dictum is to give the statement too much credit.¹²⁰ The issue of financial burdens formed no part of the Court's holding and was certainly not essential to its decision.¹²¹ Furthermore, the Court did not even begin to

¹¹⁸ See Hauben, *supra* note 10, at 174 ("Since the Court spoke in such ambiguous and equivocal terms, the implications of the *Davis* decision are unclear."); Rebell, *supra* note 70, at 1467 (noting the "highly restrictive qualifying phrases contained in [this] passage").

¹¹⁹ *Davis*, 442 U.S. at 412-13 (emphasis added).

¹²⁰ See BLACK'S LAW DICTIONARY 454 (6th ed. 1990) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication."). The Court's reference to "burdens" was not merely "not necessarily involved nor essential to determination of the case in hand," *id.*, but was wholly without support or analysis. See *infra* notes 121-25 and accompanying text. Indeed, Justice Stevens' comment does not even appear to reflect a "rule of law or legal proposition." BLACK'S LAW DICTIONARY, at 454. Rather, as Cook has observed: "This statement may have been only an observation by the Court, intended simply as discourse [T]he passage can fairly be read as simple digression, a reassuring statement for grantees perhaps, that technological advances eventually may make it less burdensome for them to comply with section 504." Cook(I), *supra* note 9, at 1513. If a category of judicial commentary less forceful or binding than obiter dictum were to be established, this passage of Justice Stevens would serve as a fine example.

¹²¹ See *Dopico*, 687 F.2d at 652 ("The central issue in *Davis*, to which questions of expenditures and effort were secondary, was whether 'an educational institution [is required] to lower or to effect substantial modifications of [its] standards to accommodate a handicapped person.'" (citing *Davis*, 442 U.S. at 413) (alteration in original); Cook(I), *supra* note 9, at 1513 ("The discussion of 'burdens' was not necessary to the decision in the case, and thus was pure *obiter dictum*"); Rennert, *supra* note 10, at 391 ("[T]he Supreme Court did not reach this issue until it had

undertake an analysis of the concept of cost in the context of what constitutes a "reasonable accommodation." As we might expect of such a casual dictum, the Court cites no case law or authority for its use of the phrase "undue financial and administrative burdens," which, as noted, does not appear in the Act or in the relevant sections of the HEW regulations.¹²²

There was simply no reason for Justice Stevens to examine the issue of cost¹²³ and potentially to do battle with an otherwise unanimous Court.¹²⁴ Indeed, Justice Stevens mentions neither section 504 nor the HEW regulations in this passage. Had the Court undertaken the appropriate analysis, of course, it would have discovered that neither the plain language of the statute, nor its legislative history, nor the implementing regu-

already decided that only fundamental alterations in the college's nursing program would allow Davis to participate, and that such accommodations were not mandated by section 504."); Wegner, *supra* note 24, at 458 ("Although the Court mentioned the financial and administrative burdens that may arise in accommodation cases, it is clear that [other factors], not cost, were the principal bases for its decision."); Pamela Huessey Simon, Comment, *Employment Discrimination — Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C. L. REV. 535, 555 (1984) ("Under the Court's analysis, however, the accommodation issue was never addressed squarely and the sub-issue of expense never emerged at all.") (emphasis added).

¹²² Compare this dictum with that of the Fourth Circuit, which did cite precedent for precluding cost as a defense to plaintiff's claim. See *supra* notes 103-104 and accompanying text.

¹²³ See Olenick, *supra* note 65, at 184 ("[T]he Court's broader pronouncements on the requirements of section 504 were unnecessary to a resolution of the case and inconsistent with the expressed intentions of Congress.").

¹²⁴ Stevens' decision is replete with confusing and unsupported language. In addition to his discussion of "affirmative action" and his reference to "undue financial and administrative burdens," Stevens raises the issue of discriminatory animus. Specifically, Stevens comments that Southeastern's desire to train persons to perform all customary nursing functions, "far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service." *Davis*, 442 U.S. at 413; see *Rebell*, *supra* note 70, at 1466 ("[A]ssuming sub silentio that intentional discrimination was a relevant factor, the Court emphasized that Southeastern's program and its admission requirements were established for the 'benign purpose' of training persons in professional nursing techniques."). A showing of animus is not, however, necessary to proving a claim under the Act. See *Alexander v. Choate*, 469 U.S. 287, 296-297 (1985) ("[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."); *Rennert*, *supra* note 10, at 368 ("Congress specifically intended the language of the statute to be broad enough to encompass both intentional discrimination and unintentional discrimination.").

lations supports a defense of undue financial burden in the context of postsecondary education.¹²⁵

As we shall see, however, by isolating these words and removing them from their context, both advocates and the courts—including, momentarily, the Supreme Court—have erroneously endowed them with the power of binding precedent.¹²⁶ Thus, Justice Stevens' dictum has been transformed into the seminal holding that, in order to be reasonable, an accommodation for disability must not impose undue financial or administrative burdens.¹²⁷ Notably, the chief culprit in this transformation was the Supreme Court itself.¹²⁸

a. The 1984 DOJ Regulations

In 1984, four years after *Davis*, the DOJ promulgated implementing regulations¹²⁹ pursuant to the 1978 amendments to section 504,¹³⁰ which extended section 504's mandate to prohibit discrimination against the disabled in programs or activities conducted by executive agencies or by the U.S. Postal Service.¹³¹ As a result, the DOJ regulations apply to all programs or activities conducted by the DOJ.¹³² What is noteworthy about the 1984 regulations is that, for the first time, they expressly allow a defense of "undue financial and

¹²⁵ See *supra* Sections I.A. and I.B.

¹²⁶ See *infra* Section I.C.2. and Part III.

¹²⁷ One commentator, discussing *Davis* in the context of public transportation cases decided under the Act, similarly observes:

In *Davis*, the Supreme Court only mentioned the possible costs of accommodation in dicta The central issue in *Davis* was whether section 504 mandated a fundamental alteration in a nursing program to allow a deaf woman to participate. Expenditures and reasonable accommodation were secondary issues that the Supreme Court did not need to decide once it found that only fundamental changes in the nursing program—not reasonable accommodations—would allow *Davis* to participate.

Rennert, *supra* note 10, at 392. The author notes that courts have given significant weight to this dicta in applying *Davis* to the issue of accessible mass transit, "thereby imputing to *Davis* a holding that is not there—that cost is a limitation on the duty to accommodate." *Id.* See generally *Id.* at 391-98. As we shall see, this phenomenon is by no means limited to mass transit. See *infra* Parts III and IV.

¹²⁸ See discussion *infra* Section I.C.2.

¹²⁹ See 28 C.F.R. §§ 39.101-39.170 (1998).

¹³⁰ Pub. L. No. 95-602, § 119, 92 Stat. 2955 (1978); see *supra* note 78.

¹³¹ See 28 C.F.R. § 39.101.

¹³² See *Id.* § 39.102.

administrative burdens" in two specific areas: "Program accessibility: Existing facilities"¹³³ and "Communications."¹³⁴ In both cases, the regulations provide that "where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens," the agency, upon proving that compliance would result in such fundamental alterations or undue burdens, will not be required to take the requested action.¹³⁵ At the outset, it should be noted that this defense of undue burdens is limited to cases involving access to existing facilities and to communications. The regulations governing other areas, including the general prohibitions against discrimination, do not allow for the defense.¹³⁶

The undue burdens language, which HEW clearly eschewed in its regulations,¹³⁷ was taken verbatim from the *Davis* decision.¹³⁸ In fact, in its "Section-by-Section Analysis and Response to Comments,"¹³⁹ the DOJ explained at length that this language was based upon, and indeed, *compelled by* the Supreme Court's decision in *Davis*, and by subsequent lower court decisions.¹⁴⁰ The DOJ asserted:

The "undue financial and administrative burdens" language . . . is based on the Supreme Court's *Davis* holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's *statement* that section 504 does not require modifications that would result in "undue financial and administrative burdens."¹⁴¹

As we have seen, however, the notion that the Supreme Court in *Davis* established a defense based upon undue burdens is

¹³³ *Id.* § 39.150(a)(2).

¹³⁴ *Id.* § 39.160(d).

¹³⁵ *Id.* §§ 39.150(a)(2), 39.160(d).

¹³⁶ See 28 C.F.R. §§ 39.130, 39.140, 39.151 (1998). Cook's assertion that the 1984 regulations "absolved federal agencies from the obligation to take 'any action' which they deem too burdensome," Cook(I), *supra* note 9, at 1512, is thus overstated.

¹³⁷ See *supra* notes 57-66 and accompanying text.

¹³⁸ See *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979); *supra* note 119 and accompanying text.

¹³⁹ 28 C.F.R. pt. 39, at 647-56 (1998).

¹⁴⁰ See *id.* at 657 (judicial interpretation of section 504 in *Davis* and its progeny "compels [the DOJ] to incorporate the new language in the federally conducted regulation").

¹⁴¹ *Id.* at 664 (emphasis added).

simply wrong.¹⁴² This is apparent from the very language that the DOJ employs: the Court's "holding" was that fundamental alterations would not be required; the Court made a "statement" with regard to undue burdens.¹⁴³ The *Davis* Court did not, moreover, state that "section 504 does not require modifications that would result in 'undue financial and administrative burdens.'"¹⁴⁴ As noted, Justice Stevens did not even mention section 504 in the relevant passage.¹⁴⁵

The DOJ's error did not go unnoticed. Section 39.150 of the regulations provoked the largest number of comments received by the DOJ on any single issue.¹⁴⁶ Most of the commentators "sought the deletion of the 'undue financial and administrative burdens' language from the regulation."¹⁴⁷ As the DOJ noted:

Many commentators argued that the Supreme Court's decision in *Davis* did not require inclusion of an undue burdens defense in this regulation. These commentators asserted that the holding in *Davis* was that plaintiff was not a qualified handicapped person and that the subsequent reference to "undue financial and administrative burdens" was mere *dicta*.¹⁴⁸

These commentators also pointed out, *inter alia*, that the DOJ "had not included these provisions when, subsequent to the *Davis* decision, it issued a regulation implementing section 504 in programs receiving Federal financial assistance from this Department."¹⁴⁹

The DOJ responded by arguing that inclusion of the undue burdens language was justified and even compelled by the decision of the District of Columbia Court of Appeals in *Ameri-*

¹⁴² See *supra* notes 118-128 and accompanying text.

¹⁴³ 28 C.F.R. pt. 39, at 664.

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* notes 123-125 and accompanying text.

¹⁴⁶ 28 C.F.R. pt. 39, at 663-64.

¹⁴⁷ *Id.* at 664.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 657. This is a reference to the 1980 DOJ regulations, 28 C.F.R. §§ 42.501-42.540 (1998), which the DOJ promulgated to apply to "each recipient of Federal financial assistance from the Department of Justice and to each program receiving or benefitting from such assistance." *Id.* § 42.502. These regulations largely mirror the HEW regulations and thus provide for a defense based upon "undue hardship," with its concomitant consideration of cost, only in the area of employment. *Id.* § 42.511(c). Like the HEW regulations, these regulations do not even mention "undue financial burdens."

can *Public Transit Association v. Lewis* ("APTA")¹⁵⁰ and two other circuit court decisions interpreting *Davis*.¹⁵¹ The DOJ's reliance upon APTA and its progeny was, however, misplaced. First, APTA, like the two other cases cited by the DOJ, was a mass transportation case.¹⁵² The DOJ provided no analysis or support for its use of this precedent to create limitations in the other areas governed by section 504.¹⁵³

Second, and more importantly, APTA cannot be used to support the DOJ's position, since it, too, erroneously relied on the *Davis* dictum to support the establishment of an undue burden defense.¹⁵⁴ In APTA, the D.C. Circuit argued that the changes that plaintiffs sought "are the kind of burdensome modifications that the *Davis* Court held to be beyond the scope of section 504."¹⁵⁵ Yet, even the DOJ admitted that the *Davis* Court did not "hold" this.¹⁵⁶ As one leading commentator observed, the D.C. Circuit merely "compounded the Supreme Court's mistakes."¹⁵⁷ The other cases cited by the DOJ are similarly unavailing.¹⁵⁸

In short, the 1984 DOJ regulations provide no support for the establishment of a defense based upon undue burden. As we have seen, the regulations were the result of a misplaced reliance upon *Davis* and its progeny.¹⁵⁹ The regulations,

¹⁵⁰ 655 F.2d 1272 (D.C. Cir. 1981).

¹⁵¹ See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490 (1st Cir. 1983).

¹⁵² See *Cook(I)*, *supra* note 9, at 1519 ("The *Lewis* decision invalidated only the mass transit provisions of a Department of Transportation regulation requiring accessible mass transit systems.").

¹⁵³ As *Cook* points out, moreover, where, as here, a rulemaker changes its policy, "[t]he rulemaker is required to give sound reasons for the change." *Cook(I)*, *supra* note 9, at 1522. The DOJ made no attempt, other than its perfunctory and misplaced reliance on *Davis* and APTA, to justify its decision. See *Cook(I)*, *supra* note 9, at 1523.

¹⁵⁴ For an exhaustive critique of the decision in APTA, see *Rennert*, *supra* note 10. For an additional critique of the 1984 DOJ regulations, see *Cook(I)*, *supra* note 9, at 1512-15.

¹⁵⁵ APTA, 655 F.2d at 1278 (emphasis added).

¹⁵⁶ See *supra* note 143 and accompanying text.

¹⁵⁷ *Rennert*, *supra* note 10, at 377; see also *Rennert*, *supra* note 10, at 402 ("[T]he *Lewis* court, relying on the dicta in *Davis*, inappropriately viewed the cost of compliance with the former DOT regulations as a fundamental alteration.").

¹⁵⁸ See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490 (1st Cir. 1983).

¹⁵⁹ Moreover, in *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court

which are expressly limited to programs or activities conducted by the DOJ,¹⁶⁰ are contrary not only to the plain language of the statute but also to Congressional intent and the HEW regulations.¹⁶¹ Furthermore, they contradict numerous other agency regulations, including regulations drafted, like those of the DOJ, after the *APTA* decision.¹⁶² Finally, the DOJ regulations establish an undue burdens defense solely with regard to existing facilities and communications.¹⁶³

The Reagan Justice Department doubtless had ideological reasons for "misreading" the *Davis* decision.¹⁶⁴ Ideology, however, cannot explain the repetition of this error by Justice Brennan and numerous other courts and advocates, which continues to this day.

b. *Alexander v. Choate*

It was not until *Alexander v. Choate*,¹⁶⁵ six years after *Davis*, that the Supreme Court again sought to clarify the meaning of section 504. In *Alexander*, a group of disabled state Medicaid recipients challenged Tennessee's proposal to reduce the number of inpatient days for which the state would reimburse hospitals on behalf of Medicaid patients on a yearly basis. The plaintiffs alleged that, although the proposal was neutral on its face, it would disproportionately affect people with disabilities in violation of the Act.

Although the Court ruled against the plaintiffs, Justice Marshall, writing for a unanimous Court, clearly sought to distance the Court from the narrow language of *Davis*. Justice

cast considerable doubt upon the D.C. Circuit's analysis. The Tenth Circuit based its decision largely upon the Supreme Court's holding in *Davis* that "section 504 does not give federal agencies the power to impose such onerous affirmative burdens on local programs." *APTA*, 655 F.2d at 1277. In *Alexander*, however, the Supreme Court moved away from this holding, establishing that grantees must make reasonable accommodations to avoid discrimination. See *Alexander*, 469 U.S. at 301; *infra* Section I.C.1.b.

¹⁶⁰ See *supra* note 132 and accompanying text.

¹⁶¹ See *supra* Sections I.A. and I.B.

¹⁶² See Wegner, *supra* note 24, at 417 n.42.

¹⁶³ See *supra* note 136 and accompanying text.

¹⁶⁴ See Rennert, *supra* note 10, at 411-12 n.384. Rennert points out that "[t]he Reagan administration opposed the full accessibility requirement of the 1979 DOT regulations" and "attempted] to weaken § 504." *Id.* at 411.

¹⁶⁵ 469 U.S. 287 (1985).

Marshall acknowledged the strong criticism provoked by Justice Stevens' use of the term "affirmative action,"¹⁶⁶ and he made clear that, under section 504, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers [T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."¹⁶⁷ Hence, Marshall indicated that some affirmative steps would be required under section 504. And "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."¹⁶⁸

Once again, financial cost played no part in the Court's decision. The Court did, however, erroneously suggest (in dictum) that, under *Davis*, some degree of *administrative* burden would not be required under the Act. Responding to what it characterized as an argument that recipients should be compelled to evaluate the effect on the disabled of every proposed action that might affect their interests, the Court observed: "The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden."¹⁶⁹ "It should be obvious," the Court added, "that [the] administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*."¹⁷⁰

The Court's allusion to "administrative costs" should not be confused with financial burden: the Court was not faced with, and did not address, a claim involving undue financial burden.¹⁷¹ In establishing the duty to make "reasonable ac-

¹⁶⁶ *Id.* at 300 n.20 ("Our use of the term 'affirmative action' in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation"); see Burgdorf, *supra* note 2, at 431 n.96 ("[T]he Court issued a retraction of its analytic confusion in *Davis*"); *supra* note 111.

¹⁶⁷ *Alexander*, 469 U.S. at 301; see also *id.* at 301 n.21 ("The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access.") (citations omitted).

¹⁶⁸ *Id.* at 300 (citations omitted).

¹⁶⁹ *Id.* at 298.

¹⁷⁰ *Id.* at 308. Once again, the Court provides no analysis or precedent to support this suggestion.

¹⁷¹ See Epstein, *supra* note 17, at 434 ("Although *Davis*, *Alexander*, and *Arline*

commodations," the Court did not recognize a defense based upon financial burden. Rather, the Court held that a grantee need not make "fundamental" or "substantial" modifications, i.e., accommodations that would "compromise[] the essential nature of the . . . program," or effect a "fundamental alteration in the nature of a program."¹⁷² Thus, although the Court ruled in favor of defendant, it nevertheless signaled a desire to broaden—or, more accurately, to restore—the ample protection afforded under section 504. *Alexander* thus constituted a clear departure from the restrictive approach of *Davis*.¹⁷³

2. *School Board of Nassau County, Florida v. Arline*

Eight years after *Davis* and two years after *Alexander*, the Supreme Court again addressed the issue of "reasonable accommodations" under the Act in *School Board of Nassau County, Florida v. Arline*.¹⁷⁴ As in *Davis*, the Court mentioned "undue financial burden" in dictum, this time in a footnote.¹⁷⁵ Unfortunately, however, rather than correcting the confusion created by the *Davis* dictum, Justice Brennan's decision merely compounded the error.

In *Arline*, the Court examined the claim of Gene Arline, an elementary school teacher discharged from her job after suffering a third relapse of tuberculosis in a two-year period.¹⁷⁶ The case raised two basic questions: whether a person with tuberculosis was a "handicapped individual" under the Act and, if so, whether she was "otherwise qualified" to teach elementary

brushed across issues germane to undue hardship, none of those cases involved a claim that accommodating a person with a disability would have been too costly. Those cases addressed administrative burdens, not financial burdens.") (emphasis omitted).

¹⁷² *Alexander*, 469 U.S. at 300 (citations omitted) (internal quotations omitted); see Weber, *supra* note 45, at 1114 ("[The Court] clarified *Davis*' distinction between reasonable accommodation and affirmative action, saying that *Davis* meant to exclude from the requirements of section 504 only fundamental alterations in programs.").

¹⁷³ See Rebell, *supra* note 70, at 1464 ("The contrasts between these two unanimous decisions of the Court . . . are striking . . ."); Weber, *supra* note 45, at 1117 ("[C]ourts have widely recognized that *Choate* expanded the reach of the law, contrary to the suggestions given in *Davis*.").

¹⁷⁴ 480 U.S. 273 (1987).

¹⁷⁵ *Id.* at 288 n.17.

¹⁷⁶ See *id.* at 276.

school. Answering the first question in the affirmative, the Court next addressed the question of whether Ms. Arline was "otherwise qualified." "The basic factors to be considered in conducting this inquiry," the Court explained, "are well established."¹⁷⁷

In a corresponding footnote, the Court explained that when a disabled individual is unable to perform the essential functions of a job, a court must consider whether any reasonable accommodation by the employer would enable the disabled person to perform those functions.¹⁷⁸ Remarkably, citing *Davis*, the Court then explained the "well established" factors to be considered in making this determination: "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, [citing *Davis*], or requires 'a fundamental alteration in the nature of [the] program.'"¹⁷⁹

Thus, eight years after *Davis*, with no directly relevant intervening Supreme Court decisions,¹⁸⁰ the Supreme Court elevated Justice Stevens' unsupported, casual dictum to the level of binding, "well established" precedent. Indeed, the Court cited no authority other than *Davis*—neither case law nor statute nor regulation—for the proposition that an accommodation is not reasonable if it imposes "undue financial or administrative burdens" on a grantee.¹⁸¹ *Arline* is thus a textbook example of the dangers of shoddy research and interpretation—of blindly relying upon a case for a proposition that the case does not and cannot support. Of course, practicing litigators will note that this is commonplace in both state and federal case law. What is astonishing, however, is that the Supreme Court could refer to the *Davis* Court's naked dicta as "well established" without further analysis, and without anyone on the Court catching the error. This is particularly noteworthy, moreover, because Justice Brennan wrote the decision.¹⁸²

¹⁷⁷ *Id.* at 287.

¹⁷⁸ See *id.* at 288 n.17 (citing the relevant regulations promulgated by the Department of Health and Human Services).

¹⁷⁹ *Arline*, 480 U.S. at 288 n.17 (citing, *inter alia*, 45 C.F.R. § 84.12(c) (1985) and 45 C.F.R. pt. 84, app. A, at 315 (1985)).

¹⁸⁰ If anything, *Choate* signaled a willingness to acknowledge and correct the mistakes made in *Davis*, and to distance the Court from *Davis*.

¹⁸¹ Cook(I), *supra* note 9, at 1515 ("The 'undue financial and administrative burdens' language of *Davis* was repeated, again in dictum and without any analysis of its origin, in a footnote in *Arline*.").

¹⁸² Late in his life, Justice Brennan wrote, "[t]o paraphrase Thomas Jefferson,

Justice Brennan was in no way constrained to elevate, or even to mention, the *Davis* dictum. First, cost was not at issue in *Arline*.¹⁸³ Hence, Brennan could have avoided any discussion of financial burden. Second, Brennan, like the other Justices, should have been aware that cost is generally not a defense to a civil rights claim.¹⁸⁴ One would not have expected Brennan—and Marshall—to derogate from this principle, and thus to limit the protections afforded under section 504, based upon Stevens' passing comment in *Davis*.¹⁸⁵ Indeed, in *Choate*, the Court signaled its intention to move away from the *Davis* decision.¹⁸⁶ Unfortunately, however, the entire Supreme Court simply has not conducted the research and analysis necessary to determine and specify the propriety of cost as a defense under section 504.

Despite its erroneous conclusion, *Arline* cemented the *Davis* dicta regarding undue financial burdens into disability case law. Although the *Arline* decision should be limited to the "employment context" in which it was decided,¹⁸⁷ neither *Davis* nor *Arline* drew any distinctions among the various contexts in which Rehabilitation Act claims might be brought, which include employment; program accessibility; preschool, elementary, and secondary education; postsecondary education;

eternal vigilance is the price of liberty and dignity—two of the true measures of freedom." William J. Brennan, Jr., *My Life on the Court*, in REASON AND PASSION 17, 21 (E. Joshua Rosenkranz et al. eds., 1997). Normally the most vigilant of justices, Justice Brennan was, frankly, asleep at the helm on this issue.

¹⁸³ See *supra* note 171 and accompanying text.

¹⁸⁴ See, e.g., COMMISSION, *supra* note 45, at 126 ("Civil rights protections generally are not limited by cost considerations."); Cook(II), *supra* note 9, at 463 ("The Supreme Court recently reaffirmed the principle that the expenditures required to remedy discriminatory conduct cannot abrogate the duty to do so."); Rennert, *supra* note 10, at 391 ("In general, cost is not an excuse for not correcting a situation which violates civil rights, and section 504 is not an exception to the general rule."); Wegner, *supra* note 24, at 448 ("In interpreting antidiscrimination statutes designed to provide increased protection to members of traditionally disadvantaged classes, the courts have limited costs as a ground for denying equal opportunity."); *infra* note 211 and accompanying text.

¹⁸⁵ Justice Brennan's dictum thus also deviated from the established principle of statutory construction that civil rights legislation is to be construed broadly to effectuate its remedial purpose. See *supra* note 34 and accompanying text.

¹⁸⁶ See *supra* note 173 and accompanying text.

¹⁸⁷ *Arline*, 480 U.S. at 288. As we have seen, the HEW regulations did provide for a consideration of "undue hardship" solely in the employment context. See *supra* notes 57-66 and accompanying text.

and health, welfare, and social services.¹⁸⁸ Quite simply, neither court questioned whether Congress intended for the defense of undue cost to be available to defendants in any, let alone all, types of claims.¹⁸⁹ Instead, *Arline's* sweeping citation of *Davis* left the impression that the "standard" articulated was to be applied universally, to cover all claims under the Act. This would prove to be another fateful mistake.¹⁹⁰

II. THE AMERICANS WITH DISABILITIES ACT

In passing the ADA, Congress recognized that, after 17 years, the Rehabilitation Act had failed to live up to its promise.¹⁹¹ The ambiguity of the statute, the paucity of legislative history, and the confusing judicial interpretations that resulted all combined to limit the effectiveness of section 504 of the Act. "Partially because it recognized the problems caused by inconsistent interpretations of the Rehabilitation Act," the Third Circuit has observed, "and intending to broaden coverage, Congress in 1990 enacted the Disabilities Act."¹⁹²

Congress expressly stated that the ADA was intended "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."¹⁹³ The implication, of course, was that the Rehabilitation Act did not fulfill this function, and that the ADA was an attempt to clarify Congress' intentions with regard to the dis-

¹⁸⁸ See *supra* notes 57-66 and accompanying text.

¹⁸⁹ See *supra* note 171 and accompanying text.

¹⁹⁰ See *infra* Part III.

¹⁹¹ Cook(II), *supra* note 9, at 416 ("In the ADA, Congress determined, as apparently did the Executive, that section 504 simply was not working as a means of eradicating discrimination and segregation in this country."); *Americans with Disabilities Act: Hearing Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 195 (1989) (statement of Attorney General Richard Thornburgh) ("Fifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life."); Brandfield, *supra* note 11, at 114 ("Unfortunately, the Rehabilitation Act has not had as substantial an effect on the lives of the handicapped as was hoped."); ADA COMPLIANCE GUIDE ¶ 110 (Thompson Publ'g Group, Inc. 1990 & Supp. Dec. 1992) ("Over time, however, it became evident that more comprehensive coverage than that afforded under the [Rehabilitation Act] would be needed for disabled people to enjoy truly equal protection.").

¹⁹² McDonald v. Pennsylvania, 62 F.3d 92, 94 (3d Cir. 1995).

¹⁹³ 42 U.S.C. § 12101(b)(2) (1994).

abled. In the ADA, then, Congress provided more explicit direction, expressly requiring the promulgation of implementing regulations¹⁹⁴ and, as we shall see, providing guidance on the content of those regulations.¹⁹⁵ The ADA thus "constitutes a second-generation civil rights statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law."¹⁹⁶

Similarly, Congress explicitly indicated that the ADA was intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁹⁷ As one court observed:

It is important to keep in mind that lawmakers made clear that the ADA was *norm-changing legislation*, akin to the legislative turning points in this country's struggle to overcome racial discrimination. President Bush referred to the Act as an "*historic new civil rights Act*." Senator Tom Harkin, the champion of the Act, announced it to be the "*20th century Emancipation Proclamation* for all persons with disabilities," while Senator Dole called it "*the most comprehensive civil rights legislation* our Nation has ever seen." Unlike other legislation designed to settle narrow issues of law, the ADA has a comprehensive reach and should be interpreted with this goal in mind.¹⁹⁸

Consistent with these broad pronouncements, Congress expressly indicated that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title."¹⁹⁹

¹⁹⁴ In Title II of the ADA, Congress expressly required that the DOJ "promulgate regulations in an accessible format that implement this part." 42 U.S.C. § 12134(a) (1994).

¹⁹⁵ See *infra* note 223 and accompanying text.

¹⁹⁶ Burgdorf, *supra* note 2, at 415.

¹⁹⁷ 42 U.S.C. § 12101(b)(1) (1994). Congress similarly stated that the ADA was intended "to invoke 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." *Id.* § 12101(b)(4). Accordingly, the ADA "must be broadly construed to effectuate its remedial purpose." *Lincoln Cerpac v. Health and Hospitals Corp.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (citation omitted); *accord* *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441 n.20 (D. Kan. 1994); see *supra* note 34 and accompanying text.

¹⁹⁸ *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 771 (E.D. Tex. 1996) (citations omitted).

¹⁹⁹ 42 U.S.C.A. § 12201 (West 1995 & Supp. 1999); *accord* ADA COMPLIANCE

"This directive," the Supreme Court recently held, "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."²⁰⁰

Hence, although the two statutes contain many similarities, the ADA is both more comprehensive and more specific.²⁰¹ The protections provided by the Act and by the various implementing regulations provide a floor, but not a ceiling, by which the ADA's protections are to be measured. As Cook explains:

Given Congress's understanding that public officials historically have been among the major perpetrators of segregated services in this country, and given the congressional findings, legislative history, and case law regarding the continued persistency and the stigmatic evils of segregation, Congress would not have simply reenacted without clarification the identical requirements it enacted seventeen years previously to little effect.²⁰²

Unfortunately, however, "most cases involving either section 504 or title II will involve both statutes, inducing the courts to interpret them to achieve a uniform result."²⁰³ As a consequence, despite Congress' rejection of Justice Stevens' reasoning in *Davis*,²⁰⁴ and despite clear implementing regulations to the contrary,²⁰⁵ courts continue erroneously to import the undue burdens language into ADA claims in circumstances under which Congress expressly precluded such a defense.²⁰⁶

Congress was, of course, well aware of the *Davis* decision, and of the conflicting HEW and DOJ regulations, at the time it promulgated the ADA.²⁰⁷ Indeed, in contrast with the Act,²⁰⁸ there is ample legislative history²⁰⁹ to indicate that in draft-

GUIDE, *supra* note 191, at ¶ 122 (Supp. Feb. 1992) ("The ADA does not reduce the scope of coverage or apply a lesser standard than is required by section 504.").

²⁰⁰ *Bragdon v. Abbot*, No. 97-156, 1998 WL 332958, at *6 (U.S. June 25, 1998).

²⁰¹ See, e.g., *Brandfield*, *supra* note 11, at 115 ("[T]he ADA is not an amendment to the Rehabilitation Act, but rather a more comprehensive statute that differs both in scope and effect.").

²⁰² *Cook(II)*, *supra* note 9, at 416.

²⁰³ *Weber*, *supra* note 45, at 1117.

²⁰⁴ See *infra* note 221 and accompanying text.

²⁰⁵ See *infra* Section II.B.

²⁰⁶ See *infra* Part III.

²⁰⁷ See *infra* notes 221-223 and accompanying text.

²⁰⁸ See *supra* notes 21-22 and accompanying text.

²⁰⁹ See *Brandfield*, *supra* note 11, at 126 ("Under the ADA, however, the courts

ing the ADA, Congress specifically considered both the issue of cost and the undue burdens defense.²¹⁰ As Cook convincingly demonstrates, that history reveals that "Congress determined that the benefits of integration far outweighed the costs of compliance with the ADA."²¹¹ This included not merely the societal, moral costs of segregation, but the economic costs as well.²¹² As Senator Edward Kennedy proclaimed:

Some will argue that it costs too much to implement this bill. But I reply, it costs too much to go on without it. We are spending billions of dollars today in the federal budget on programs that make disabled citizens dependent, not independent . . . The short term cost of this legislation is far less than the long-term gain.²¹³

Indeed, the Senate Committee on Labor and Human Resources "heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."²¹⁴ As one witness noted, "[t]he National Council

should more easily be able to interpret the language because it is much more definite and has extensive legislative history.").

²¹⁰ In fact, in introducing the ADA in 1988, Senator Lowell Weicker announced that "the costs associated with this bill are a small price to pay for opening up our society to persons with disabilities." 134 CONG. REC. S5109 (daily ed. Apr. 28, 1988).

²¹¹ Cook(II), *supra* note 9, at 464. See, e.g., 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("[C]osts do not provide the basis for an exemption from the basic principles in a civil rights statute, like the ADA. The mandate to end discrimination must be clear and unequivocal."); *Americans with Disabilities Act of 1989: Hearings Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 184 (1989) (statement of Laura D. Cooper) ("I don't know any other civil rights statute that even has any cost analysis or cost exemptions or cost justifications or cost anything in it.").

²¹² See *The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Education and Employment Opportunities of the Comm. on Education and Labor*, 101st Cong. 38 (1989) (statement of Rep. Martinez) ("It will cost to build the necessary facilities to let people in. It will cost more to lock them out. It will cost us morally. It will cost us money as well.").

²¹³ 135 CONG. REC. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy); see 135 CONG. REC. S10,737 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch) ("It is going to impose a lot of expenses and rightly so. It is time that we did these things. It is time that we brought persons with disabilities into full freedom, economic and otherwise, with other citizens in our society. This bill will do that. In doing so we should be aware that it is going to be costly and it is going to be difficult and that there will be some complaints.").

²¹⁴ *Report of the Senate Comm. on Labor and Human Resources*, S. REP. NO. 101-116, at 16 (1989); see, e.g., 135 CONG. REC. S10,713 (daily ed. Sept. 7, 1989)

on Disability, 15 distinguished Reagan appointed Republicans . . . , studied the problems of people with disabilities for more than three years. They concluded that the cost of discrimination far exceeds the cost of eliminating it."²¹⁵ Congress accordingly concluded that focusing on the costs of compliance by covered entities was totally inappropriate given the economic benefits to society of reducing the deficit by getting people off of welfare, out of institutions, and onto the tax rolls.²¹⁶

(statement of Sen. Harkin) ("Thus, enactment of the ADA will save billions of dollars per year that are currently being expended on social welfare programs."); 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("The economic benefits to society in terms of reductions in the deficit from getting people off welfare, out of institutions, and on to the tax rolls cannot be ignored."); *The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Education and Employment Opportunities of the Comm. on Education and Labor*, 101st Cong., 1st Sess 39 (1989) (statement of Rep. Bartlett) ("[I]f we pass legislation like this that empowers people to be able to control their own lives, there will be a cost savings to the Federal Government and that is true as we give people the chance to be independent to provide for their own employment, their own income, their own housing, their own transportation, that, in fact, would save the taxpayers substantial sums from the alternatives."); *Americans with Disabilities Act of 1989: Hearings Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 78 (1989) (statement of Neil F. Hartigan, Attorney General of Illinois) ("There will be unquestionably major public costs involved in coming into compliance with the Title III requirements for new buses, new railcars, access to stations, and general program access. But there are major public costs involved when society is not accessible for everyone. What we might call that is a 'lost opportunity cost,' and we see it running in the hundreds of millions of dollars."); Statement of President George Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), *reprinted in* REAMS, *supra* note 1 ("And when you add together Federal, State, local, and private funds, it costs almost \$200 billion annually to support Americans with disabilities—in effect, to keep them dependent."); *see also* Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMP. L. REV. 375, 378 (1991) ("Any hardship cost created, however, may well be offset by corresponding gains.").

²¹⁵ *Americans with Disabilities Act of 1989: Joint Hearing Before the House Subcomm. on Select Education and Employment Opportunities*, 101st Cong. 57 (1989) (statement of Mr. Dart); *see* 135 CONG. REC. H2440 (daily ed. May 17, 1990) (statement of Rep. Fish) ("Can the cost of any reasonable accommodation compare to what we are paying to keep qualified people unemployed?").

²¹⁶ *See* 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin); *see Americans with Disabilities Act of 1989: Hearings Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 78 (1989) (statement of Neil F. Hartigan, Attorney General of Illinois) ("Because equal opportunity is an American right and calls for a national policy, it also calls for a commitment of Federal funds."); 135 CONG. REC. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy) ("Vast resources can be saved by making disabled Americans productive Americans.").

Title II of the ADA reflects this sentiment, explicitly limiting the undue burdens defense to discrete circumstances. The following discussion briefly examines Title II and the implementing regulations promulgated by the DOJ. As the discussion indicates, Congress left no doubt of its intention generally to preclude the undue burdens defense in claims brought under Title II.

A. *Title II of the ADA*

Similar to section 504 of the Act,²¹⁷ Title II of the ADA broadly provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."²¹⁸ The chief difference between the statutes is that section 504 applies to all entities that receive federal financial assistance,²¹⁹ whereas Title II covers "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government."²²⁰

Title II also provides greater insight into Congress' intent than section 504, particularly with regard to the issue of cost. Both the statute itself and ample legislative history demonstrate Congress' rejection of Justice Stevens' dictum in *Davis* and a general aversion to the undue burdens defense inadvertently spawned by that dictum. As one commentator explains:

In the legislative history of title II, the congressional committees held out *Choate* as the definitive interpretation of section 504 that it

²¹⁷ See 28 C.F.R. pt. 35, app. A, at 438 (1998) ("[T]he standards adopted in this part are generally the same as those required under section 504 for federally assisted programs."); Weber, *supra* note 45, at 1099 ("Title II's statutory language restates section 504 in its general terms . . .").

²¹⁸ 42 U.S.C.A. § 12132 (West 1995 & Supp. 1999).

²¹⁹ 29 U.S.C. § 794 (1985 and Supp. 1998).

²²⁰ 42 U.S.C.A. § 12131(1) (West 1995 & Supp. 1999); see 28 C.F.R. pt. 35, app. A, at 437-38 (1998) ("Title II of the ADA extends th[e] prohibition of discrimination to include all services, programs, and activities provided or made available by state and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance.").

intended title II to copy. *Davis* does not receive mention. Similarly, a few other cases, all sympathetic to the claims of persons with disabilities, appear as examples of what Congress wanted title II to accomplish. This "selective incorporation" of section 504 case law gives a different cast to title II than that of section 504. Section 504 must live with all the baggage of its past. The congressional committees intended to give title II only some of that baggage, generally that most favorable to persons with disabilities.²²¹

Indeed, Congress specifically concluded that defendants generally should not be permitted to raise an undue burdens defense under Title II. As the House Committee on the Judiciary observed:

While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole The specific sections on employment and program access in existing facilities are subject to the "undue hardship" and "undue burden" provisions of the regulations which are incorporated in Section 204. *No other limitation should be implied in other areas.*²²²

Unlike section 504, moreover, Congress expressly clarified its intent *in the statute itself*:

Except for "program accessibility, existing facilities", and "communications", regulations under [Title II] shall be consistent with this chapter and with the coordination regulations . . . promulgated by [HEW] on January 13, 1978 With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.²²³

²²¹ Weber, *supra* note 45, at 1115-16; accord Cook(II), *supra* note 9, at 428 ("Congress rejected Justice Powell's reasoning in the first Supreme Court case concerning section 504, *Southeastern Community College v. Davis*."); see H.R. REP. NO. 101-485, pt. 2, at 84 (1990) ("[I]t is . . . the Committee's intent that section [12132] also be interpreted consistent with *Alexander v. Choate*."). See generally Cook(II), *supra* note 9, at 428-29.

²²² *Americans with Disabilities Act of 1990: Report of the House Comm. on the Judiciary*, H.R. REP. NO. 101-485, pt. 3, at 50 (1990) (emphasis added). The House Judiciary Committee further noted: "The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title." *Id.*

²²³ 42 U.S.C.A. § 12134(b) (West 1995 & Supp. 1999); see Cook(II), *supra* note 9, at 462 ("As a statutory compromise, Congress adopted the weaker standard permitting waivers for undue burdens and fundamental alterations of programs,

Rather than leave it to the courts, or to an administrative agency, Congress instructed the DOJ to promulgate regulations consistent with the 1978 HEW regulations,²²⁴ with limited exception. As we shall see, the DOJ did precisely that.²²⁵ Under Title II, then, there is no need to deconstruct *Davis* and *Arline*: Congress' rejection of the undue burdens defense is statutorily prescribed.

B. *The Implementing Regulations*

The DOJ regulations, which are entitled to legislative and therefore controlling weight,²²⁶ expressly apply to "all services, programs, and activities provided or made available by public entities."²²⁷ In four separate subparts, the regulations establish general prohibitions against discrimination²²⁸ as

but *only* for those portions of the ADA rules governing 'program accessibility/existing facilities,' and 'communications,' (i.e. architectural and communications barriers). Congress then specified that every other aspect of the public services title was to be governed by the more stringent HEW regulation, which permitted no waiver of obligations based upon cost.").

²²⁴ See *supra* note 51 and accompanying text.

²²⁵ See *infra* Section II.B.

²²⁶ See, e.g., *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996); see also *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) ("Because Title II was enacted with broad language and directed the Department to promulgate regulations . . . , the regulations which the Department of Justice promulgated are entitled to substantial deference."); *supra* note 68 and accompanying text. The Third Circuit has suggested, moreover, that because Congress expressed its approval of the regulations promulgated under section 504 of the Act in enacting the ADA, the DOJ regulations are entitled to even greater force:

The legislative history demonstrates that the congressional committees drafting the Disabilities Act were conversant with regulations previously adopted to implement section 504 of the Rehabilitation Act. Indeed, in certain respects the committee reports borrowed language from some of these regulations in explaining the meaning of the proposed Disabilities Act . . . Consequently, the regulations so utilized have more than usual force in providing guidance for interpretation of the Act.

McDonald v. Pennsylvania, 62 F.3d 92, 95 (3d Cir. 1995); accord *Helen L.*, 46 F.3d at 332-33 ("[Section 35.130(d) of the ADA regulations] is almost identical to the section 504 integration regulation which has been in effect since 1981. As Congress has voiced its approval of that coordination regulation, Section 35.130(d) has the force of law.").

²²⁷ 28 C.F.R. § 35.102 (1998).

²²⁸ *Id.* §§ 35.130-135.

well as specific rules governing employment,²²⁹ program accessibility,²³⁰ and communications.²³¹ Consistent with Congress' intent, the regulations provide for a defense based upon undue financial burden only in limited circumstances.

In the area of employment, the DOJ regulations incorporate "the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41."²³² Thus, public employers need not provide any accommodation that would cause "undue hardship."²³³

The regulations governing program accessibility make a clear distinction between "Existing facilities" and "New construction and alterations."²³⁴ With respect to existing facilities, the regulations do not require a public entity "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."²³⁵ Instead, the regulations require that "each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities."²³⁶ In its section-by-section analysis, however, the DOJ makes clear that "[t]his paragraph does not establish an abso-

²²⁹ See *id.* § 35.140.

²³⁰ See *id.* §§ 35.149-151.

²³¹ See *id.* §§ 35.160-64.

²³² 28 C.F.R. § 35.140(b)(2) (1998).

²³³ *Id.* § 41.53; see Weber, *supra* note 45, at 1102 ("In the area of employment, section 504 and title II apply the same limit to the obligation to provide reasonable accommodation—the employer need not provide an accommodation that would cause undue hardship.").

²³⁴ 28 C.F.R. §§ 35.149-151.

²³⁵ *Id.* § 35.150(a)(3) (emphasis added). The DOJ explains that the concept of "program accessibility" reflected in the regulations stems from the HEW regulations of 1977. *Id.* pt. 35, app. A, at 455. The "undue burdens" language set forth in subsection 35.150(a)(3), however, is "taken from the section 504 regulations for federally conducted programs." *Id.* The latter must refer to the 1984 DOJ regulations, since, it may be recalled, the HEW regulations, which predated the Davis decision, eschewed any mention of "undue financial or administrative burdens." See *supra* notes 51-66 and accompanying text; see also Weber, *supra* note 45, at 1103 ("The title II regulations are somewhat more explicit than those of section 504, however.").

²³⁶ 28 C.F.R. pt. 35, app. A, at 455 ("[T]he program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases."); see 28 C.F.R. § 35.150(a).

lute defense" and that compliance "would in most cases not result in undue financial and administrative burdens on a public entity."²³⁷

By contrast, the regulations governing "New construction and alterations" contain no such defense. Instead, the regulations broadly require that new facilities be "designed and constructed in such manner that the facility or part thereof of the facility is readily accessible to and usable by individuals with disabilities,"²³⁸ and that facilities "be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities"²³⁹

Finally, the regulations governing communications provide for a defense based upon "undue financial and administrative burdens."²⁴⁰ The DOJ explains that, like section 35.150(a)(3), this section "limits the obligation of the public entity to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it."²⁴¹ The establishment of this defense is not, however, "in accordance with *Davis*," but with section 12134(b) of Title II.²⁴² In any event, the DOJ suggests that, like the regulations governing existing facilities, compliance would in most cases not result in undue financial and administrative burdens on a public entity.²⁴³

²³⁷ 28 C.F.R. pt. 35, app. A, at 455. The regulations establish that "a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens." 28 C.F.R. § 35.150(a)(3).

²³⁸ 28 C.F.R. § 35.151(a); see *Kinney v. Yerusalim*, 9 F.3d 1067, 1074 (3d Cir. 1993) ("New construction and alterations, however, present an immediate opportunity to provide full accessibility."); *AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL* § 2:110 (C. Angela Van Etten ed. 1994) ("[I]n contrast to the regulations governing the accessibility of existing facilities, the regulations governing new construction and alterations are substantially more stringent and consequently the undue burden defense is not available in the context of alterations."); Weber, *supra* note 45, at 1104 ("Undue burden operates only as a limit on covered entities' obligations with respect to program accessibility as a whole and the operation of facilities already in existence. Under title II, undue burden does not excuse a failure to make altered or new facilities accessible."); *supra* note 222 and accompanying text.

²³⁹ 28 C.F.R. § 35.151(b); see *Kinney*, 9 F.3d at 1071 ("This obligation of accessibility for alterations does not allow for non-compliance based upon undue burden.").

²⁴⁰ 28 C.F.R. § 35.164 (1998).

²⁴¹ 28 C.F.R. pt. 35, app. A, at 461.

²⁴² See *supra* notes 222-223 and accompanying text.

²⁴³ See 28 C.F.R. pt. 35, app. A, at 461 ("The preamble discussion of § 35.150(a) regarding [the determination whether there is an undue financial or administrative

Pursuant to Congress' explicit instructions, the DOJ regulations provide no other exception based upon undue burden.²⁴⁴ As the Third Circuit explained in *Kinney v. Yerusalim*: "There is no general undue burden defense in the ADA. Rather, following the Section 504 regulations for program access in existing facilities, as Congress intended, the ADA regulations provide for the defense only in limited circumstances."²⁴⁵

To be more specific, all other claims brought under Title II are governed by the standard set forth in section 35.130(b)(7) of the regulations,²⁴⁶ which requires that entities make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications *would fundamentally alter the nature of the service, program, or activity*."²⁴⁷

Congress' intention to limit the undue burdens defense could hardly be clearer. The following section reveals, however, that, notwithstanding this bright line, courts and advocates persist in misapplying this defense.²⁴⁸

burden] is applicable to this section."). The DOJ thus incorporated its discussion of undue burdens with regard to section 35.150(a) into the discussion of section 35.164. See *supra* note 236 and accompanying text. The DOJ also stated that, "[b]ecause of the essential nature of the services provided by telephone emergency systems, the Department assumes that § 35.164 will rarely be applied to § 35.162 [which governs telephone emergency services]." 28 C.F.R. pt. 35, app. A, at 461.

²⁴⁴ See AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 2:110 (C. Angela Van Etten ed. 1994) ("There is no general undue burden defense in the ADA, but only regulations providing for the defense in limited circumstances, as for example in existing facilities and programs.").

²⁴⁵ *Kinney v. Yerusalim*, 9 F.3d 1067, 1074 (3d Cir. 1993).

²⁴⁶ Section 35.130 "establish[es] the general principles for analyzing whether any particular action of the public entity violates this [Title II] mandate." 28 C.F.R. pt. 35, app. A, at 447.

²⁴⁷ 28 C.F.R. § 35.130(b)(7) (1998) (emphasis added).

²⁴⁸ In its section-by-section analysis of section 35.130, the DOJ misleadingly alludes to "undue burden," in the context of communications: "For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program." 28 C.F.R. pt. 35, app. A, at 448. This is misleading because, as we have seen, communications represents one of the only areas in which the DOJ regulations provide for a consideration of undue burden. See *supra* Section II.B.; ADA COMPLIANCE GUIDE, *supra* note 191, at ¶ 850 ("Under the ADA, removing communication barriers is an affirmative step that all state and local governments must take, although their obligation is limited by the 'undue burden' standard."). As Cook explains: "[C]ommunications barriers are the singular statutory and regu-

III. THE COMPOUNDING OF ERRORS: ERRONEOUS APPLICATION OF THE UNDUE BURDENS DEFENSE

There are, unfortunately, numerous examples of improper application of the undue burdens defense, right up to the present day, including the Supreme Court's decision in *Olmstead*.²⁴⁹ This section briefly examines a small number of representative circuit court cases decided prior to *Olmstead*. As the analysis indicates, these cases have adopted the defense as a result of a number of errors, including interpreting the disability statutes identically and simultaneously, failing to read the relevant implementing regulations, citing the wrong regulations, citing the *Davis* and *Arline* dicta as binding precedent (regardless of the factual basis of plaintiff's claim), and citing earlier mischaracterizations of this dicta without analyzing the original source.

In some of these cases, the undue burdens analysis has been dispositive, in others, a contributing factor in defendant's victory. Even in those cases where plaintiffs prevailed, however, the analysis has had at least two deleterious consequences: it has resulted in an unnecessary waste of time and resources for both the court and the parties, and it has created additional unfounded precedent, guaranteeing the further compounding of errors.

This analysis begins with a trio of cases from the Third Circuit, which allow us to trace the successive errors of a single court through the years. In *Nathanson v. Medical College of Pennsylvania*,²⁵⁰ the Third Circuit examined the section 504 claim of Jayne G. Nathanson, a medical school student with disabilities,²⁵¹ who argued that the Medical College of Penn-

latory exception to the general requirement that auxiliary aids and program modifications be provided without regard to financial and administrative burden. However, the Attorney General's discussion unfairly fails to mention this critical caveat." Cook(II), *supra* note 9, at 432 n.271. The DOJ certainly was not attempting, through administrative fiat, to abrogate the express intention of Congress, see *supra* notes 222-223 and accompanying text, or the DOJ's own regulations, which provide for no undue burdens defense. See 28 C.F.R. § 35.130(b)(7). But see Lucille D. Wood, *Costs and the Right to Community-Based Treatment*, 16 YALE L. & POL'Y REV. 501, 505 (1998) ("In this appendix the undue burden defense, and with it the language of costs, creeps in the back door.").

²⁴⁹ See discussion *infra* Part IV.

²⁵⁰ 926 F.2d 1368 (3d Cir. 1991).

²⁵¹ Specifically, Ms. Nathanson suffered from "continuing back and neck injuries"

sylvania ("MCP") had failed reasonably to accommodate her request for closer parking and a straight-back chair.²⁵² Focusing on the concept of "reasonable accommodation," the court explained that "[t]he standard for reasonable accommodation was first set forth in *Southeastern Community College v. Davis*."²⁵³ Citing *Davis*, the court announced that "a recipient's refusal to modify a program may be unreasonable, and therefore a violation of § 504, if the modification would not entail an undue financial or administrative burden."²⁵⁴

This is, of course, a reference to the *Davis* dictum, which, as we have seen, established no such thing.²⁵⁵ In fact, in the very same paragraph, the court acknowledged that the *Davis* majority "found that the defendant nursing program's requirement for certain physical qualifications was legitimate because to change it would *fundamentally alter* the curriculum."²⁵⁶ Unfortunately, however, the court did not endeavor to distinguish between *Davis*' holding and its dictum.

In establishing the undue burdens defense, the Third Circuit relied not merely upon *Davis*, but also upon the implementing regulations promulgated by HEW. Rather than citing the applicable regulations governing "Postsecondary Education,"²⁵⁷ however, the *Nathanson* court cited the HEW regulations governing "Employment Practices."²⁵⁸ The court therefore concluded that a recipient must make reasonable accommodations "unless the recipient can show that the accommodation 'would impose undue hardship on the operation of its program.'"²⁵⁹ Again citing only the regulations governing em-

resulting from an automobile accident. *Id.* at 1370. Among other things, defendant argued that it neither knew nor had reason to know that Ms. Nathanson was disabled, and that Ms. Nathanson never specifically requested the accommodations at issue in the lawsuit. *See id.* at 1382. The Third Circuit remanded the case, *inter alia*, for determination of these disputed facts. *See id.* at 1386-87.

²⁵² *See id.* at 1386.

²⁵³ *Nathanson*, 926 F.2d at 1383 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

²⁵⁴ *Id.* at 1383 (citing *Davis*, 442 U.S. at 412-13).

²⁵⁵ *See supra* Section I.C.1.

²⁵⁶ *Nathanson*, 926 F.2d at 1383 (emphasis added).

²⁵⁷ 45 C.F.R. §§ 84.41-84.47 (1998).

²⁵⁸ *Id.* §§ 84.11-84.14.

²⁵⁹ 926 F.2d at 1385 (quoting 45 C.F.R. § 84.12(a) (1990)). The court added: "We find nothing inconsistent between the regulations and the Supreme Court holdings [in *Davis* and *Alexander*] that we have reviewed." *Id.* By "regulations," the Third

ployment practices, as well as *Nelson v. Thornburgh*,²⁶⁰ an employment case, the court generically asserted that "the regulations" suggest the factors to be considered in determining whether an accommodation would create an undue hardship, including "[t]he nature and cost of the accommodation needed."²⁶¹

The court's reliance upon the employment regulations, rather than the regulations governing postsecondary education, was another serious error. As we have seen, the HEW regulations provide different standards for different factual contexts. In particular, "[e]ducational institutions are not subject to a reasonable accommodation/undue hardship standard, as are employers."²⁶² Failing to distinguish among the various regulations, the *Nathanson* court cited the wrong regulations to establish a defense that does not exist in the context of higher education, namely, that "[a]ccommodations that are 'reasonable' must not unduly strain financial resources."²⁶³

Based upon this erroneous reasoning, the court remanded the case, *inter alia*, for resolution of the "disputed issue of fact whether Nathanson needed 'reasonable' accommodations that would not cause 'undue financial or administrative burdens' or 'impose an undue hardship' upon the functioning of the recipient's program."²⁶⁴ Aside from the fact that the court's errors resulted in the establishment of a significant limitation in the rights of the disabled, both the court and the parties were forced to expend substantial time and money on an irrelevant issue. The court's remand on the issue of cost, moreover, ensured that further time expense would be dedicated to this judge-made defense.

Circuit must have been referring merely to the regulations governing employment practices, rather than the appropriate regulations governing postsecondary education; by "holdings," the court must have been referring merely to dictum. *See supra* Sections I.B. and I.C.

²⁶⁰ 567 F. Supp. 369, 379-80 (E.D. Pa. 1983).

²⁶¹ *Nathanson*, 926 F.2d at 1386.

²⁶² Olenick, *supra* note 65, at 179; *see supra* notes 53-66 and accompanying text.

²⁶³ 926 F.2d at 1386.

²⁶⁴ *Id.* at 1386 (citing *Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Community College v. Davis*, 442 U.S. at 397; 45 C.F.R. § 84.12(a) (1990)). The court's perfunctory reliance upon *Alexander* for this proposition is as puzzling as its citation to *Davis* and the HEW employment regulations.

Three years later, in *Easley v. Snider*,²⁶⁵ the Third Circuit again examined the issue of reasonable accommodation,²⁶⁶ this time under the ADA. In *Easley*, the plaintiffs brought suit challenging the requirement under the Pennsylvania Attendant Care Act ("PACA") that individuals eligible for attendant care be not only disabled but also mentally alert.²⁶⁷ At trial, the plaintiffs provided expert testimony that consumers could and did employ surrogates to help manage attendant caregivers, obviating the need for mental alertness.²⁶⁸ Plaintiffs therefore argued that, with reasonable modifications, they were eligible for attendant services.

The defendant argued that "the right to exercise consumer control" was an essential part of its program, and, since plaintiffs could not themselves exercise such control, they were not otherwise qualified for the services under the ADA.²⁶⁹ The district court ruled for the plaintiffs, finding plaintiffs eligible for attendant care because "the basic services would be the same regardless of the consumer role"²⁷⁰ and noting that defendant "never rebutted why, in practical terms, the state could not amend the act to allow this accommodation [of providing surrogates] to replace the need for the consumer to be able to hire, fire and supervise."²⁷¹

On appeal, the Third Circuit reversed on two grounds. First, the Third Circuit found that plaintiffs sought a modification that would change "the essential nature of the program,"²⁷² which was "to foster independence through consumer control for individuals who, but for their physical disabilities, could manage their own lives."²⁷³ Second, and more importantly for our analysis, the court ruled that the modification

²⁶⁵ 36 F.3d 297 (3d Cir. 1994).

²⁶⁶ Under the relevant DOJ regulations, the precise term is "reasonable modifications." 28 C.F.R. § 35.130(b)(7) (1998). Like many other courts, however, the Third Circuit, in *Easley*, used the terms "reasonable modifications" and "reasonable accommodations" interchangeably. See, e.g., 36 F.3d at 302.

²⁶⁷ See 36 F.3d at 298-99.

²⁶⁸ See *Easley v. Snider*, 841 F. Supp. 668, 676 n.4 (E.D. Pa. 1993), *rev'd*, 36 F.3d 297 (3d Cir. 1994).

²⁶⁹ *Id.* at 676.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 676 n.4 (citation omitted).

²⁷² 36 F.3d at 304.

²⁷³ *Id.*

that plaintiffs sought "would create an undue and perhaps impossible burden on the State."²⁷⁴

Notably, the district court never examined the issue of undue burden; rather, the district court correctly assessed plaintiffs' claim under section 35.130(b)(7) of the DOJ regulations,²⁷⁵ which provides no defense based upon undue burden.²⁷⁶ The district court therefore properly concluded that, to prevail, defendants must prove that the requested modification—the hiring of surrogates—would "fundamentally alter' the program."²⁷⁷ This, the district court found, defendant could not do.²⁷⁸

Disregarding the governing regulations that the district court properly cited, the Third Circuit proceeded to read an undue burdens analysis into the district court decision:

The district court's statement . . . can only be interpreted to mean that unless removing the mental alertness criteria would be an unreasonable accommodation, i.e., "would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds," the State would have to drop the requirement.²⁷⁹

The Third Circuit posited that the district court must have so concluded based upon the Third Circuit's erroneous conclusion that "[t]he test to determine reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall

²⁷⁴ *Id.* at 305.

²⁷⁵ 28 C.F.R. § 35.130(b)(7) (1998).

²⁷⁶ See *supra* notes 244-248 and accompanying text.

²⁷⁷ 841 F. Supp. at 676 n.4.

²⁷⁸ *Id.* ("I find that the use of surrogates would be a reasonable accommodation to the Attendant Care Program, and that the experience of caregivers and consumers reveals that it would not 'fundamentally alter' the program.")

²⁷⁹ 36 F.3d at 302. Here, the Third Circuit was quoting *Strathie v. Department of Transportation*, 716 F.2d 227, 231 (3d Cir. 1983), a transportation case decided under the Act seven years before the passage of the ADA, and eight years before the promulgation of the DOJ regulations that should have governed the *Easley* plaintiffs' ADA claim. *Strathie* erroneously derived its undue burdens language, moreover, from the dictum in *Davis* and, as in *Nathanson*, from *Nelson v. Thornburgh*, 567 F. Supp. 369, 379-82 (E.D. Pa. 1983), an employment case. See *Strathie*, 716 F.2d at 230 (Under *Davis*, "requiring accommodation is unreasonable if it would place undue burdens, such as extensive costs, on the recipient of federal funds.") (citing *Davis*, 442 U.S. at 412; *Nelson*, 567 F. Supp. at 379-82); see also *supra* notes 254-258.

program.²⁸⁰ For this conclusion, the Third Circuit cited three sources: (1) Justice Brennan's inaccurate and inapposite dictum set forth in a footnote in *Arline*,²⁸¹ an employment case; (2) *Alexander*,²⁸² which does not even mention undue burdens on the page cited²⁸³ and certainly established no such test,²⁸⁴ and (3) *Nathanson*,²⁸⁵ the foibles of which we have just reviewed.²⁸⁶

Easley thus perfectly illustrates the compounding of multiple errors to construct an analysis that Congress expressly precluded. And indeed, *Easley* was in large measure based upon the Third Circuit's determination that the modification requested "would create an undue and perhaps impossible burden on the State."²⁸⁷ Compare this outcome with the district court's decision, which correctly eschewed any examination of undue burdens and ruled in plaintiffs' favor.²⁸⁸

Finally, in *Juvelis v. Snider*,²⁸⁹ the Third Circuit examined the section 504 claim of Nikitas Juvelis, "a profoundly retarded individual," which challenged the Pennsylvania Department of Welfare's requirement of "intent to establish domicile" in order to be eligible for mental retardation services.²⁹⁰ Because Mr. Juvelis was a minor before his placement in Pennsylvania facilities, he was deemed a resident of his parents' domicile, Venezuela. Mr. Juvelis lacked the mental capacity to form an intent to remain in Pennsylvania as an adult, and thus sought an exception to the residency policy as a reasonable accommodation of his disability.²⁹¹

Citing *Easley*, the Third Circuit announced that "[t]he test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue

²⁸⁰ 36 F.3d at 305 (citations omitted).

²⁸¹ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987); see *supra* Section I.C.2.

²⁸² See *Alexander v. Choate*, 469 U.S. 287 (1985).

²⁸³ See *id.* at 300.

²⁸⁴ See *supra* Section I.C.1.b.

²⁸⁵ See *Nathanson v. Medical College of Pa.*, 926 F.2d 1368 (3d Cir. 1991).

²⁸⁶ See *supra* notes 250-264 and accompanying text.

²⁸⁷ See *Easley*, 36 F.3d at 305.

²⁸⁸ See *Easley*, 841 F. Supp. 668.

²⁸⁹ 68 F.3d 648 (3d Cir. 1995).

²⁹⁰ *Id.* at 651.

²⁹¹ See *id.* at 651-52.

burden or hardship in light of the overall program."²⁹² The Third Circuit neither cited nor analyzed the relevant HEW regulations governing public benefits and services,²⁹³ nor did it refer to the Supreme Court cases cited by the court in *Easley*. Instead, the court relied solely upon *Nathanson*²⁹⁴ for the proposition that "[a]ccommodations that are 'reasonable' must not unduly strain financial resources."²⁹⁵

As we have seen, both *Easley* and *Nathanson* erroneously constructed an undue burdens defense where none was applicable,²⁹⁶ with the *Easley* decision relying upon the flawed *Nathanson* decision. By relying on those cases instead of the relevant HEW regulations, the *Juvelis* court failed to discover its errors, creating more bad precedent. Fortunately, notwithstanding the undue burdens analysis, the *Juvelis* court ultimately ruled in plaintiff's favor, finding that the defendant "failed to prove that a modification of its policy to allow [plaintiff] to show a change of domicile to Pennsylvania [from Venezuela] would be unduly burdensome."

Nonetheless, *Juvelis* further entrenched the Third Circuit's blind adoption of the undue burdens defense under both section 504 and the ADA. And, as *Juvelis* itself demonstrates, once a court creates a generic undue burdens defense, it is unlikely to question or revisit its earlier interpretation.

The Third Circuit is not alone. In the Eighth Circuit case of *Gorman v. Bartch*,²⁹⁷ Jeffrey Gorman, a paraplegic who used a wheelchair, was injured while being transported by the Kansas City police following his arrest. The police wagon was not equipped with a wheelchair lift or wheelchair restraints. Nevertheless, and despite Mr. Gorman's request for reasonable

²⁹² *Id.* at 652 (quoting *Easley*, 36 F.3d at 305).

²⁹³ Plaintiff's claim under section 504 should have been governed by the regulations governing "Health, Welfare, and Social Services," which provide no undue burdens defense. See *supra* notes 46-66 and accompanying text.

²⁹⁴ *Nathanson v. Medical College of Pa.*, 926 F.2d 1368 (1991).

²⁹⁵ 68 F.3d at 657 (quoting *Nathanson*, 926 F.2d at 1368) (internal quotations omitted). The court also referenced another Third Circuit case, *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002 (3d Cir. 1995). Interestingly, *Wagner* erroneously relied upon five of the cases we have examined—*Davis*, *Arline*, *Nathanson*, *Easley*, and *Strathie*—to create an undue burdens defense in a case challenging denial of admission to a county-operated nursing facility. See *id.* at 1009-17.

²⁹⁶ See *supra* notes 250-288 and accompanying text.

²⁹⁷ 152 F.3d 907 (8th Cir. 1998).

accommodations, the police simply lifted him out of his wheelchair and placed him on a bench inside of the van. The police then used Mr. Gorman's belt to fasten him to the wall behind the bench and placed a seatbelt around his waist.²⁹⁸ During the drive to the station, the belts came loose, and Mr. Gorman fell to the floor, suffering extensive injuries.²⁹⁹

Mr. Gorman brought suit alleging discrimination under section 504 and Title II of the ADA. Examining section 504 first, the Eighth Circuit set forth the prerequisites to a section 504 claim and then broadly announced that "[d]efendants may demonstrate as an affirmative defense that a requested accommodation would constitute an undue burden."³⁰⁰ For this proposition, the court relied upon two sources: section 794a(a)(1)³⁰¹ and the case of *Barth v. Gelb*.³⁰² Naturally, neither of these sources supports this assertion. Section 794a(a)(1) merely provides that the remedies, procedures, and rights under the Civil Rights Act of 1964 shall be available "to any employee or applicant for employment."³⁰³ The section further provides that, in fashioning an "affirmative action" remedy under section 791 of the Rehabilitation Act, "a court may take into account the reasonableness of the cost of any necessary work place accommodation"³⁰⁴ Thus, the section is wholly inapplicable to *Gorman*, a case involving public benefits and services.³⁰⁵ The same is true of *Barth*, an employment discrimination case.³⁰⁶

Turning to the ADA, the court first explained that cases interpreting either section 504 or the ADA "are applicable and interchangeable," an indication of the reasoning that would follow. The court explained that "defendants may also raise as an affirmative defense that the requested accommodation of the plaintiff's disability would constitute an undue burden,

²⁹⁸ See *id.* at 909-10.

²⁹⁹ See *id.* at 910 ("The fall injured his shoulders and back severely enough to require surgery and also broke his urine bag, leaving him soaked in his own urine.").

³⁰⁰ *Id.* at 911 (citations omitted).

³⁰¹ 29 U.S.C.A. § 794a(a)(1) (West 1985 & Supp. 1998).

³⁰² 2 F.3d 1180 (D.C. Cir. 1993).

³⁰³ 29 U.S.C. § 794a(a)(1) (emphasis added).

³⁰⁴ *Id.* (emphasis added).

³⁰⁵ See *Gorman*, 152 F.3d at 912-13.

³⁰⁶ See *Barth*, 2 F.3d at 1180.

requiring 'a fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens."³⁰⁷ For support, the court cited only the DOJ regulations governing program accessibility/existing facilities.³⁰⁸

Although these regulations do indeed establish a defense based upon undue burden, they are inapplicable to Mr. Gorman's public benefits/services claim. The court should have examined the "[g]eneral prohibitions against discrimination,"³⁰⁹ which rightfully governed Mr. Gorman's claim. These regulations provide no defense based upon undue burden, as Congress expressly intended.³¹⁰ The court later identified and applied the appropriate DOJ regulations to Mr. Gorman's claim,³¹¹ but nevertheless insisted upon importing the undue burdens defense from the wholly inapplicable regulations governing accessibility to existing buildings. As a result, the court remanded the case to the district court, explicitly stating that "the defendants can also raise issues of reasonable accommodation and undue burden."³¹²

In *Onishea v. Hopper*,³¹³ HIV-positive inmates brought suit under section 504 challenging the policy of the Alabama Department of Corrections ("DOC") to exclude them from participating in most of the educational, vocational, rehabilitative, religious, and recreational programs offered in Alabama state prisons.³¹⁴ DOC contended that high-risk behavior such as anal intercourse, sharing drug needles, and tattooing could occur during any of these programs without proper supervision, which created the possibility of transmission of the HIV virus and justified the exclusion of HIV-positive inmates.³¹⁵ The plaintiffs alleged that the DOC's concerns could be avoided by simply hiring additional corrections officers, and, in some cases, a single officer.³¹⁶

³⁰⁷ *Id.* (citing 28 C.F.R. § 35.150(a)(3) (1998)).

³⁰⁸ *See id.*

³⁰⁹ 28 C.F.R. § 35.130 (1998).

³¹⁰ *See id.*

³¹¹ *See* 152 F.3d at 913 (citing 28 C.F.R. § 35.130(b)(1) (1998)).

³¹² *Id.* at 916.

³¹³ 126 F.3d 1323 (11th Cir. 1997), *rev'd en banc and vacated*, 133 F.3d 1377 (11th Cir. 1998), *different results reached on reh'g*, 171 F.3d 1289 (11th Cir. 1999).

³¹⁴ *See id.* at 1323-24.

³¹⁵ *See id.* at 1344 (Cox, J., concurring in part and dissenting in part).

³¹⁶ *See id.* at 1338.

Onishea, of course, had nothing to do with employment, the only area in which the 1980 DOJ regulations cited by the court allow for an "undue hardship" analysis.³¹⁷ Citing both *Alexander* and Justice Brennan's footnote in *Arline*, however, the Eleventh Circuit observed that "[a] proposed accommodation . . . need not be implemented if it would impose an undue fiscal or administrative burden upon the recipient of federal funds or would require the grantee fundamentally to alter its program."³¹⁸ To compound this error, the court added that "[t]he reasonable accommodation and undue burden inquiries overlap somewhat, and their precise contours are difficult to chart."³¹⁹ In truth, these concepts overlap only in the context of employment under the DOJ regulations.³²⁰

By ignoring the distinctions that HEW and, subsequently, DOJ carefully crafted in the implementing regulations, the Eleventh Circuit nakedly conflated the distinct regulations, citing the 1980 DOJ employment regulations to justify its undue burdens analysis³²¹ and noting in an accompanying footnote: "Although this [undue burdens] provision is located in a section of the Department of Justice's Rehabilitation Act regulations titled 'Employment,' the first and third factors it suggests are equally relevant to evaluating whether an accommodation would be an undue burden in a non-employment case."³²² With this footnote, the careful distinctions drawn by the HEW and, subsequently, the DOJ are summarily abrogated, and a defense that they explicitly rejected, save in limited circumstances, is grafted on to section 504.

Applying the undue burdens analysis, the court vacated the district court's perfunctory finding that "any expenditure

³¹⁷ See *supra* note 57 and accompanying text.

³¹⁸ *Onishea*, 126 F.3d at 1328 (citing *Alexander*, 469 U.S. at 299-302; *Arline*, 480 U.S. at 287 n.17).

³¹⁹ *Id.* (citations omitted). For this proposition, the court relies upon *Davis, Borkowski v. Valley Central School District*, 63 F.3d 131 (2d Cir. 1995), an employment case, and *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), which, citing *Davis*, states in a footnote: "[*Davis*] possibly indicates that section 504 does not require the provision of services that would impose 'undue financial and administrative burdens' upon the recipient." 625 F.2d at 564 n.19 (citation omitted) (emphasis added).

³²⁰ See *supra* notes 57-66 and accompanying text.

³²¹ See *Onishea*, 126 F.3d at 1339 (citing 28 C.F.R. § 42.511(c) (1998)).

³²² *Id.* at 1339 n.29.

by DOC to hire additional staff would be an 'undue burden.'³²³ The court remanded the case, however, for a more definite assessment of the cost of the requested accommodations, "leav[ing] open on remand the possibility that sufficient evidence may be adduced as to the unreasonableness of adding even a single guard"³²⁴

In *Pottgen v. Missouri State High School Activities Ass'n*,³²⁵ Edward Leo Pottgen, a high school senior with a learning disability, brought suit under section 504 and Title II of the ADA challenging defendant's refusal to waive its age limitation for participation in interscholastic sports.³²⁶ Mr. Pottgen petitioned defendant for a hardship exception since he was held back due to his learning disabilities, but defendant denied his petition.³²⁷

Examining Mr. Pottgen's section 504 claim first, the court ruled that "the age limit is an essential eligibility requirement in a high school interscholastic program."³²⁸ Among other things, the court noted that the age limit "helps reduce the competitive advantage flowing to teams using older athletes" and "protects younger athletes from harm."³²⁹ "Even though [Mr.] Pottgen [could not] meet this essential eligibility requirement," the court continued, "he is 'otherwise qualified' if reasonable accommodations would enable him to meet the age limit."³³⁰

The court did not look to the governing regulations to determine the scope of defendant's obligation to accommodate plaintiff. Instead, the court cited Brennan's footnote in *Arline*, explaining that "[a]ccommodations are not reasonable if they impose 'undue financial and administrative burdens' or if they require a 'fundamental alteration in the nature of [the] program.'"³³¹ Based upon this standard, the court concluded that

³²³ *Id.* at 1339.

³²⁴ *Id.*

³²⁵ 40 F.3d 926 (8th Cir. 1994).

³²⁶ *See id.* at 927.

³²⁷ Pottgen played interscholastic baseball for three years in high school and intended to play in his senior year as well. *See id.* at 928. Because he turned 19 shortly before his senior year, however, he was deemed ineligible. *See id.*

³²⁸ *Id.* at 929.

³²⁹ *Pottgen*, 40 F.3d at 929.

³³⁰ *Id.* (citations omitted).

³³¹ *Id.* at 930 (quoting *Arline*, 480 U.S. at 287 n.17) (alteration in original).

Mr. Pottgen was not "otherwise qualified" under section 504 because waiving the age limit "would constitute a fundamental alteration in the nature of the baseball program."³³² Hence, although the court erroneously cited *Arline* to create an undue burdens defense, the court rejected Pottgen's section 504 claim based upon the "fundamental alteration" standard.

Turning to Mr. Pottgen's ADA claim, the court revealed, for the first time in the decision, the modification that Mr. Pottgen sought: "an individualized inquiry into the necessity of the age limit in Pottgen's case."³³³ As the dissent pointed out, such an inquiry would have revealed that Mr. Pottgen was not a threat to the safety of others and that "any competitive advantage resulting from plaintiff's age is *de minimis*."³³⁴ For this reason, the dissent concluded that "[i]f an eligibility requirement can be reasonably modified to make someone eligible, that person is a qualified individual."³³⁵

The majority rejected this interpretation upon a pure undue burdens analysis:

The dissent's approach requires thorough evidentiary hearings at each stage of the process. Clearly the ADA imposes no such duty. Indeed, such an approach flies in the face of the *Arline* Court's statement that "[a]ccommodation is not reasonable if it either imposes 'undue financial and administrative burdens' [on the public entity] or requires 'a fundamental alteration in the nature of [the] program.'"³³⁶

Because the court apparently never consulted the governing regulations, accepted the *Arline* dictum as binding precedent, and applied this dictum from an employment case to a case involving secondary education, the court concluded that the dissent's approach "flies in the face" of the law.³³⁷ Ironically, it is the majority's creation of an undue burden defense, and its rejection of plaintiff's ADA claim thereupon, that flies in the face of the law.³³⁸

³³² *Id.*

³³³ *Id.*

³³⁴ *Pottgen*, 40 F.3d at 932 (Arnold, C.J., dissenting) (quoting *Pottgen v. Missouri St. High Sch. Activities Ass'n*, 857 F. Supp. 654, 662 n.3 (E.D. Mo. 1994)).

³³⁵ *Id.* at 933.

³³⁶ *Id.* at 931 (quoting *Arline*, 480 U.S. at 287 n.17) (alterations in original) (citations omitted).

³³⁷ *Id.*

³³⁸ Rather than fear the deleterious effects of narrowly construing plaintiff's civil

In *McPherson v. Michigan High School Athletic Ass'n*,³³⁹ the Sixth Circuit rejected the claim of Dion R. McPherson that, under section 504 and Title II of the ADA, he was entitled to a waiver of an eight-semester athletic eligibility rule. Like the Eighth Circuit in *Pottgen*, the Sixth Circuit relied solely upon the *Arline* dictum for the proposition that defendant need not "grant a waiver [that] would 'impose[] undue financial and administrative burdens . . . , or require[] a fundamental alteration in the nature of the program.'"³⁴⁰ Disregarding the legislative history of the ADA, the express mandate of section 12134 of the ADA, and the implementing regulations, the court explained: "most of the law that has been made in ADA cases has arisen in the context of employment discrimination claims, but we have no doubt that the decisional principles of these cases may be applied to this case."³⁴¹ One wonders why Congress, the HEW, and the DOJ even bothered to "assign[] different legal consequences to the costs of accommodation in different societal areas."³⁴²

Having adopted the *Arline* dictum, the court concluded that requiring a waiver would not only "work a fundamental alteration,"³⁴³ but "would impose an immense financial and administrative burden on the [defendant], by forcing it to make 'near-impossible determinations' about a particular student's physical and athletic maturity."³⁴⁴ This burden alone, the court announced, "necessarily means that the plaintiff's requested accommodation is not reasonable."³⁴⁵

rights claims, the court appeared far more concerned with the potential expense "for each individual seeking to *attack* a program requirement." *Id.* at 931 (emphasis added). The court's decision thus flies in the face of Congress' express intention largely to preclude cost-based defenses, *see supra* Section II.A., the implementing regulations, which provide no defense based upon undue burdens in education, *see supra* Section II.B., and established principles of statutory construction. *See supra* notes 34, 184, 197 and accompanying text.

³³⁹ 119 F.3d 453 (6th Cir. 1997).

³⁴⁰ *Id.* at 461 (quoting *Arline*, 480 U.S. at 287 n.17) (second and third alterations in original) (citation omitted).

³⁴¹ *Id.* at 460.

³⁴² COMMISSION, *supra* note 45, at 103. *See, e.g., supra* notes 46-50 and accompanying text.

³⁴³ 119 F.3d at 462.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 463.

Finally, in *Davis v. Francis Howell School District*,³⁴⁶ the Eighth Circuit rejected the claim of Mary and Bobby Davis that the defendant's refusal to administer their son's prescribed dose of medication violated Title II of the ADA and section 504 of the Act.³⁴⁷ Unlike *Pottgen* and *McPherson*, the court in *Francis Howell* correctly cited the DOJ's general prohibitions against discrimination, which contain only the fundamental alteration standard.³⁴⁸ Citing both *Pottgen* and *McPherson*, however, the court grafted an undue burdens defense on to the law.³⁴⁹ This error proved critical, for the court rejected plaintiff's claim based upon the undue burdens defense: "The Davises' alternative proposal that the district waive its policy is not reasonable because it would impose undue financial and administrative burdens on the district by requiring it to determine the safety of the dosage and the likelihood of future harm and liability in each individual case."³⁵⁰ *Davis* gave birth to *Arline*, which spawned *Pottgen* and *McPherson*, leading to *Francis Howell*. Bad decisions make bad decisions.

IV. *OLMSTEAD V. ZIMRING*

Coincidentally, as this article was being prepared, the Supreme Court ruled for the first time on the issue of cost under Title II of the ADA in *Olmstead v. Zimring*.³⁵¹ Unfortunately, the Supreme Court once again got it wrong. This time, however, the Court did not do so merely in dictum, and it did not do so by directly following *Davis* or *Arline*.³⁵² Rather, following the lower court's lead, the Court created a novel yet equally improper cost-based defense by erroneously conflating the undue burdens and fundamental alteration defenses under the DOJ regulations and by citing the wrong regulations.

³⁴⁶ 138 F.3d 754 (8th Cir. 1998).

³⁴⁷ See *id.* at 755.

³⁴⁸ See *id.* at 756 (citing 28 C.F.R. § 35.130(b)(7) (1998)).

³⁴⁹ See *id.* at 756-57.

³⁵⁰ *Id.* at 757 (citations omitted).

³⁵¹ 119 S. Ct. 2176 (1999).

³⁵² Interestingly, the Court did not even cite *Davis* or *Arline*. The Court did, however, largely follow the Eleventh Circuit's reasoning. The Eleventh Circuit, in turn, based its cost-based defense on another Eleventh Circuit case that erroneously cited *Davis* for this proposition. See *infra* notes 364-370 and accompanying text.

In *Olmstead*, plaintiffs alleged that the State of Georgia violated their rights under Title II of the ADA by failing to place them in community-based programs once their treating professionals determined that such placement was appropriate.³⁵³ In particular, plaintiffs alleged that defendant violated section 35.130(d) of the DOJ regulations, which provides: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."³⁵⁴ Among other things, the defendant responded that the plaintiffs' ADA claim must fail because the denial of community-based placement was based on a lack of funds, not on plaintiffs' disabilities.³⁵⁵

Granting summary judgement in favor of the plaintiffs, the district court found that the defendant's failure to place the plaintiffs in an appropriate community-based program, rather than confining them in a state hospital, violated Title II of the ADA. The court also ruled that "the denial of community placements could not be justified by the State's purported lack of funds"³⁵⁶ In affirming, the Eleventh Circuit correctly observed that "[t]he State's argument that its lack of funds makes its refusal to provide integrated services non-discriminatory is inconsistent with the ADA's statutory scheme and would permit a public entity to justify its refusal to comply with the ADA by asserting that it lacked the money to do so."³⁵⁷ "Moreover," the court explained, "the plain language of the ADA's Title II regulations, as well as the ADA's legislative history, make clear that Congress wanted to permit a cost defense only in the most limited of circumstances."³⁵⁸

The Eleventh Circuit even cited the correct DOJ regulations, explaining that under section 35.130(b)(7), a state may justify its failure to make reasonable modifications only when those modifications "would fundamentally alter the nature of the service, program, or activity."³⁵⁹ In addition, the court cited the House Judiciary Report on the ADA, which states:

³⁵³ See *Olmstead*, 119 S. Ct. at 2178.

³⁵⁴ 28 C.F.R. §35.130(d) (1998).

³⁵⁵ *Zimring v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998).

³⁵⁶ *Id.* at 895.

³⁵⁷ *Id.* at 902.

³⁵⁸ *Id.*

³⁵⁹ *Id.* (quoting 28 C.F.R. § 35.130(b)(7) (1998)).

“The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 . . . or under this title”³⁶⁰ Finally, the court explained that, “[u]nder the ADA, as with other federal statutes, ‘inadequate state appropriations do not excuse noncompliance’ with federal law.”³⁶¹ It appeared, then, that the Eleventh Circuit was correctly rejecting a cost-based defense under the “plain language” of the DOJ regulations and the “clear” legislative history.³⁶²

Anomalously, however, on the final page of its decision, the Eleventh Circuit ruled that the district court improperly failed to consider “whether treating [plaintiffs] would require additional expenditures, and if so, whether the State had met its burden of proving that those expenditures were unreasonable in light of the State’s mental health budget.”³⁶³ The only authority the court cited for an examination of this “burden” was *United States v. Board of Trustees for the University of Alabama*,³⁶⁴ a secondary education case in which plaintiff sought accommodations in the provision of auxiliary aids and transportation under section 504. Although the court in *Board of Trustees* ruled for the plaintiff, it nevertheless erroneously applied the “undue financial or administrative burdens” defense in assessing plaintiff’s claim for interpreters³⁶⁵ and lift-equipped bus service.³⁶⁶ As we have seen, the relevant HEW regulations governing secondary education do not provide for a defense based upon “undue financial and administrative burdens.”³⁶⁷ The court did not, however, consult the applicable

³⁶⁰ *Olmstead*, 138 F.3d at 902 (quoting H.R. REP. NO. 101-485, pt. 3, at 50 (1990)); see *supra* note 222.

³⁶¹ *Olmstead*, 138 F.3d at 904 (quoting *Alabama Nursing Home Ass’n v. Harris*, 617 F.2d 388, 396 (5th Cir. 1980)) (other citations omitted).

³⁶² *Id.* at 902.

³⁶³ *Id.* at 905.

³⁶⁴ 908 F.2d 740 (11th Cir. 1990).

³⁶⁵ See *id.* at 748.

³⁶⁶ See *id.* at 751.

³⁶⁷ See 34 C.F.R. §§ 104.31-104.47 (1998); *supra* notes 46-66, 262-263 and accompanying text.

regulations in establishing this defense; instead, it blindly cited *Davis* and, even more improbably, *Alexander*,³⁶⁸ for this defense.³⁶⁹

In *Olmstead*, then, the Eleventh Circuit repeated its error in *Board of Trustees*, this time citing only that decision, and neither *Davis* nor *Alexander* (nor, for that matter, the controlling regulations) for the establishment of a cost-based defense in the area of public benefits and services, this time under the ADA. Thus, after expressly recognizing that "Congress wanted to permit a cost defense only in the most limited circumstances," the court completely failed to recognize that those circumstances do not include public benefits and services claims under Title II of the ADA.³⁷⁰

Of even greater significance, the court confounded the undue financial burdens and fundamental alteration defenses set forth in the DOJ regulations: "Unless the State can prove that requiring it to make these additional expenditures would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures."³⁷¹ The court then remanded the case for, *inter alia*, consideration of the question: "whether the additional expenditures . . . would be unreasonable given the demands of the State's mental health budget."³⁷² Citing only *Board of Trustees*, a flawed secondary education case brought under section 504 (rather than the ADA), the Eleventh Circuit thus grafted an undue financial burdens defense onto the district fundamental alteration defense under the ADA, notwithstanding Congress' and the DOJ's explicit rejection of a cost-based defense in public benefits and services claims under Title II (and notwithstanding decades of clear distinction between these defenses).

The Supreme Court compounded the Eleventh Circuit's error. Writing for the majority, Justice Ginsburg accepted and even amplified the cost-based defense that the Eleventh Cir-

³⁶⁸ See *supra* note 264.

³⁶⁹ See 908 F. 2d at 751 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Alexander v. Choate*, 469 U.S. 287 (1985)).

³⁷⁰ See *infra* notes 393-394 and accompanying text.

³⁷¹ *Zimring v. Olmstead*, 138 F.3d 893, 905 (11th Cir. 1998).

³⁷² *Id.*

cuit fabricated under section 35.130(b)(7) of the DOJ regulations. Indeed, the Court held that the Eleventh Circuit's remand as to cost was "unduly restrictive," since it only permitted consideration of the cost of providing community-based care to the litigants.³⁷³ "In evaluating a State's fundamental-alteration defense," the Court ruled, "the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."³⁷⁴

The Court did not rely on any authority for this novel and unsupported defense. The Court never questioned the Eleventh Circuit's authority to erect this defense under section 35.130(b)(7) of the DOJ regulations,³⁷⁵ and the Court never examined *Board of Trustees*,³⁷⁶ the case upon which the Eleventh Circuit premised its consideration of cost in *Olmstead*. Furthermore, the Court ignored the unequivocal legislative history evincing Congress' intent to preclude a cost-based defense in public benefits and services claims under Title II. The Court likewise completely ignored the overall scheme of the DOJ regulations, which expressly distinguish between the undue financial burdens defense and the fundamental alteration defense, conspicuously omitting the former in section 35.130(b)(7).

Consider, for example, section 35.150(a)(3), the parallel regulation governing program accessibility to existing facilities. It expressly provides that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."³⁷⁷

³⁷³ *Olmstead v. Zimring*, 119 S. Ct. 2176, 2185 (1999) "If . . . the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget," the Court explained, "it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail." *Id.* at 2188.

³⁷⁴ *Id.* at 2185.

³⁷⁵ This is a glaring omission considering that both the Eleventh Circuit and the Supreme Court deviated from the established principle that cost is generally not a defense to civil rights claims. See *supra* notes 184, 211 and accompanying text; see also *supra* notes 34, 197 and accompanying text.

³⁷⁶ *United States v. Board of Trustees*, 908 F.2d 740 (11th Cir. 1990).

³⁷⁷ 28 C.F.R. § 35.150(a)(3) (1998) (emphasis added); see also *supra* note 135

Under this regulation, the public entity has the burden of proving that compliance "would result in such alteration or burdens."³⁷⁸ This distinction exists not only in the regulations but in the case law as well: in *Arline*, for example, the Court expressly stated that "[a]ccommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, or requires 'a fundamental alteration in the nature of [the] program.'"³⁷⁹

Quite simply, under section 35.130(b)(7), the question is whether "making the modifications would fundamentally alter the nature of the service, program, or activity," not whether the cost of making the modifications would do so.³⁸⁰ The Supreme Court, through judicial fiat, has inserted into the regulations a defense that is not only absent from the controlling regulation, but that Congress and the DOJ expressly and purposefully omitted.

The court's interpretation of section 35.130(b)(7) is, in addition, contrary to the plain meaning of that regulation. Section 35.130(b)(7) expressly provides for a defense when "making the modifications would fundamentally alter the nature of the [singular] service, program, or activity."³⁸¹ In *Olmstead*, however, the Supreme Court ruled that in assessing this defense, courts must look at the "range of services the State provides" and "the State's obligation to mete out those services equitably."³⁸² Hence, the Court has not only created a cost-based defense under section 35.130(b)(7), but it has fundamentally altered the language of the regulation, providing for a defense if the state's "range of services" would be fundamentally altered, rather than the service, program, or activity at issue.³⁸³

and accompanying text.

³⁷⁸ 28 C.F.R. § 35.150(a)(3).

³⁷⁹ *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (citations omitted) (emphasis added); see *supra* note 179 and accompanying text; see also *supra* note 141 and accompanying text.

³⁸⁰ 28 C.F.R. § 35.130(b)(7).

³⁸¹ *Id.* (emphasis added).

³⁸² *Olmstead v. Zimring*, 119 S. Ct. 2176, 2185 (1999).

³⁸³ Indeed, when quoting the regulations, the Court conspicuously omitted the last five words of the regulation which refer to "the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added). The Court then paraphrased these words, replacing "or" with "and" and turning the singular into the plural, trans-

Finally, as in many of the cases examined in Part III of this Article, in reaching its conclusion, the Supreme Court simply read the wrong regulations to support the imposition of a cost-based defense. In a footnote, the Court explained: "We reject the Court of Appeals' construction of the reasonable-modifications regulation for another reason."³⁸⁴ Specifically, Congress ordered that the DOJ regulations "shall be consistent with' the regulations in part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act,"³⁸⁵ i.e., the HEW's prototype regulations, which became, pursuant to Executive Order, the DOJ's coordinating regulations.³⁸⁶ Citing the DOJ's coordinating regulations governing employment cases, the Court observed:

The § 504 regulation upon which the reasonable-modifications regulations is based provides now, as it did at the time the ADA was enacted:

"A recipient shall make reasonable accommodations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."³⁸⁷

This is an egregious error. Congress expressly limited the defense of "undue hardship" under the ADA to the areas of employment and program access in existing facilities. As the House Committee on the Judiciary explicitly observed: "The specific sections on employment and program access in existing facilities are subject to the 'undue hardship' and 'undue burden' provisions of the regulations which are incorporated in[to] [the ADA]. *No other limitation should be implied in other areas.*"³⁸⁸ As we have seen, Congress expressly clarified this point in the statute itself.³⁸⁹ In *Olmstead*, the Court simply ig-

forming the words into "the State's services and programs." *Olmstead*, 119 S. Ct. at 2188 ("The DOJ regulation allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs.") (citing 28 C.F.R. § 35.130(b)(7)).

³⁸⁴ *Olmstead*, 119 S. Ct. at 2190 n.16.

³⁸⁵ *Id.* (quoting 42 U.S.C. § 12134(b)).

³⁸⁶ See *supra* note 51.

³⁸⁷ *Olmstead*, 119 S. Ct. at 2190 n.16 (citing 28 C.F.R. § 41.53).

³⁸⁸ H.R. REP. NO. 101-485, pt. 3., at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 473 (emphasis added); see *supra* note 222 and accompanying text.

³⁸⁹ See *supra* notes 223-225 and accompanying text.

ignored or disregarded Congress' expressed intent, importing this defense into a public benefits and services case.

Compounding its own error, the Court then cited the Equal Employment Opportunity Commission Regulations governing *employment* for a definition of undue hardship,³⁹⁰ citing, in addition, the Department of Health and Human Services' regulations governing *employment* under section 504.³⁹¹ Upon this flawed authority, the Court concluded that, "[u]nder the Court of Appeals' restrictive reading, the reasonable-modifications regulation would impose a standard substantially more difficult for the State to meet than the 'undue burden' standard imposed by the corresponding § 504 regulation."³⁹² The whole point is that the "corresponding" regulation under section 504 is that which governs health, welfare, and social services, not employment, and it does not provide for a defense based upon "undue burden."³⁹³ Once again, the Court failed or refused to acknowledge that the section 504 regulations "assign[] different legal consequences to the costs of accommodation in different societal areas."³⁹⁴

Olmstead encapsulates, in one case, many of the errors in interpretation that have lead to the improper application of the undue burdens defense. These include ignoring the relevant regulations, citing the wrong regulations, citing *Davis* and its progeny as binding precedent in inapplicable contexts, and blindly citing cases without analyzing the source of their pronouncements on cost. *Olmstead* adds a new twist, however, improperly creating an undue burdens defense out of the distinct fundamental alteration defense. *Olmstead* is on the books, but it is fundamentally incorrect under the law. It will be up to advocates to continue to resist this unprincipled and unsupported defense, and to force the Supreme Court finally to get it right.

³⁹⁰ See *Olmstead*, 119 S. Ct. at 2190 n.16 (quoting 28 C.F.R. § 42.511(c) (1998)).

³⁹¹ See *id.* (citing 45 C.F.R. § 84.12(c) (1998)).

³⁹² *Id.*

³⁹³ See *supra* note 66 and accompanying text.

³⁹⁴ COMMISSION, *supra* note 45, at 103; see *supra* notes 49, 342 and accompanying text.

CONCLUSION

Civil rights statutes such as the Rehabilitation Act and the ADA are to be construed broadly to effectuate their remedial purpose.³⁹⁵ In addition, the protections afforded by such statutes are generally not limited by considerations of cost.³⁹⁶ One would therefore expect courts derogating from these principles, and construing the statutes narrowly on the grounds of undue expenditure, to marshal and cite convincing evidence in favor of their decisions.

As we have seen, however, such justification is impossible since there is no statutory, regulatory, or common law basis for the defense of undue financial burden in most factual contexts under the disability statutes and their implementing regulations. The failure of courts and advocates to recognize this fact is no mere intellectual curiosity or historical relic; adoption of this defense under wholly inappropriate circumstances continues to this day, significantly curtailing the rights of the disabled. Quite simply, the emperor has no clothes. It is time to dress the disability statutes in the full protections that Congress and the administrative agencies charged with implementing the statutes intended. This may, at times, require courts and advocates to challenge "established" precedent and to consider carefully the relevant statutory and regulatory frameworks. But if we are to achieve Congress' stated goal of "assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency for such [disabled] individuals,"³⁹⁷ we must do nothing less.

³⁹⁵ See *supra* note 34 and accompanying text.

³⁹⁶ See *supra* note 184 and accompanying text.

³⁹⁷ 42 U.S.C.A. § 12101(a)(8) (West 1995 & Supp. 1999).

