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Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act

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Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of The Americans With Disabilities Act

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I. INTRODUCTION

Post-secondary educational institutions are obliged under Section 504 of the Rehabilitation Act\(^1\) and Titles II\(^2\) and III\(^3\) of the Americans with Disabilities Act (A.D.A.) to refrain from discriminating against disabled students and program applicants. This duty goes beyond a simple requirement of equal treatment. The law insists that the disabled be given an equal opportunity to participate in educational programs.\(^4\) To achieve the goal of equal opportunity, academic institutions are required to make reasonable accommodations in their programs and practices and are specifically required by federal regulations to make "academic adjustments" to accommodate disabled students.\(^5\) In effect, they may be required to change their standards for selecting, teaching, and evaluating students. The prohibition against disability related discrimination is not absolute, however. Unlike Title VI of the Civil Rights Act of 1964, which forbids all discrimi-

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4. See, e.g., 42 U.S.C.A. § 12101(a)(8)(1995)(goal of equal opportunity); id. § 12182 (a) (full and equal enjoyment of goods and services); id. § 12182(b)(1)(A)(ii)(equal opportunity to participate in benefits); 34 C.F.R. § 104.4(b)(1995)(Section 504 regulation); 28 C.F.R. § 35.130(b)(iii)(1995)(Title II regulation); id. § 36.201(a), 36.202(b)(1995)(Title III regulations).
nation on the basis of race,6 Section 504 and the A.D.A. protect only disabled individuals who are "otherwise qualified" to participate in post-secondary programs.7 Schools are thus allowed to take disability into consideration and are not required to make modifications that lower academic standards or cause fundamental changes in the nature of their programs.8 To that extent, both federal statutes attempt to protect academic decision making in areas that affect the integrity of educational programs.

"Academic standards" for students is a vast concept and difficult to reduce to a short, handy definition. Justice Frankfurter once stated that universities have an institutional right, among other things, to decide for themselves on academic grounds who should be admitted to study, what will be taught, and how it will be taught.9 This statement nicely sets out the realm in which academic standards come into play. Standards are normally set by the faculty or other academic authorities based on professional judgment although they are often influenced, and sometimes dictated, by accrediting bodies and licensing agencies. Standards provide a way of assuring that a particular student has demonstrated sufficient knowledge, skill, or understanding to justify admission to a program, retention, or the award of a degree, certificate, or other evidence of achievement. More specifically, standards include minimum admissions criteria such as prior grades or standardized test scores, course requirements, minimum grade point averages in a program, or other performance criteria. I use the term "program modification" to refer to alterations in such standards.

It is hardly surprising when students (disabled or otherwise) and post-secondary institutions disagree over academic programing decisions. The two groups have different interests and perspectives. Students are aware that educational achievement is necessary for success in other stages of life and have every reason to enter and graduate from post-secondary institutions. Higher education institutions share the goal of promoting educational achievement by students. However, these institutions also have an independent interest in maintaining the integrity of their programs by ensuring that students meet minimum standards of competency for admission and continuation. Certain accommodations imposed by federal disability laws, such as the

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6. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d (1995).
7. See infra notes 33-140 and accompanying text.
8. Id.
9. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (quoting The Open Universities in South Africa 10-12) (statement of scholars from the University of Cape Town and Witwatersrand); see generally infra notes 141-46 and accompanying text.
removal of architectural barriers, are hardly academic in any sense. Objections to these measures are normally based on expense.\textsuperscript{10} Other modifications, however, such as waiver of admissions requirements or changes in curriculum, strike at the heart of academic decision making.

Litigation challenging an institution's refusal to make a program modification often turns on the issue of whether plaintiff was "otherwise qualified" to participate or continue in the program. Success depends on plaintiff's ability to convince a court that a proposed accommodation does not affect the integrity of an academic program. Plaintiffs rarely prevail on these claims, yet judicial decisions favoring defendants may never reach the merits of an institution's argument that an accommodation jeopardizes academic integrity. Most courts refuse to entertain a plaintiff's arguments out of deference to academic decision making. Deference to academic authorities, however, has not followed a single pattern. In the absence of a Supreme Court ruling on the role of deference to academic decisions under the Rehabilitation Act and the A.D.A., a variety of approaches have emerged in the lower courts.

I take the position that judicial deference to academic standards in Section 504 and A.D.A. claims is a good policy in spite of its tendency to interfere with the statutory goals of creating equal opportunity for the disabled. The purpose of this paper is to examine the role of judicial deference to academic decisions in Section 504 and A.D.A. actions involving claims that a student is "otherwise qualified" to participate in a program. The plan of this paper is as follows. I initially present in Part II of this Article an overview of Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act with particular emphasis on their effects on higher education and on judicial interpretations of the "otherwise qualified" standard. In the next section, I review the constitutional and common law principles that courts have relied on in granting deference to academic decisions. Part IV describes the approaches employed by the lower courts in giving deference to academic authorities when program modification claims arise under the Rehabilitation Act and the A.D.A.\textsuperscript{11} Finally, in

\textsuperscript{10} Post-secondary institutions are required to conduct their activities in accessible locations and facilities. Both the Rehabilitation Act and the Americans with Disabilities Act obligate covered entities to remove physical barriers or provide services in accessible locations, subject to exceptions for undue expense. \textit{See generally} Laura F. Rothstein, \textit{Disabilities and the Law} 273-93 (2d ed. 1992) (discussing architectural barriers). Program accessibility in this sense lies outside the scope of this paper.

\textsuperscript{11} Enforcement of federal disability laws by administrative agencies lies outside the scope of this paper. Persons claiming discrimination under Section 504 of the Rehabilitation Act have the option of complaining to the funding federal agency or the Department of Justice. The agency involved is required to make a prompt
Part V, I argue that deference to academic decisions is justified by the incompetence of courts to review academic standards.

II. ACADEMIC STANDARDS UNDER SECTION 504 AND THE A.D.A.

A. Introduction

Both Section 504 and the A.D.A. require post-secondary institutions to change academic standards under certain circumstances. As a very general rule, schools must make program modifications when a student or applicant is capable of succeeding in the program with the aid of an accommodation that does not work a fundamental program alteration. Such a general formulation obviously leads to a high degree of uncertainty about an institution's obligation in particular instances. Some vagueness in the law was inevitable. Congress chose a comprehensive strategy for each statute, employing broad terms to define both the class of persons protected and the extent of protection. In legislative drafting, breadth and vagueness are often companions.

Normally, the key issue in a Section 504 or A.D.A. claim involving program modifications is whether the plaintiff is an “otherwise qualified individual.” The term originated in Section 504 of the Rehabilitation Act where it was not defined. Consequently, the courts were forced to fashion a definition. The judicial definition, in turn, was incorporated into the Americans with Disabilities Act. This section examines the “otherwise qualified individual” standard in detail. As a preliminary matter, I have included a summary of the elements of Section 504 and A.D.A. claims in order to set a proper context for the “otherwise qualified” concept. I also chose to examine the Rehabilitation Act and the A.D.A. separately. Given the high degree of consistency between the Acts, at least as they regard program modifications, it is possible to regard the “otherwise qualified” standard as a single concept with two statutory manifestations. The majority of relevant cases, however, originated under the Rehabilitation Act. Moreover, it is simply more convenient to deal with the two Acts separately.

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investigation and to attempt informal resolution if a violation is apparent. 28 C.F.R. § 42.107(d)(1)(1995). A formal hearing and decision may follow if informal means fail. Id. §§ 42.109-42.111. The complainant is not, however, a party to the enforcement proceedings and is not personally entitled to a remedy for a violation. See generally ROTHSTEIN, supra note 10, § 3.07. The most likely remedy for a violation in an administrative action is the termination of federal funds. Id. Agency enforcement has been dismissed by some as ineffective. See, e.g., Bonnie P. Tucker, Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future, 1989 U. Ill. L. Rev. 845, 851-83 (asserting that the dissemination of responsibility inhibits effective enforcement).

12. See infra notes 97-107 and accompanying text.
B. Section 504

1. Introduction

The Rehabilitation Act of 1973 was the first general federal civil rights act for the disabled. For higher education, the key provision is Section 504 which prohibits discrimination against the disabled by recipients of federal financial assistance. Application of Section 504 to post-secondary institutions is nearly universal since most institutions receive some form of federal financial assistance.13 Section 504 provides, in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .14

Section 504 is part of a broader scheme of anti-discrimination provisions and mechanisms in Title V of the Rehabilitation Act. Section 50115 requires federal agencies to practice affirmative action in hiring the disabled. Section 503 requires that federal contracts in excess of $10,000 contain a similar affirmative action provision.16 Section 502 created the Architectural and Transportation Barriers Compliance Board.17 The Access Board, as it is commonly known, has a number of functions including development of standards and guidelines for building accessibility and transportation systems.18 Finally, Title V contains enforcement provisions.19

2. Elements of a Section 504 Claim

Lower courts have consistently held that the elements of a Section 504 claim are: 1) plaintiff is a disabled individual as defined by the Act; 2) he or she is otherwise qualified to participate in a program or activity; 3) he or she has been excluded from participation solely because of a disability; and, 4) the program receives federal financial

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13. See infra note 103 and accompanying text.
18. Id. § 502(b).
assistance.\textsuperscript{20} Comprehensive treatment of all elements of Section 504 is, of course, far beyond the scope of this paper.\textsuperscript{21} The otherwise qualified and discrimination elements are discussed at length in Parts II.B.3 and II.C.2-3. However, some commentary about the disability and federal recipient status elements should be helpful in understanding the role of academic discretion with Section 504 claims.

\textbf{a. Disability Status}

Section 504 protects anyone who is disabled. As a result, a plaintiff must demonstrate that he or she meets the Act’s definition of a disabled individual. Disabled individuals are defined under the Act as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”\textsuperscript{22} Although this paper does not consider the definition of disability under the Rehabilitation Act in detail, it is important to note that Congress took a broad view of what constitutes a disability. Rather than attempt to generate a list of specific diseases, conditions, and ailments, Congress employed a functional definition which tests the severity of a claimed disability against its effect on life activities.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{20} See, e.g., Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988); Doe v. New York Univ., 666 F.2d 761, 774-75 (2d Cir. 1981); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1384 (10th Cir. 1981); Doe v. Washington Univ., 780 F. Supp. 628, 632 (E.D. Mo. 1991).
\item \textsuperscript{21} See generally ROTHSTEN, supra note 10, at 31-45; Bonnie P. Tucker & Bruce A. Goldstein, Legal Rights of Persons with Disabilities: An Analysis of Federal Law 3:3 to 3:30 (1994).
\item \textsuperscript{22} 29 U.S.C. § 706(8)(B)(1994).
\item \textsuperscript{23} See generally ROTHSTEN, supra note 10, § 1.03.
\end{itemize}

Regulations implementing the statutory definition add some specificity. The Department of Education, for example, defines physical and mental impairments as:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine, or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. § 104.3(j)(2)(iii)(1995). The inclusion of “specific learning disabilities” is obviously significant to post-secondary institutions. Major life activities are defined as: “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” Id. § 104.4(j)(2)(i)(1995) (emphasis added).

Commentary by the Department of Education to its § 504 regulations underscores the flexible and inclusive strategy behind the statutory and regulatory definition. The Department states that it elected not to attempt a list of specific diseases and conditions that met the statutory definition because of “the difficulty
The lesson of this definition for post-secondary institutions is that the class of disabled students, and therefore the class of potential litigants, is quite broad. Learning is specifically listed as a major life activity under the Department of Education (D.O.E.) regulations while other specified functions such as seeing, hearing, and speaking have an obvious impact on the learning process. Similarly, D.O.E.'s commentary to its regulations indicates that the definition of impairment embraces a wide range of conditions that can affect learning such as "orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." Studies of college students indicate that approximately 10% report some type of disability. Although the methodology employed is questionable, the studies tend to confirm the presence of a large group of disabled students enrolled in American post-secondary institutions.

Issues of disability status, however, have little relevance to academic judgments. Having a disability satisfies one element of a Section 504 claim but does not, by itself, require a program modification. This element of a Section 504 claim amounts to a strictly factual inquiry regarding whether a plaintiff has an impairment that interferes with a major life activity. There is nothing "academic" about this inquiry. For example, a college's history department has no particular wisdom about the severity of a student's arthritis or degree of visual acuity. As noted below, academic judgment is relevant only to the question of the disabled student's ability to meet standards. Hence, of ensuring the comprehensiveness of any such list." 34 C.F.R. pt. 104, app. A at 372 (1995). The statement added: Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition.

Id.

26. See Profile of Handicapped Students in Postsecondary Education (1987) (DOE Doc. No. 065-000—00376-9)(10% of students have disabilities); CATHY HENDERSON, HEALTH RESOURCE CENTER OF THE AMERICAN COUNCIL ON EDUCATION, COLLEGE FRESHMEN WITH DISABILITIES: A STATISTICAL PROFILE (1992) (8.8% of students have disabilities); see generally ROTHSTEIN, supra note 10, § 7.01.
27. Studies relying on student self reporting of disabilities are problematic. For example, students who wear glasses may over report visual impairments while students with AIDS may be reluctant to identify themselves, fearing loss of confidentiality. See ROTHSTEIN, supra note 10, § 7.01 n.1. Collecting accurate information may also be hampered by restrictions on pre-admission inquiries about disabilities. See 34 C.F.R. § 104.42(b)(4) (1995).
28. See infra note 33-140 and accompanying text.
the issue of academic deference should not arise under this element of a Section 504 claim.

b. Federal Recipient Status

The limitation of Section 504's coverage to recipients of federal financial assistance has no appreciable academic implications. Nearly all post-secondary institutions receive federal money such as student loan funds; hence they are covered entities under the Act.\(^{29}\) Prior to 1987, Section 504 was construed as program specific. In *Grove City College v. Bell*,\(^{30}\) the Supreme Court held that the gender discrimination prohibitions of Title IX of the Education Amendments of 1972 applied only to a program receiving funds and not an entire educational institution. This holding was later extended to Section 504.\(^{31}\) The program specific holding changed with the Civil Rights Restoration Act of 1987.\(^{32}\) The 1987 Act subjects an entire institution to Section 504's non-discrimination mandate if any program or sub-division receives federal funding. Like disability status, receipt of federal money is a strictly factual issue which few defendants challenge.

3. The Otherwise Qualified Individual Standard

Finally, a plaintiff must establish that he or she is *otherwise qualified* to participate in a program and was excluded solely on account of a disability. Although the two are stated as separate elements, in practice they are difficult to delineate. Justice Marshall's opinion in *Alexander v. Choate*\(^{33}\) points out that the two inquiries are "two sides of the same coin,"\(^{34}\) the ultimate question being to what extent a federal recipient is required to make modifications in its program or practices to avoid discriminatory conduct.\(^{35}\) In the typical case, the two elements merge into an argument that the plaintiff would be otherwise qualified but for the defendant's discriminatory refusal to make a *reasonable accommodation* by modifying its academic program. Since decisions about student qualifications are thoroughly academic judgments, and since courts are likely to give deference to academic decisions,\(^{36}\) it is critical to understand Section 504's otherwise qualified standard and an institution's obligation to make reasonable accommodations for disabled students. In the context of higher education, judi-

\(^{29}\) See infra note 103 and accompanying text.


\(^{33}\) 469 U.S. 287 (1985).

\(^{34}\) Id. at 300 n.19.

\(^{35}\) Id. at 287.

\(^{36}\) See infra notes 220-67 and accompanying text.
cial interpretations of the interrelated "otherwise qualified" and discrimination elements can be reduced to the following statement: a disabled person is protected under Section 504 if he or she meets an institution's requirements for participation in an academic program either with or without a reasonable program modification; \(^{37}\) a modification is reasonable if it does not involve undue financial or administrative burdens or require a fundamental alteration in the nature of the academic program. \(^{38}\)

The evolution of this standard is a curious thing. Section 504 expressly limits protection to "otherwise qualified individuals," but does nothing to define the term, nor does the Act mention reasonable accommodations. Vagueness in the statutory language is matched by a lack of guidance in the legislative history. \(^{39}\) It appears that the Congress that enacted the Rehabilitation Act \(^{40}\) viewed Section 504 as a civil rights statute that would be construed liberally to protect the disabled against discrimination by recipients of federal funds. \(^{41}\) The

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38. Id. at 5:4 to 5:10.
40. The anti-discrimination provisions of Section 504 originated in unsuccessful proposals by Senators Humphrey and Percy, see S. 3044, 92nd Cong., 2d Sess., 118 Cong. Rec. 525-26 (1972), and Representative Vanik, see H.R. 14033, 92d Cong., 2d Sess., 118 Cong. Rec. 9712 (1972); H.R. 12154, 92nd Cong., 1st Sess., 117 Cong. Rec. 45945 (1971)(to amend Title VI of the Civil Rights Act of 1964 to include the handicapped as a protected class). The same provisions were also included in an earlier version of the Rehabilitation Act that was vetoed by President Nixon for reasons unrelated to Section 504. See H.R. 8395, 92nd Cong., 2d Sess. (1972); S.7, 93rd Cong., 1st Sess. (1973). See generally Donald J. Olenick, Comment, Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern, 80 Colum. L. Rev. 171, 172-76 (1980)(deliberate repetition of the language of the Civil Rights Act in § 504 demonstrates Congress' commitment to the disabled.). Senator Humphrey, see 118 Cong. Rec. 32,310 (1972), Senator Percy, see 119 Cong. Rec. 6497 (1973), and Representative Vanik, see 119 Cong. Rec. 18, 137, each stated that Section 504 carried over the intent of their prior bills. In view of the lack of debate over Section 504 of the Rehabilitation Act by Congress, the Supreme Court gives great weight to the statements of sponsors in inferring the legislative intent behind Section 504. See Alexander v. Choate, 469 U.S. 287, 296 n.13 (1985). The Court also relied on interpretations of Section 504 in the nearly contemporaneous 1974 Rehabilitation Act Amendments, Pub. L. No. 93-516, 88 Stat. 1617 (1974). See, e.g., Alexander v. Choate, 469 U.S. 287, 293 n.7, 304 n.24, 306 n.27 (1985); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 n.15 (1984).
41. See Timothy M. Cook, The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws, 20 Loy. L.A. L. Rev. 1471, 1472-81 (1987)(Congress was mindful of protecting not only the mildest handicapped individuals but the most severely handicapped as well); Brigid Hurley, Note, Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations under Section 504 of the Rehabilitation Act, 32 B.C. L.
guiding principle was equal opportunity for the disabled and their integration into American society. Nonetheless, the legislative history gives no clue about the Congressional view of an "otherwise qualified" person. Apparently, Congress was content to allow federal agencies to work out the complex details of the Act.

Regulations implementing Section 504 attempt to spell out a recipient's obligations under the Act. Although many federal agencies have promulgated rules to implement Section 504, those issued by the Department of Education in Title 34, Part 104 of the Code of Federal Regulations deal specifically with higher education. Consequently, these regulations are the most relevant to academic decisions. The Department's rules define a "qualified handicapped person" for purposes of enforcing the Act.

Rsv. 1051, 1054-55 (1991)(noting the broad social policy underlying technical changes to Section 504).


45. At least 55 federal agencies have issued rules under Section 504. TUCKER & GOLDSTEIN, supra note 21, at 3:2. For a comprehensive list of agency regulations under Section 504, see id. at B:1-3.


47. Until the enactment of the Americans with Disabilities Act, the term "handicapped" was generally employed by Congress to refer to those with physical or mental impairments. ROTHSTEIN, supra note 10, § 1.03. "Handicapped" was utilized in Section 504 of the Rehabilitation Act until 1992, when it was changed to "disabled." See, e.g., Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(d), 106 Stat. 4344, 4348-49 (1992)(definition of "individual with disabilities."). In titling the Americans with Disabilities Act, Congress deferred to the sensibilities of persons with disabilities and adopted their preferred terminology. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 50-51; however, no substantive change in meaning from "handicapped" was intended. Id. Current D.O.E regula-
poses of post-secondary education as one who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." The Department then sets out a number of specific rules to implement the Act regarding admissions practices, the general treatment of students, housing, financial and employment assistance and non-academic services (e.g., physical education and athletics, counseling and placement services, and social organizations). For the most part, these regulations do not affect academic practices as defined by this paper.

48. 34 C.F.R. § 104.3(k)(3) (1995). Departmental commentary to the regulations indicates that the term technical standards "refers to all nonacademic admissions criteria that are essential to participation in the program in question." Id. at App. A, 374.

49. Id. § 104.42. Recipients may not utilize any admissions test or criterion that has a disparate impact on disabled applicants unless the test or criterion has been validated as a predictor of student success, nor may schools make pre-admission inquiries about disabilities except under limited circumstances. Id. Cf. Halasz v. University of New England, 816 F. Supp. 37, 42 n.6 (D. Me. 1993) (rejecting argument that Scholastic Aptitude Test violates 34 C.F.R. § 104.42); Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992) (public school teachers may be required to show minimum competency on national teacher examination).

50. 34 C.F.R. § 104.43 (1995). The regulation provides:

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

51. 34 C.F.R. § 104.45 (1995)(requires recipients who provide housing to non-disabled students to provide comparable, accessible housing to disabled students).

52. Id. § 104.45 (rule of non-discrimination in administering financial aid and employment services).

53. Id. § 104.46(a)(1),(2) (requires equal opportunity for participation in the most integrated setting).

54. Id. § 104.46(b)(rule of non-discrimination; prohibits counseling disabled students toward more restrictive career opportunities than other students with similar abilities).

55. Id. § 104.46(c) (prohibition of discrimination in membership practices).
Restrictions on admissions procedures can, however, affect academic judgments significantly. A decision to admit a student generally entails a judgment that an applicant is academically qualified to participate in a program. Institutions traditionally base these decisions, in part, on standardized tests such as the Scholastic Aptitude Test (S.A.T.), the Law School Aptitude Test (L.S.A.T.) or the Graduate Record Examination (G.R.E.). A federal rule regulating reliance on these traditional criteria of academic preparation and aptitude is potentially a significant limitation on academic discretion.

Academic judgments are directly affected by Subpart E's rules for "academic adjustments." The Department of Education requires that post-secondary institutions make accommodations in four areas. First, and perhaps most important, post-secondary institutions are obliged to alter academic requirements if 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." Among the examples of adjustments given in the rule are: "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." Yet the regulations stop short of an open-ended requirement to accommodate. Institutions need not make academic adjustments which "the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement . . . ." Second, a section entitled "other rules" forbids the imposition of rules that have the effect of limiting participation such as prohibiting tape recorders or guide dogs in classrooms. Third, schools must employ testing methods that measure achievement rather than the student's impairment. Finally, recipients must provide auxiliary aids, such as interpreters or taped texts, for students with communications impairments. Schools need not, however, supply personal devices such as hearing aids.

Judicial interpretation of the otherwise qualified element and its implementing regulations began with *Southeastern Community College v. Davis.* In its first interpretation of Section 504, the United States Supreme Court attempted to resolve the issue of who is other-
wise qualified under Section 504 and what academic accommodations a recipient must make. In *Davis*, plaintiff applied for admission to a nursing program. During the admissions process, it became clear that plaintiff suffered from a serious hearing impairment. She could detect sounds with the assistance of a hearing aid but could not distinguish speech patterns. Her principal method of communication was lip-reading. She was eventually denied admission on the ground that her inability to hear vocal commands would jeopardize the safety of her patients and herself in nursing practice and in the school's clinical training program. Additionally, the school concluded that any modifications in the program would make the clinical program pointless.

Plaintiff argued that Section 504 obligated defendant to take affirmative action to counter the effects of her disability. Specifically, she called for individual supervision by faculty and, more importantly, waiver of certain required courses. Plaintiff's theory was that she could work as a registered nurse in situations where lip-reading would be sufficient, such as an industrial facility or a physician's office. In such instances, clinical training would not be critical. Hence the school, she argued, was obligated to make appropriate curricular modifications under the Department of Health, Education, and Welfare (H.E.W.) regulations then in effect.

In finding that the plaintiff was not otherwise qualified, the Court took a narrow view of a recipient's obligation under the Act. Section 504, the Court reasoned, did not require educational institutions to disregard an applicant's disability. Rather, the Act's prohibition against exclusion of otherwise qualified individuals simply meant that a recipient could not base a decision to exclude an individual on the mere existence of a disability. Decisions about a plaintiff's ability to

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65. *Id.* at 400.
66. *Id.* at 401.
67. *Id.* at 401.
68. *Id.* School authorities specifically feared that plaintiff would not be able to communicate in an operating room where surgical masks are worn, and would not be able to respond immediately to vocal instructions from physicians when quick action was needed. *Id.* at 403.
69. *Id.* at 401-03.
70. *Id.* at 407-08.
71. *Id.* at 408 n.8.
72. See *id.* at 409 n.9, citing 45 C.F.R. § 84.44 (1978), now codified at 34 C.F.R. § 104.44(a) (1995).
73. The Fourth Circuit had ruled that Section 504 required that the defendant not take plaintiff's hearing impairment into account. *Southeastern Community College v. Davis*, 574 F.2d 1158, 1160-61 (4th Cir. 1978). Taken literally, the Supreme Court noted, such an interpretation would result in otherwise qualified blind persons being hired as bus drivers. *Id.* at 407 n.7.
74. *Id.* at 404.
function in a particular environment must be informed by specific facts, not by stereotypes. An otherwise qualified person, therefore, was "one who is able to meet all of a program's requirements in spite of his handicap." Institutions, moreover, were under no obligation to make substantial alterations in their programs. Such a requirement would amount to affirmative action that was not required by the Act's rule against discrimination. To the extent that the implementing regulations required such affirmative conduct, they were invalid.

Applying these principles to the facts of Davis, the Court concluded that granting the plaintiff a waiver of clinical training would require a fundamental alteration of the defendant's academic program. Thus, the defendant was not obliged to undertake such accommodations on plaintiff's behalf. The Court acknowledged that the line between affirmative action and discrimination was blurry and that it was "possible" that a recipient's failure to make modifications under some circumstances might be discriminatory, particularly if those changes did not entail undue financial and administrative burdens or if technological advances facilitated participation. However, the Court offered no test for identifying such situations.

Davis was a controversial decision. Although it can be faulted for reaching a questionable factual conclusion, most commentary focused on the Court's definition of an otherwise qualified person. The

75. Id. at 405.
76. Id. at 406 (emphasis added).
77. Id. at 410.
78. Id.
79. Id. at 412-13.
obvious effect of the "in spite of" standard was to severely limit the class of persons protected by the Act. In higher education, a rigorously applied Davis standard would have had the effect of protecting persons with impairments that are irrelevant to the learning process, such as cosmetic disfigurement or loss of limb. Ironically, these persons would have required no accommodation, reasonable or otherwise. Persons with disabilities that affect learning such as learning disabilities, blindness, or hearing impairments would not have met the academic requirements of most programs and therefore would have been deemed not otherwise qualified.

Aware of the difficulties caused by the Davis opinion, the Court revisited the otherwise qualified issue in Alexander v. Choate,82 a class action challenge to the State of Tennessee's decision to reduce Medicaid program costs by limiting the number of inpatient hospital days.83 Resolution of the controversy depended, in part,84 on the State's obligation as a federal recipient under the Rehabilitation Act to make reasonable accommodations in administering its Medicaid program. The Court acknowledged that its imprecise use of the term "affirmative action" in Davis caused great confusion.85 Affirmative action, the Court stated, customarily refers to a remedial policy designed to correct past discrimination while reasonable accommodation refers to removal of existing obstacles against the disabled.86 The Court stated:

Regardless of the aptness of our choice of words in Davis, it is clear from the context of Davis that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial"... or that would constitute "fundamental alteration[s] in the nature of the program... rather than to those changes that would be reasonable accommodations.87

Alexander recast the accommodation issue as one of "meaningful access."88 Characterizing the issue as a balance between the right of the disabled to be integrated into society and the right of federal grantees to preserve the integrity of their programs, the Court held

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83. Id. at 289-90.
84. Before reaching the reasonable accommodation issue, the Court first had to resolve the issue of whether Section 504 reached beyond intentional discrimination to prohibit actions with discriminatory effect. The Court held that it did. See id. at 299.
85. Id. at 300 n.20.
86. Id.
87. Id. (citations omitted).
88. Id. at 301.
that federal recipients are required to make reasonable accommoda-
tions that permit disabled individuals meaningful access to the pro-
gram in question. Alexander thus resolved the ambiguity left by Davis
and confirmed that federal grantees must make program modific-
tions that are not unduly burdensome nor fundamentally alter their
programs. On the other hand, Alexander did nothing to clarify the
concept of "meaningful access" or "reasonable accommodation" except
to say that modifications should not affect program integrity. As one
court noted, "the question after Alexander is the rather mushy one of
whether some 'reasonable accommodation' is available to satisfy the
legitimate interests of both the grantee and the handicapped
person." 89

C. The Americans With Disabilities Act

1. Introduction

On January 26, 1990, President Bush signed the Americans with
Disabilities Act90 into law. It was instantly heralded as the most sig-
nificant civil rights legislation since the Civil Rights Act of 1964.91
Sections of the Act establish far reaching rules against disability
discrimination in the most important aspects of life: employment,92
public services,93 public accommodations,94 transportation95 and tele-
communication.96 As a general matter, it is fair to say that the A.D.A.
universalizes the protections of Section 504 of the Rehabilitation Act
by extending coverage to entities that do not receive federal financial
assistance.97 The Act's definition of a disabled individual essentially
reiterates the corresponding definition under the Rehabilitation Act,98
and its provisions continue the concepts of equal opportunity99 and

89. Brennan v. Stewart, 834 F.2d 1248, 1262 (5th Cir. 1988).
91. See, e.g., Terry Wilson, For the Disabled, It's Independence Day,' Chi. Trib., July
27, 1990, p.1; Don Shannon, Spirits Soar as Disabled Rights Becomes the Law,
L.A. Times, July 27, 1990, p. 1; A Law for Every American, N.Y. Times, July 27,
93. Id. §§ 12131-12165 (West Supp. 1995).
94. Id. §§ 12181-12189 (West Supp. 1995).
95. Id. §§ 12141-12165 (West Supp. 1995) (public transportation systems); Id.
221, 225, 661 (1991)) (telecommunications provisions).
97. ROETHSTEIN, supra note 10, § 1.02, 2.03.
98. The A.D.A. defines "disability" with respect to an individual as: "A) a physical or
mental impairment that substantially limits one or more of the major life activi-
ties of such individual; B) a record of such an impairment; or C) being regarded as
99. See, e.g., id. § 12101(a)(8).
reasonable accommodations\textsuperscript{100} as well as the defenses of undue burdens\textsuperscript{101} and fundamental program alterations\textsuperscript{102} that were developed under the Section 504 case law.

Post-secondary institutions are covered under either Title II or Title III of the Act. In most respects, the A.D.A. did not change the operating environment for higher education. Virtually all post-secondary institutions are federal grantees and hence already bound by Section 504 of the Rehabilitation Act.\textsuperscript{103} As noted below, the anti-discrimination mandates of Titles II and III and their implementing regulations are essentially the same as those under Section 504.\textsuperscript{104} Moreover, Congress did not repeal Section 504 even though it had become largely superfluous. Instead, it chose to insure that the rule structure of the two statutes would be compatible. The Act contains a general rule of construction forbidding courts to apply a lesser standard than what is required by Section 504 and its regulations.\textsuperscript{105} Similarly, Department of Justice regulations implementing Titles II and III specifically state that neither should be construed to afford less protection than the Rehabilitation Act.\textsuperscript{106} The effects of the A.D.A. are therefore largely psychological, at least as far as academic modifications are concerned.\textsuperscript{107}

2. Title II

Title II of the A.D.A. covers services, programs, and activities of public entities,\textsuperscript{108} including state and local government run institutions of higher education. The Act protects "qualified individual[s] with a disability\textsuperscript{109}" by providing that:

\...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

\textsuperscript{100} See, e.g., id. §§ 12131(2); 12182(b)(2)(A)(iii).

\textsuperscript{101} See, e.g., id. § 12182(b)(2)(A)(iii).

\textsuperscript{102} See, e.g., id. § 12182(b)(2)(A)(i-iii).

\textsuperscript{103} ROTHSTEIN, supra note 10, § 7.01.

\textsuperscript{104} See infra notes 105-107 and accompanying text.


\textsuperscript{106} 28 C.F.R. § 36.103(a) (1995) (Title II); id. § 36.103(a) (Title III).

\textsuperscript{107} See generally Wayne A. Hill, Jr., Americans with Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities, 18 J. C. & U. L. 389, 415-17 (1992)("Most university officials felt they are ahead of any other sector of the economy in making facilities accessible to the disabled.").

\textsuperscript{108} Public entities are defined by the Act as follows:

As used in this subchapter:

(1) Public entity. The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45). 42 U.S.C. § 12131(1) (Supp. V 1993).

\textsuperscript{109} Id. at § 12132.
In order to allege successfully a Title II claim, a plaintiff must demonstrate that he or she: (1) has a disability; (2) is otherwise qualified for the benefit in question; (3) was excluded from participation in the benefit due to discrimination solely on the basis of disability; and, (4) the defendant is a state or local government entity.

Much like the language of Section 504, Title II is crafted in general terms. Implementing regulations issued by the Department of Justice (D.O.J.) establishes several principles for the enforcement of Title II, including requirements that a covered entity cannot deny the opportunity to participate in a service, fail to provide an equal opportunity to participate, provide a benefit that is not as effective in allowing an opportunity to achieve the same result as others, nor provide benefits that are different or separate from those given to others.

Certain specific D.O.J. regulations are especially significant for higher education. First, covered entities are obliged to make modifications in their practices, policies, and procedures to avoid discrimination unless such alterations would cause a fundamental alteration in the nature of the service. Second, covered entities must provide auxiliary aids and services of a non-personal nature unless doing so would fundamentally alter their activities. Finally, the regulations forbid the use of eligibility criteria which screen out or tend to screen out protected individuals unless the criteria are necessary to offer a public entity's services.

Neither Title II nor its regulations provide specific rules for higher education. Unlike Titles I and III, Congress opted to rely on a generally worded prohibition against discrimination rather than set out a list of discriminatory acts. Congress intended simply to extend the prohibitions of Section 504 to all activities of state and local government. Nonetheless, the Act's rule of construction requiring consistency with Title V of the Rehabilitation Act should resolve any questions arising from the generality of Title II and its regulations. For example, the requirement that covered entities make modifica-

110. Id.
113. Id. § 35.130(B)(1)(ii).
114. Id. § 35.130(B)(1)(iii).
115. Id. § 35.130(B)(1)(iv).
116. Id. § 35.130(b)(7).
117. Id. § 35.160(b)(1) (requiring auxiliary aids and services); § 35.135 (exempting items of a personal nature).
118. Id. § 35.164.
119. Id. § 35.130(b)(8).
tions in their practices and policies must be read in light of the Section 504 regulations requiring 'academic adjustments.'

Perhaps the most important facet of Title II for academic decision-making is the adoption of the "otherwise qualified" standard from the Section 504 case law. Title II protects "otherwise qualified individuals with disabilities" which it defines as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

This definition tracks the concept of the otherwise qualified individual under the Rehabilitation Act as developed by the courts. The otherwise qualified standard is also reflected in the "fundamental alteration" exception to regulations governing modifications in practices and policies, auxiliary aids and services, and use of eligibility criteria.

3. Title III

Title III prohibits discrimination against the disabled by public accommodations and specifically includes "undergraduate, or postgraduate private school[s] or other place[s] of education" in its definition of public accommodation. The elements of a Title III claim are identical to those in a Title II claim, except that the plaintiff must demonstrate that the defendant is a public accommodation rather than a public entity. Title III contains a broadly stated rule against discrimination as well as a number of rules of construction which resemble the Title II regulations, both in language and in lack of specific reference to higher education. Public accommodations may not deny benefits on the basis of disability or provide unequal or sep-
Three specific prohibitions, already familiar from the section 504 and Title II regulations, have equivalent implications for academic decision making. Covered entities may not: 1) use eligibility criteria which unnecessarily screen out or tend to screen out a disabled individual or a class of disabled individuals; 134 2) fail to make reasonable modifications in policies or practices unless such changes would work a fundamental alteration in the goods or services; 135 and 3) fail to provide auxiliary aids and services unless doing so would fundamentally alter the nature of the goods or services or impose an undue burden. 136 As with Title II, any difficulties created by the lack of specific reference to post-secondary institutions should be cured by the requirement that the Act be construed consistently with Section 504. 137

So far as academic decision-making is concerned, there is no significant difference between Title II and Title III of the Act. Both public and private post-secondary institutions are required to make reasonable program modifications short of a fundamental change in the nature of those programs. Title III curiously fails to refer to the "qualified individual with a disability" 138 specified in Title II and instead forbids discrimination against "individuals" 139 in the operation of public accommodations. The failure to limit coverage to qualified individuals in Title III might be taken as an intent to abandon the otherwise qualified standard in this part of the Act. The more natural explanation for this wording is that one does not normally think of "qualifications" in the same context as accommodations that are open to the public. 140 References to fundamental alterations and undue burden in other parts of Title III also make clear Congress' intent to carry the otherwise qualified standard of Section 504 and Title II over into Title III.

III. INSTITUTIONAL ACADEMIC FREEDOM

Any attempt to regulate institutions of higher learning, including the Rehabilitation and Americans with Disabilities Acts, raises the

132. Id. § 12182(b)(1)(A)(iii).
133. Id. § 12182(b)(1)(B).
134. Id. § 12182(b)(2)(A)(i).
135. Id. § 12182(b)(2)(A)(ii).
136. Id. § 12182(b)(2)(A)(iii).
137. See supra notes 104-106 and accompanying text.
139. Id. § 12182(a).
140. See Mary A. Crossley, Of Diagnoses and Discrimination: Discriminatory Non-treatment of Infants with HIV Infection, 93 COLUM. L. REV. 1581, 1645 n.253 (1993)("one does not normally think of needing to be 'qualified' to eat at a restaurant, visit a museum, or go to a doctor's office . . .").
possibility of interference with academic freedom. Academic institutions in the United States have enjoyed remarkable freedom from judicial scrutiny. Traditionally, courts have been reluctant to review decisions of universities in academic matters. The classic statement of institutional autonomy is Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire. Sweezy reversed a contempt citation against a university professor who refused to cooperate with a McCarthy-era investigation of his classroom activities. The majority opinion recognized a First Amendment right of academic freedom which protected individual teachers from state intrusion into the classroom.

The Court feared that restrictions on inquiry and expression within universities would jeopardize the search for knowledge and would imperil democratic self-government by denying students an opportunity for maturity and understanding by way of exposure to competing ideas. While agreeing that free societies depended upon freedom of inquiry, Frankfurter nonetheless saw the wrong in this case to be against the university and not the individual teacher. In his view, society's need for knowledge was secured by permitting universities to create an atmosphere of intellectual inquiry free from interference by civil and political authorities. He identified academic freedom with the "four essential freedoms" of the university set out by a group of South African professors in an earlier era: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

A. First Amendment Protections of Institutional Academic Freedom

As a matter of constitutional law, academic freedom is widely perceived as a First Amendment right of free expression held by individual faculty members and enforceable against state authorities, including state universities themselves. Leading cases on aca-

141. See generally J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251 (1989) (describing the system of academic freedom in relation to the Constitution); Virginia D. Nordin, The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 141 (1981-82) (one of the strongest exceptions to judicial intervention has been "academic abstention.").


143. Id. at 249-55.

144. Id. at 250-51.

145. Id. at 263 (Frankfurter, J., concurring in result) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12) (emphasis added).

ademic freedom such as Sweezy v. New Hampshire and Keyishian v. Board of Regents affirm the right of individual university teachers to express views free of interference by academic or civil authorities. These decisions reflect a philosophy that campuses should be free markets of ideas which the state has no interest in controlling. Institutional academic freedom as described by Frankfurter has also been recognized, although less forcefully, as a First Amendment value.

Sweezy was the first Supreme Court case to equate institutional academic freedom with First Amendment protections. Institutional academic freedom reappears twenty-one years later in Regents of the University of California v. Bakke. In Bakke, a plurality of the Supreme Court struck down a special admissions program at the University of California at Davis medical school which reserved 16 of 100 seats in each entering class for minority students. The Court held that the special admissions program was violative of the Equal Protection Clause and Title VI.

Justice Powell’s plurality opinion, however, refused to bar any consideration of race in admissions. Drawing on Frankfurter’s concurrence in Sweezy, Powell argued that the composition of a class was an academic prerogative. Fourth among the “four essential freedoms” of a university identified by Frankfurter was the right to decide “who may be admitted to study.” Powell placed great emphasis on the commonly held belief of university officials that diversity in a student body

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147. 354 U.S. 234 (1957) (plurality opinion).
151. Id.
152. Id.
153. Id. at 311-19.
was necessary to expose students to a variety of persons, ideas, and viewpoints; this practice in turn contributed to an atmosphere of speculation and inquiry which promoted learning. Race was therefore one of many factors such as geographic origin, personal talents, work experience, and compassion for the poor which a university could consider on an individual basis in making an admissions decision. To Powell, a state university's interest in creating a beneficial educational environment was sufficiently compelling to permit a limited consideration of race in admissions and to overcome any objections based on the Equal Protection Clause.

While confirming a constitutional status for institutional academic autonomy, *Bakke* may prove to be the high water mark of First Amendment protections of institutional academic privileges. Since *Bakke*, the Court has failed to give any definite contours to this constitutional doctrine. In *Widmar v. Vincent* the Court disapproved of a state university's policy against the use of university facilities for religious exercises. Apparently perceiving no distinction between a state university and other state agencies, the Court viewed the restriction as an impermissible content based restriction on speech in a public forum. One could argue that regulating the content of stu-

154. *Id.* at 311-15.
155. *Id.* at 317-18.
156. *Id.* at 315-19.
157. Some commentators have taken a cynical view that Justice Powell's reliance on institutional autonomy may have been a gentle device to preserve affirmative action policies rather than a view of academic freedom. See, e.g., J. HARVIE WILKINSON, FROM BROWN TO BAKKE 303-04 (1979); Lino A. Graglia, *Hopwood v. Texas: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 86-87 (1995)(asserting that only a lawyer as practiced as Justice Powell could simultaneously denounce as impermissible the rise of racial classifications and approve precisely such a practice); Yudof, *supra* note 146, at 855-56. Professor Byrne has argued that the institutional autonomy theory in *Bakke* has more vitality than was suggested by the initial, cynical reaction of some. He noted, however, that the Court has failed to provide it with "a definite sphere of influence or an adequate constitutional justification." Byrne, *supra* note 141, at 315-16. Byrne's optimism about institutional autonomy may now appear overstated in light of the intervening decisions in the *University of Pennsylvania* and *Rosenberger* cases. See infra notes 165-81 and accompanying text. Professor Metzger also saw a constitutional trend away from institutional neutrality toward institutional prerogative after the *Widmar* decision. See Metzger, *supra* note 146, at 1321-22. His conclusion is susceptible to the same objection.
158. Byrne, *supra* note 141, at 315-16.
160. *Id.* at 267-74. The Court reasoned that the university established a public forum by opening its facilities to student groups. *Id.* at 267-68. Moreover, the Court found that the university imposed content based restrictions on expression by forbidding the use of the university facilities by groups engaging in worship or professing a religious viewpoint. *Id.* at 268-70. The Court rejected the university's argument that the policy reflected a compelling state interest in avoiding the Establishment of Religion inasmuch as an open-forum policy would not have
dent activities on campus is as much an academic prerogative as the
right to promote diversity in student bodies which was recognized in
Bakke. Yet only Justice Stevens took this view. He argued that the
compelling state interest test was inappropriate in a campus environ-
ment where the speech content of student (and other) activities was
directly related to the educational process. Stevens felt that aca-
demic freedom permitted a university to make judgments about how it
would utilize its limited resources to pursue educational goals. He
would have permitted a university to make the same choices about
facility usage as it does when selecting books or devising a
curriculum.

No other justice joined in Stevens' concurrence. It should be noted
that Stevens' view of institutional autonomy was not absolute. He
would not permit a state university to discriminate against particular
viewpoints once it had approved a student activity. The majority
gave lip service to Frankfurter's concurrence in Sweezy by briefly ac-
knowledging the right of academic institutions to make academic
judgments. Theories of institutional autonomy, however, played no
role in the majority's analysis.

University of Pennsylvania v. Equal Employment Opportunity
Commission further narrowed the scope of institutional academic
freedom. The University had attempted to quash a subpoena of confi-
dential peer review materials issued by the E.E.O.C. during an inves-
tigation of a Title VII claim. Invoking Frankfurter's concurrence in
Sweezy, the University maintained that the First Amendment pro-
tected its right to determine "on academic grounds who may teach."
There is no doubt that the disclosure of confidential peer reviews may
affect the faculty selection process. The University argued that loss
of confidentiality would result in less candor in evaluations and, con-
sequently, the hiring and tenuring of less qualified individuals.

the effect of advancing religion. Id. at 270-74. For a discussion of First Amend-
ment prohibitions on content based speech restrictions, see LAWRENCE H. TRIBE,
AMERICAN CONSTITUTIONAL LAW § 12 (2d ed. 1988).
162. Id. Justice Stevens noted that under the Court's approach a student group want-
ing to view Mickey Mouse cartoons would have a right to use university facilities
equal to that of a group wanting to practice a performance of Hamlet. Id. at 278.
163. Id. at 280.
164. Id. at 278-79 n.2 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)
(Frankfurter, J., concurring in result)).
166. Id. at 186-88.
167. Id. at 197.
168. See Byrne, supra note 141, at 319 (loss of confidentiality diminishes candor in
evaluations).
The University further contended that disclosure would create an air of divisiveness and tension that was antithetical to the "free exchange of ideas that is a hallmark of academic freedom." Indeed, to the extent that institutional academic freedom provides immunity from civil interference in academic matters, it is difficult to imagine a more purely academic matter than a tenure decision.

The Court, however, took a limited view of the institutional right created by Sweezy and progeny. It construed those cases as protecting universities from content based regulation of university speech and activities by outside authorities. The crux of the actions in both Sweezy and Keyishian was an attempt to control the content of classroom lectures through the intimidation of faculty. In contrast, the subpoena at issue in University of Pennsylvania had no direct effect on either the content of university speech or on the criteria employed for granting tenure. The Court, moreover, considered the relationship between the disclosure of confidential materials and the feared lowering of personnel standards to be remote and speculative.

Most recently, in Rosenberger v. University of Virginia, the Court rejected a state university's argument that the First Amendment empowered it to refuse to fund a Christian student newspaper. The University had declined to pay printing costs under a school regulation prohibiting the funding of student publications that promote religious activities. Inasmuch as the University was willing to subsidize publications dealing with the subject of religion except those taking a religious viewpoint, the majority in Rosenberger had little trouble in holding that the funding restriction constituted an impermissible viewpoint discrimination. Relying on Widmar's assurance that universities must make academic judgments about the allocation of scarce resources, the University contended, in part, that academic funding decisions must consider content and viewpoint in order to achieve its educational mission.

The Court responded that Widmar simply recognized that the state (or its agencies) may make content-based choices when it is the

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170. Id. at 197.
171. Id.
172. Id. at 198.
173. Id. at 199-200.
174. Id.
176. Id. at 2514-15.
177. Id. at 2516-20.
178. Id. at 2518 (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
179. The university also argued that funding a religious student newspaper would constitute a violation of the Establishment Clause. See id. at 2520-25. The Court rejected this argument as well. Id.
180. Id. at 2518-20.
speaker. In *Rosenberger*, however, independent student organizations were not state speakers and hence were entitled to participate in a limited public forum free from viewpoint discrimination.\(^{181}\) Perhaps the most striking aspect of the decision was the Court's inclination to treat a university as simply another agency which created a public forum.

After *Rosenberger*, it is difficult to measure the boundaries of First Amendment protection of institutional autonomy. The Supreme Court continues to recognize institutional academic freedom as a viable First Amendment principle. The Court has cited Frankfurter's concurrence in *Sweezy* with approval\(^ {182}\) and has emphasized the importance of protecting institutional prerogatives.\(^ {183}\) Yet the utility of this constitutional doctrine in protecting higher education from interference by civil authorities has been limited. The "essential" freedoms to determine what is taught and how it is taught have been both confirmed and restricted. *Rosenberger* explicitly recognizes that state universities\(^ {184}\) are free to determine the content of their educational programs. The Court's conclusion is based on a public university's status as a "state speaker" which is free to control the content of its own speech.\(^ {185}\)

As a general matter, state speakers are free to expend money to promote their own viewpoints and are not required to disseminate competing views so long as they do not create a forum for private expression.\(^ {186}\) Setting aside the awkwardness of classifying a university as a "state speaker," *Rosenberger* validates a part of Frankfurter's view of academic freedom. By recognizing control over the "content" of its educational program, the Court at least confirmed the power of a state university to make determinations about curriculum. According to this logic, a state university should be free to determine what courses are required of its students in particular programs and what other requirements a student must meet in order to participate in the project.

\(^{181}\) *Id.* at 2519.


\(^{184}\) Of course, *Rosenberger* does not address the question of a private university's right to be free of state interference.


\(^{186}\) *Id.* at 2516-17.
On the other hand, *Rosenberger* leaves some limitations against state universities in place. State schools still have no power to shape their educational message to promote a particular viewpoint. It is now black letter wisdom that a state university may not invoke institutional academic freedom to suppress particular points of view once it has created a forum for the discussion of a particular matter. In addition, *Rosenberger* solves only part of the puzzle. *Rosenberger* deals only with the issue of institutional prerogatives in a state university. The court elected to find an institutional power over educational programming in the university’s status as a “state speaker” rather than attempting to assign to the university a more general right as an institution of higher learning. While the sheer number of state supported institutions makes the ruling significant, “state speaker” analysis does not apply to private colleges and universities. Presumably, the Court’s general and approving references to Frankfurter’s concurrence indicate that private institutions have a constitutionally protected right to control their curricula and set standards.

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189. The Court’s failure to articulate a view of institutional academic freedom that bridges the public-private distinction may reflect the fact that fewer academic freedom cases from private universities are likely to be litigated as such. By recognizing academic freedom as a “special concern of the First Amendment,” the Court created a right to be free of government interference. Whether that right belongs properly to individual faculties, institutions, or both, there can be no violation of the principle without state action. As a practical matter, controversies arising in state universities are most likely to involve state action. First, in claims by individual faculty members regarding university rules or actions, the school itself is the state agency. Second, some claims involve direct action by state agencies other than school administrations against faculty. Finally, state universities may challenge actions by other branches of government. In contrast, private universities are affected by state action only by the last situation. David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTMP. PROBS. 227, 231 (1990). Hence it is natural that the Court’s development of the institutional academic freedom doctrine should reflect the dynamic of public university settings.

Of the institutional academic freedom cases, only one involved a private university, *University of Pennsylvania*. The Court commented in a footnote that:

Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification. . . . Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First amendment issues are presented because government is simultaneously both speaker and regulator.

*University of Pa. v. Equal Opportunity Employment Comm’n*, 493 U.S. 182, 198 n.6 (1989). Although the quoted material helps to explain the Court’s reluctance to “define[] the precise contours of any academic-freedom right,” id. at 198,
The institutional academic freedom cases also preserve a significant measure of university control over issues of who may teach and who may be admitted to study. Rosenberger's declaration that state schools are free to determine the content of their educational programs can be read to include related matters such as standards for faculty. Teacher characteristics bear an obvious relationship to the conduct of instruction and campus discourse. Hence, university hiring criteria based on intellect, educational achievement, knowledge of a specialty, life experience, or particular philosophy are so closely linked to educational programming that they should receive constitutional protection from outside review. Universities have a similar interest in screening potential students for their ability to contribute to the educational experience of a university.\textsuperscript{190}

The Court does not pursue this point in Rosenberger. However, in both University of Pennsylvania and Bakke, the Court appeared to confirm a university's power to set standards for faculty and students. University of Pennsylvania\textsuperscript{191} acknowledged a university's power to set non-discriminatory academic criteria for tenuring decisions. There the Court voiced concerns about the dangers to academic freedom implicit in allowing outside authorities to influence university hiring criteria\textsuperscript{192} as well as the traditional respect of courts for professional

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where state universities are involved, it does nothing to resolve the question of whether institutional academic freedom has a different meaning in a private university. Indeed, it does nothing to distinguish the First Amendment rights of a private university from those of an individual.
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\textsuperscript{190.} The awkwardness of using a "state speaker" theory of institutional prerogative is illustrated by the matter of student performance evaluations. There is little doubt that Justice Frankfurter's view of the freedom to decide on academic grounds who may be admitted to study entails the power to determine whether a student's academic progress is satisfactory. Fitting this academic prerogative into the "state speaker" rationale is challenging at the least. The Rosenberger Court apparently viewed curricular determinations in that case as a form of state generated communication protected by Rust v. Sullivan. Rosenberger v. University of Va., 115 S. Ct. 2510, 2518-19 (1995)(citing Rust v. Sullivan, 500 U.S. 173, 174 (1991)). Under this logic, a variety of academic standards might become constitutionally protected institutional prerogatives. For example, a requirement that all undergraduates take a physics course can be construed as part of a university's message about what an educated person should know in the late 20th century. A decision that a student has not passed a physics course is more difficult to pigeon-hole as a form of communication. The student's transcript does indeed convey information about that student but has little do with a university's message about the role of science in modern life. It has no more communicative value than the revocation of a drivers license. Similarly, a decision not to admit a student with low high school grades does not reflect any particular viewpoint.


\textsuperscript{192.} Id. at 198 (referring to state attempts to influence classroom speech in Keyishian).
academic judgments.\textsuperscript{193} \textit{Bakke},\textsuperscript{194} as already noted, emphasized the traditional freedom enjoyed by universities to make academic judgments in assembling student bodies.

It is obvious, however, that the Court is unwilling to allow concepts of institutional academic freedom to interfere with the equally significant attempts by the federal government to eliminate discrimination in American society, including its campuses. Significantly, the Court has never struck down a federal statute on grounds of constitutionally protected institutional autonomy: \textit{Bakke} subjects higher education to Title VI while \textit{University of Pennsylvania} does the same for Title VII.

In \textit{University of Pennsylvania}, the Court was uncomfortable with the prospect of creating a broad institutional freedom to control all internal processes with academic implications. Obviously aware of the implications for enforcing federal anti-discrimination laws, the Court implied that claims of institutional academic freedom must bear some relation to "academic speech"\textsuperscript{195} or "university discourse."\textsuperscript{196} Nevertheless, the damage done to institutional autonomy is probably minimal. Review of internal processes under federal civil rights statutes represents a limited intrusion into the academic realm. Moreover, imposing public policies against discrimination on universities via legislation such as Title VI and Title VII should not affect a genuinely academic decision. Discrimination on the basis of race or gender is simply not an academic value. In this sense federal anti-discrimination laws and institutional autonomy are compatible.\textsuperscript{197}

Under the current state of law, post-secondary institutions should not be able to avoid the requirements of Section 504 or the A.D.A. by taking refuge in a constitutionally protected institutional academic freedom. It is reasonably clear, though the parameters are fuzzy, that public and private institutions of higher learning have a certain constitutionally protected right to set academic standards in the nature of admissions criteria, course requirements, and minimum performance standards for students. Nevertheless, these First Amendment rights cannot be read to nullify the power of Congress to protect "otherwise qualified" disabled persons. Perhaps the pivotal case is \textit{University of Pennsylvania}. Both the federal policies against race and gender discrimination in educational settings and the federal policy forbidding

\textsuperscript{193} Id. at 199 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225(1985)).
\textsuperscript{194} Bakke v. Regents of the Univ. of Cal., 438 U.S. 265 (1978).
\textsuperscript{196} Id.
\textsuperscript{197} The question of how much damage is done to peer evaluations by breach of confidentiality is also debatable. Even Professor Byrne, a proponent of institutional autonomy, acknowledges that there is no empirical information on this point and that the damage might be diminished by protective orders. See Byrne, supra note 141, at 319-20.
discrimination against the disabled are compatible with, and perhaps unrelated to, academic matters. Universities have no more interest in discriminating against the disabled than against minorities or women.

Analogies to race and gender discrimination, however, are tenuous. The term discrimination connotes not so much a fact as a legal conclusion that certain behavior is inappropriate. Any consideration of race and gender, at least of a negative sort, by a university is impermissible. Yet, as explained in Part II, taking disability into account does not, of itself, amount to discrimination under Section 504 or Titles II and III of the A.D.A. Discrimination occurs only when a covered entity denies a benefit on the basis of stereotyped attitudes (i.e., the disability is irrelevant) or refuses to make a reasonable accommodation (i.e., the disability is insignificant). Neither action amounts to an academic judgment. In those situations the logic of University of Pennsylvania and Bakke should prevail and subject universities to a rule of non-discrimination outside of its core academic areas.

By not requiring universities to make fundamental alterations in their programs or incur undue expenses, however, Section 504 and the A.D.A. stop short of what is the likely constitutionally protected area of academic decision making. Institutional prerogatives in the area of curriculum appear to have survived Rosenberger intact. Davis explained this limitation by finding that Congress did not intend to place covered entities under an affirmative action mandate. One could argue that the same result is required under the theory of institutional academic autonomy. For example, the power to deny admission to a disabled person who is not "otherwise qualified" is part of a university's constitutionally protected freedom to set standards, i.e., the essential freedom to determine on academic grounds who may be admitted to study. Additionally, one could argue that questions of reasonable accommodations involving waivers of standards are constitutionally exempted from judicial review by reason of the essential freedoms to determine on academic grounds what is taught and how it is taught. No reported case under Section 504 or the A.D.A. appears to consider this particular argument. The absence of constitutional argument on this point is due, in part, to the reasoning adopted by Davis, but also to the existence of a non-constitutional doctrine of academic abstention.

B. Academic Abstention

Since the late 19th Century, American courts have observed a common law principle of not interfering in internal academic decisions.198

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198. See Byrne, supra note 141, at 323-31; Nordin, supra note 141, at 146-47. Earlier courts also took a laissez faire attitude toward colleges based on a property theory. See Matthew W. Finkin, On "Institutional" Academic Freedom, 61 Tex. L.
As a general rule, a court will not review a university decision in a purely academic matter, especially grading, without some showing of arbitrariness or a countervailing statute. Arguments that a student was entitled to a remedy based on his contract with the school are generally turned aside by construing the agreement to give the school a high degree of discretion in making and applying academic standards.

Professor Byrne objects to labeling the practice of academic abstention a “doctrine” because of the failure of the courts to develop a consistent rationale in applying it or even to explain the need for academic discretion. Nonetheless, abstention has occurred with remarkable consistency over the years. The result has been that actions based on a breach of contract theory are nearly always decided in the school’s favor.

Byrne suggests three purposes (if not explanations) for the unwillingness to question academic judgments. First, older cases reflected a belief that broad discretion is necessary to enable universities to control student behavior while acting in loco parentis. Since contemporary higher education takes little interest in the moral development of students, this rationale is no longer important. Second, Byrne sug-

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200. See, e.g., Berea College v. Commonwealth, 94 S.W. 623 (Ky. 1906) aff’d, 211 U.S. 45 (1908)(upholding statute forbidding education of persons of different races in same institution).

201. Byrne, supra note 141, at 324 (citing Anthony v. Syracuse Univ., 231 N.Y.S. 435 (A.D. 1928)). Professor Byrne notes that the level of discretion that the courts find in most contracts between colleges and students would be sufficient to void a commercial contract for lack of mutuality. Id. See also Nordin, supra note 141, at 145-46 (academic abstention consistently applied).

202. Byrne, supra note 141, at 323, 325. See also Nordin, supra note 141, at 146.

203. Byrne, supra note 141, at 323.

204. Id.

205. Id. at 325.
suggests that the courts have viewed the academy as a "separate realm" governed by values and processes which are different from the larger society. Under this view, personal relations within the university community are guided to achieve pedagogical goals. Subjecting such relationships and the discretion that guides them to a legal remedy would, in this view, be destructive. It is probably significant that the cases that Byrnes cites for this proposition are older. Contemporary cases do not take this viewpoint explicitly. However, some remnant of this view exists in the consistent refusal of courts to recognize a Due Process right to the active participation of lawyers in disciplinary hearings on the ground that adversarial procedures are inimical to student-faculty relations.

The final and most important rationale for academic abstention is the perception that courts are incompetent to review academic decisions. Two Supreme Court cases set forth this general principle. In both Board of Curators v. Horowitz and Regents of the University of Michigan v. Ewing, medical students complained that their dismissal from a state university medical school on academic grounds violated due process.

In Horowitz, the plaintiff contended that procedural due process required a pre-dismissal hearing. The plaintiff in Ewing argued that the defendant's refusal to allow him to retake a standard medical exam was arbitrary and hence violated substantive due process. The Court refused to question the academic judgment in either case. The Horowitz Court reasoned that the judicial or administrative style fact finding that would occur in a pre-dismissal hearing had little utility in verifying academic evaluations. Unlike disciplinary matters, for example, which turn on factual inquiries into a student's behavior, ac-

206. Id.
207. Id. at 326.
208. See id. at 325 n.292 (citing People ex. rel. Pratt v. Wheaton College, 40 Ill. 186, 187-88 (1866); Woods v. Simpson, 126 A. 882, 883 (Md. 1924)).
209. See, e.g., Rosenberger v. University of Va., 115 S. Ct. 2510 (1995). In Rosenberger, the Court appears to treat a state university as a state agency which may be entitled to rights as a "state speaker" under the appropriate circumstances. See id. at 2516-20.
210. See Byrne, supra note 141, at 326 n.298 (citing Crook v. Baker, 813 F.2d 88, 99 (6th Cir. 1980); Frumkin v. Board of Trustees, 626 F.2d 19, 21-22 (6th Cir. 1980); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 188-59 (5th Cir. 1961)). See also Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978)(educational process not adversarial).
211. Byrne, supra note 141, at 325-26.
214. See Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. at 79, 82-84.
215. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 217-19 (1985). Plaintiff argued that the refusal was arbitrary in that the medical school had allowed other students to re-take the exam after initial failure. Id. at 219.
ademic judgments depended on expert evaluation of cumulative information that a hearing could not duplicate.\textsuperscript{216} 

\textit{Ewing} applied the same reasoning to judicial review of academic decisions. The Court flatly told the lower courts not to override a "genuinely academic decision" unless it constituted "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."\textsuperscript{217} The Court was concerned, in large part, by the judiciary's lack of sufficient expertise to review such decisions.\textsuperscript{218}

A prudential rule forbidding review of academic decisions that fall within the norms of accepted practice will insulate a university from liability in most cases.\textsuperscript{219} To the extent that this rule applies in Section 504 or A.D.A. litigation, the limitation of liability should be significant. Judgments made by academic authorities in determining whether a student is otherwise qualified to enter or continue in a program are rarely factual questions that can be easily verified by a court. Rather, such decisions involve the application of professional judgment to an array of facts and other information. It is precisely these sorts of decisions that the Court in \textit{Ewing} considered inappropriate for judicial review.

\section*{IV. APPROACHES TO DEFERENCE: HOW THE COURTS GO ABOUT YIELDING TO ACADEMIC DECISIONS UNDER SECTION 504 AND THE A.D.A.}

\subsection*{A. Introduction}

Part III of this paper examines the persistent rule of judicial restraint. The present section undertakes the task of identifying the techniques employed by courts to effectuate the policy of abstaining from review of academic decisions in Section 504 and A.D.A. cases. In the absence of guidance from the United States Supreme Court in this particular context, the lower courts developed a variety of approaches designed to protect academic judgments. These decisions fall into three categories. The first position is that academic decisions are owed no deference at all. A second group of decisions is willing to sustain any academic decision that is reasonable. The final position is that academic judgments should be sustained so long as there is undisputed evidence that relevant academic officials have considered a plaintiff's requests for accommodations and have made rational decisions that a modification would affect academic integrity.

\textsuperscript{216} Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978).
\textsuperscript{218} Id. at 226 (citing Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978)).
\textsuperscript{219} Byrne, supra note 141, at 323.
B. Methods of Deference

1. The No Deference Approach

Pushkin v. Regents of the University of Colorado\textsuperscript{220} is the leading, and perhaps only, case which pays no heed to academic judgments. In Pushkin, the plaintiff was a medical doctor who suffered from multiple sclerosis and was wheel-chair bound.\textsuperscript{221} After being denied admission to a psychiatric residency program, he brought an action under Section 504 seeking an injunction\textsuperscript{222} ordering his admission to the program. Plaintiff was able to muster unusually good evidence that he was otherwise qualified for the program and that defendants had acted solely on the basis of his disability. Defendants presented no credible evidence that they made any individualized determination that plaintiff was unqualified for the residency; rather, the trial court found that defendants rejected plaintiff’s application out of a fear that his disability would interfere with the treatment of psychiatric patients.\textsuperscript{223} There were no specific physical requirements for the residency program;\textsuperscript{224} rather, residents needed the qualities of “intelligence, emotional stability and physical stamina,”\textsuperscript{225} none of which were at issue. Even under the restrictive pre-Alexander standards, plaintiff was able to convince the trial court that he met all program requirements in spite of his disability. The court was critical of defendants’ unverified assumption that plaintiff was incapable of making effective adjustments to patient reactions to his disability.\textsuperscript{226}

On appeal, defendants argued that their decision about plaintiff’s suitability for a residency program should be sustained so long as it was reasonable. They contended that a deferential, rational basis test, like that employed under equal protection analysis, was necessary to protect academic decisions concerning admissions to programs. The Tenth Circuit rejected this argument as inconsistent with the language of the statute. The court was unable to reconcile a rule of deference to academic decisions with the plain language of Section 504 which forbids discrimination against otherwise qualified individuals with disabilities.\textsuperscript{227} A rational basis standard of review would eliminate the judicial role in academic cases under Section 504 and would “reduce that statute to nothingness.”\textsuperscript{228} In the Tenth Circuit’s view,

\begin{itemize}
\item 220. 658 F.2d 1372 (10th Cir. 1981).
\item 221. Id. at 1376.
\item 222. Plaintiff’s claim for monetary damages was denied by the trial court. See Pushkin v. Regents of the Univ. of Colo., 504 F. Supp. 1292, 1299 (D. Colo. 1981).
\item 223. Id. at 1295-96.
\item 224. Id. at 1298.
\item 225. Id. at 1299.
\item 226. Id.
\item 227. Id. at 1381-84.
\item 228. Id. at 1384.
\end{itemize}
the reasonableness of a defendant's action is relevant only to the issue of whether those actions are discriminatory.229

As a practical matter, the Pushkin philosophy of treating the reasonableness of a defendant's actions simply as evidence of non-discrimination makes it easier for plaintiffs to avoid summary judgment and advance a claim to trial. Summary judgment is granted whenever a moving party can demonstrate that there are no genuine factual issues and the moving party is entitled to prevail as a matter of law.230 In the typical Section 504 claim, the defendant institution brings the motion for summary judgment; hence it bears the initial burden of demonstrating the absence of material factual issues.231 A defendant's position is normally strengthened, however, by the fact that it does not bear the ultimate burden of proof at trial.232 Therefore, the defendant is only required to establish the absence of material issues relating to any single element of a Section 504 claim.233

Usually that single issue in a Section 504 claim is plaintiff's failure to meet an academic standard. Had the Pushkin court agreed to respect academic decisions about student qualifications whenever there was a reasonable basis for them, the defendant's burden in a summary judgment motion would be minimal. As discussed at greater length below,234 the reasonable basis standard merely requires that there be some relationship between an academic standard and the pedagogical goal. Normally, an affidavit from a relevant university official should suffice to establish this fact. It will be difficult in most instances for a plaintiff to offer evidence that an academic standard does not relate to an educational goal. Instead, by treating the reasonableness of defendants' actions or policies as evidence of non-discrimination and no more, Pushkin enables plaintiffs to challenge academic standards by offering competing evidence about their necessity. For example, a plaintiff can present expert testimony that an admissions requirement of a professional school has no relationship to job performance. Similarly, a plaintiff can offer evidence that a standard is not used at other schools. In either case, such evidence will likely create a material issue about whether the waiver of an academic standard represents a fundamental alteration in a program.

229. Id. at 1383.
232. Treatment of the burden of proof at trial in Section 504 cases falls beyond the scope of this paper. For a discussion of the various approaches taken by the federal courts, see generally Tucker & Goldstein, supra note 21, at 3:13-17.
233. See Friedenthal, Kane & Miller, supra note 231, § 9.3.
234. See infra note 259 and accompanying text.
2. The Reasonable Basis Approach

A second, more widely accepted practice, is to defer to academic authorities whenever they can demonstrate a reasonable basis for their decisions. The underlying theme is the belief that courts are not qualified to evaluate academic judgments or practices. Courts should therefore abstain from questioning an institution's actions so long as there is some basis for an academic standard or action and there is no evidence of malice or discriminatory animus. Most decisions in this category also take a generous view of what is reasonable. Only when an academic standard or evaluation serves no apparent purpose will a court question an institution's judgment. Doe v. New York University\(^{235}\) is the leading case.

The plaintiff in Doe was admitted to medical school at New York University but had concealed a history of psychiatric disorders and self-injurious behavior.\(^{236}\) She was forced to withdraw during her first year when the school became aware of her condition.\(^{237}\) After unsuccessful attempts to gain re-admission, plaintiff brought an action under Section 504 seeking to be re-admitted to medical school. The trial court granted plaintiff's motion for a preliminary injunction and ordered her re-admission to medical school. It concluded that plaintiff met her burden of showing probable success on the merits by demonstrating that it was more likely than not that she could complete medical school without a recurrence of dangerous psychiatric symptoms.\(^{238}\)

\(^{235}\) 666 F.2d 761 (2d Cir. 1981).
\(^{236}\) Id. at 766. Plaintiff had specifically been diagnosed as suffering from Borderline Personality Disorder by several psychiatrists. See id. at 768, 772, 777-78. Borderline Personality Disorder is a serious condition that manifests itself in violent and self-destructive behavior and is triggered by a stressful environment. Id. at 771-72, 778-79.
\(^{237}\) Id. at 767-68.
\(^{238}\) Under Second Circuit precedent, a preliminary injunction may be issued on a showing of 1) irreparable harm, and 2) either a likelihood of success on the merits or a sufficiently serious question going to the merits plus a balance of hardships favoring the movant. Doe v. New York Univ., 666 F.2d 761, 773 (2d Cir. 1981). The trial court found irreparable harm in the fact that plaintiff would have to delay her medical education for a year. Id. at 773. The trial court also found probability of success on the merits. The court reduced the merits issue to a question of whether plaintiff could demonstrate that it was "more likely than not" that plaintiff could complete her medical education without a recurrence of symptoms that posed a risk to herself or others. Id. at 772. The court credited plaintiff's evidence and concluded that defendant failed to offer sufficient proof that plaintiff was not otherwise qualified and had not been rejected solely because of her disability. Id. at 772-73.

Perhaps the most interesting aspect of the trial court's ruling is its minimalist view of the proper qualifications for a medical student. Attempting to apply the Davis standard, the court concluded that the plaintiff was otherwise qualified for re-admission if she was more likely than not to complete medical school without a
On appeal to the Second Circuit, a key issue was the trial court's obligation to defer to the defendant's professional evaluation that the plaintiff was not otherwise qualified to attend medical school. The Second Circuit took the position that was rejected in *Pushkin*. It held that although the ultimate decision on this point was a judicial function, courts must give considerable deference to institutional academic judgments in the absence of proof that their academic standards or applications served "no purpose other than to deny an education to handicapped persons." The court was primarily concerned about the incompetence of the judiciary, in contrast to experienced educators, to apply unfamiliar professional standards to students. The appellate court could have reversed on the grounds that plaintiff had not shown irreparable harm, but it decided to reach the merits of the case. Applying the rule of deference, the court held that it was improper for the trial court to disregard defendant's assessment of the risk posed by the plaintiff. Given the magnitude of the harm, the court felt that a medical school was entitled to make a judgment that students should not present a significant safety risk even if the likelihood of occurrence was less than 50%. The court further implied that an "appreciable risk" would satisfy this standard. Although the Second Circuit reversed and remanded for trial, it was openly

recurrence of symptoms that would pose a danger to herself or others. *Id.* at 772. Under this formulation, plaintiff would prevail even if the chances of a recurrence were 49%. See *id.* at 777. It is unclear how the lower court reached this conclusion. Even without granting deference to academic decisions, a court must begin its analysis by determining whether plaintiff can meet existing standards in spite of his or her disability or can meet them with a reasonable accommodation. The court's rather lenient standard for re-admission to medical school ignores the defendant's established criteria for re-admission: that a student demonstrate that he or she has resolved all problems precipitating a leave, is now capable of sustaining all academic and emotional stress involved in attending medical school, and can function properly as a physician. *Id.* at 768-69. Thus, the trial court's approach in *Doe* appears to disregard the *Davis* holding that federal recipients are not required to make substantial program modifications.

239. *Id.* at 776 (emphasis added).

240. *Id.* at 775-76 (citing Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978)).

241. *Id.* at 774.

242. Appellate review was complicated by the fact that the trial court chose to disregard expert psychiatric evidence as well as the defendant's own judgments. Instead, the trial court considered the defendant's actual behavior over the previous five years. See *Doe* v. New York Univ., 666 F.2d 761, 772 (2d Cir. 1981). The appellate court deemed this decision erroneous on the ground that the symptoms of Borderline Personality Disorder could recur after a dormant period in an un-stressful environment. *Id.* at 779. Reliance on expert opinion was therefore necessary.

243. *Id.* at 777.

244. *Id.*
skeptical that plaintiff could offer sufficient proof that she was otherwise qualified given the rule of deference announced in the case.\textsuperscript{245}

Several courts have adopted the \textit{Doe} philosophy of deferring to reasonable institutional decisions about who is qualified to participate in a program.\textsuperscript{246} \textit{McGregor v. Louisiana State University Board of Supervisors,}\textsuperscript{247} for example, endorses the notion that courts should accept academic decisions barring evidence of malice or ill-will.\textsuperscript{248} Yet the decisions in this category are not a tidy lot. There are some differences about what is reasonable and the degree of deference owed to academic decisions.

The Seventh Circuit's opinion in \textit{Anderson v. University of Wisconsin}\textsuperscript{249} appears to be even more protective of academic discretion than \textit{Doe}. Plaintiff in \textit{Anderson} was an alcoholic who had twice been dismissed from the University of Wisconsin Law School for failure to maintain a minimum grade point average. He brought a Section 504 claim when the University refused to readmit him for the third time. The trial court granted defendant's motion for summary judgment. On appeal, plaintiff argued that his ability to succeed in law school was a disputed, material issue that should be resolved at trial. The Seventh Circuit affirmed, holding that plaintiff's ability to succeed was immaterial. The only issue was whether the law school had performed a stereotype-free assessment of the plaintiff and applied to him the same standards it applied to non-disabled students in determining academic eligibility and re-admission.\textsuperscript{250} The standards themselves, the court stated, were a matter for the law school and not for the court.\textsuperscript{251} The court's absolute statement, however, probably should not be taken literally.

Since \textit{Alexander v. Choate}, it is clear that recipients of federal funds are required to make reasonable program modifications. The \textit{Anderson} court's rigid position is explained in part by plaintiff's sur-

\begin{itemize}
\item \textsuperscript{245} Id. at 779.
\item \textsuperscript{246} See, e.g., \textit{Anderson v. Univ. of Wis.}, 841 F.2d 737 (7th Cir. 1988); \textit{McGregor v. Louisiana State Univ. Bd. of Supervisors}, 3 F.3d 850 (5th Cir. 1993); \textit{Doe v. Washington Univ.}, 780 F. Supp. 628 (E.D. Mo. 1991).
\item \textsuperscript{247} 3 F.3d 850 (5th Cir. 1993).
\item \textsuperscript{248} The \textit{McGregor} court's use of the reasonable basis test is curious in light of previous Fifth Circuit decisions. The court cites \textit{Brennan v. Stewart}, 834 F.2d 1248 (5th Cir. 1988), for the proposition that courts owe deference to academic decisions. \textit{Brennan}, however, questioned, in light of \textit{Alexander v. Choate}, the appropriateness of a previous decision, \textit{Doe v. Region 13 Mental-Health Mental Retardation Comm'n}, 704 F.2d 1402 (5th Cir. 1983), in which the circuit adopted a broad rule of deference to program administrators. See \textit{Brennan v. Stewart}, 834 F.2d 1248, 1261 (5th Cir. 1988). Any doubts about the reasonableness standard seem to have disappeared in the interim.
\item \textsuperscript{249} 841 F.2d 737 (7th Cir. 1988).
\item \textsuperscript{250} Id. at 741.
\item \textsuperscript{251} See id.
\end{itemize}
prising failure to argue that Section 504 required defendant to alter its program requirements or procedures.252 A failure to implement a reasonable accommodation should be actionable in spite of Anderson, although an institution's good faith judgment about what is reasonable would no doubt control.

Another variation occurs in Doherty v. Southern College of Optometry.253 Here, the Sixth Circuit appears to use "necessity" as the threshold of academic deference instead of reasonableness. The plaintiff in Doherty suffered from retinitis pigmentosa and related neurological disorders resulting in a limited field of vision and diminished motor skills.254 He was unable to pass a proficiency test in the use of certain mechanical devices required for graduation from the defendant optometry school.255 The court held that the defendant was free to establish "necessary" academic requirements which need not be waived under the Davis holding that federal recipients need not make fundamental program alterations.256 However, the court's analysis and the evidence presented at trial focused on the reasonableness of the mechanical proficiency requirement.257 In fact, plaintiff presented persuasive arguments that the requirements were not strictly necessary and might have prevailed had the court taken the term literally.

Using reasonableness as the trigger for deference to academic judgments should have the practical effect of insulating most academic defendants from liability. Nearly all Section 504 or A.D.A. claims that seek program modifications involve a plaintiff who has failed to meet general institutional standards of academic eligibility. The threshold for deference to such decisions is remarkably low. In Doe, for example, the Second Circuit called for deference to academic evaluations unless there is proof that the institution's standards serve no purpose other than to exclude a disabled person from an educa-

252. See id. at 740.
253. 862 F.2d 570 (6th Cir. 1988).
254. Id. at 572.
255. Id. at 572-73.
256. Id. at 573-74.
257. Id. at 574 (expert opinion that proficiency requirements are "reasonable and desirable").
258. Plaintiff offered proof that: 1) proficiency with the instruments was a recently imposed requirement; 2) optometrists often do not use these four instruments in their practice; 3) the instruments are not used in the defendant's general clinic; and, 4) optometrists were prohibited from using these instruments in six states. Given these facts, a professional judgment that an optometry student should be proficient in the use of these instruments is probably reasonable but hardly necessary in the sense that one cannot function as an optometrist without such skills. Id.
It is a rare thing that an academic standard such as a minimum grade point average or a course requirement does not bear some relationship to the integrity of an educational program. (Institutional defendants who cannot demonstrate such a link should promptly secure new counsel.) Thus the issue is reduced to the simple question of whether the plaintiff actually met the academic standards. If not, he or she is not “otherwise qualified” to participate in the program. A plaintiff’s only remaining argument is that he or she was treated differently than non-disabled students by the defendant. Again, this strategy is not promising. Plaintiffs in the typical case argue that the failure to modify general academic standards is the source of discrimination, i.e., that they should have been treated differently. Except in the rare cases where there exists evidence of discriminatory animus, plaintiffs are likely to fail.

Another consequence of the reasonableness rule is that many claims will be terminated early through summary judgment. As noted above, it is easy to demonstrate that an academic standard is reasonable. It is correspondingly difficult to establish that a requirement has no rational relationship to an educational objective. Educational defendants should be able to establish the reasonableness of their standards quite easily through affidavits or interrogatories. Plaintiffs will be hard-pressed to create a triable issue under these circumstances. Rational basis is a minimal standard. At the same time, it is insufficient to offer proof that alternative standards either exist or are feasible. The reasonableness standard does not require that educa-

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259. Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981). The same approach is followed in other circuits employing the reasonable basis test for deference. See also McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993); Wood v. President of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992)(citing Doe v. New York Univ., 666 F.2d 761, 776 2d Cir. 1981). In McGregor, the Fifth Circuit calls for “reasonable deference” to academic decisions, 3 F.3d at 859, (relying on Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988)). The Brennan court determined that program administrators’ decisions should be reviewed under a standard of “meta-reasonableness;” that is, to validate reasonable restrictions; and to give “reasonable deference” to the grantee’s own determination of the restriction’s reasonableness. Id. at 1261. In support, Brennan cites Doe v. Region 13 Mental Health-Mental Retardation Comm’n, 704 F.2d 1402 (5th Cir. 1983), which in turn cites to Doe v. New York Univ., 666 F.2d at 776. Thus, in spite of differences in terminology, the Fifth Circuit appears to adopt the minimal Doe standard for academic deference. Notably, courts that have rejected the reasonable basis standard have also pointed to the minimal requirement for deference under the reasonable basis test. In Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983), the Third Circuit equated the Doe approach with the minimal rationale basis test used under 14th Amendment analysis. Id. (citing Allied Stores v. Bowers, 358 U.S. 522 (1958)(any conceivable basis justifies constitutionality)); Williamson v. Lee Optical, 348 U.S. 483 (1955)(legislative reform may proceed step by step). See also Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19, 25 (1st Cir. 1991)(citing Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983)).
tional institutions pursue optimal or even improved academic standards. They need only be reasonable.

3. Procedural Regularity

A third approach to academic deference is found in the First Circuit's decision in Wynne v. Tufts University School of Medicine. After an unsuccessful first year of medical school, plaintiff received a neuropsychological evaluation which concluded that he had difficulty processing information in certain formats. He was re-admitted to the first year class with several accommodations such as note-takers, tutors, counseling, and tapes of lectures. Nevertheless, plaintiff was dismissed from medical school after failing a multiple choice biochemistry examination for the third time. After his dismissal, plaintiff secured additional diagnoses suggesting that he was dyslexic and that he had difficulty interpreting certain types of multiple choice questions. In his action against the school, the plaintiff argued that Section 504 obliged the school to use a different test format. The school's response was that the multiple choice format measured certain skills that a physician must have, including the "ability to assimilate, interpret and analyze complex written material . . . necessary for the safe and responsible practice of modern medicine."

Although the court eventually sided with the defendant, it rejected the Doe approach of deferring to an academic defendant's decisions whenever a reasonable basis can be found. While acknowledging a need to respect the professional judgments of educators, the court was skeptical that a broad policy of deference based on a rational basis test could effect Congress' goal of eradicating stereotypes and generalizations that had denied the disabled access to federally funded programs. In the court's view, the Ewing approach of sustaining any standard or decision falling within accepted academic norms failed to acknowledge an institution's affirmative obligation to seek reasonable means of accommodating the disabled. The court further noted that many possible accommodations are the result of new technologies or techniques that are not yet within accepted academic norms. The First Circuit adopted the following test designed to insure that the educational institution met its obligation to consider all reasonable accommodations:

260. 932 F.2d 19 (1st Cir. 1991).
261. Id. at 21.
262. Id. at 27.
263. See Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992)(affirming summary judgment for defendant following remand).
264. Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19, 25 (1st Cir. 1991).
265. Id.
266. Id. (citing Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979)).
If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.\textsuperscript{267}

In effect, the First Circuit took the reasonableness standard of \textit{Doe} and grafted on a requirement that the institution consider any suggestions for accommodations in good faith and keep reliable records of the decisional process. Although this standard for deference appears to be more demanding than in \textit{Doe} and its progeny, the \textit{Wynne} decision is probably more protective of academic autonomy. The court emphasizes that judgment as a matter of law, i.e., summary judgment, should be the normal result when an institutional defendant presents undisputed evidence that it considered proposed accommodations.\textsuperscript{268} By characterizing an academic institution's duty as an obligation to consider possible accommodations in good faith, as opposed to making an accommodation, the First Circuit reduced the otherwise qualified issue to a factual issue which is not likely to be disputed.

V. ANALYSIS

A. Introduction

Judicial treatment of academic standards in Section 504 and A.D.A. claims suggests a two-part question. First, should the courts yield to academic judgments about student qualifications? If we answer yes to this question, then we must ask how to go about implementing a policy of deference. I submit that deference is a good thing and that the system of limited deference in the \textit{Wynne} decision is the wisest approach. There is room for disagreement. In this section I propose to test my conclusion by weighing four factors that are likely to influence any decision on this matter.

First, there is the institutional competence of the judiciary. Here we ask whether there is any reason to think that courts are suited to make judgments about the qualifications of disabled students. Second, we must ask what effect judicial review would have on internal academic processes. Third, there is the natural suspicion that ostensibly academic decisions may be influenced by the costs of an accommodation. Finally, we must ask whether a rule of deference encourages institutional decision makers to act, even in good faith, on the basis of subtle biases or stereotypes about the abilities of the disabled in ways that Section 504 and the A.D.A. intended to eliminate. I do not believe that judicial review will have a significant effect on internal academic

\textsuperscript{267} Id. at 26 (emphasis added).\textsuperscript{268} Id.
procedure, nor do I think that universities flinch at the cost of changing standards. To my mind, the dispositive factor is judicial incompetence in academic matters: the damage done by judicial intrusions will outweigh any benefits gained.

B. The Question of Deference

1. Judicial Competence

   a. Judicial Expertise in Academic Matters

   As noted frequently throughout this paper, the typical Section 504 or A.D.A. higher education case involves an assertion by a plaintiff that he or she is entitled to a waiver or modification of an academic standard. The typical response is that the unmet standard is necessary for program integrity and therefore cannot be relaxed. Whether a program requirement is necessary or may be foregone is a determination that is not likely to lie within the expertise of most courts. Standards are the product of professional judgment which in turn is based on extensive education, training, and experience within an academic discipline, and, to some degree, interaction with other individuals or groups who have an interest in the academic program. Even outside of the higher education context, courts have already expressed a general, if not overwhelming, preference for deferring to the decisions of program administrators or other public officials when the latter possess a level of expertise that is relevant to the “otherwise qualified” inquiry. In School Board of Nassau County v. Arline, for example, a Section 504 case involving the dismissal of a public school teacher susceptible to tuberculosis, the Supreme Court stated in dicta that school authorities should defer to the reasonable medical judgments of public health officials when assessing the risks of contagious diseases.

   It is worth noting that decisions outside of the educational context have also developed competing versions of deference to program administrators' decisions about who is otherwise qualified to participate in a program. In Strathie, for example, the Third Circuit imposed a rule that deference should occur once program administrators offer a written record indicating that relevant officials considered the proposed accommodations and rejected them as contrary to the fundamental nature of the program. Strathie, 716 F.2d at 231. This approach was later adopted by the First Circuit in a higher education setting in Wynne. See supra notes 260-267 and accompanying text. The defendant in Strathie revoked the plaintiff’s bus drivers license upon discovering that plaintiff wore a
Concerns for expertise and familiarity with particular programs should apply equally to the highly specialized environment of higher education. In some ways the need for judicial restraint may be greater. One striking factual similarity among the academic deference cases is that plaintiffs are usually enrolled in professional programs, especially medical or health science programs. Plaintiffs in Doe, Pushkin and Wynne were medical students or residents; Doherty involved an optometry student; plaintiffs in McGregor and Anderson were law students. I suspect, without any empirical basis, that the prospect of career failure motivates disappointed professional students to bring legal actions more than undergraduates in the same situation. At any rate, the issues that arise under Section 504 and A.D.A. claims in higher education will tend to involve highly technical or specialized fields of knowledge. It will be difficult for courts to make positive contributions to the resolution of such claims if academic deference is not observed.

In resolving the inevitable issue of whether the plaintiff was "otherwise qualified," courts would, of course, be forced to entertain the plaintiff's arguments that certain academic requirements or standards were not necessary to the integrity of an educational program. Both plaintiff's and defendant's cases would inevitably focus on expert opinions about educational practice. Given the want of judicial expertise in these areas, courts would be especially reliant upon expert opinions. Under these circumstances, it is doubtful that courts have the capacity to make meaningful determinations about standards in such unfamiliar territory.

Doe v. New York University is illustrative of the pitfalls concomitant with forcing courts to review academic standards. As explained at greater length in Part IV, plaintiff was diagnosed as having Borderline Personality Disorder. One characteristic of this psychiatric disorder is a tendency to engage in violent behavior during periods of stress. At issue was the defendant school's standard that medical students must not pose a significant risk of endangering themselves or others and the likelihood of a recurrence of plaintiff's symptoms.

hearing aid in violation of departmental safety regulations. In reversing the trial court, the Third Circuit noted the defendant's failure to make an individualized determination as to the plaintiff's ability to operate a vehicle without imposing safety risks and to consider proposed accommodations. Strathie, 716 F.2d at 231. In contrast, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983) applies a reasonable basis test for deferring to a program administrator's decision. In Region 13, the plaintiff was dismissed from her position as a psychiatric worker on the grounds of her own psychiatric disorders which led to self-injurious behavior. Relying on Doe v. New York University, the Fifth Circuit opted to give deference to decisions of program administrators out of a reluctance to second-guess their expertise. Region 13, 704 F.2d at 1410.

272. 666 F.2d 761 (2d Cir. 1981).
273. Id. at 765-69.
The trial court concluded that the plaintiff was "otherwise qualified" to re-enroll in medical school so long as she was more likely than not to progress through the program without a recurrence of dangerous symptoms.\(^{274}\) In other words, the court reduced the acceptable level of risk to slightly less than a coin toss. The defendant's position was that the potential for serious injury to patients and the plaintiff herself was unacceptable.\(^{275}\)

Although the Second Circuit reversed with instructions to give deference to the defendant's standards,\(^{276}\) it is instructive to speculate how the trial court might have gone about resolving the academic standards issue in *Doe* were it free to do so. Since acceptable risk levels are a matter of professional judgment, the court would have required expert medical testimony as to acceptable risk levels both in medical school and medical practice contexts. In some instances, a court can deal with such expert evidence in artificial ways. For example, it might distinguish competing opinions on the basis of one expert's superior training or familiarity with risk factors in a particular medical subspecialty. On the other hand, the court might be presented with conflicting assessments from equally qualified experts. (Indeed, disagreement among experts is likely inasmuch as risk assessments are a method of dealing with *uncertain* events.) In these difficult cases, I suspect, the court would be obliged to rule against the party who carries the burden of proof, i.e., the plaintiff. Arguably, the result would appear to be the same as simply deferring to academic judgments.

Facts of other reported academic deference cases present the same practical difficulties for courts as *Doe*. There is no doubt that the plaintiff in *Wynne*\(^{277}\) could have found an expert to present evidence that the ability to pass a biochemistry exam in a multiple choice format was not an essential skill for a practicing physician. Indeed, the argument has some intuitive appeal: Hippocrates, Galen, and Joseph Lister, to name a few, seem to have done well enough unscreened by multiple choice tests. Similarly, the plaintiff in *Doherty* presented evidence that his inability to manipulate certain mechanical devices bore only a tenuous relationship to optometry practice.\(^{278}\)

Plaintiffs in *McGregor*\(^{279}\) and *Anderson*\(^{280}\) probably could have found expert testimony that law school grades are not reliable indicators of ability, do not correlate with successful law practice, or are so-

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274. *Id.* at 772.
275. *Id.* at 771-72.
276. *Id.* at 779-80.
278. *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988). *See also supra* notes 253-58 and accompanying text.
280. *Anderson v. University of Wis.*, 841 F.2d 737 (7th Cir. 1988).
cially undesirable. The point is not that any of these arguments are true; rather, the difficulty is that they may be impossible to refute. Disagreement among experts in an educational specialty is unlikely to be resolved by a judge, much less a jury. Indeed, in Anderson, Judge Easterbrook seemed to be alarmed by the prospect of a jury deciding to waive a law school's minimum grade point average.

An obvious rejoinder to my pessimism about judicial competence in educational matters is the fact that courts routinely handle complicated matters. There is a bit of merit in this point. Judges and juries are often called on to sift through mounds of complicated, technical information in design defect, environmental, medical malpractice, and defective construction cases. To acknowledge that courts undertake such exercises, however, is not to say that they do it well. Courts resolve these disputes because no other institution is available to adjudicate them. In contrast, the courts have been able to practice benign neglect in educational matters since higher education has provided an alternative mechanism for resolving academic questions. Rather than proving the competence of courts to review educational decision making, the courts' frequent experiences with complex litigation simply illustrate the lack of an alternative forum.

A separate concern regarding judicial competence to review academic standards is the lack of an authoritative standard that the court may apply to particular facts. Courts function well when a decision is controlled by an ascertainable standard. To pick an easy example, a statute of limitations requiring that an action be commenced within six years has a sufficiently definite meaning to be applied easily by a court. Similarly, a discovery rule that tolls the statute until a plaintiff should have discovered an injury also provides a definite standard: ambiguities will arise in the assessment of facts, not the law. Even the reasonable person standard applied in tort law can be reduced to a judicially manageable standard.

A rule that a covered entity under the Rehabilitation Act or the Americans with Disabilities Act need not compromise a fundamental


282. Anderson v. University of Wis., 841 F.2d 737, 471 (7th Cir. 1988).


284. See, e.g., United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1948)(duty to prevent injuries is a function of three variables: probability of injury, gravity of injury, and burden of precautions).
standard is different. Here the question is not the standard itself, but a particular post-secondary institution's judgment about program integrity. The unique circumstances of many academic programs and the interaction with related interest groups makes it impossible to reduce this analysis to a formula that can be applied by an outsider. The Supreme Court expressed a similar concern in Horowitz. The Court viewed the medical school faculty's evaluation of plaintiff's clinical abilities as a subjective, cumulative process (presumably unique to each student) that cannot be duplicated in a judicial style hearing. The Court's concerns regarding the review of an institution's academic standards in Ewing are to the same effect.

b. Structural Incapacity of the Judiciary

Reasons for denying the courts a power to review academic standards go beyond the lack of judicial expertise in academic matters. The very nature of academic standards makes them unsuitable for judicial review. These standards are often compromises that reflect the interaction of many constituencies within the university community. Sometimes these compromises are delicately balanced to accommodate competing institutional interests. A waiver of a standard may upset a carefully crafted arrangement, resulting in repercussions in other areas. External review of academic standards therefore may affect more than the parties to a Section 504 or A.D.A. claim.

Lon Fuller described these situations as "polycentric." He observed that the behavior of many social institutions turns on the complex interaction of multiple, interrelated points of interest. He further argued that attempts to alter any one element of a polycentric situation would have repercussions that may affect other centers of interest. Fuller, in language too apt to leave unquoted, analogized polycentric situations to a spider's web:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" — each crossing of strands is a distinct center for distributing tensions.

285. See infra notes 288-324 and accompanying text.
286. See COUNCIL ON THE ROLE OF COURTS, supra note 283, at 103-04.
288. See supra notes 50-51 and accompanying text.
291. Id. at 395.
Fuller argued that polycentric problems were suited to solution by only two methods: managerial direction or contract. Managerial direction, for example, allows the manager of a baseball team to resolve the classic polycentric question of who will pinch hit for the pitcher based on who is left in the bullpen (or the other team's bullpen), the batting average of the pinch hitter in clutch situations, the E.R.A. of the opposing pitcher against left-handed batters, how the other manager is likely to shade the infield, and so forth. Such decisions are complex, not subject to formulas, and require a high level of discretion and intuition. Resolution of polycentric problems may also occur through contract, for example, a process of reciprocal adjustment among the centers of interest. Labor negotiations or multilateral arbitration aimed at structuring various wage scales within a factory are an example. Fuller noted that parliamentary methods were comparable to contracts in that political deals struck after legislative maneuvering could result in an accommodation of competing interests.

Courts, in Fuller's mind, do not have the capacity to resolve polycentric problems. Polycentricity presents two principal impediments to adjudication by the courts. First, the difficulty in a polycentric situation lies in the inability of a court to hear from all the parties that will be affected by a judgment. The difficulty includes, but is not limited to, the great number of parties likely to occupy a polycentric position. Courts have disposed of actions involving vast num-

292. Id. at 398.
293. See id.
294. See id.
295. Id. at 399.
296. See id. at 395-96.
297. Id. at 400.
298. In Fuller's view, the essence of traditional adjudication was the "[p]resentation of proofs and reasoned arguments." Id. at 363. Three conditions were necessary for adjudication to function in an optimal fashion. First, the advocate must be free to participate if the adversarial process was to reach an impartial judgment. Id. at 382-85. Second, the judge must be impartial but still knowledgeable about the subject matter of the dispute. Id. at 385-91. Finally, decisions must be retrospective. Id. at 391-92.
299. Polycentricity can be further refined into concepts of legal and non-legal polycentricity. William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 645-46 (1982). The former refers to situations where the centers of interest in a polycentric problem have legally protected interests. Id. at 645-46. For example, many persons may assert a legal entitlement to the use of limited water resources. Id. at 646. Fuller apparently did not draw this distinction. See id. at 646 n.36. Disability claims under Section 504 and the A.D.A. fall into the category of non-legal polycentricity. The parties with legally protected interests will be the disabled plaintiff and the post-secondary institution. Other interested parties will tend not to have any legally assertable claim. See infra notes 300-01 and accompanying text.
300. Fuller, supra note 290, at 395, 397.
bers of parties such as air crash litigation or class actions. In the
typical polycentric scenario, the parties to a legal action represent
only a fraction of persons who may be affected by a decision. Judicial
intervention, however, is limited to legally cognizable claims. The
courts simply have no basis for permitting the intervention of persons
who may be affected, yet lack a legally protected interest or relation-
ship with a party. Yet without their participation, no court can sensi-
bly evaluate the consequences of a ruling on a polycentric situation.301
Thus, a decision is like plucking a strand from a spider's web.

301. Id. at 394.

The role of courts in public law litigation is controversial and has produced an
academic debate that goes well beyond the scope of this paper. It is sufficient to
note here that Fuller's pessimism about the courts' ability to deal with polycen-
tric situations is not universally accepted. Professor Chayes, for example, has
observed that public law litigation does not fit the traditional model of adjudica-
tion. The latter is characterized by a dispute in which the parties have diametri-
cally opposing interests, the wrong arises from a single episode, evaluation or
evidence is retrospective, and there is a close relationship between wrong and
remedy. Abram Chayes, The Role of the Judge in Public Law Litigation, 89
HARV. L. REV. 1281, 1282-83 (1976). Public law litigation, in contrast, involves a
sprawling party structure; the adversarial relationship among the parties is often
affected by frequent negotiations; the remedy focuses less on redressing a wrong
than on adjusting future behavior; and, the trial judge takes on the role of a man-
ager of a complex remedial decree. Id. at 1284-1304. School desegregation, em-
ployment discrimination, and prison reform cases are good examples. Id. at 1284.
Chayes specifically recognized that public law litigation often affects the interest
of non-parties. Id. He argued that courts were capable of managing these types
of situations, largely through forcing the parties to negotiate workable remedies.
Id. at 1307-09. In effect, he is satisfied that judges can perform the managerial
functions that Fuller thought necessary to settle polycentric disputes. Judge
Frank Johnson adds a different viewpoint. He argues that judicial activism in
public law cases was made inevitable by the intransigence of public officials in
areas such as school desegregation, prison reform, mental health, and so forth.
See Frank M. Johnson, The Constitution and the Federal District Judge, 54 TEX

The situations that Chayes and Johnson envision are very different from
those presented by a Section 504 or A.D.A. claim requesting a program modifica-
tion. Judicial decisions in either area certainly have the potential to disrupt the
relationships of numerous unrepresented parties. In the former situations, insti-
tutions such as school systems, prisons, or mental health hospitals became dys-
functional or intransigent and were incapable of complying with the commands of
the law. On the other hand, there is no credible suggestion that academic offi-
cials in colleges and universities are systematically thwarting the rights of the
disabled. There is a difference between a college's curriculum review committee
and Bull Conner's dogs that requires no explanation.

Another difference is the scope of litigation and remedies. Desegregation or
prison crowding cases, for example, involve essentially one wrong directed at
many people. Hence one-size-fits-all remedies, such as redistricting or an order
to build new facilities, are possible. In disability claims about academic stan-
dards, the variety of disabilities and the uniqueness of their manifestations in
individuals dictate that litigation focus on the individual. Remedies will tend to
be personal to each litigant. (The same distinction may not apply, however, in a
A second problem with judicial review in polycentric situations lies in the nature of adjudication. Decision making in polycentric environments involves a back-and-forth interaction among the centers of interest. Any proposal is subject to adjustment to accommodate the responses of others. Decisions made under these conditions are likely to reflect difficult compromises and trade-offs made by all concerned. Professors Henderson and Twerski, for example, have observed this dynamic in product design decisions while Fuller has noted a similar practice in labor negotiations. Traditional, adversarial adjudication in which each party stakes out a position at the beginning is unlikely to yield a decision that approximates the result that would occur after extensive interaction under polycentric conditions.

Academic standards are classic examples of polycentric interaction. Unlike Athena, they do not leap full-blown from the head of Zeus. Nor do they leap from the head of the department, the dean of the college, or the provost. Instead, they tend to represent compromises based on the give-and-take among various academic constituencies. Perhaps the most important constituency is the faculty itself. Decisions on academic requirements tend to be assigned to faculty and are the product of faculty deliberations. Faculty, however, is not a

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disability claim based on campus-wide building access and barrier removal). Thus, the advantages of allowing judicial activism in public law litigation do not apply to Section 504 or A.D.A. claims, at least to the same extent.


In many design cases, plaintiffs confront difficulties in trying to introduce a new alternative safety feature into an existing design. These difficulties arise because competing alternative design features inherently tend to crowd each other out. Thus, introducing a new feature into an existing design usually necessitates rearranging other aspects of the design and frequently requires rethinking much, if not all, of the existing design. This feature ... reflects what the authors have elsewhere referred to as the "polycentric" quality of design problems. Simply stated, a polycentric problem is one in which each of the elements is dependent on all, or most, of the other elements, so that altering one element necessarily alters all, or most, of the others.

303. Fuller, supra note 290, at 395-97.

monolithic concept. There are apt to be significant differences in educational outlook and philosophy within a single faculty. To the extent that faculty members control academic standards, their actions will reflect a compromise among the viewpoints of what constitutes minimally acceptable performance or results in an academic program.

Other centers of interest undoubtedly influence the formulation of academic standards, though in a less visible way. Accrediting agencies, particularly in professional programs, may dictate or influence academic programs. In consumer-oriented schools, students acting through student organizations or through membership on university committees may affect academic decisions. The demand for pass-fail courses is a time-honored example. University administrators concerned with institutional image may also be concerned about any perception of lower standards. Concerns about the financial implications of an academic standard, such as a required practicum, may also pique the interest of a chancellor or president. Trustees and, in state supported institutions, legislators may also want to influence academic decisions for a variety of reasons.

The polycentricity of academic standards has two significant implications for Section 504 and A.D.A. claims. First, comparison of academic standards among institutions, even in similar programs, has little meaning in light of the many centers of interest that contribute to rule formulation in each institution. In *McGregor v. Louisiana State University Board of Supervisors*,305 the plaintiff sought a waiver of a law school rule against part-time study as an accommodation for a fatigue causing spinal injury. The gist of his argument was that other part-time programs have been accredited by the American Bar Association; hence L.S.U. should not be allowed to claim that a full-time attendance standard was essential to a law school program.306 The argument is superficially appealing. The American Bar Association does not regard part-time programs as necessarily detrimental to legal education. Moreover, a court does not need any special competence to establish that alternative standards exist at other accredited schools. Thus, various practices of related programs could be viewed as a range of alternatives from which a court could select a reasonable accommodation without jeopardizing program integrity.

The *McGregor* court dismissed the point by saying that the actions of accrediting agencies do not have an "adjudicatory effect."307 The

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305. 3 F.3d 850 (5th Cir. 1993).
306. Id. at 859.
307. Id. Employing the reasonable basis standard, the court found that the full-time program requirement was reasonable. In part, the court was persuaded by the school's desire to create a first year experience that was comparable in intensity with law practice. Id. at 859-60. Perhaps more importantly, the court acknowledged that the school relied on a rigorous, full-time first year curriculum to win-
better reasoning, however, is that educational programs reflect their own circumstances and are simply not totally comparable. All educational programs have some unique qualities or special emphases. Some make deliberate choices to stand outside of the mainstream. Academic standards employed in one institution may have little relevance to compromises reached by academic constituencies elsewhere. The availability of part-time law programs elsewhere had little to do with the full-time attendance rule in McGregor, given the defendant’s admissions policies. The law school’s admissions policy was based on the unusual goal of admitting a large first year class with little regard for qualifications which would then compete for a limited number of seats in the second year class.\textsuperscript{308} Practices of other schools were essentially irrelevant under the facts of McGregor.

A second, and perhaps more significant, implication of polycentricity in Section 504 and A.D.A. claims is that the courts cannot adjudicate program modification requests without the risk of undermining delicately balanced relationships within and without the academy. Fuller’s concern for the inability of courts to take into account the interests of all affected parties is well illustrated in the academic deference cases. Take the example of the minimum law school grade point requirements at issue in Anderson\textsuperscript{309} and McGregor.\textsuperscript{310} Grading practices, including minimum grade averages, readmission standards, and the like, reflect a faculty’s judgment about minimally acceptable performance. As previously noted, however, that judgment may embody a compromise of divergent philosophies within the faculty.

Inasmuch as the defendant in a Section 504 or A.D.A. claim is usually the institution, it is unlikely that the academic constituencies that struck this particular balance can be heard in the resolution of the claim. Nor are these the only centers of interest to be excluded. Certainly the bar’s obligation to protect the public from incompetent lawyers gives it an interest in minimum standards for law school performance.\textsuperscript{311} The need in Wisconsin, where Anderson arose, is all the

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\item[308.] Id. at 854 n.3, 859 n.12.
\item[309.] Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).
\item[310.] McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993).
\item[311.] The leading recent example of the bar’s interest in legal education is the MacCrate Report. See American Bar Ass’n, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (1992). The MacCrate Report reflected the concern of the bar over the lack of practical training that law school students receive. It identified a core of skills and values that all law graduates should possess, id. at 135-221, and recommended that law schools review
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greater in view of the diploma privilege for University of Wisconsin Law School graduates. Employers of law school graduates, the public, and legislators concerned with legal malpractice also have an interest in an assurance that lawyers meet minimum standards. Yet none of these interests is represented in a disability claim. A policy of academic deference leaves intact the relationship of these entities. To avoid belaboring the point, it is sufficient to note that similar observations can be made about the cases dealing with the health care professions, e.g., Doe, Doherty, Wynne and Pushkin.

It might be argued that polycentricity is not an impediment to meaningful judicial review in those areas where a court is likely already to have sufficient knowledge about who is an "otherwise qualified" student. The obvious example is a claim related to legal education. While judges may not know much about biology, so the argument goes, they are at least familiar with legal education, and therefore, with the interests of faculty, the bar, and the public. They

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their curricula for adequate instruction in these areas. Id. at 381 (recommendation C.8.). In response to the MacCrate Report, the A.B.A. House of Delegates amended Standard 301(a) to read:

A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession.

AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 301(a)(1994)(emphasis added). Later the House of Delegates, over the objection of the Council of the Section of Legal Education and the American Association of Law Schools, passed a resolution urging law schools to integrate the MacCrate recommendations on skills and values into their curricula. See John S. Elson, The Regulation of Legal Education; the Potential for Implementing the MacCrate Report's Recommendations for Curricular Reform, 1 CLINICAL L. REV. 363 (1994).


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312. See Wis. Sup. Ct. R. § 40.02(a), 40.03.
315. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).
316. Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991).
318. Cf. SAM COOKE, Wonderful World, on SAM COOKE: THE MAN AND HIS MUSIC (RCA Records 1986)("don't know much biology").
are also in a position to reach conclusions about how legal education has prepared students for law practice. Indeed, the courts have shown little inclination to defer to bar examiners in claims brought under the federal disability statutes.\textsuperscript{319}

In \textit{D'Amico v. New York State Board of Bar Examiners},\textsuperscript{320} plaintiff made an unsuccessful request to the New York State Board of Bar Examiners to take the bar examination over four days instead of two. The Board argued that the proposed accommodation would give plaintiff an unfair advantage and further argued that its decisions were entitled to respect because of its expertise in testing.\textsuperscript{321} The court, granting a preliminary injunction in favor of the accommodation, noted that the accommodation was a medical, not a testing issue.\textsuperscript{322} Courts in Delaware\textsuperscript{323} and Massachusetts\textsuperscript{324} have also overruled decisions of bar examiners.

In spite of judicial familiarity with law schools, there is no compelling case for creating an exception to the general rule of deference. First, the expertise of judges will tend to lie in the area of trial practice. Given that much of law practice takes place outside of litigation in the form of transactional work, it is unlikely that the bench as a whole will have the expertise to review academic standards designed to produce "complete" lawyers. More importantly, it is doubtful that judges have sufficient understanding of the dynamics within and among law schools to overcome the repercussive effects of any judicial decision.

Law schools are no more photocopies of themselves than schools in other disciplines. Their standards reflect compromises among faculty

\textsuperscript{319} The value of a comparison of academic institutions with boards of bar examiners is limited by the traditional independence of the former and the subordinate role of the latter. Bar examiners tend to be the agents of state supreme courts to whom the latter have delegated part of their authority and responsibility to govern admission to the bar. This agency relationship lacks the pronounced polycentric features of a university or law school environment. Deference by courts to bar examiners must therefore be based largely on the bar examiners' expertise in testing the competence of law school graduates. \textit{See D'Amico v. New York State Bd. of Bar Examiners}, 813 F. Supp. 217 (W.D.N.Y. 1993).

\textsuperscript{320} \textit{Id.}

\textsuperscript{321} \textit{Id.} at 222.


\textsuperscript{323} \textit{In re Rubenstein}, 637 A.2d 1131 (Del. 1994)(bar applicant with learning disability ordered admitted after passing multistate and essay portions of exam during different sittings).

\textsuperscript{324} \textit{Weintraub v. Board of Bar Examiners}, No. OE-0087 (Mass. 1992) (bar applicant with attention deficit disorder provided double the standard time to take examination).
philosophies of legal education and the influence of other interest
groups. For example, requirements for trial advocacy courses, partic-
pipation in a clinical program, or substitutes for these experiences at a
particular school may reflect a compromise between traditional views
of legal education, less practice-oriented views, and the desire of ac-
crediting agencies to improve practice skills.

Judicial willingness to overrule bar examiners should also bear lit-
tle significance for academic matters. Bar examinations, at least in
theory, are designed to protect the public from incompetent lawyers by
testing for minimum competence within a limited range of legal sub-
jects. Law school programs, in contrast, may reflect a wide range of
philosophies and pedagogical goals with which the bench has no par-
ticular familiarity. In short, there is no reason to believe that a

325. See Code of Recommended Standards of Bar Examiners, in COMPREHENSIVE
GUIDE TO BAR ADMISSION REQUIREMENTS 1994-95 vii-x (policy statement of Amer-
ican Bar Association, National Conference of Bar Examiners, and Association of
American Law Schools).

_Purpose of Examination._ The bar examination should test the ability of
an applicant to identify legal issues in a statement of facts, such as may
be encountered in the practice of law, to engage in a reasoned analysis of
the issues and to arrive at a logical solution by the application of funda-
mental legal principles, in a manner which demonstrates a thorough un-
derstanding of these principles. The examination should not be designed
primarily to test for information, memory or experience. Its purpose is
to protect the public, not to limit the number of lawyers admitted to
practice.

_Id._ at ix. The bar examination has been severely criticized on several grounds.
For a review of the literature, see generally W. Sherman Rogers, _Title VII Pre-
emption of State Bar Examinations: Applicability of Title VII to State Occupa-

326. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE
1850s TO THE 1980s, at 264-79 (1983)(describing modern divergence between
legal profession and legal education and various philosophies of legal education).

As judged by trends in scholarship, the modern legal academy offers a pot-
pourri of legal philosophies. For example, there is traditional legal scholarship
with its emphasis on resolution of conflicts through identification of problems and
review of possible solutions. See Arthur Austin, _The Top Ten Politically Correct
scholarship which attempts to reconcile apparent inconsistencies in appellate de-
isions through the “skills of legal analysis.” Richard A. Posner, _The Present Sit-
schools of thought include: 1) critical race theory, whose defining viewpoint is
that persons of color speak with a unique voice that dominant white males cannot
understand, see, e.g., Alex M. Johnson, Jr. _The New Voice of Color_, 100 Yale L.J.
2007 (1991); Richard Delgado, _Legal Scholarship: Insiders, Outsiders, Editors_, 63
U. ColO. L. Rev. 717 (1992); 2) critical legal studies, which contends that law
lacks its purported qualities of objectivity and neutrality, see, e.g., John H. Schle-
gal, _Notes toward an Intimate, Opinionated, and Affectionate History of the Con-
ference on Critical Legal Studies_, 36 Stan. L. Rev. 391 (1984); 3) feminist legal
theory, dedicated to exposing and eradicating the patriarchal elements of the
legal system see, e.g., CATHERINE A. MACKINNON, _TOWARD A FEMINIST THEORY OF
THE STATE_ (1989); Deborah L. Rhode, _Missing Questions: Feminist Perspectives
court has the capacity to second-guess decisions about the essential components of a legal education.

2. **Internal Processes**

Potential interference with internal academic processes also favors judicial restraint in reviewing academic standards. First, there is a legitimate fear that academic decision making will be influenced by a desire to avoid the burdens of litigation. Even the resoluteness of well-counselled defendants such as university officials and faculty may waiver after months of discovery and days of trial. It is not farfetched to assume that such persons will feel subtle pressures to avoid litigation by softening academic standards the next time a program modification request is made. Coverage of Section 504 and A.D.A. claims in the *Chronicle of Higher Education* and other media forums are likely to have a similar effect on other academic officials who rule on program modification requests.

Second, direct judicial review of academic decisions as to who is "otherwise qualified" may have an undesirable effect on pedagogical relationships. As noted in Part III, a university's relationship with its students is based upon values that do not prevail in the larger society. Good educational results require that faculty and school officials be given wide discretion in evaluating students. Permitting courts to review academic standards or decisions about student qualifications

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In Robert Bolts's play *A Man for All Seasons*, Sir Thomas More remarks to his son-in-law: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester." *ROBERT BOLT, A Man for All Seasons*, in *THREE PLAYS* 147 (Heinemann ed. 1967). I doubt that even Thomas More could make his way through the thickets of 20th Century legal philosophies. In light of what happened to More, perhaps judges presiding over Section 504 and A.D.A. claims should be reluctant to enter the thicket of academic standards.

327. *See infra* notes 206-10 and accompanying text.
would not only limit discretion, but would also introduce an inappropriate adversarial element into the student-teacher and student-institution relationship.

Although the fear of intrusion into academic processes is a legitimate concern, we should be careful not to give undue weight to this factor. While it is true that the prospect of litigation may affect decision making, it is probably impossible to measure the impact. Indeed, such attempts to avoid a day in court are designed to go unnoticed. Fear of litigation is also only one of many considerations in disposing of program modification requests. The effect of intrusions into pedagogical relationships is also likely to be marginal. Higher education is already subject to a web of civil rights laws that have introduced an adversarial element into the university community. To the extent that the old dynamic between student and university still exists, denying deference to "otherwise qualified" determinations of academic officials will not substantially alter campus culture.

3. Costs

It is possible that some institutions might take advantage of judicial deference to avoid the costs of accommodating students with disabilities. Although I have no empirical basis for this assertion, I am confident that the cost of potential accommodations figures prominently in the process of devising accommodations for students. Indeed, both the Rehabilitation Act and the A.D.A. are sensitive to the potential costs of accommodations and permit covered entities to take expense into consideration under certain circumstances. Section 504 has been construed not to require accommodations that would impose an undue financial or administrative burden on a recipient. The same concern for costs also appears in the A.D.A. For example, regulations issued under Title II of the A.D.A. permit covered entities to decline to provide particular auxiliary aids and services if doing so would result in "undue financial and administrative burdens." Under Title III of the A.D.A., barrier removal in existing structures is limited to "readily achievable" alterations which are defined as those that can be undertaken "without much difficulty or expense."

Covered entities under Title III may also decline to provide an accommodation if it imposes an undue financial burden.

328. See Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979) (Section 504 does not require accommodations that impose undue financial or administrative burdens.).
330. Id. § 35.164.
332. Id. § 12181(9).
333. Id. § 12182(b)(2)(A)(iii)(1995) (undue burden defense for failure to offer auxiliary aids and services).
I doubt, however, that cost plays a significant role in proposals to alter academic standards. Unlike issues involving the provision of auxiliary aids and services to remedy communications deficits (e.g., note takers, readers, and sign language interpreters), academic standards are inexpensive to waive or modify. Consider the facts of the leading academic deference cases. The accommodation proposed in Doherty would have required only a waiver of mechanical proficiency tests; plaintiffs in Anderson and McGregor called for a waiver of minimum grade point averages; Wynne involved a request for a biochemistry test in a different format; and Pushkin required a medical school to admit a doctor to a residency program. None of these actions would have involved more than negligible costs. Only Doe v. New York University appears to entail significant costs. Had the plaintiff been ordered re-admitted to medical school, the defendant might have felt it necessary to provide individual supervision and add security during clinical education phases to guard against violent outbursts brought on by the plaintiff's Borderline Personality Disorder. Yet, the financial burden defense was not raised. On balance, therefore, the cost factor seems neutral and does not work against a policy of judicial deference.

4. Latent Bias

Finally, there is the matter of subtle, unintended discrimination against disabled students. A system of judicial deference to academic decisions may have a tendency to reinforce improper assumptions about the abilities of the disabled or to perpetuate standards that unnecessarily disadvantage them. In the absence of judicial review, or the threat of review, academic authorities have no special incentive to re-evaluate standards with an eye toward creating equal opportunity for the disabled. Take the example of the Doherty case. The only impediment between plaintiff and graduation from optometry school was the ability to manipulate four devices that apparently were not used frequently by practicing optometrists. Nothing in the Sixth Circuit's opinion or that of the lower court indicates that school officials ever considered the disabled when formulating the mechanical proficiency requirement.

334. Professor Rothstein notes that larger post-secondary institutions may decline to pursue arguments based on excessive cost out of a desire not to open their discretionary budgets to scrutiny. Rothstein, supra note 10, § 7.10.
335. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).
336. Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1993).
337. McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993).
338. Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991).
339. Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1982).
340. 666 F.2d 761 (2d Cir. 1981).
341. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).
Of all the arguments against judicial deference, the contention that it may perpetuate unjustified assumptions about the necessity of certain academic standards has the most merit. The problem is not that academic officials will act in bad faith when formulating standards; rather, the danger is that they will not be moved to consider alternatives that maintain program integrity but also promote equality of opportunity for the disabled. As a general matter, covered entities under Section 504 and the A.D.A., including post-secondary institutions, have an obligation that exceeds neutral treatment. Although the duty does not amount to affirmative action, Alexander v. Choate made clear that federal recipients have a duty under Section 504 to provide "meaningful access" to disabled individuals.

Titles II and III of the A.D.A. explicitly carry over the obligation of covered entities to provide reasonable accommodations. Legislative history also makes clear that Congress did not intend to limit its efforts to actions prompted by an active dislike for the disabled. Although the record of the Rehabilitation Act is sparse, there are indications that its framers were also concerned with the neglect of the disabled. In the A.D.A. Congress revealed a decided concern for stereotyped or complacent views of disabled citizens. For example, in detailing the need for legislative actions, the report of the Senate Committee on Labor and Human Resources noted:

Discrimination results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural barriers and the adoption or application of standards and communication and criteria and practices and procedures based on thoughtlessness or indifference — of benign neglect.

When courts defer to academic judgments about program standards, they may create a de facto exception to the general requirement that covered entities take steps to promote equal opportunity for the disabled by making reasonable accommodations in program requirements.

5. Conclusion

Resolving the question of whether courts should practice deference to academic decisions depends largely on the first and last of the four
factors discussed above. As already noted, we can discount the effect of interference in internal university processes as minimal or incremental at worst. It is also unlikely that costs have much to do with decisions about waiver or modification of academic standards. The issue then becomes how to balance the incompetence of the courts in academic matters against the possibility that university officials will be lulled into complacency about the effects of academic standards on the disabled.

I would strike the balance in favor of academic deference. The undesirable effects of requiring courts to review academic standards will occur anytime a plaintiff raises the issue with sufficient evidence to survive preliminary motions. Gauging the effect of the final factor is more difficult. We should not assume that academic officials will use judicial deference as a shield for bad faith attempts to avoid the disability laws; it is also not possible to measure the degree to which deference has discouraged introspection about the necessity of academic standards.

The benefits of permitting judicial review are equally speculative. The mere possibility of having to defend standards in court must have some effect on academic behavior. However, I would not expect that effect to be significant until university officials are confronted with the possibility of adverse decisions. Indeed, some decisions might have turned out differently had the courts been free to adjudicate academic standards. *Doherty* is the obvious example. A trial court freed of the obligation to defer might conclude that the ability to operate the four mechanical devices in question was unnecessary to optometry practice. Such a decision, in turn, might have prompted other optometry schools to review their catalogs for marginal graduation requirements. Perhaps an adverse decision in *McGregor* would have prodded the defendant and other law schools to reconsider hard and fast rules against part-time study. A decision in *Wynne* favoring plaintiff might have prompted medical schools to review their testing policies.

In many cases, however, the effect of judicial review would probably be marginal. It is difficult to imagine that the defendant in *Doe v. New York University* would have compromised its standards on patient safety even if the plaintiff won re-admission to medical school or that other medical schools would have followed suit. Similarly, I doubt that adverse decisions in *Anderson* or *McGregor* would

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351. *Anderson v. University of Wis.*, 841 F.2d 737 (7th Cir. 1988).
have prompted those law schools to alter minimum grade requirements. Even judicial incompetence plays a role here. A side effect of incompetence is inconsistency. It is reasonable to assume that the courts will produce inconsistent results if forced to review standards that they do not understand. University officials would have a difficult time reacting to such decisions in a meaningful way. In short, the benefits of permitting judicial review are hazy at best. Trading away a system that respects academic judgments for one that encourages academic introspection to an unpredictable degree is a bad bargain.

C. Methods of Deference

Given the need to respect academic decisions, there remains the question of how best to affect this practice. As discussed in Part IV of this paper, two approaches have emerged in the reported decisions. Significantly, neither method extends carte blanche to university officials. One group of cases, exemplified by Doe v. New York University,353 extends deference any time a school can articulate a reasonable basis for its actions. This approach contemplates that most actions involving academic standards will terminate on motions for summary judgment.354 So long as a pertinent university official can produce an affidavit indicating in good faith that an academic standard has some pedagogical value, then the institution should prevail on its motion for summary judgment; plaintiff's day in court will be done.

A second approach, exemplified by Wynne,355 focuses on internal processes. Deference is triggered by proof that the relevant university officials considered proposed program modifications in good faith, rejected them, and documented these steps.356 This approach also contemplates early termination of litigation by summary judgment.

On balance, the Wynne approach is the better policy. The two methods are equally effective in protecting academic decisions from judicial incompetence. Academic defendants subject to the "reasonable basis" test of Doe v. New York and related cases should find little difficulty in articulating some pedagogical basis for an academic standard.357 Similarly, defendants bound by the Wynne approach simply must adjust their internal processes to ensure that all program requests by disabled students are handled under a uniform procedure by attentive officials who keep good written records of decisions. The difference between the two standards lies in their power to force univer-

353. 666 F.2d 761 (2d Cir. 1981).
354. See supra note 259 and accompanying text.
355. Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991).
356. See supra notes 260-67 and accompanying text.
357. Id.
sity officials to consider the effect of academic standards on the disabled.

Schools bound by the "reasonable basis" approach have little incentive to re-examine academic standards in light of the needs of the disabled. They enjoy a favorable standard of judicial review that will confirm nearly all academic standards once the unchallenging task of showing a reasonable basis has been performed. Serious re-examination of program requirements may only take place after litigation begins. At this stage, however, the review may be affected by the now openly adversarial relationship between school and student. Consequently, the review will hardly reflect genuine academic judgment.

In contrast, the Wynne approach encourages review of academic standards when a program modification request is made. There are three advantages to forcing a decision at this point. First, early review takes place before litigation commences and when the prospect of legal action is often distant. Decisions made away from the specter of litigation are more likely to be based on academic considerations than on limitation of liability. Second, the documentation requirement of Wynne guarantees that each request will at least be considered by someone with decision making authority and get a reasoned response. Third, Wynne may encourage institutions to permit disabled students or their advocates to participate in the accommodation review process. While Wynne does not accord any particular procedural rights, its protective standard of review plus its emphasis on procedural regularity may encourage universities to seek out the potentially valuable input of students at the decisional stage.

The Wynne approach does not guarantee that post-secondary institutions will review academic standards with sensitivity to the capabilities of the disabled or with enthusiasm for integrating them into American society. Accomplishment of this goal would require a far ranging power to review standards which the courts are not capable of doing. Wynne does, however, advance the goal of integration as far as judicial competence permits. Courts perform well when called upon to police compliance with procedures. The issues that a court must entertain under Wynne are largely factual and do not require entry into the unmanageable complexities of polycentric educational structures. The courts can force academic officials to go through the motions of accepting requests for program modifications and giving them due

358. There is universal awareness by academic officials that the denial of a program modification request may lead to litigation. As noted above, however, the effect of this knowledge plays an unmeasurable and probably marginal role in most academic decisions made under Section 504 and the A.D.A. In some instances, early participation of counsel for either students or post-secondary institutions may create a charged atmosphere that destroys the chance that decisions will be made on purely academic grounds.
consideration. These officials need only act in good faith. If so, the stereotyping of the disabled which the Supreme Court condemned in Davis will be subordinated to factual inquiries and decisions based on the application of relevant institutional standards. Wynne is not an ideal standard. It is, however, the best solution to a difficult problem.

VI. CONCLUSION

Judicial deference to academic decisions is a concession to the fact that courts are normally incapable of making meaningful assessments of academic decisions. A policy of deference nevertheless limits the power of courts to advance the goal of Section 504 and the A.D.A. to create equal opportunity for the disabled. It also creates an environment in which university officials are less likely to pursue this goal vigorously. I have attempted to demonstrate that judicial incompetence should be the controlling factor in this inquiry. Courts are unlikely to offer satisfactory answers to the question of who is “otherwise qualified” to enter or continue in educational programs. Undoubtedly some benefits would flow from allowing plaintiffs to challenge academic standards at trial. Academic officials would become more sensitive to the goal of creating equal opportunity for the disabled. To some degree, they would become more disposed to review the appropriateness of standards for disabled persons in general and would become more receptive to individual program modification requests. But the benefit is too speculative to overcome the injury that would occur by allowing courts to weigh academic standards. A rule of law that forbids discrimination against the disabled only when they meet academic standards cannot escape the need to rely on academic expertise in resolving the central factual issue.