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## A CAMPUS HANDICAP? DISABLED STUDENTS AND THE RIGHT TO HIGHER EDUCATION— *SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS*

*There are in this country tens of millions of people who have difficulty hearing, seeing, moving, learning, controlling their emotions, talking. But all are people. Their disabilities are real, but so are their abilities. They are disabled, but they need not be handicapped.*

*Yet we handicap them.*[1]

### I
### INTRODUCTION

Congressional interest in the plight of the handicapped originated in response to the needs of returning disabled World War I veterans.[2] In 1920, President Wilson signed into law the Smith-Fess Act[3] which established a program offering vocational rehabilitation in the form of training, counseling, and placement services to physically handicapped veterans. The program served approximately 500 handicapped individuals in its first year.[4] While the scope and effectiveness of the program established by the Smith-Fess Act changed substantially during the fifty-three years following its inception,[5] the basic purpose of congressional aid for the handicapped continued to be training and rehabilitation.[6]

The Rehabilitation Act of 1973[7] (1973 Act) marked the beginning of a new type of congressional aid for the handicapped. Title V of the 1973 Act[8]

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1. F. BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE ix (1978).

2. *See* Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U. L. REV. 31, 37-38 (1977).

3. Pub. L. No. 66-236, 41 Stat. 735 (1920) (repealed 1973).

4. Cook, *supra* note 2, at 37-38.

5. The program became permanent under the Social Security Act of 1935, Pub. L. No. 74-271, § 1001, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 1381-82 (1979)). Services were extended to the mentally ill in 1943, Vocational Rehabilitation Amendments of 1943, Pub. L. No. 78-113, 57 Stat. 374 (1943) (repealed 1973). Other major amendments were the Vocational Rehabilitation Act of 1954, Pub. L. No. 83-565, §§ 2-5, 68 Stat. 652 (1954) (repealed 1973); the Vocational Rehabilitation Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965) (repealed 1973), and the Vocational Rehabilitation Amendments of 1968, Pub. L. No. 90-391, 82 Stat. 297 (1968) (repealed 1973).

6. *See generally* S. REP. NO. 318, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. CONG. & AD. NEWS 2076.

7. Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-94 (Supp. 1978)).

8. Pub. L. No. 93-112, §§ 501-04, 87 Stat. 355 (codified at 29 U.S.C. §§ 791-94 (Supp. 1978)).

(Title V) was the first major piece of civil rights legislation for the handicapped, establishing basic rights for disabled individuals. Congress declared that the objective of the 1973 Act was "the complete integration of all individuals with handicaps into normal community living, working, and service patterns."[9] In order to realize its objective of equality for the millions of disabled Americans, Congress required equal opportunity, equal rights under the law, and equal access to programs, buildings, and facilities.[10] Section 501 of Title V prohibits discrimination against the handicapped in federal government employment, and requires the federal government to take affirmative steps to employ the handicapped.[11] Section 502 creates the Architectural and Transportation Barriers Compliance Board and empowers the Board to establish and carry out barrier-free construction and transportation programs for the disabled.[12] Section 503 requires that federal government contractors take affirmative action to ensure equal employment opportunities for the disabled.[13] Section 504, potentially the most far-reaching of Title V's provisions, prohibits discrimination against the handicapped in all federally funded programs.[14] Section 504 provides that: "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, 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."[15]

In passing section 504, Congress intended to change drastically treatment of the handicapped[16] by establishing a federal policy to discourage discrimination against the handicapped. This policy was analogous to the policies behind the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964[17] (Title VI), addressing discrimination based upon race, and of Title IX of the Education Amendments of 1972[18] (Title IX), addressing discrimination based

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9. White House Conference on Handicapped Individuals Act of 1974, Pub. L. No. 93-516, tit. III, 88 Stat. 1631-34 (1974) (codified at 29 U.S.C. § 701 note (Supp. V 1975)).

10. F. BOWE, *supra* note 1, at vii. Estimates vary as to the number of handicapped Americans. *See* Title III, §-301(3) of the Rehabilitation Act Amendments of 1974, Conference Report No. 93-1270, *reprinted in* 120 CONG. REC. 35007 (1974) (7 million children, 28 million adults); 119 CONG. REC. 24562-63 (1973) (7 to 12 million); 119 CONG. REC. 24442 (1973) (28 to 50 million; statement of Senator Dole).

11. 29 U.S.C. § 791 (1973).

12. 29 U.S.C. § 792 (1973).

13. 29 U.S.C. § 793 (1973).

14. 29 U.S.C. § 794 (1973).

15. *Id.* For the text of § 706(6), *see* note 525, *infra*.

16. Congressional intent is best expressed by the late Senator Humphrey's remarks in support of § 504: "I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance. . . . These [disabled] people have the right to live, to work to the best of their ability—to know the dignity to which every human being is entitled." 118 CONG. REC. 525 (1972).

17. 42 U.S.C. §§ 2000d, 2000e (1970 & Supp. V 1975).

18. 20 U.S.C. §§ 1681-86 (Supp. V 1975).

upon sex.[19] The fundamental rationale behind section 504 is that "a disability is irrelevant to an individual's potential to contribute to, or benefit from those activities that the federal government assists."[20]

The 1973 Act required the Department of Health, Education and Welfare (HEW) to promulgate regulations setting forth the standards to be followed by educational institutions in accommodating the handicapped.[21] HEW, however, delayed promulgation of these standards for three-and-a-half years, until an Executive Order[22] was issued and a suit was brought in federal court.[23] The purpose of the HEW regulations[24] was to "effectuate section 504 of the Rehabilitation Act of 1973."[25] The regulations apply to every state, county, and local government program, and to every private agency that receives federal funds, either directly or through another recipient. The regulations create new rights,[26] and prescribe schemes for the enforcement of existing rights in the areas of employment, education, health care, and other social services for the disabled.[27]

Since the 1973 Act was passed and HEW regulations were promulgated, there has been a great deal of litigation over the scope of the Act. The earliest cases brought under section 504 dealt with procedural issues such as whether a

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19. *See* 120 CONG. REC. 30551 (1974) (remarks of Senator Stafford). Conceptually, however, section 504 differs significantly from Title VI and Title IX.

> The premise of both Title VI and Title IX is that there are no inherent differences of inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of federal programs. The concept of Section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to Federally assisted programs and activities, and identical treatment may, in fact constitute discrimination. . . . Thus, under Section 504, questions arise as to when different treatment of persons should be considered, and when it should be required

R. CLELLAND, SECTION 504: CIVIL RIGHTS FOR THE HANDICAPPED v-vi (1978)

20. Cook, *supra* note 2, at 43.

21. *See* S. REP. NO. 1297, 93rd Cong., 2nd Sess. 39-40 (1973)

22. Exec. Order No. 11,914, 3 C.F.R. 117 (1976).

23. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

24. 45 C.F.R. §§ 84.1-.99 (1979). The regulations were signed into law on April 28, 1977

25. 45 C.F.R. § 84.1 (1979).

26. *See generally* notes 142-60, *infra*, and accompanying text

27. In signing the HEW regulations into law, Secretary Califano made these observations about their intent:

> The Section 504 regulation . . . reflects the recognition of the Congress that most handicapped persons can lead proud and productives lifes [sic], despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law. . . . [E]nding discriminatory practices and providing equal access to programs may involve major burdens on some recipients [of federal funds] Those burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation: Congress' mandate to end discrimination is clear

*Section 504 Handbook: The HEW Regulations* iii (1977) (unpublished pamphlet, available from the Public Interest Law Center of Philadelphia).

private right of action existed,[28] or whether all administrative remedies must be exhausted before a suit was allowed.[29] Recent litigation, however, has focused on the substantive issue of the extent to which federally funded programs to benefit the handicapped must require "affirmative action."[30] The resolution of the "affirmative action" issue is integrally related to the meaning of section 504's "otherwise qualified" clause.[31] There is considerable ambiguity concerning the use of the term "affirmative action." Unfortunately, it is impossible to avoid using the term because after its use by the Court of Appeals for the Fourth Circuit in *Southeastern Community College v. Davis,*[32] the Supreme Court in *Davis* adopted the term.[33] For purposes of this discussion, "affirmative action" does *not* take on the traditional Title VI meaning of taking steps to overcome past discrimination by giving special benefits to certain racial minorities. Instead, in the context of section 504 litigation, "affirmative action" describes the phenomenon whereby an institution is required to modify its programs to allow for the accommodation and participation of "otherwise qualified" individuals.

A narrow interpretation of the "otherwise qualified" clause, in which that term is construed as "otherwise able to function sufficiently in the [program] in spite of the handicap,"[34] places no significant affirmative action burden on the institution. By contrast, under a broad interpretation of the "otherwise qualified" clause, the qualification which a person cannot meet because of his handicap is considered to be waived, so that an "otherwise qualified" person is one who is qualified except for his handicap, rather than in spite of his handicap.[35] This broad interpretation places upon the institution the requirement of compensating for the person's handicap, a great affirmative action burden.

In *Southeastern Community College v. Davis,*[36] the Supreme Court addressed both the question of the meaning of the "otherwise qualified" clause and the affirmative action issue. The Court seemed to adopt a narrow interpre-

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28. As a result of these decisions, a private right of action is almost universally recognized under § 504. *See, e.g.,* Camenisch v. Univ. of Tex., 616 F.2d 127 (5th Cir.) *cert. granted,* No. 80-317 (1980); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977).

29. Administrative exhaustion of remedies is not required if resort to those remedies would have proved futile. *See, e.g.,* Davis v. Southeastern Community College, 574 F.2d 1158, 1160 (4th Cir. 1978). *But see* Doe v. NYU, 442 F. Supp. 522, 523 (S.D.N.Y. 1978).

30. *See* text accompanying notes 31-33, *infra,* for an explanation of the use of the term "affirmative action."

31. *See* text accompanying note 15, *supra.*

32. 574 F.2d 1158, 1162 (4th Cir. 1978). The Fourth Circuit speaks of the requirements of "affirmative conduct" by Southeastern Community College.

33. 442 U.S. 397, 404 (1979).

34. Davis v. Southeastern Community College, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976).

35. *See* Davis, 574 F.2d 1158, 1161 (4th Cir. 1978). *See also* Charmatz and Penn, *Postsecondary and Vocational Education Programs and the "Otherwise Qualified" Provision of Section 504 of the Rehabilitation Act of 1973,* 12 U. MICH. J. L. REF. 67 (1978).

36. 442 U.S. 397 (1979).

tation of the "otherwise qualified" clause.[37] The Court's resolution of the affirmative action question, however, was unclear. While the Court concluded that affirmative action was not required under the extreme facts of the *Davis* case,[38] it is unclear how far the Court went in closing the door to an affirmative action requirement in other section 504 cases.[39]

This Note will discuss the *Davis* case, will evaluate the Court's reasoning in that case, and will consider one lower court opinion that applies *Davis*. While some commentators may interpret certain dicta in the Court's opinion as indicating that a narrow interpretation of the "otherwise qualified" clause is appropriate, this Note will argue that after *Davis*, the affirmative action question remains open. The lower courts should not read *Davis* as requiring a narrow interpretation of the "otherwise qualified" clause. Rather, the lower courts should limit *Davis* to its facts and interpret it as meaning only that deaf students need not be admitted to nursing programs. The Note will further analyze alternative interpretations of the "otherwise qualified" clause that are left open by the *Davis* opinion.

This Note will analyze both the narrow interpretation of the "otherwise qualified" clause, applied in dictum by the Supreme Court in *Davis*, and the broader interpretation applied by the Fourth Circuit Court of Appeals. After criticizing both of those interpretations, the Note will introduce a third interpretation of the "otherwise qualified" clause. This interpretation, suggested by the HEW regulations and supported by both the legislative history of the 1973 Act and public policy considerations, requires at least some degree of affirmative action on the part of higher educational institutions. Under this middle-of-the-road approach, "reasonable accommodations" to the handicapped must, therefore, be provided.

This Note will then discuss alternative theories of relief from discrimination against the handicapped and will examine the possibility of constitutional review under the equal protection clause. Acts of discrimination against the handicapped will be evaluated under three alternative equal protection tests: the rational basis test, the strict scrutiny test, and the newer "balancing" test. In addition, this Note will discuss the possibility of relief under the due process clause through the application of the irrebuttable presumption doctrine. Several of these constitutional theories can be used effectively to combat discrimination against the handicapped in higher education.

This Note will conclude that while the battle for equal opportunity, equal access to facilities, and equal rights for the disabled is just beginning, an expansion in the law of handicapped rights is justified, and should be vigorously pursued.

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37. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at 406.

38. *Id.* at 409-10. *See* text accompanying notes 40-46, *infra*.

39. *See* Davis, 442 U.S. 397, 412-13 (1979); *see also* Sections III-V, *infra*, for a discussion of the implications of *Davis*.

## II
## THE *DAVIS* CASE

In 1974, Frances Davis, a Licensed Practical Nurse, applied for admission to the Associate Degree Nursing Program at Southeastern Community College in Whiteville, North Carolina, in order to qualify to become a Registered Nurse.[40] In the course of her application to the Nursing Program, Davis was interviewed by a member of the faculty at Southeastern, and it became apparent that Davis had difficulty hearing. Upon inquiry, Davis acknowledged dependence on a hearing aid, and was referred to an audiologist to determine the extent of her hearing impairment. The audiologist reported that Davis had "bilateral sensorineural hearing loss," resulting in a "moderately severe hearing loss in the right ear and a severe hearing loss in the left ear."[41] The audiologist's report concluded that Davis was an

> excellent lip reader and although she does not possess normal hearing, she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others. She is well aware of gross sounds . . . but can only be responsible for speech spoken to her or when the talker gets her attention and allows her to look directly at the talker.[42]

Southeastern then consulted with the Executive Director of North Carolina's Board of Nursing (Director), who recommended, on the basis of the audiologist's report, that Davis not be admitted to the Nursing Program. The Director further advised that it would neither be safe for Davis to practice as a nurse, nor possible for Davis to participate safely in the Nursing Program.[43]

Based on the findings of the audiologist, the recommendations of the Director, and the school's feeling that Davis would be "unable to serve as a Registered Nurse on completion of the Program," Southeastern denied Davis' application for admission.[44] After being notified that she was not qualified for admission to the Nursing Program because of her disability, Davis requested that the decision by Southeastern's Admissions Committee be reconsidered. Southeastern's entire nursing staff was assembled, and after a review of all of the evidence and an additional consultation with the Director of the State

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40. A Licensed Practical Nurse (LPN), unlike a Registered Nurse (RN), "operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." Davis, 424 F. Supp. 1341, 1342-43 (E.D.N.C. 1976).

41. *Id.* at 1343.

42. *Id.*

43. Davis, 442 U.S. 397, 401-02 (1979). The Executive Director noted that Davis' hearing ability would be inadequate for her to identify all of a patient's needs, or even to be accountable in situations which could be critical. Davis, 424 F. Supp. 1341, 1343 (E.D.N.C. 1976).

44. Davis, 424 F. Supp. 1341, 1343 (E.D.N.C. 1976).

Board, the staff confirmed the Admissions Committee's earlier decision to deny admission.[45]

While Southeastern had a procedure for resolving admissions-related grievances within the school, Davis opted not to avail herself of that procedure, assuming that instituting any such intramural appeal would be futile.[46] Upon learning of the staff's decision, Davis filed suit in the United States District Court for the Eastern District of North Carolina. She alleged that Southeastern violated both section 504, and the equal protection and due process clauses of the fouteenth amendment, in that the school's denial of Davis' admission constituted discrimination on the basis of her hearing disability.[47]

### *A. The District Court Opinion*

After a bench trial, the district court entered judgement for Southeastern. The court first found that because admission to a school was a privilege and not a right, the school's decision was to be evaluated under a "rational basis" test. This test empowered Southeastern to apply any standards and requirements for admission so long as those standards were not arbitrary or unreasonable.[49] The court then recognized that "the single major factor in [Southeastern's] refusal to allow admissions [sic] to [Davis] was her projected inability to be licensed as a Registered Nurse after graduation. . . ."[50] The court noted that due to the nursing personnel shortage in North Carolina, the state has a major responsibility to encourage qualified people to enter the health care professions. In light of this shortage, "it is completely reasonable and logical for the state to limit enrollment to such persons as are able to meet professional qualifications upon graduation."[51]

Although the district court ruled that Davis was "handicapped" within the meaning of the 1973 Act,[52] the court, nevertheless, adopted a narrow interpre-

45. *Id.*

46. *See* note, 29 *supra*, and accompanying text.

47. Davis, 424 F. Supp. 1341 (E.D.N.C. 1976).

48. *Id.* at 1346.

49. *Id.* at 1344. Under traditional equal protection theory, the rational basis test is applied unless the threatened right is considered to be a fundamental right. Therefore, in ruling that the right of admission was not fundamental, the court applied the less stringent rational basis test. *See* notes 168-72 *infra*, and accompanying text.

Judge Hemphill relied to some extent on Davis' failure to attack the accuracy or reasonableness of the admissions standards, and her failure to claim arbitrary or capricious action in Southeastern's denial of her admission of Davis, 424 F. Supp. 1341, 1344 (E.D.N.C. 1976).

50. *Id.*

51. *Id.* at 1344-45. The district court, as well as the higher courts on appeal, applied a standard related to employability in determining whether admission should be granted. The courts declined, however, to apply section 503's affirmative action requirement associated with employment. *See* text accompanying note 13, *supra*; notes 108-09, *infra*, and accompanying text.

52. 29 U.S.C. § 706(6) (1976) defines "handicapped individual" in part as follows: "For the purposes of . . . this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

tation of the Act's "otherwise qualified" clause. Looking to *Webster's Third New International Dictionary*, the court concluded that "[o]therwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought *in spite of* the handicap, if proper training and facilities are suitable and available."[53] The court found that because Davis' handicap actually prevented her from performing effectively both as a nurse and as a participant in the Nursing Program, she was not "otherwise qualified" for admission.[54] The court thus held that Southeastern had not violated section 504.[55]

### *B. The Court of Appeals Opinion*

Davis appealed to the Court of Appeals for the Fourth Circuit.[56] In vacating and remanding the district court's decision, the Fourth Circuit ruled that the district court misconstrued the meaning of the "otherwise qualified" clause in light of the newly promulgated HEW regulations.[57] The Fourth Circuit relied on the HEW regulations which define a person as "otherwise qualified" if that person meets the "academic and technical standards requisite to admission."[58] The court noted that the official HEW explanation of its regulations indicated that the "term 'technical standards' refers to all nonacademic admissions criteria that are *essential* to participation in the program in question."[59] The court concluded that because the ability to hear was not an *essential* academic or technical admissions criterion, the district court erred by considering Davis' hearing disability in determining whether she was "otherwise qualified" for admission.[60]

The Fourth Circuit then briefly discussed Davis' affirmative action claim that Southeastern had a duty to modify its program so as to accommodate Davis,[61] and remanded the case to the district court for reconsideration of this claim.[62] The Fourth Circuit directed the district court to look at both the new

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53. Davis, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976) (emphasis added).

54. The court relied heavily on Davis' failure to give evidence that she could perform safely as a nurse and in the Nursing Program. *Id.* at 1346. *See* note 49, *supra*.

55. Davis, 424 F. Supp. 1341, 1346 (E.D.N.C. 1976).

56. Davis, 574 F.2d 1158 (4th Cir. 1978).

57. *Id.* at 1161. The regulations went into effect after the district court's decision in *Davis*, but before the Fourth Circuit heard the case. *See* notes 22-24, *supra*, and accompanying text. *See also* Davis, 574 F.2d 1158, 1163 n.9 (4th Cir. 1978).

58. 45 C.F.R. § 84.3(k)(3) (1979) provides: "With respect to post-secondary and vocational education services, [an otherwise qualified handicapped person is one who] meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."

59. Davis, 574 F.2d 1158, 1161 (4th Cir. 1978) (emphasis added) (quoting 42 Fed. Reg. 22,676, 22,687 (1977)).

60. Davis, 574 F.2d 1158, 1161 (4th Cir. 1978).

61. *Id.* at 1162.

62. *Id.* For a discussion of the term "affirmative action" and the attendant ambiguity of its use, *see* text accompanying notes 31-33, *supra*.

HEW regulations dealing with academic adjustments and auxiliary aids,[63] and supporting precedent,[64] to determine whether Davis met the *essential* academic and technical criteria and was therefore "otherwise qualified" for admission to the Nursing Program.[65]

Southeastern filed an appeal to the Supreme Court and, due to the importance of the issue to the many institutions covered by section 504, the Supreme Court granted certiorari.[66]

### *C. The Supreme Court Opinion*

By the time *Davis* reached the Supreme Court, the case had become one of national concern, and many states and interest groups submitted amicus curiae briefs.[67] Justice Powell, writing for an unanimous Court, reversed the judgment of the Fourth Circuit and upheld the district court's decision that Davis was not "otherwise qualified" to be admitted to Southeastern's Nursing Program.[68] Apparently interpreting section 504 as only an antidiscrimination statute (which prohibits unequal standards but which would not require affirmative action), the Court concluded that section 504 does not "compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."[69] Instead, the Court held that the statute indicates only that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[70]

The Court rejected the Fourth Circuit's finding that the ability to hear was *not* an essential academic or technical criterion for admission,[71] noting that if the approach of the court below was taken literally, it would "prevent an institution from taking into account any limitation resulting from the handicap, however disabling."[72] The Court then employed the "plain meaning rule" of statutory interpretation,[73] and adopted the district court's definition of an "otherwise qualified" person as one who is able to meet all of a program's

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63. 45 C.F.R. §§ 84.44(a), (d)(1) (1979).

64. The court noted that precedent "supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive." Davis, 574 F.2d 1158, 1162 (4th Cir. 1978).

65. *Id.*

66. Davis, 439 U.S. 1065 (1979).

67. A total of 18 amicus curiae briefs representing 34 states and 59 interest groups were submitted.

68. Davis, 442 U.S. 397, 404 (1979).

69. *Id.* at 405.

70. *Id.* (footnotes omitted).

71. *Id.* at 406-07; *see* text accompanying notes 56-60, *supra*.

72. Davis, 442 U.S. 397, 406 (1979).

73. The plain meaning rule of statutory interpretation has been criticized for the absurd conclusions which may result. *See generally* H. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144-1417 (1958) (unpublished; tentative edition).

requirements *in spite of* his handicap.[74] Examining section 504 closely, the Court reasoned that HEW's "technical standards," referred to by the Fourth Circuit, may include legitimate physical qualifications if such standards are essential to participation in the program.[75] The Court then considered the question of whether the qualifications which Southeastern demanded of its nursing students were in fact essential to participation in the Nursing Program. Reversing the court of appeals' finding that the ability to hear is not an essential admissions criterion, the Court found that "the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program," and "this ability also is indispensible for many of the functions that a registered nurse performs."[76]

In dictum, the Court also analyzed Davis' argument that section 504, when properly interpreted, would compel Southeastern to undertake affirmative action which would eliminate the need for effective oral communication in the Nursing Program.[77] Davis supported her argument by citing the HEW regulations. In particular, she relied on a regulation dealing with post-secondary educational programs which required that covered institutions make "modifications" in their programs to accommodate handicapped persons, and provide "auxiliary aids" such as sign language interpreters.[78] Davis argued that this

74. Davis, 442 U.S. 397, 405 (1979) (emphasis added).

75. *Id.* at 406-07. *See* text accompanying notes 58-60, *supra*; 45 C.F.R. pt. 84 app. A, at 405 (1978).

76. Davis, 442 U.S. 397, 407-12 (1979).

77. Davis argued in essence that the Nursing Program should be modified for her so that she might participate in it. Thus Davis argued that she could be given individual supervision by faculty members whenever she directly attended patients. In addition, the school might dispense with certain required courses for her. Further, she argued that Southeastern need not train her for *all* of the tasks potentially performed by a registered nurse. "Rather, it is sufficient to make § 504 applicable if [Davis] might be able to perform satisfactorily *some* of the duties of a registered nurse or to hold *some* of the positions available to a registered nurse" (emphasis added). *Id.* at 408 (footnote omitted). The Fourth Circuit accepted Davis' argument, noting that:

> in the medical community, there does appear to be a number of settings in which [Davis] could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. . . . If [Davis] meets all the other criteria for admission in the pursuit of her RN career . . . it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers.

Davis, 574 F.2d 1158, 1161 n.6 (4th Cir. 1978).

78. This regulation provides in part:

> (a) *Academic Requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.
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regulation imposed an affirmative obligation on Southeastern to make the kinds of adjustments that would ensure her full, safe participation in the Nursing Program. The Supreme Court rejected Davis' affirmative action argument, reasoning that even if the HEW regulations were given their broadest possible reading "it appears unlikely [that Davis] could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring."[79] The Court noted that while nothing short of individual supervision would guarantee patient safety in the clinical phase of the Nursing Program, the regulation explicitly excludes such "devices . . . of a personal nature"[80] which Davis would require. The Court further observed that the fundamental alterations in the Nursing Program required to accommodate Davis go far beyond the "modifications to its academic requirements" that Southeastern was required to make under the regulations.[81]

Commenting on the scope of section 504, the Court said that

> an interpretation of the [HEW] regulations that required the extensive modifications necessary to include [Davis] in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead they would constitute an unauthorized extension of the obligations imposed by that statute.[82]

In dictum, the Court suggested that since Congress explicitly required affirmative action in other sections of the 1973 Act,[83] and since the language of section 504 did not have an explicit affirmative action requirement, affirmative action may not be required under section 504.[84]

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(d) *Auxiliary Aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

45 C.F.R. § 84.44 (1979).

79. Davis, 442 U.S. 397, 409 (1979).

80. *Id.*; *see* note 78, *supra.*

81. Davis, 442 U.S. 397, 410 (1979). *Cf.* note 78, *supra.*

82. Davis, 442 U.S. 397, 410 (1979).

83. §§ 501 and 503 of Title V have explicit affirmative action requirements. 29 U.S.C. §§ 791, 793 (1979).

84. The Court concluded that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." Davis, 442 U.S. 397, 411-12 (1979) (footnote omitted).

The actual holding of *Davis,* however, is more limited. The Court held only that Southeastern's failure to make the substantial adjustments in its program to accommodate Davis was not a violation of section 504. The Court did not reach the general question of whether section 504 requires affirmative action.

## III
## INTERPRETATIONS OF THE SUPREME COURT'S OPINION

The holding in *Davis,* that Southeastern was not required to admit Davis to the Nursing Program, is reasonable given the extreme facts of the case. It is difficult to generalize the Court's holding, however, and to interpret and apply *Davis* in other situations. The Supreme Court stated that institutions will not be required to make "substantial adjustments" in existing programs,[85] and the Court implied that section 504 could not impose "undue financial and administrative burdens."[86] The Court did not, however, conclude that affirmative action could never be required under section 504. The Court stated that since the program modifications necessary to accommodate Davis were extraordinary, Davis need not be admitted. In other situations, however, where adjustments are not so "substantial," and burdens are not "undue," accommodations to facilitate the participation of handicapped applicants may be required.[87] Since the Court spoke in such ambiguous and equivocal terms, the implications of the *Davis* decision are unclear.

### *A.* Upshur v. Love: *One Lower Court's Interpretation of* Davis

The Supreme Court's dicta in *Davis* indicated that the "otherwise qualified" clause may be interpreted narrowly.[88] Under the narrowest possible interpretation, absolutely no affirmative obligations would be placed on the higher educational institution to which a handicapped individual applied. How the lower courts would interpret *Davis* was thus critical to the development of the handicapped rights movement.

*Upshur v. Love*[89] was the first case that applied the Supreme Court's decision in *Davis.* In *Upshur,* the plaintiff, James Upshur, a blind teacher, sued the Oakland Unified School District, alleging violations of federal civil rights laws,[90] section 504, and California law.[91] Upshur alleged that the school district's discriminatory policies and practices prevented him from obtaining an administrative position in the district. The District Court of the

85. *Id.* at 410; *see* text accompanying note 105, *infra.*
86. Davis, 442 U.S. 397, 412 (1979); *see* text accompanying note 106, *infra.*
87. Davis, 442 U.S. 397, 412-13 (1979).
88. *See* text accompanying note 74, *supra.*
89. 474 F. Supp. 332 (N.D. Cal. 1979).
90. Upshur alleged a violation of 42 U.S.C. § 1983. *See* note 161, *infra,* for the relevant text of § 1983.
91. CAL. LAB. CODE § 1410 (West 1979).

Northern District of California noted the two reasons for the school district's denial to Upshur of the administrative position: "First, [the district] did not believe that Upshur was qualified to be an administrator. . . . Second, the committee was concerned that Upshur's blindness would present difficulties in certain areas."[92] Since the California Fair Employment Practices Commission failed to reverse the school district's decision, Upshur brought suit.

Addressing Upshur's equal protection claim under section 1983,[93] the court found that visually handicapped persons are not members of a suspect class and therefore, their claims of discrimination should not be evaluated under a strict scrutiny standard. Instead, the court held that "a physical handicap is a trait far more analogous to age, which only evokes the rational basis test, than to race, which has long been considered a suspect classification."[94] Applying the rational basis test, the court found no violation of the equal protection clause.

Upshur also claimed that the school board's denial of employment constituted an irrebuttable presumption that visually handicapped teachers are unable to perform administrative functions and that it was therefore violative of the fourteenth amendment's due process clause.[95] The court found that since the school district did not have a flat ban on hiring blind administrators, Upshur failed to establish a due process violation.[96]

Upshur's primary claim was based on section 504. Upshur argued that he was qualified for an administrative position in the school district, and was denied the position on the basis of his blindness. Following the decision in *Davis,* the court held that no violation of section 504 occurred. The court held that Upshur was not an "otherwise qualified" applicant since, aside from the problems presented by his blindness, he lacked the necessary administrative skills. The court found that "[s]ection 504 is violated only if a recipient of federal funding excludes an 'otherwise qualified' handicapped individual from participation in its activities *'solely by reason of his handicap'*."[97] Upshur's incompetence in administrative skills provided an alternative reason for his rejection. After reviewing the Supreme Court's opinion in *Davis,* the *Upshur* court concluded that although the school district committee did consider the limitations caused by Upshur's handicap, this consideration was not inconsistent with section 504. The court also held that no reasonable accommodations

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92. Upshur, 474 F. Supp. 332, 335 (N.D. Cal. 1979). The committee concluded that Upshur needed to "sharpen and develop his administrative skills." Further, "[t]he committee members were not satisfied with Upshur's responses to their questions about how Upshur would cope with his handicap. . . ." *Id.*

93. *See* note 161, *infra.* Section 1983 is the civil statutory provision which implements the equal protection clause.

94. Upshur, 474 F. Supp. 332, 337 (N.D. Cal. 1979) (footnote omitted).

95. *See generally* Section IV (B), *infra.*

96. Upshur, 474 F. Supp. 332, 337-38 (N.D. Cal. 1979).

97. *Id.* at 341 (emphasis added).

for Upshur were required since those accommodations were only mandated for "otherwise qualified" applicants.[98] The court concluded that Upshur did not establish a violation of his rights under section 504.

*Upshur* can be interpreted narrowly on its facts, thus limiting the holding to the court's conclusion that Upshur was not qualified due to his lack of administrative skills. However, a broader reading of *Upshur* points to the unfortunate impact that the Supreme Court's decision in *Davis* may have. Read broadly, *Upshur* can be construed to hold that section 504 does not require *any* accommodations. Since this holding results from a literal interpretation of the broad language of *Davis,* the *Davis* decision may be read as a license for lower courts to dismiss all discrimination claims of handicapped individuals.[99] The Supreme Court's ambiguous language, indicating that an institution may not be required to take affirmative action to help integrate handicapped people into society, was interpreted by the *Upshur* court to mean that the accommodation of providing an assistant for a school administrator was not required.[100] There is no indication in *Upshur* that even minor accommodations would be required by section 504. Such an interpretation of *Davis* is not surprising given the broad language of the Supreme Court's opinion.

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98. *Id.* at 342. While the court held that the committee need not look at what accommodations are required, the court found that

> the committee did assume that an aide would be provided and that Upshur would have to perform certain administrative duties in a somewhat different manner than a sighted individual. The committee members nevertheless concluded that Upshur's blindness would present significant problems, and they were not confident that Upshur would be able to deal with these problems. The School District was not prepared to hire an aide who was fully qualified to serve as an administrator. Particularly in light of the *Davis* decision, the Court agrees that Section 504 does not require that degree of accommodation to the needs of handicapped individuals.

*Id.*

99. *But see* Camenisch v. Univ. of Tex., 616 F.2d 127 (5th Cir. 1980), *aff'g in part* 16 Emp. Prac. Dec. ¶ 8336 (W.D. Tex. 1978). *Camenisch* is one of the most recent § 504 cases. In that case, the Fifth Circuit upheld a district court order directing the University of Texas, under the Rehabilitation Act of 1973, to procure and compensate a qualified interpreter to assist plaintiff, a deaf graduate student, in his classes. *See* note 126, *infra,* and accompanying text. The Fifth Circuit went on to discuss and interpret the Supreme Court's decision in *Davis,* and its effect on plaintiff's claim in *Camenisch,* stating that

> the Supreme Court's decision . . . says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification, it is clear that in this case, Camenisch's claim can succeed on the merits, despite the holding in [*Davis*], since he can obviously perform well in his profession.

Camenisch, 616 F.2d 127, 133 (5th Cir. 1980). For an analysis of the *Davis* case which is consistent with the Fifth Circuit's opinion, *see* Note, *Defining the Rights of the Handicapped Under Section 504 of the Rehabilitation Act of 1973: Southeastern Community College v. Davis,* 24 ST. LOUIS L.J. 159 (1979).

100. Upshur, 474 F. Supp. 332, 342 (N.D. Cal. 1979).

### *B. An Alternative Interpretation of the Supreme Court's Opinion*

Unlike the district court in *Upshur,* lower courts could take a different view of the *Davis* case. *Davis* does not have to be read as requiring a narrow interpretation of the "otherwise qualified" clause. *Davis* can be limited to its facts and interpreted as meaning only that deaf students need not be admitted to nursing programs.[101] Such a reading of *Davis* is justified because of the Supreme Court's equivocal and ambiguous language, and the strong policy considerations which favor the requirement of at least some degree of accommodation of the needs of the handicapped.

In the Supreme Court's opinion,[102] Justice Powell pointed out that the line between "lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" will not always be clear.[103] The Court's language suggests that *Davis* may represent an extreme case, and Southeastern's refusal to engage in affirmative action did not amount to discrimination because the admission of Davis would require an extraordinarily high degree of affirmative action. The Court's decision in *Davis,* therefore, can be interpreted as holding only that section 504 does not require an accommodation of great magnitude. The Supreme Court recognized, however, that it is possible to envision a situation where a lesser degree of affirmative action is required, and where refusal to modify a program to accommodate a disabled person would be unreasonable and discriminatory, in violation of section 504. In such a situation, the Court implied, affirmative conduct on the part of the discriminating institution would be required.[104]

In *Davis,* therefore, the Court established the outer limits of the burdens which section 504 places on institutions, by indicating that in extreme situations, where substantial modifications and undue financial burdens may be necessary, accommodations will not be required. The Court did not, however, establish guidelines for determining when failure to act affirmatively *will* result in a violation of section 504. While the Court attempted to clarify the affirmative obligations imposed by section 504, the result was the creation of even more ambiguity. The Court stated that the HEW regulations cannot "require *substantial adjustments in existing programs* beyond those necessary to eliminate discrimination against otherwise qualified individuals. . . ."[105] The Court stated that attaining the goals of enhanced opportunities to rehabilitate the handicapped "without imposing *undue financial and administrative burdens*

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101. For an excellent discussion of the conclusion that, due to the extreme factual record in *Davis,* the decision can be limited to its facts, *see* Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern,* 80 COLUM. L. REV. 171, 184-86 (1980).

102. Davis, 442 U.S. 397 (1979).

103. *Id.* at 412-13.

104. *Id.*

105. *Id.* at 410 (emphasis added).

upon a State" would be permissible.[106] Finally, the Court stated that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect *substantial modifications of standards* to accommodate a handicapped person."[107] The Court's failure to define such phrases as "substantial adjustments," "undue burdens," or "substantial modifications of standards" makes future application of the *Davis* opinion uncertain. Given these ambiguous phrases, a narrow interpretation of the "otherwise qualified" clause is not warranted.

A final reason why *Davis* should not be interpreted as indicating that the "otherwise qualified" clause of section 504 is to be read narrowly is that the *Davis* case can be characterized as a section 503 employment discrimination case. Under such a reading of *Davis*, the Court's opinion would not be relevant to interpreting section 504. The courts involved in the *Davis* litigation arguably applied an incorrect standard in determining the appropriate degree of affirmative action required. In determining whether Davis should be admitted to the Nursing Program, the courts repeatedly considered whether Davis could be employed safely as a nurse.[108] This question was not, however, appropriate for the courts' consideration.[109] Under section 504 (the applicable statute), whether Davis could be employed as a nurse is not a relevant consideration in determining whether she should be admitted to the Nursing Program at Southeastern. The proper consideration for the courts in *Davis* was, therefore, whether Davis could safely perform in the nursing training program, and *not* whether she could safely perform as a nurse. The Court's misplaced reliance on the issue of Davis' ability to perform as a nurse may have confused the situation sufficiently to preclude interpreting the *Davis* opinion as establishing a narrow interpretation of the "otherwise qualified" clause.

In summary, there are several factors which lead to the conclusion that the Supreme Court's opinion in *Davis* should not be read as requiring a narrow

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106. *Id.* at 412 (emphasis added).

107. *Id.* at 413 (emphasis added).

108. "Furthermore, it appears from the testimony that the single major factor in the defendant's refusal to allow admission to plaintiff was her projected inability to be licensed as a Registered Nurse after graduation. . . ." Davis, 424 F. Supp. 1341, 1344 (E.D.N.C. 1976). *See also id.* at 1342, 1343. "[I]n the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN. . . ." Davis, 574 F.2d 1158, 1161 n.6 (4th Cir. 1976). "In McRee's view, respondent's hearing disability made it unsafe for her to practice as a nurse." Davis, 442 U.S. 397, 402 (1979) (footnote omitted). *See* text accompanying note 50, *supra*.

109. In the employment context, under § 503, affirmative action in the form of reasonable accommodation is clearly required by both § 503 and the HEW regulations. Section 503 states in relevant part: "Any contract in excess of $2500 entered into by any Federal department . . . shall contain a provision requiring that in employing persons to carry out such contract the party . . . shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . ." 29 U.S.C. § 793 (1979). *See also* text accompanying note 13, *supra*. 45 C.F.R. § 84.12(a) (1979) provides: "A recipient shall make reasonable accommodation 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. . . ."

reading of the "otherwise qualified" clause. These factors are: the language and ambiguous phrases of the Court, the extreme facts of *Davis*, the extraordinary accommodations and excessive financial burdens that would have been required, and the misapplication of the section 503 standard. The Court's opinion in *Davis*, therefore, leaves open the question of whether some degree of affirmative action is required under section 504's "otherwise qualified" clause.

## IV
## THE MERITS OF OTHER INTERPRETATIONS OF THE "OTHERWISE QUALIFIED" CLAUSE

The extent to which affirmative action to accommodate the handicapped is required is, as mentioned above, closely tied to the definition of the "otherwise qualified" clause.[110] Therefore, an interpretation of the "otherwise qualified" clause is crucial in determining how section 504 should be applied and enforced. Several alternative interpretations of the "otherwise qualified" clause were suggested in the *Davis* litigation.

### *A. The Narrow Interpretation*

The narrowest approach to interpreting the "otherwise qualified" clause is that adopted in dictum by the Supreme Court in *Davis*. The Court viewed a handicapped person as being "otherwise qualified" if that person is able to function in the position sought in spite of his handicap.[111] This interpretation has the advantage of being easy to apply. A court needs to look only at whether the applicant, when judged by an objective standard, will be capable of participating in a program that does not accommodate his handicap. If the person can participate fully, he is "otherwise qualified"; if he cannot, he is not "otherwise qualified." Under this interpretation, section 504 is seen only as an antidiscrimination statute, and its effect is limited to prohibiting discrimination solely on the basis of the fact that the applicant has a handicap. While this is certainly an arguable interpretation of the *wording* of the statute, it is inconsistent with the legislative history of section 504, the subsequent amendments to section 504, the standards put forth in the HEW regulations, the public policy considerations, and the congressional objective in enacting section 504.[112]

#### *1. Criticism of the Narrow Interpretation*

##### *a. Legislative History of Section 504*

As noted above, section 504 was enacted to halt a long history of discrimination against disabled persons, its objective being the complete integra-

110. *See* text accompanying notes 31-35, *supra*.
111. Davis, 442 U.S. 397, 406 (1979).
112. *See* note 9, *supra*, and accompanying text. *See also* text accompanying notes 16-20, *supra*.

tion of the handicapped into society.[113] In her brief to the Supreme Court, the plaintiff in *Davis* argued that:

> Congress recognized that elimination of the obstacles to education and employment is a critical aspect of securing complete integration of all handicapped persons. Accordingly, the Rehabilitation Act seeks to "initiate and expand services to groups of handicapped individuals . . . who have been underserved in the past . . ." and, more importantly, to "promote and expand employment opportunities in the public and private sectors for handicapped individuals. . . ." [114]

The Senate Report accompanying the 1974 Amendments to the Rehabilitation Act expressly stated that "[w]here applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." [115] Congress was especially concerned about the accessibility of higher educational opportunities to the handicapped. The Report of the Senate Labor and Public Welfare Committee stated that:

> Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals . . . must be afforded equal opportunity and access to higher educational services. The Committee is aware that at the present time most of these avenues are not open to individuals with handicaps.[116]

In response to this evidence of Congress' motives, the Supreme Court stated that "isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment." [117] Despite the Court's commentary that the committee reports do not represent the will of Congress, the legislative history indicates an intention by Congress that section 504 be interpreted as more than a mere nondiscrimination statute, and that the statute make some sort of affirmative action obligatory.

*b. The 1978 Amendments*

The Supreme Court also refused to give effect to the argument that various 1978 amendments to the 1973 Act reflected Congress' approval of the affirmative action obligations created by HEW's regulations.[118] Even if, as

113. *Id.*

114. Brief for Respondent at 19-20, Southeastern Community College v. Davis, 442 U.S. 397 (1979) (quoting 29 U.S.C. §§ 701(6) and (8) (1979)).

115. S. REP. NO. 1297, *supra* note 21, at 39.

116. *Id.* at 58.

117. Davis, 442 U.S. 397, 411 n.11 (1979).

118. *Id.* While the Court considered a part of the 1978 Amendments, *id.* at 402 n.2, 411 nn.10 & 11, the Court did not mention § 505(a)(1) of the 1978 Amendments, in its decision. *See* note 119, *infra*, and accompanying text for the text of § 505(a)(1).

the *Davis* Court suggested, congressional intent was not clear, the 1978 Amendments to section 504 show that Congress unequivocally intended that section 504 authorize affirmative action. Those Amendments provide: "The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this title." [119] As noted above, section 504 "was patterned after and is almost identical to the antidiscrimination provisions of Section 601 of Title VI of the Civil Rights Act of 1964. . . ." [120] Title VI has been interpreted by the Supreme Court to require that institutions receiving federal financial assistance take affirmative action where necessary to enable the participation of individuals protected by the 1964 Civil Rights Act.[121] Thus, the 1978 Amendments imply that section 504 requires affirmative action to protect the rights of the disabled in America. Therefore, the Court's discussion of affirmative action in *Davis* should have been preempted by the 1978 Amendments.[122]

*c. The Scope and Significance of the HEW Regulations*

The extent to which the HEW regulations require higher educational institutions to accommodate the handicapped also indicates that section 504 has an affirmative action element. The educational institution's duty to modify its program to assist handicapped individuals [123] is the most substantial obligation

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119. Comprehensive Rehabilitation Services Amendments of 1978, § 505(a)(1), 29 U.S.C. § 794(a)(2) (1978).

120. S. REP. NO. 1297, *supra* note 21, at 39. *See also* notes 17-19, *supra*, and accompanying text.

121. Lau v. Nichols, 414 U.S. 563 (1974). In *Lau*, which held that Title VI of the Civil Rights Act of 1964 requires affirmative relief to prevent discrimination against students who do not speak English as their native language, the Supreme Court said that there is "no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977), where the court, noting the parallels between Title VI of the Civil Rights Act and the Rehabilitation Act of 1973, paraphrased *Lau*, and required that public transportation facilities be made accessible to the handicapped. *See also* Charmatz and Penn, *supra* note 35, at 83-84.

122. As has been noted:

> Because the Comprehensive Rehabilitation Services Amendments of 1978 were not enacted until after the facts which gave rise to the *Davis* case, and because those amendments are, like all statutes, presumed to apply prospectively only, the Rehabilitation Act Amendments of 1978 had no application to the *Davis* case. Whether these amendments will ultimately change the Court's affirmative action analysis in *Davis* must therefore await further litigation.

Memorandum of American Coalition of Citizens with Disabilities, Inc., Re: Southeastern Community College v. Davis and Traegeser v. Libbie Rehabilitation Center, 10 n.3 (July 10, 1979) (unpublished—on file with the *Review of Law and Social Change*).

123. 45 C.F.R. § 84.44 (1979). This section is cited in relevant part at note 78, *supra*. *See also* text accompanying note 138, *infra*.

which HEW imposes on federal aid recipients. The modifications which are required may include changes in the length of time permitted for the completion of degree requirements, substitution of courses, and modifications in the manner in which specific courses are conducted.[124] HEW also requires institutions to provide auxiliary learning aids for students with impaired sensory, manual, or speaking skills to ensure that such students are not denied the benefits of the program.[125] Auxiliary aids include such services as sign language interpreters for deaf students, readers for blind students, and classroom equipment adapted for use by manually impaired students.[126] Demonstrably sound academic requirements that are essential to the program of instruction or to any directly related licensing requirements, however, need not be changed.[127] These HEW regulations clearly require the institutions to take affirmative steps to modify their programs to accommodate the handicapped.

The Supreme Court may have erred in not giving enough deference to HEW's regulations. Principles of administrative law indicate that "[w]hen there is an express delegation of rule-making power, it should be generously construed to include authority to promulgate any regulation reasonably related to the purposes of the enabling legislation."[128] As long as the regulations are not ultra vires because they are beyond the scope of the enabling statute, administrative regulations have the same force and legal effect as a statute.[129] Thus, while the Supreme Court in *Davis* refused to acknowledge that Congress' intention in enacting section 504 was to impose affirmative obligations on educational institutions, and while under the Court's narrow reading of the statute, the HEW regulations would be beyond the scope of the statute,[130] the HEW regulations should have been given greater deference.

*d. Economic Considerations*

In the *Davis* case, the Supreme Court also considered the potential economic impact of imposing an affirmative action requirement. The Court

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124. 45 C.F.R. § 84.44(a) (1979).

125. 45 C.F.R. § 84.44(d)(1) (1979).

126. 45 C.F.R. § 84.44(d)(2) (1979). Cost is not a defense to the provisions required under this statute, and several courts have required institutions to provide interpreters for deaf students. *See* Camenisch v. Univ. of Tex., 16 Emp. Prac. Dec. ¶ 8336 (W.D. Tex. 1978), *aff'd* 616 F.2d 127 (5th Cir. 1980); Crawford v. Univ. of N. C., 440 F. Supp. 1047 (M.D.N.C. 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977).

127. 45 C.F.R. § 84.44(a) (1979).

128. B. SCHWARTZ, ADMINISTRATIVE LAW 149 (1976) (citing Mourning v. Family Publications Serv., 411 U.S. 356, 359 (1973)).

129. B. SCHWARTZ, *supra* note 128, at 155. Under the Supreme Court's very narrow interpretation of Congress' purpose in passing § 504, the HEW regulations might, in fact, be ultra vires. The great weight of the evidence, however, points to this Note's conclusion that Congress had a very broad purpose in passing § 504. *See, e.g.*, note 16, *supra*. Under such a broad interpretation of the purposes of § 504, the HEW regulations are *not* ultra vires, and therefore should be given great deference.

130. Davis, 442 U.S. 397, 410-11 (1979).

weighed the costs involved in requiring affirmative action and concluded that the imposition of undue financial and administrative burdens upon an educational institution would not be acceptable.[131] The potentially burdensome effect of the costs required to meet affirmative obligations imposed by section 504 is of particular concern to financially troubled higher educational institutions.[132]

The introductory comments to the HEW regulations mention that costs were considered when the regulations were promulgated,[133] and HEW claims that the economic and inflationary impact of the regulations were carefully evaluated.[134] An HEW report which analyzed the costs and benefits of section 504 concludes that

> the 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.[135]

Despite HEW's optimistic outlook on the costs of instituting an affirmative action plan as mandated by section 504, the issue of who is responsible for paying those expenses remains. "No one can quarrel with the goal of full access and participation by handicapped citizens in the life and affairs of this nation, but questions are legitimately raised as to who can and should bear the costs inherent in serving that goal."[136] Indeed, while it is unclear whether the

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131. *Id.* at 412. *See also* text accompanying note 106, *supra*.

132. *See A Campus Handicap*, NEWSWEEK, Aug. 8, 1977, at 58, which states:

> HEW Secretary Joseph Califano has promised that the department will "be guided by sensitivity, fairness and common sense" in enforcing the new regulations, and his pledge has encouraged some worried administrators. But many want further clarification—especially as to why so little Federal money is available to help meet the goals. "What Congress is doing," says Robert Coleman, president of Converse College, "is appropriating private funds for what it deems a public good."

*See also* Davis, 574 F.2d 1158, 1162 (4th Cir. 1978); note 27, *supra*.

133. 42 Fed. Reg. 22,676 (1977). *See* 45 C.F.R. pt. 84, app. A, at 382-84 (1978).

134. *See* 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. 20,312 (1976) [hereinafter cited as *O'Neill Report*].

135. *Id.* at 20,320. The *O'Neill Report* goes on to comment on the costs specifically related to higher education:

> The major expense imposed on institutions of higher education by this regulation will be the cost of complying with the requirements of . . . building accessibility. It is not expected that subpart E, which requires nondiscrimination in recruitment, admissions, and provision of courses and noncurricular services, will impose any significant additional costs.

*Id.* at 20,360 (footnote omitted).

136. Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 MERCER L. REV. 745, 745-46 (1978). *See also* Barnes v. Converse

economic costs of an affirmative action program do in fact outweigh the economic benefits, it is clear that the costs are borne not by the government but by the hard-pressed individual educational institutions. Resolution of the issue of who should bear these costs is important to the institutions as well as to the handicapped people involved. Society as a whole reaps the benefits of the affirmative action programs. Therefore, it would be inequitable to require private institutions to bear the complete costs of these programs.

The overriding question of whether the handicapped have a right to enjoy the benefits of these programs, however, should not be answered solely on the basis of financial considerations. The resolution of this issue should be based on an analysis of (1) the degree to which the programs must be adjusted, (2) the type of program which is involved, and (3) the program's economic costs.

#### *e. The Narrow Interpretation Reexamined*

In spite of the Supreme Court's view to the contrary, the legislative history, subsequent legislation, HEW regulations, and other policy considerations support the interpretation that section 504 requires some degree of affirmative action by higher educational institutions. Thus, the Supreme Court's extremely narrow interpretation of the "otherwise qualified" clause, that an individual must be qualified *in spite of* his handicap, is not justified, and alternative interpretations must be examined.

### *B. The Extremely Broad Interpretation*

An alternative to the Supreme Court's interpretation of the "otherwise qualified" clause is the broad interpretation of the clause adopted by the Fourth Circuit in *Davis*. Under this interpretation, an "otherwise qualified" handicapped person is one who meets all the requirements for admission to the

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College, 436 F. Supp. 635 (D.S.C. 1977). The court in *Barnes* took a realistic approach to the question who should pay those costs:

> [The] court is most sympathetic with the plight of defendant as a private institution which may well be forced to make substantial expenditures of private monies to accommodate the federal government's generosity. . . . [I]f the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e. our taxes) . . . and not require that private educational institutions use their limited funds for such purposes.

*Id.* at 638-39. The court concluded, however, that until the law is changed, the institution must bear the cost of interpretive services. *Id.* at 639. *But see* Crawford v. Univ. of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977). The court in *Crawford* held that

> [i]n reviewing the financial data supplied to the Court concerning the expense of providing an interpreter . . . [i]t would be a financial hardship for [the plaintiff] to provide his own interpreter. This burden must be juxtaposed against that imposed on the defendants. . . . [T]he Court has no doubt that the University would be better able to pay the costs.

*Id.* at 1059.

program to which the person has applied, except for that requirement which is associated with his handicap.[137] Thus if, as in *Davis*, a person has a hearing disability, and one of the requirements for admission is the ability to communicate orally, that requirement must be waived, and the person is "otherwise qualified" as long as all of the other requirements for admission are met. This interpretation would advance the handicapped rights movement significantly, because it would enable virtually all physically handicapped[138] people to be considered "otherwise qualified" for programs from which they were previously excluded due to their disabilities.

This broad, literal interpretation is inappropriate, however, because it would lead to anomalous results, such as the absurd situation where "a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving."[139] In addition, the broad interpretation could be overly costly, without regard to the financial constraints placed upon higher educational institutions.[140] Several courts have also taken the view that the "exclusion of handicapped [persons] from [an institution's] activity is not improper if there exists a substantial justification for the [institution's] policy."[141] Thus, the extremely broad interpretation of the "otherwise qualified" clause, like the extremely narrow interpretation, cannot be supported.

### *C. The Intermediate Approach*

A middle-of-the-road interpretation of the "otherwise qualified" clause is suggested by the HEW regulations.[142] The HEW approach is a balance which takes into consideration the limits that a handicap places upon a person, but also recognizes that a handicapped person has many abilities which should not be ignored.

While, in *Davis*, the Supreme Court put limits on how broadly the HEW regulations can be interpreted, the Court's criticism seems to be directed more at the court of appeals' expansive reading of the HEW regulations than at the regulations themselves. The Court stated that if the regulations were to require *substantial adjustments* in existing programs, they would be of questionable validity.[143] In fact, while the Supreme Court's opinion may be characterized as requiring a narrow interpretation of the "otherwise qualified" clause, the

137. Davis, 574 F.2d 1158, 1161 (4th Cir. 1978).

138. Presumably this broad interpretation would even extend to mentally handicapped persons.

139. 45 C.F.R. pt. 84, app. A, subpt. A, § 5 (1978).

140. *See* Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Brooks, *supra* note 136.

141. Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977). *See also* Upshur v. Love, 474 F. Supp. 332, 339 (N.D. Cal. 1979), for a general criticism of the broad interpretation of the "otherwise qualified" clause.

142. 45 C.F.R §§ 84.1-.99 (1979).

143. Davis, 442 U.S. 397, 410 (1979).

opinion's language was conflicting and ambiguous enough to leave open the validity of HEW's middle-of-the-road interpretation.[144] It is important, therefore, to examine fully the implications of the HEW approach.

*1. Reasonable Accommodation*

In analyzing what types of requirements are imposed under the middle-of-the-road interpretation, we must look at the character of the affirmative obligations imposed by HEW's regulations upon covered institutions. The fundamental concept underlying the regulations promulgated under section 504 is that "reasonable accommodations"[145] must be made to compensate for the known physicial or mental limitations of qualified handicapped program applicants. Such adjustments are required unless evidence is provided that accommodations would be so extraordinary that they would impose undue hardships on a program's operation.[146]

The "reasonable accommodation" standard of the HEW regulations originated in the area of employment discrimination against the handicapped under section 503.[147] Under section 503, employers receiving federal contracts may not refuse to hire, train, promote, or transfer a disabled person if a reasonable accommodation can be made for the individual's handicap, and if the handicap does not prevent the person from performing the job.[148]

While reasonable accommodation in higher education programs takes on a different meaning than in employment, the requirement of reasonable educational accommodations is generally accepted.[149] Factors which should be con-

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144. *See id.* at 410, 412.

145. As one commentator has noted:

> Discussions of the reasonable accommodation requirement have a tendency to couch this mandate in terms of "affirmative action." However, it is clear that "reasonable accommodation" differs from special efforts to initially hire or promote disabled persons. . . . Indeed, "reasonable accommodation" is not triggered until disabled persons have been hired, at which point a determination regarding particular requirements is made.

Cook, *supra* note 2, at 58 n.167.

146. *See* CLELLAND, *supra* note 19, at 110-11. *See generally* Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973*, 6 FORDHAM URB. L.J. 399 (1978).

147. 29 U.S.C. § 793 (1979). *See* text accompanying note 13, *supra*. For a discussion of reasonable accommodations in the employment setting, *see* Cook, *supra* note 2, at 58-60. *See generally* Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785 (1976).

148. 45 C.F.R. §§ 84.12(a), (d) (1979). Reasonable accommodation in the employment context includes such things as: making facilities accessible; providing readers or interpreters; purchasing aids or modifying equipment; restructuring jobs by shifting mental and physical tasks; transferring non-essential duties to other employees; and arranging part-time or modified work schedules. 45 C.F.R. § 84.12(b) (1979).

149. *See* Crawford v. Univ. of N.C., 440 F. Supp. 1047, 1059 (M.D.N.C. 1977); Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S.C. 1977); Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D.W.Va. 1976). *See also* Amicus Curiae Brief of the State of California in Support of the Respondent at 3-17, Southeastern Community College v. Davis, 442 U.S. 397 (1979).

sidered in determining whether an accommodation is reasonable are the costs involved in providing the accommodation, the institution's ability to bear such costs, the nature of the applicant's handicap, and the nature of the program to which the person has applied. Accordingly, reasonable accommodation in educational programs means that opportunities must be opened up so that handicapped students may participate more readily in higher education programs; that tests and other methods of evaluating a student's aptitude may not be biased against students with handicaps; that inquiries in the admissions process as to whether the applicant is handicapped be severely limited; that facilities be made more accessible to the handicapped; that effective communications in the form of auxiliary hearing or sight aids must be provided; and that academic rules and regulations be adjusted where applicable.[150] According to the HEW regulations, accommodations need not produce "the identical result or level of achievement for handicapped and nonhandicapped persons."[151] It is sufficient that the accommodations "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement. . . ."[152]

The major advantage of the HEW approach is that it establishes a flexible standard for identifying a "qualified handicapped person,"[153] a standard which changes with the type of program involved, and the severity of the handicap. Thus, with respect to post-secondary and vocational education services, a qualified handicapped person is a person who, with the aid of reasonable accommodations on the part of the institution, "meets the academic and technical standards requisite to admission or participation" in the educational institution's program or activity.[154] In the employment context, a qualified handicapped person is one who, "with reasonable accommodation, can

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Judicial decisions support the requirement of reasonable accommodations outside the employment area. *See* United Handicapped Federation v. Andre, 558 F.2d 413, 416 (8th Cir. 1977) and Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1287-88 (7th Cir. 1977).

150. *See* 45 C.F.R. §§ 84.41-.47 (1979).

151. 45 C.F.R. § 84.4(b)(2) (1979), *quoted with approval in* N.Y. State Ass'n for Retarded Children v. Carey, 466 F. Supp. 487, 502 (E.D.N.Y. 1979). *See also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977) (regulations interpreted to require transit authorities to make their facilities and services accessible to the handicapped).

152. 45 C.F.R. § 84.4(b)(2) (1979).

153. HEW uses the term "qualified handicapped individual" instead of "otherwise qualified handicapped individual" since: "The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap." 45 C.F.R. pt. 84, app. A, subpt. A, § 5 (1978).

154. 45 C.F.R. § 84.3(k)(3) (1979). The official explanation of that regulation states that "both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. pt. 84, app. A, subpt. A, § 5 (1978). The critieria for qualification are different for employment and for pre-elementary and secondary school programs. *See* 45 C.F.R. § 84.3(k)(1), (k)(2) (1979). For a discussion of the HEW regulations with respect to higher education, *see* Charmantz and Penn, *supra* note 35, at 77-81.

perform the essential functions of the job in question."[155] For primary, secondary, and adult educational programs, a qualified handicapped person is one who must by law be provided with free educational benefits or is of an eligible age for the free educational benefits provided to non-handicapped persons.[156] Thus, HEW's middle-of-the-road approach allows great flexibility in its definition of what constitutes an "otherwise qualified" handicapped individual. Since the middle-of-the-road approach is so flexible, and can be adapted to the needs of the handicapped on a case-by-case basis, the HEW interpretation of the "otherwise qualified" clause should serve as the model in determining the extent to which section 504 requires affirmative action.

Application of HEW's middle-of-the-road approach to the varied situations covered by section 504 produces generally satisfactory results. As mentioned above, in the employment area, reasonable accommodations such as modification of work schedules and job descriptions, and physical modifications of offices may be required.[157] Access to the physical facilities in which government programs are conducted also must be made available to handicapped persons. This can be accomplished by accommodations such as redesigning equipment and assigning of services to more accessible buildings.[158] For preschool, elementary, and secondary education, the primary requirements are that a free, appropriate public education be provided, and that mainstreaming occur to the maximum extent that is reasonable.[159] Post-secondary educational regulations require that adjustments in academic requirements and practices be made.[160]

If the middle-of-the-road interpretation of the "otherwise qualified" clause had been applied to the extreme facts of *Davis,* the plaintiff in *Davis* might not have been admitted. The nature of Davis' disability, the type of program for which she was applying, and the great cost of modifications in the program would have imposed burdens on Southeastern Community College which might have been unreasonable, and therefore might not have been required by section 504.

## V
## ALTERNATIVE CONSTITUTIONAL THEORIES OF RELIEF

The plaintiff in *Davis* brought her action under section 1983 of Title 42 of the United States Code,[161] as well as section 504. The section 1983 claim

155. 45 C.F.R. § 84.3(k)(1) (1979).
156. 45 C.F.R. § 84.3(k)(2) (1979).
157. 45 C.F.R. pt. 84, app. A, at 409 (1978).
158. *Id.* at 410.
159. *Id.* at 413.
160. *Id.* at 417.
161. 42 U.S.C. § 1983 (1979) provides: "Every person who, under color of any statute . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."

alleged that Southeastern denied Davis the equal protection of the law by denying her admission to the Nursing Program.[162] The district court rejected Davis' equal protection claim, concluding that unless rules and regulations for admission are arbitrary or unreasonable, admission to the Nursing Program of a state community college is a privilege and not by itself a fundamental constitutional right.[163] Thus, the district court held that the denial of admission did not violate any constitutional provisions. On appeal, Davis argued that the district court's decision, upholding her exclusion from the Nursing Program, denied her the right of equal protection guaranteed by the fourteenth amendment. The Fourth Circuit found that since it could dispose of the case on non-constitutional, statutory grounds,[164] it had no reason to reach Davis' constitutional claims.[165] Since Davis received favorable judgment from the court of appeals on her statutory claims, Davis' equal protection claims were not raised when the Supreme Court considered the case.

Despite the failure of the courts in *Davis* to consider Davis' constitutional claims adequately, the equal protection and due process clauses of the fourteenth amendment may provide a remedy for discrimination against parties situated similarly to Davis, who are receiving unequal treatment in higher education because of their handicaps.

### *A. Equal Protection Analysis*

To qualify for equal protection analysis, there must be two distinct groups of people, one of which is treated differently from the other, and there must be a degree of state action. In *Davis*, the unequal treatment resulted from the college's policy of treating applicants with physical disabilities differently from those applicants who were not disabled. Since Southeastern was a state community college funded by the state of North Carolina, the state action requirement was satisfied. In the case of a purely private college, the state action requirement could arguably be satisfied under several theories. First, under a "public function" theory, a private college may be seen as a quasi-governmental institution. Since the facilities are built and operated primarily to benefit the public, and their operation is essentially a public quasi-governmental function, federal regulation may be acceptable.[166] Second, under a "nexus theory," the state action requirement for private colleges could

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Section 1983 is based on the fourteenth amendment, which states in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

162. Davis, 424 F. Supp. 1341, 1342 (E.D.N.C. 1976).

163. *Id.* at 1344.

164. *See* text accompanying notes 56-65, *supra*.

165. Davis, 574 F.2d 1158, 1163 (4th Cir. 1978).

166. *See* Marsh v. Ala., 326 U.S. 501, 506 (1946); The Civil Rights Cases, 109 U.S. 3, 36-62 (1883) (Harlan, J., dissenting). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 918-27 (9th ed. 1975).

be satisfied by the nexus created by the large amounts of government funding and other government support which the private institution receives.[167] Since both private and public colleges satisfy the state action requirement, those actions of educational institutions which distinguish handicapped applicants from nonhandicapped applicants may be subjected to equal protection analysis.

Under the traditional "two-tiered" mode of equal protection analysis, developed by the Warren Court,[168] most governmental classifications are tested according to a rational basis standard. If, however, the classification is alleged to discriminate against a "suspect class," or impinges upon a "fundamental interest," the more rigorous or "strict scrutiny" standard of review is invoked. The two-tiered approach has been criticized as overly rigid and mechanistic, and several Supreme Court justices and commentators have called for an intermediate or balancing approach.[169] This section will examine handicapped classifications under the traditional two-tiered model as well as the intermediate approach.

### *1. The Two-Tiered Model*

#### *a. The Rational Basis Test*

Even before the Warren Court, the Supreme Court required classifications which distinguish between individuals and involve state action to be "reasonable" or "rational." Thus, "equal protection came to be seen as requiring 'some rationality in the nature of the class singled out,' with 'rationality' tested by the classification's ability to serve the purposes intended by the legislative or administrative rule. . . ."[170] In considering an equal protection claim, therefore, the first question for a court is whether the classifications challenged are rational in light of their purposes. The Supreme Court has exhibited great deference to legislative decisions in applying the rational basis standard,[171] and

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167. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), where the Supreme Court held that the state was significantly involved in private discrimination because of the financial interconnections between the privately owned restaurant and the state.

168. *See, e.g.*, Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

169. *See* Gunther, *The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33 (1972) [hereinafter cited as Gunther, *Newer Equal Protection*]. *See also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

170. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 995 (1978) (quoting Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966)).

171. *See* Chief Justice Warren's formulation of the standard in McGowan v. Md., 366 U.S. 420 (1961). Chief Justice Warren wrote:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

*Id.* at 425-26.

has been willing to uphold almost all classifications which can rationally be conceived to further a legitimate state policy.[172] The rational basis test would be satisfied in the *Davis* case, since it is arguable that the state's interest in training qualified nurses will be served more effectively by educating only nonhandicapped students. The state can assert that it has a policy of conserving limited public resources and that this policy justifies treating disabled students severely. This argument would probably pass "rational basis test" scrutiny.

*b. The Strict Scrutiny Test*

The second tier of the two-tiered model is the "strict scrutiny test," which invalidates the classification unless the state can convincingly demonstrate that the classification is necessary to promote a "compelling" government interest.[173]

> The rigorous level of scrutiny would be invoked when legislation, or some other form of state action (1) contained classifications which were inherently "suspect," such as those based on race or nationality, or (2) affected a "fundamental right" either expressly or impliedly guaranteed by the constitution, such as the right to vote or to have offspring.[174]

Strict scrutiny has been described frequently as "strict in theory, and usually fatal in fact,"[175] because very few courts applying the strict scrutiny test uphold the challenged state action.[176]

*i. Suspect Classifications*

The application of the strict scrutiny standard to suspect classifications began to take shape in the now famous "footnote four" of *United States v. Carolene Products Co.*,[177] where Justice Stone, writing for the Court, recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[178]

In 1973, in *San Antonio Independent School District v. Rodriguez*,[179] the Supreme Court stated that classifications based on a group characteristic would

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172. L. TRIBE, *supra* note 170, at 996.

173. Burgdorf and Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 900 (1975).

174. *Id.* at 900-01.

175. Gunther, *Newer Equal Protection*, *supra* note 169, at 8; *see* L. TRIBE, *supra* note 170, at 1000.

176. Gunther, *Newer Equal Protection*, *supra* note 169, at 8.

177. 304 U.S. 144 (1938).

178. *Id.* at 153 n.4.

179. 411 U.S. 1 (1973).

trigger strict scrutiny when that group was "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political processes."[180] One commentator has concluded that the factors relevant to a determination of suspectness are

> (1) that suspect classes suffer from "an immutable characteristic determined solely by the accident of birth," which "bears no relation to ability to perform or contribute to society"; (2) that suspect classes have suffered historical vilification . . .; and (3) that the suspect class, largely because of past discrimination, lacks effective political power and redress.[181]

It is arguable that handicapped classifications possess most, and possibly all, of these indicia of suspectness.[182] Handicapped people are readily seen as "saddled with disabilities," because a handicap is, by definition, a disability. Many handicaps are determined "solely by accident of birth." Furthermore, while a large number of disabilities develop later in life, as a result of accident or illness, the victims of these handicaps are not responsible for their disabilities. Such handicaps may be seen as "acts of God" which are similar to "accidents of birth." Handicapped people have clearly suffered "historical vilification," and are universally seen as the subjects of "unequal treatment."[183] The "political powerlessness" question could be the subject of extensive discussion.[184] However, most mentally handicapped persons are denied the right to vote, and transportation difficulties and architectural barriers at polling places make it difficult for many physically handicapped people to vote. "These and other problems, including restrictions upon the right to hold public office, have rendered handicapped persons almost totally 'politically powerless'."[185] A strong case can be made, therefore, that the class composed of handicapped persons meets all of the criteria of the Supreme Court for suspectness, and that classifications relating to the handicapped should be strictly scrutinized.[186]

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180. *Id.* at 28. *See* Frontiero v. Richardson, 411 U.S. 677, 682-86 (1973), where Justice Brennan noted the factors which the Court considered relevant to the determination of suspectness.

181. Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 980 (1975) (quoting in part Frontiero v. Richardson, 411 U.S. 677, 685-86 & n.17 (1973)) (footnotes omitted).

182. Burgdorf and Burgdorf, *supra* note 173, at 905-08.

183. *See, e.g.*, Burgdorf and Burgdorf, *supra* note 173, at 861-99; Cook, *supra* note 2, at 31-37.

184. Burgdorf and Burgdorf, *supra* note 173, at 906-07.

185. *Id.* at 907 (footnotes omitted). Absentee ballotting may mitigate the political powerlessness of the handicapped individual. However, the handicapped are not organized into an identifiable group for political purposes.

186. At least one state court has found that handicapped persons merit strict judicial scrutiny. In re G.H., 218 N.W.2d 441 (N.D. 1974). *But see* Upshur v. Love, 474 F. Supp. 332, 337 (N.D. Cal. 1979); Doe v. Colautti, 454 F. Supp. 621, 631-32 (E.D. Pa. 1978), *aff'd* 592 F.2d

*ii. Fundamental Rights Analysis*

In addition to requiring strict scrutiny for suspect classifications, the equal protection clause prohibits a state from infringing on fundamental rights. If an individual can show that a classification limits or prevents the exercise of a constitutionally protected fundamental right, the state must prove that the classification is essential to the attainment of a compelling governmental interest.[187] If the state cannot make such a showing, the classification will be invalidated.

In determining whether the right in question is fundamental for purposes of equal protection analysis, the key is "assessing whether there is a right . . . explicitly or implicitly guaranteed by the Constitution."[188] Despite the fears of Justice Harlan that the "fundamental rights" doctrine "creates an exception which threatens to swallow the standard equal protection rule,"[189] the Supreme Court has found very few rights to be fundamental.[190] The Court has found that there is a fundamental right to interstate travel;[191] to equal voting opportunity;[192] to equal litigation opportunity;[193] to contraception;[194] to procreation;[195] to marriage and family relationships;[196] and to abortion.[197] In *San Antonio Independent School District v. Rodriguez*,[198] however, the Supreme Court seemed to limit the scope of the fundamental rights doctrine. Addressing the question of whether education is a fundamental right, the Court said that

> the key . . . is not to be found in comparisons of the relative societal significance of education as opposed to [other rights]. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[199]

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704 (3d Cir. 1979); Gurmankin v. Costanzo, 411 F. Supp. 982, 992 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1979).

187. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

188. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

189. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). Justice Harlan found the doctrine unnecessary as well, stating that the Court should not choose "particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." *Id.* at 662.

190. *See generally* L. TRIBE, *supra* note 170, at 1002-11.

191. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

192. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

193. Boddie v. Conn., 401 U.S. 371 (1971).

194. Griswold v. Conn., 381 U.S. 479 (1965).

195. Skinner v. Okla., 316 U.S. 535 (1942).

196. Loving v. Va., 388 U.S. 1 (1967).

197. Roe v. Wade, 410 U.S. 113 (1973).

198. 411 U.S. 1 (1973).

199. *Id.* at 33-34.

Absent a suspect classification, therefore, strict scrutiny is called for only when there is discrimination against the exercise of an explicit or implicit constitutional right. In applying the fundamental rights doctrine, the Court has found that neither welfare assistance[200] nor housing[201] is a fundamental right. Since, after *Rodriguez,*[202] it is questionable whether the right to secondary education in general is fundamental, it may be difficult to argue that the right of the handicapped to higher education is fundamental, and that the denial of this right requires strict juducial scrutiny.

*2. The Sliding Scale Test*

As discussed above, commentators severely criticize the two-tiered approach as being overly rigid.[203] As a result of dissatisfaction with the two-tiered approach, a growing range of cases involving important but not "constitutionally fundamental" interests have triggered a form of review "poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny. . . ."[204] While such an intermediate standard of review has never been adopted by a majority of the Supreme Court,[205] this proposed test is applied when two circumstances are present.

> First, intermediate scrutiny has been triggered if important, though not necessarily "fundamental" or "preferred," interests are at stake. . . . [E]ither a significant interference with liberty or a denial of a benefit vital to the individual triggers intermediate review.
>
> Second, intermediate review has been triggered if sensitive, although not necessarily suspect, criteria of classification are employed. . . . Whether or not the groups in question might qualify for treatment as "discrete and insular minorities," they bear enough resemblance to such minorities to warrant more than casual judicial response when they are injured by law. . . . More generally, intermediate review . . . will be most appropriate when the legislative and administrative processes seem systemically resistant to change.[206]

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200. Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977); Dandridge v. Williams, 397 U.S. 471 (1970).

201. Lindsey v. Normet, 405 U.S. 56 (1972).

202. *Rodriguez* was limited to a *relative* deprivation of education, *i.e.*, the right to equal quality of education. The Court expressly reserved the question of whether the right to *some* degree of education is fundamental. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973).

203. Gunther, *Newer Equal Protection, supra* note 169, at 17-18. *See* text accompanying note 169, *supra.*

204. L. TRIBE, *supra* note 170, at 1082. *See* text accompanying note 160, *supra.*

205. *See generally* Gunther, *Newer Equal Protection, supra* note 169; Wilkinson, *supra* note 181.

206. L. TRIBE, *supra* note 170, at 1089-92 (footnote omitted).

The unequal treatment of the handicapped in admission to higher educational institutions should meet the requirements for intermediate or balancing review. Certainly, the right to the benefits of higher education is vital to the handicapped individual. In addition, the handicapped are generally viewed as "discrete and insular minorities." Further, the political processes are unresponsive and are particularly resistant to change. Therefore, intermediate review may be triggered by handicapped classifications.

The standard for intermediate review is a "sliding scale" analysis which uses a balancing approach based on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[207] The advantage of such a balancing approach is its flexibility, as it can accommodate different governmental and individual interests in various factual settings.[208]

The application of the balancing test, which is more exacting than the rational basis test, would significantly advance the handicapped rights movement in higher education, even though it is more difficult to predict individual case results under the balancing test. Since educational opportunities are crucial to ensuring the full integration of the handicapped into society, the state's interest in an equitable distribution of limited resources might often have to yield to the great weight of these interests of the handicapped individual.

In conclusion, traditional equal protection analysis may provide relief for the handicapped if the right to attend an educational institution is found to be fundamental. This traditional analysis, however, confronts the handicapped with a substantial burden of proof which will be difficult to meet. Yet, the courts may establish an effective theory of relief if they adopt an intermediate balancing approach for dealing with classifications adversely affecting the handicapped. These classifications might then be stricken as violative of the equal protection of the law.

### *B. The Irrebuttable Presumption Doctrine*

An alternative constitutional theory of relief for handicapped individuals confronted with discrimination in higher education is the irrebuttable presumption doctrine. Under this theory, an administrator of a program violates due process of law[209] when he fails to allow challenges to factual assumptions related to the competence of the applicant. Under the irrebuttable presumption doctrine, although a presumption may be struck down, this does not mean that the qualification involved is irrelevant. It means only that a handicapped applicant would be allowed to rebut a presumption that because of his

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207. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).

208. Wilkinson, *supra* note 181, at 989.

209. U.S. CONST. amend. XIV, § 1 states in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

handicap, the applicant is not qualified for admission; in addition, where justified, exceptions to general rules would be permitted.

The Supreme Court has employed the irrebuttable presumption doctrine in a few cases to invalidate classifications which attribute an undesirable characteristic to all members of a group.[210] "The doctrine is premised on the notion that, under certain circumstances, due process requires individualized determinations for the government to deprive persons of life, liberty or property."[211] In theory, therefore, courts could apply the doctrine to all overly broad classifications.

Most commentators have criticized the invocation of the irrebuttable presumption doctrine,[212] arguing that the challenged classification "presumes" nothing, but simply mandates one substantive governmental policy over another. Furthermore, "[a]ll the Court is really condeming when it invalidates an irrebuttable presumption . . . is a substantive rule that it deems impermissibly overinclusive."[213] In *Weinberger v. Salfi*,[214] the Supreme Court signalled its intention to limit the use of the irrebuttable presumption doctrine, expressly rejecting the use of irrebuttable presumption analysis to strike down a federal statutory classification. Warning that an extension of the irrebuttable presumption doctrine to Social Security Act classifications "would turn the doctrine . . . into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution,"[215] the Court declined to apply the doctrine in an expansive manner.[216] Irrebuttable presumption analysis, however, has been applied by a few lower courts since *Salfi*[217] and, while severely eroded, the doctrine may still be alive.

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210. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974) (pregnant teachers unfit to work after five months of pregnancy); Stanley v. Ill., 405 U.S. 645, 658 (1972) (unwed fathers are unfit parents).

211. Comment, *Constitutional Law—Irrebuttable Presumption Doctrine—Right of Blind Teachers to Take Teacher's Examination*, 23 WAYNE L. REV. 1295, 1296 (1977) [hereinafter cited as Comment, *Irrebuttable Presumptions*].

212. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1555-56 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 473 (1975); Comment, *Irrebutable Presumptions*, *supra* note 211, at 1304. *But see* L. TRIBE, *supra* note 170, at 1095-96.

213. L. TRIBE, *supra* note 170, at 1094.

214. 422 U.S. 749 (1975).

215. *Id.* at 772.

216. *Id.* at 771-72.

217. *See* Gurmankin v. Costanzo, 411 F. Supp. 982, 990-92 (E.D. Pa. 1976), *aff'd* 556 F.2d 184, 187-88 (3d Cir. 1977). In *Gurmankin*, both courts applied the irrebuttable presumption doctrine to invalidate the school district's presumption that blind teachers were unfit to teach sighted pupils. *See also* Beazer v. N.Y.C. Transit Auth., 399 F. Supp. 1032, 1057 (S.D.N.Y. 1975), *aff'd* 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979). In *Beazer*, the district court applied an irrebuttable presumption analysis to find that the New York City Transit Authority's blanket exclusion of all former heroin addicts from any form of employment violated the due process clause. The Supreme Court, however, reversed on other grounds, finding no merit to the irrebuttable presumption claim. The Court rejected the argument

An analysis of the Supreme Court cases before *Salfi* reveals a tripartite test to determine when the irrebuttable presumption doctrine may be applied:

> First, application of the doctrine is permissible when constitutionally protected rights are at stake, despite the administrative inconvenience and expense which individualized determinations entail. Second, if an interest is not constitutionally protected, its importance must be weighed against the effectiveness, inconvenience and expense of individualized determinations. If the personal interest outweighs these governmental interests, application of the doctrine is proper, and the classification will fall. Third, classifications made in social welfare legislation appear to be excepted from the scope of the doctrine.[218]

The irrebuttable presumption doctrine could, according to this test, be applied to situations similar to the facts of *Davis*, where access to higher education is involved. First, while the right may not be constitutionally protected, it is, nonetheless, an important right to a handicapped individual. The handicapped have many abilities and they must be allowed to demonstrate those abilities instead of being presumed to be incompetent. Second, in the context of admission to a program, the administrative inconvenience of holding a hearing to determine qualifications on an individual basis would be negligible, since most applicants to educational programs are already given personal interviews.

In sum, if a handicapped individual were denied admission to an educational institution because of a presumption on the part of the school that his handicap deprives the individual of the capacity to perform safely or competently in the program, such a presumption could be struck down on the ground that it might be refuted if the handicapped applicant were given the chance to present contrary evidence. Thus, if the irrebuttable presumption doctrine is still good law after *Salfi*, it could be used as an alternative theory of relief for disabled individuals. The disabled applicant would therefore be given the opportunity to demonstrate his competence in the program to which he has applied.

## VI
## CONCLUSION

In the context of an analysis of the recent Supreme Court case of *Southeastern Community College v. Davis*, this Note has attempted to justify an expansion in the law regulating rights of the handicapped to higher education. The Note has also examined constitutional arguments which can be applied to rights of the handicapped. In conclusion, congressional intent, legislative his-

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that an individualized determination of each applicant's qualifications was required on equal protection grounds. Beazer, 440 U.S. 568, 592 (1979).

218. Comment, *Irrebuttable Presumptions*, *supra* note 211, at 1300-01 (footnotes omitted).

tory, recent amendments to section 504, and compelling policy considerations justify placing an affirmative action burden on higher educational institutions in the form of reasonable accommodations to the needs of the handicapped. In addition, equal protection and due process arguments may be used as theories of relief for handicapped individuals confronted with discriminatory state action.

Even if the law is interpreted to support the handicapped rights movement, however, the law alone is not sufficient. To effectuate the national goal of full integration of the disabled into American society, the people of the United States, nonhandicapped and handicapped alike, must change their stereotyped views of the role of the disabled. In many ways, the battle for the legal rights of the handicapped to higher education is, therefore, just the beginning.

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*On May 9, 1980, due to the creation of the Federal Department of Education, several regulations that were previously promulgated by the Department of Health, Education and Welfare (HEW) were transferred to the new Department of Education. As a result, HEW regulations previously found at, and cited in this Note as, 45 C.F.R. part 84, (1979) are now located at 34 C.F.R. part 104 (1980).* See *45 Fed. Reg. 30,936 (1980).*

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