

THE AMERICANS WITH DISABILITIES ACT: THE MOVE TO INTEGRATION

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I. INTRODUCTION

After all the excitement over the enactment of the Americans with Disabilities Act of 1990 ("ADA"), after all the letters and telegrams were sent from the grass-roots disability population across the land, after eleven public hearings were held by the House of Representatives¹ and three by the Senate,² after sixty-three public forums, at least one in each state,³ after lengthy floor debates in the

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1. *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. of the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecommunications Relay Services, Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1988: Hearings on S.2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong., 2nd Sess. (1989); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomm. on Employment Opportunities and Select Education of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. (1989). See *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991) and 47 U.S.C.A. §§ 225, 611 (West 1991)). Textual references to provisions of the ADA are cited to the codified sections of the U.S.C.A.

2. *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 11, 69, 154, 195 (1989).

3. *Americans with Disabilities Act: Hearing before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 16 (1989) (statement of Justin Dart).

Senate⁴ and in the House of Representatives,⁵ and after all the negotiations and compromises that ensued, the disability community paused for well-deserved self-congratulations and celebrations over this legislative accomplishment. Surely the significance of Congress's actions in placing disability discrimination on a par with race discrimination could not be overstated.

Yet, there was a lingering sense of *deja vu* among those disability rights advocates who had been with this movement the longest. It was over fourteen years ago, when the issue was whether section 504 of the federal Rehabilitation Act of 1973,⁶ the closest we had at the time to national disability rights legislation, would be enforced with strong administrative rules. In support of strong regulations, the grass-roots disability community had written countless letters, had demonstrated at each of the ten regional offices of the United States Department of Health, Education, and Welfare ("HEW"),⁷ and even had occupied HEW Secretary Califano's office for twenty-eight hours and the offices of HEW Region IX in San Francisco for twenty-two days. When a relatively tough set of regulations finally was published on April 28, 1977,⁸ there were celebrations, much like those surrounding the enactment of the ADA, in the homes and workplaces of persons with disabilities across the nation.

But what effect did these wondrous new regulations, published fourteen years ago as our salvation, have on the forty-three million persons with disabilities in this country? The answer is—very little. As a remedy for segregated public services, the Rehabilitation Act and its contemporaneously enacted regulation have been practically a dead letter. We still see, in almost every school district across the country, just as many students with disabilities excluded and segregated from the public schools their siblings and neighbors attend, despite a mandatory regulation requiring otherwise.⁹ A federal appellate court recently ruled, for example, that it was consistent with this regulation, and with section 504, for a school board to segregate services for students with disabilities outside of their neighborhood schools, forcing students with disabilities to ride segregated buses each day to other schools.¹⁰ According to that court, the

4. 135 CONG. REC. S4984-88 (daily ed. May 9, 1989); 135 CONG. REC. S10,701-10,723 (daily ed. Sept. 7, 1989); 136 CONG. REC. S9529 (daily ed. July 11, 1990).

5. 136 CONG. REC. H4582 (daily ed. July 12, 1990).

6. Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 500-504, 87 Stat. 390 (codified as amended at 29 U.S.C. § 794 (1988)).

7. HEW was then the lead agency for enforcing § 504 and other disability rights laws.

8. See OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, OCR HANDBOOK FOR THE IMPLEMENTATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973 (1981); see also *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 278 n.3 (Congress thought initial drafts of HEW's § 504 rule making to be too narrow), *reh'g denied*, 481 U.S. 1024 (1987).

9. See 34 C.F.R. § 300.552(c) (1990). Students with disabilities must be educated in the public schools they would attend were they not disabled, unless their individualized education programs require some other arrangement. *Id.* See *infra* notes 145-49 and accompanying text for a discussion of the segregated school system for students with disabilities.

10. *Barnett v. Fairfax County School Bd.*, 927 F.2d 146, 151 (4th Cir. 1991) (per curiam) (school did not discriminate against hearing-impaired student by not providing an interpreter at his community school when such a program was available five miles away), *petition for cert. filed*, 60 U.S.L.W. 3045 (U.S. July 8, 1991) (No. 91-62).

avoidance of segregated services is merely one factor to be taken into account in determining a child's placement.¹¹

Adults with disabilities seeking access to integrated residential and community services have fared little better. Appellate courts, ignoring substantial section 504 arguments, have permitted government agencies to confine and isolate persons with disabilities in remote institutions, nursing homes, and other segregated facilities.¹² Appellate courts have prohibited trial courts from even considering desegregation remedies—except as a last resort.¹³

The Supreme Court has ensured that we cannot obtain integrated services through the Developmentally Disabled Assistance and Bill of Rights Act of 1975,¹⁴ a law enacted two years after section 504, which ostensibly guaranteed persons with developmental disabilities “the right to receive appropriate treatment, services, and habilitation in a setting that is least restrictive of [their] personal liberty.”¹⁵ The Court ruled in *Pennhurst State School & Hospital v. Halderman*¹⁶ that this plain provision provided persons with disabilities “no rights whatsoever” to integrated community services.¹⁷ The High Court, in its efforts to nullify section 504 and other congressional actions guaranteeing disability rights, has held also that federal courts cannot enforce section 504 and the Education of the Handicapped Act against a state agency.¹⁸

Nor have persons with disabilities obtained much solace from federal administrative agencies sworn to uphold the requirements of section 504. It took many years and many court orders before federal agencies would even publish enforcement rules.¹⁹ Even with enforcement rules, federal agencies have initi-

11. *Id.* The court also ignored other mandatory considerations such as the harms to students with disabilities stemming from the stigma of being the only children in their neighborhood forced to ride segregated buses to attend different and distant schools. See 34 C.F.R. § 300.552(d) (1990).

12. See, e.g., *Society for Good Will for Retarded Children, Inc., v. Cuomo*, 902 F.2d 1085, 1087 (2d Cir. 1990) (state does not provide constitutional entitlement to live or receive services in community settings).

13. *Id.* at 1091.

14. Pub. L. No. 94-103, 89 Stat. 486 (42 U.S.C. § 6010 (1970 & Supp. 1975) (current version codified in scattered sections of 42 U.S.C.)).

15. *Id.* § 6010(2); see *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 443 (1985) (quoting Developmental Disabilities Assistance and Bill of Rights Act in reviewing laws affecting persons with retardation). The 1987 amendments to the Act even more forcefully state that “it is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible . . . to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens.” 42 U.S.C. § 6000(9) (1988).

16. 451 U.S. 1 (1981).

17. *Id.* at 16 n.12.

18. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (sovereign immunity abrogated only if Congress's intention clear in statute); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (Rehabilitation Act does not abrogate 11th amendment bar to suits against states), *reh'g denied*, 473 U.S. 926 (1985). Congress overrode the *Atascadero* ruling in the Rehabilitation Act Amendments of 1986 by abrogating the states' 11th amendment immunity to suits under § 504. 42 U.S.C. § 2000d-7(a) (1991).

19. See, e.g., *Cherry v. Mathews*, 419 F. Supp. 922, 922 (D.D.C. 1976) (HEW Secretary must promulgate regulations implementing § 504 of Rehabilitation Act of 1973). See 45 C.F.R. § 84 (1990) (§ 504 enforcement rules).

ated few enforcement actions regarding segregated services. When it comes to the segregation of persons with disabilities, federal compliance investigators have largely turned their heads.²⁰

Some persons with disabilities have brought successful section 504 enforcement actions, to be sure, and various discriminatory practices have been altered. Many architectural barriers have come down,²¹ and we have been successful in obtaining readers for persons who are blind²² and interpreter services for people who are deaf.²³ But most of us who have sought to use federal administrative processes or the courts to end our systemic segregation in the isolated settings established and supported by state and municipal governments with federal assistance have not fared as well.²⁴ Many of our section 504 and constitutional

20. The federal government's virtual abdication of administrative enforcement efforts for disability rights is well-documented, both in congressional hearings and in scholarly articles. *See, e.g.*, Dinerstein, *The Absence of Justice*, 63 NEB. L. REV. 680 (1984) (during Reagan Administration, historic position of Justice Department as protector of rights of institutionalized persons eroded substantially); *Enforcement of Section 504 of the Rehabilitation Act: Institutional Care and Services for Retarded Citizens, Hearings Before the Subcomm. on Handicapped of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. (1984) (lack of civil rights of retarded and other persons with disabilities in segregated state facilities).

21. *See, e.g.*, *Disabled In Action v. Pierce*, 606 F. Supp. 310, 315 (E.D. Pa. 1985) (plaintiffs have cause of action under § 504 as long as inaccessibility of HUD's activities results from improper physical barriers).

22. *See, e.g.*, *Nelson v. Thornburgh*, 567 F. Supp. 369, 382 (E.D. Pa. 1983) (provision requiring readers to enable plaintiffs to perform their jobs consistent with § 504 mandates), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

23. *See, e.g.*, *Rothschild v. Grottenhaler*, 716 F. Supp. 796, 806 (S.D.N.Y. 1989) (deaf parents required to have "meaningful access" provided for participation in school initiated conferences), *aff'd*, 907 F.2d 286 (2d Cir. 1990).

24. *See, e.g.*, *Society for Goodwill to Retarded Children v. Cuomo*, 902 F.2d 1085, 1087 (2d Cir. 1990) (actions to reduce segregation and establish services in community not justifiable remedies for constitutional violations at state-operated facilities for retarded); *Americans Disabled for Accessible Public Transp. ("ADAPT") v. Skinner*, 881 F.2d 1184, 1196 (3d Cir. 1989) (en banc) (plurality opinion) (transportation acts do not require integration of passengers with disabilities at same facilities used by nondisabled); *Rhode Islanders Handicapped Action Comm. v. Rhode Island Public Transp. Auth.*, 718 F.2d 490, 495 (1st Cir. 1983) (district court's order to install wheelchair lifts and bays in buses exceeded authority of § 504); *American Public Transit Ass'n ("APTA") v. Lewis*, 655 F.2d 1272, 1277 (D.C. Cir. 1981) (regulations requiring newly purchased buses to have wheelchair lifts not valid way of enforcing § 504); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (health hazard posed by children with retardation carrying hepatitis B insufficient to justify their segregation); *Schuldt v. Manteko Indep. School Dist. Number 77*, No. 4-89-636 (D. Minn. 1990) (1990 LEXIS 19027) (school district not required to modify school's entrance to make more accessible for handicapped children), *aff'd*, 937 F.2d 1357 (1991); *Barnett v. Fairfax County School Bd.*, 721 F. Supp. 755 (E.D. Va. 1989) (school district not required to provide service required by students with disabilities at their community schools), *aff'd*, 927 F.2d 146, 151 (4th Cir. 1991); *Disabled in Action v. Bridwell*, 593 F. Supp. 1241, 1252 (D. Md. 1984), *appeal dismissed*, 820 F.2d 1219 (4th Cir. 1984) (Rehabilitation Act does not require transit system to provide access to buses); *Pinkerton v. Moye*, 509 F. Supp. 107, 114 (W.D. Va. 1981) (county not compelled to establish a "self-contained" learning disabilities program at each elementary school); *but see Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977) (Equal Protection Clause of 14th amendment prohibits segregated institutions for persons with retardation), *aff'd*, 612 F.2d 84 (3d Cir. 1978), *rev'd on other grounds*, 451 U.S. 1 (1980); *Hairston v. Drosick*, 423

desegregation claims have been denied by judges who are simply uninformed about what it is like to be a person with a disability; how important it is to our dignity and self-worth to be educated, and to work in community settings; how easily our disabilities can be accommodated; or the services we need provided in nonsegregated, regular settings.

The issue today is whether persons with disabilities, a great number of whom were engaged in the enactment of the ADA, will rest on their laurels and legislative victories—allowing the ADA to accompany its legislative predecessors languishing in the hollows of nonenforcement. This article will offer some concrete suggestions on how to ensure that the ADA, and the earlier enacted disability rights statutes as well, are fully and finally enforced.

This article focuses on Title II of the ADA, which prohibits discrimination and segregation by all units of state and local government.²⁵ The article's principal purpose is to demonstrate that Congress's intent in enacting Title II of the ADA was to ensure that all government services be provided effectively—with necessary accommodations and aides—in integrated settings. Under the ADA, classifications that segregate persons with disabilities are henceforth to be presumptively illegal and given the same scrutiny under the ADA as classifications based upon race are given under the fourteenth amendment's Equal Protection Clause and the Civil Rights Act of 1964.²⁶

This article begins by tracing the historical legacy in this country, whereby state and local officials, consciously and intentionally, out of animus and ignorance, segregated persons with disabilities and denounced us as not only inferior, but also as dangerous, and unworthy of the quality of life accorded other citizens. The state legislatures put a system of apartheid into place, and the courts enforced it. This article demonstrates that these official forms of segregation and discrimination remain with us today because of continued fear, ignorance, hostility, and the inertia supplied by a long history of disability segregation. Segregation persists despite the overwhelming body of research literature manifesting the efficacy of integration for all persons with disabilities—research that is ignored by most administrators of segregated services. Until the misjudgments and mistreatments of the past are rectified, and persons with disabilities are brought back into the community as full and equal citizens, there is little hope that the ADA will have a substantial dramatic impact upon the daily lives of persons with disabilities, especially persons with severe disabilities.

The excuses employed to justify the regime of segregation and degradation are feeble and have been refuted by data-based research. We know, for example, that prejudice is overcome through contact between persons with and without

F. Supp. 180 (S.D. W. Va. 1976) (school officials must make every effort to include children with disabilities in regular classroom).

25. 42 U.S.C.A. §§ 12131-12161. *See infra* notes 35-74 and accompanying text for a discussion of the historical legacy of segregation under state laws and policies.

26. U.S. Const. amend. xiv, § 1; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000a-2000e (1988) and other scattered sections of 42 U.S.C.). *See infra* notes 280-325 and accompanying text for a discussion of the appropriate standards of review for classifications that segregate based on disability.

disabilities, not by continued separation.²⁷ The research data also refute the long-held belief that persons with disabilities are permanently incapable and cannot live productive lives in the community.²⁸ Individuals who are presently living successful lives in the community include people with severe and profound retardation, persons with severe behavioral difficulties, and individuals who have been denominated "medically fragile."²⁹ Not only are community programs for all of these individuals feasible, but the research demonstrates overwhelmingly that the various outcomes obtained in integrated settings—in terms of, for example, skills learned, improvements in affect and appearance, post-education and training employment experiences, and expectations of service providers and even of parents—are far superior to the outcomes obtained in segregated settings.³⁰

Congress was aware of these facts, and therefore took strong action in the ADA to eliminate disability segregation in this country. Congress adopted, as the ADA's statutory purpose, the provision of a "clear" mandate to end all forms of segregation and discrimination, and provided "clear" standards for doing so.³¹

Congressional guidance for determining those standards is set forth in the statutory findings embodied in section 12101(a) of the ADA.³² Those findings make it as plain as it could be that the primary evil addressed in the ADA was the segregation that continues to impose an isolated, denigrated existence upon persons with disabilities. Congress stated, both in the statutory findings and over and over again in the legislative history, that it was informed of the historical origins of disability segregation.³³ Through the ADA, Congress mandated the elimination of the vestiges of that regime.

The legislative findings provide the groundwork for the standard of review of policies and practices that classify and segregate on the ground of disability. Congress chose to employ practically all of the legislative and judicial findings and rationales that were developed over the past five decades to justify heightened scrutiny of classifications based on race, and to expressly apply those same findings and rationales to classifications based on disability.³⁴ Thus, Congress not only decided that discrimination against persons with disabilities should cease, but also provided the tools with which to make it happen.

27. See *infra* notes 336-41, 377-81 and accompanying text for a discussion of the relationship between segregation and prejudice.

28. See *infra* notes 342-60 and accompanying text for a discussion of the abilities of persons with disabilities to live productive lives in the community.

29. See *infra* notes 350-54 for studies demonstrating that even individuals with the most severe disabilities can live successfully in integrated settings.

30. See *infra* notes 361-63, 382-416, and accompanying text for a discussion of the many benefits of integration.

31. See 42 U.S.C.A. §§ 12101(b)(1) & (2).

32. *Id.* §§ 12101(a)(1)-(9).

33. See *infra* notes 290-99 and accompanying text for a discussion of congressional acknowledgement of the deep-seated nature of prejudice against persons with disabilities.

34. See *infra* notes 284-99 and accompanying text for a discussion of Congress's decision to adopt concepts developed to combat racial discrimination.

II. THE LEGACY OF GOVERNMENT-IMPOSED SEGREGATION, ISOLATION, AND DEGRADATION OF PERSONS WITH DISABILITIES IN THE UNITED STATES

A. *The Historical Record*

The official practice throughout this country of segregating services for children and adults with disabilities was an integral part of, and its continuing currency is firmly imbedded in, the "history of unfair and often grotesque mistreatment" arising from the "prejudice and ignorance" acknowledged by five Justices in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*³⁵ The historical "regime"³⁶ that permitted the segregation of persons with disabilities from the rest of us, often for life, continues to be expressed in segregated public education, transportation, recreational programs, employment, and housing.

In 1927, counsel for Carrie Buck argued before the Supreme Court that Buck's state-imposed sterilization, based on disability, was unconstitutional. The Court rejected that argument in *Buck v. Bell*,³⁷ the epitome of this country's eugenic hysteria and the resulting historical attitudes regarding disability. In *Buck*, Justice Oliver Wendell Holmes refused to apply the Court's earlier ruling in *Meyer v. Nebraska*³⁸ to children with disabilities. Justice Holmes ratified the views of the "experts" and state authorities by concluding that persons with disabilities were "a menace" and comparing the country's "best citizens" (those without disabilities) with those who "sap the strength of the state" (those with disabilities).³⁹ To avoid "being swamped with incompetence," Justice Holmes ruled that "[i]t is better for all the world, if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."⁴⁰

Like mandatory sterilization, government-imposed segregation and exclusion of persons with disabilities—the "manifestly unfit"—from regular public benefits and services are part of the history of unequal treatment of persons with disabilities that was recognized and deplored by five Justices in *Cleburne*. Describing the sources of the "regime of state-mandated segregation and degradation," Justice Marshall wrote:

Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in large degree for many if

35. 473 U.S. 432, 454 (1985) (Stevens, J., joined by Burger, C.J., concurring); *Id.* at 461 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring and dissenting in part).

36. *Id.* at 462 (Marshall, J., concurring and dissenting in part) (regime of state-mandated segregation and desegregation).

37. 274 U.S. 200 (1927).

38. 262 U.S. 390 (1923). The Court, quoting from *Plato's Ideal Commonwealth*, stated that the historical practice of " 'put[ting] away . . . the offspring of the inferior, or of the better when they chance to be deformed' " would "do . . . violence to both the letter and spirit of the Constitution." *Id.* at 401-02.

39. *Buck*, 274 U.S. at 207.

40. *Id.*

not all of our social problems."⁴¹

The public policy of segregating and sterilizing children and adults with disabilities was first implemented throughout the nation in the decades surrounding the turn of this century. As the *Cleburne* Justices judicially acknowledged, the xenophobic hysteria of that era was fueled by the new "science" of the eugenics movement and possessed by severe strictures of Social Darwinism dictating the survival of the fittest.⁴² The unprecedented flow of new immigration and the uncertainties of a new industrial age added to the hysteria.⁴³ The xenophobic movements took on all of the force of state power and focused that force pervasively against African-Americans and against persons with disabilities.⁴⁴ Thus was visited upon both groups the most severe disqualifications imaginable among citizens.

Analogizing disability discrimination to race discrimination, and quoting from the *Bakke* decision on the history of racial segregation in this country, Justice Marshall, with Justices Brennan and Blackmun, observed, in *Cleburne*, that persons with disabilities "have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque."⁴⁵ Justice Stevens, joined by Chief Justice Burger, similarly acknowledged "the history of unfair and often grotesque treatment" by government officials of persons with disabilities as a result of ignorance and prejudice.⁴⁶

Historical public attitudes regarding persons with disabilities are reflected in the nearly universal state segregation of persons with disabilities which existed throughout this country. That policy of segregation, implemented through official state action, legislatively deemed persons with disabilities to be "unfit for citizenship."⁴⁷ In virtually every state, in inexorable fashion, people with disabilities—especially children and youth—were declared by state lawmaking bodies to be "unfitted for companionship with other children,"⁴⁸ a "blight on mankind"⁴⁹ whose very presence in the community was "detrimental to normal" children,⁵⁰ and whose "mingling . . . with society" was "a most baneful

41. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461-62 (1985) (quoting H. GODDARD, *THE POSSIBILITIES OF RESEARCH AS APPLIED TO THE PREVENTION OF FEEBLE-MINDEDNESS*, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 307 (1915)).

42. *Id.*

43. *See infra* notes 77-80 and accompanying text for a discussion of prevailing attitudes toward recent immigrants.

44. *See infra* notes 81-93 and accompanying text for a discussion of the similarities in the ways both groups were viewed and treated.

45. *City of Cleburne*, 473 U.S. at 461 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978)).

46. *Id.* at 454 (quoting *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F.2d 191, 197 (5th Cir. 1984)).

47. 1920 Miss. Laws 294, ch. 210, § 17 (chancery courts have jurisdiction in cases of legal inquiry in regard to feeble-mindedness which renders persons unfit for citizenship).

48. 1909 Wash. Laws 260, tit. I, subch. 6, § 2.

49. REPORT OF THE VT. STATE SCHOOL FOR FEEBLE-MINDED CHILDREN 17-18 (1916).

50. CALIFORNIA BD. OF CHARITIES AND CORRECTIONS REP. 41 (1905).

evil.”⁵¹ Persons with severe disabilities were considered to be “anti-social beings,”⁵² as well as a “defect . . . [which] wounds our citizenry a thousand times more than any plague.”⁵³ Persons with disabilities were believed to simply not have the “rights and liberties of normal people.”⁵⁴

The federal government also took part in, and fully supported, these endeavors. In the days before home rule in the District of Columbia, Congress authorized, at the urging of the District of Columbia Board of Charity, the isolation of persons with disabilities because they were “not much above the animal.”⁵⁵ Persons with disabilities officially were considered “not far removed from the brute,”⁵⁶ not quite persons, but “by-products of unfinished humanity.”⁵⁷ Persons with disabilities were to be segregated for the benefit of society,⁵⁸ and “to relieve society of ‘the heavy economic and moral losses arising from the existence at large of these unfortunate persons.’ ”⁵⁹

State officials thought it important to find a “way of getting rid of these kinds of cases.”⁶⁰ Official government reports labeled persons with disabilities “a parasitic, predatory class,”⁶¹ a “danger to the race,”⁶² “a blight and a misfor-

51. REPORT OF THE BD. OF BLDG. COMM’RS OF THE STATE OF ORE. RELATIVE TO THE LOCATION AND ESTABLISHMENT OF AN INST. FOR FEEBLE-MINDED AND EPILEPTIC PERSONS, TO THE TWENTY-FOURTH LEGIS. ASSEMBLY, REGULAR SESS., 22-23 (1906).

52. REPORT OF THE COMM’N ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PA. 43 (1913).

53. BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL BIENNIAL REP. 3 (1938).

54. SOUTH DAKOTA COMM. FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED BIENNIAL REP. 3 (1932).

55. *District of Columbia Appropriations Bills, Hearings Before the Comm. on Appropriations*, 67th Cong., 2d Sess. 96 (1923). In testimony before the Appropriations Committee, the executive secretary of the D.C. Board of Charities urged Congress to isolate persons with disabilities as far away as possible, stating that “[i]solation is demanded, absolutely, and the only thing we can promise to put into their lives is humane segregation in the open air.” *Id.* He concluded his testimony by stressing that for persons with disabilities, “segregation from society . . . is the best of things.” *Id.* at 183. Senator Ball, a member of the Committee, agreed, stating that “[i]f you are going to segregate that class of people to make them more content, you want a farm entirely separate.” *Id.* Congress acted on this testimony, as most of the state legislatures already had done, appropriating \$300,000 for segregated facilities. See Pub. L. No. 67-457, 42 Stat. 37 (1923).

56. STATE BD. OF CHARITIES AND CORRECTIONS, SPECIAL REP. TO THE GEN. ASSEMBLY, MENTAL DEFECTIVES IN VA. 20 (1916).

57. BALDWIN, THE CAUSES, PREVENTION, AND CARE OF FEEBLE-MINDED CHILDREN, IN PROCEEDINGS OF THE TEXAS CONFERENCE OF CHARITIES AND CORRECTIONS, SECOND ANNUAL MEETING 87 (1912).

58. See 1919 Ga. Laws 379, No. 373, § 32 (segregation permitted “for his own protection or the protection of others”).

59. *City of Cleburne, Texas v. Cleburne Center for Living*, 473 U.S. 432, 462-63 n.9 (1985) (Marshall, J., concurring in part and dissenting in part) (quoting Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143, (repealed 1955)).

60. *Connecticut School for Imbeciles: Hearings on H.B. No. 644 Before the Joint Standing Comm. on Humane Institutions* 20 (Feb. 25, 1915) (statement of Mr. Kerner of Waterbury).

61. REPORT OF THE VT. SCHOOL FOR FEEBLE-MINDED CHILDREN 17-18 (1916).

62. WISCONSIN SEN. J., 48TH LEG. SESS., REPORT OF THE LEGISLATIVE VISITING COMMISSION, 262 (1907).

tune both to themselves and to the public"⁶³ whose role "in discounting social progress is by far the most potent influence for evil under which society is struggling today."⁶⁴

Government officials actively inculcated fear of persons with disabilities, particularly persons with intellectual disabilities, and directed their identification and exclusion from public services. Children with disabilities were especially targeted. State officials coerced the assistance of school principals and teachers, social workers, health workers, county and municipal officials, ministers, welfare workers, and a variety of others in segregating children with disabilities, even against parental objections to the contrary.⁶⁵ State statutes authorized and directed the taking of children out of their family homes if their parents "should neglect or refuse" to segregate their children with disabilities.⁶⁶ One state made it a criminal offense, punishable by a \$200 fine, for a parent to refuse.⁶⁷ Once their children were segregated, state laws required parents to waive all rights to remove their children from custody either permanently or for a limited time.⁶⁸ State officials thought that such laws were necessary to ensure the continued segregation of children "whose parents or guardians are adverse to such action."⁶⁹ State officials made the judgment that "the presence of the unfortunate child in the home"⁷⁰ was "more tragic than any known disease."⁷¹ Numerous state enactments specified "segregation,"⁷² and the official government reports

63. KANSAS SCHOOL FOR FEEBLE-MINDED YOUTH, WINFIELD, KAN. BIENNIAL REP. 12 (1906).

64. REPORT OF THE IND. COMM. ON, MENTAL DEFECTIVES, MENTAL DEFECTIVES IN IND. 6 (1922).

65. See, e.g., 1915 N.C. Sess. Laws 337-38, ch. 266, § 3 (provides for admission application to school for feeble-minded by parents or persons managing place where children are cared for without parent's consent); 1931 S.D. Sess. Laws 200, ch. 153, §§ 3(b), (c) (teachers, doctors, and nurses required to report names of feeble-minded to State's Commission for the Control of the Feeble-Minded); 1918 Ky. Acts 171, ch. 54, § 30 (duty of public health officer to secure custody of feeble-minded persons likely to become parents); 1917 Or. Laws 739, 740, ch. 354, §§ 1, 5 (feeble-minded persons over age of five may be committed for indeterminate detention if judged to be unsafe to be at large or likely to procreate); CALIFORNIA BD. OF CHARITIES AND CORRECTIONS OF THE STATE OF CAL. BIENNIAL REP. 51 (1918); STATE TRAINING SCHOOL, WINFIELD, KAN. BIENNIAL REP. 3 (1922).

66. See 1920 Miss. Laws 294, ch. 210, § 17 (court may make application to have person adjudged feeble-minded upon request by citizen if parents neglect or refuse to make application); 1921 W. Va. Acts 480, ch. 131, § 4(a) (if citizen requests, county clerk may summon child, over parental objections, to be adjudged feeble-minded); see also 1909 Okla. Sess. Laws 538, ch. 34, art. 2, § 8 (any citizen may request commitment of feeble-minded individual when relatives permit feeble-minded individual to be at large).

67. 1905 Wash. Laws 135, ch. 70, § 9.

68. See generally 1905 Mich. Pub. Acts 169-70, No. 121; 1919 N.J. Laws 508, ch. 217, § 3.

69. STATE BD. OF CHARITIES AND CORRECTIONS OF THE STATE OF CAL. BIENNIAL REP. 30 (1916); accord BOARD OF COMM'RS OF STATE INST. BIENNIAL REP. 11 (1919) (need for children with disabilities to be "detained in the institution against the desire of the parent," if necessary).

70. REPORT OF THE R.I. SCHOOL FOR THE FEEBLE-MINDED 21 (1910).

71. BOARD OF TRUSTEES OF THE UTAH TRAINING SCHOOL BIENNIAL REP. 3 (1938).

72. See 1919 Fla. Laws 231, ch. 7887, § 8 (purpose of Florida Farm Colony is segregation of feeble-minded); 1918 Ky. Acts 156, ch. 54; *id.* at 171, § 30 (provision for segregation and custody of feeble-minded, epileptic, and insane persons); 1921 Neb. Laws 843, ch. 241, § 1 (object of state

of virtually all of the remaining states specified the same objective for persons with severe disabilities.⁷³ As Georgia officials put it, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is no philosopher's stone to turn the base metals of defect into gold."⁷⁴

institution for feeble-minded is "to segregate them from society"); 1905 N.H. Laws 413, ch. 23, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1917 N.H. Laws 645, ch. 141, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1911 Pa. Laws 927, preamble & § 1 (commission established to investigate plan for segregation, care, and treatment of feeble-minded); 1913 Pa. Laws 494, No. 328, § 1 (state institution devoted to segregation and care of epileptics and feeble-minded); 1921 S.D. Sess. Laws 344, ch. 235, §§ 1-3 (state commission granted power to make regulations for care and segregation of feeble-minded); 1914 Va. Acts 242, ch. 147, § 1 (state board to develop scheme for training and segregation of feeble-minded); 1916 Va. Acts 662, ch. 388 (purpose of act to define feeble-mindedness and provide for care and segregation of feeble-minded in institutions); 1909 Wash. Laws 260, tit. I, subch. 6, § 2 (idiotic children to be segregated in suitable accommodations).

73. See, e.g., CALIFORNIA STATE BD. OF CHARITIES AND CORRECTIONS, SURVEYS IN MENTAL DEVIATION IN PRISONS, PUBLIC SCHOOLS, AND ORPHANAGES IN CAL. 43 (1918) (permanent segregation of feeble-minded during reproductive years would extinguish defective strains); BOARD OF CONTROL OF THE COLO. STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES BIENNIAL REPORT, 5 (1912) (recommends segregation of feeble-minded individuals for life, or at least during reproductive years to reduce risk of hereditary feeble-mindedness); CONNECTICUT SCHOOL FOR IMBECILES, LAKEVILLE, CONN. BIENNIAL REP. 8 (1915).

74. GEORGIA TRAINING SCHOOL FOR MENTAL DEFECTIVES ANN. REP. 4 (1922).

The actions of the historical regime primed against persons with disabilities in this country did not stop with segregation, isolation, and sterilization. Indeed, the social preoccupation with eugenics introduced "an attitude favoring the killing of defective children." D. Shurtleff, *Myelodysplasia: Management and Treatment*, 10 CURRENT PROBS. IN PEDIATRICS 1, 8 (Jan. 1980). Many physicians actively advocated that those considered to be unfit simply be eliminated. In 1904, a distinguished Chicago physician endorsed the "destruction" of persons with disabilities on eugenic grounds: "In strict justice to society . . . and in many cases in all kindness to the defective himself, every degenerate who is useless to himself, a menace to the health of society, and is shown to be incurable should be effectively eliminated by destruction." G. LYDSTON, M.D., DISEASES OF SOCIETY 568 (1904). A respected New York physician advocated the elimination of children with severe disabilities, including "idiots," most "imbeciles," and the greater number of epileptics, for society's protection, via a "gentle, painless death" by the inhalation of carbonic gas. *Id.*

For decades thereafter, health care professionals in this country continued to support the view that the "defective" should die. In the wake of a physician's admission that he had put to death a child with a disability, Dr. Morris Fishbein, editor of the *Journal of the American Medical Association*, observed that health care workers frequently face this situation and may generally choose death for their patients without interference. *The Right to Kill*, TIME, Nov. 18, 1935, at 53. A Nobel Prize winner at the Rockefeller Institute, Alexes Carrel, similarly urged that "sentimental prejudice should not obstruct the quiet and painless disposition of incurables, criminals, [and] hopeless lunatics." *Id.* at 53-54. See also Kennedy, *The Problem of Social Control of the Congenital Defective*, 99 AM. J. PSYCH. 13-16 (1942) (argues for euthanasia for hopelessly mentally defective individuals). Numerous media accounts of the day confirm that the practice of killing newborns with disabilities was common. A New York Times front page report, "Defective Babe Dies as Decreed: Physician, Refusing Saving Operation, Defends Course as Wisest for Country's Good," exemplifies this practice:

John Bollinger, the baby boy condemned as a hopeless defective and therefore not operated on, died early this evening in the German-American Hospital. The child was five days old

Its life, Dr. H.J. Haiselden, the attending physician said, might have been saved by an operation, but this he did not feel justified in performing. The partial paralysis and the

B. The Roots of Government-Sponsored Segregation and Exclusion of Persons with Disabilities

Our government's systematic segregation and exclusion of those thought to be inferior and unfit, of course, was not limited to persons with disabilities. Indeed, the far better known and understood official apartheid in this country has been that based upon race,⁷⁵ especially after the Supreme Court in 1896 gave the states *carte blanche* authority to establish "separate-but-equal" government services in *Plessy v. Ferguson*.⁷⁶ The Jim Crow system established after *Plessy* and the government-supported, systematic segregation of persons with disabilities during precisely the same time period were no mere coincidences of historical events. The historical record abounds with evidence that disability discrimination emanated from the same attitudes and prejudices fomenting at the turn of the century regarding race. Public officials felt that a solution regarding disability, equal to the severity and the magnitude of the "problem" of racial intermixing, was imperative.⁷⁷

The xenophobic hysteria around the turn of the century, dressed in the power of state authority, focused pervasively against racial minorities (especially black Americans)⁷⁸ as well as persons with disabilities. Both groups were seen

malformations, he said, were so great a bar to happiness or attainment that he did not feel justified in saving the baby from the death which nature ordained. . . .

Coroner Hoffman said tonight: "I do not believe there will be an inquest. The case is not different from many others. . . ."

State's Attorney Hoyne said privately that he approved the physician's refusal to act in the case. Officially, since there appeared a basis for legal action, he would express no opinion. . . .

Dr. Haiselden in discussing his action said tonight: "I rest with my conscience . . . I believe I have done the child, its parents, who agree with me, and the race a favor in taking the course I did. . . ."

Many persons had asked permission to take the baby to their homes and have it cared for by other surgeons. Women pleaded, and at least one vented her wrath in epithets of the bitterest nature.

New York Times, Nov. 18, 1915.

75. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387-94 & n.1 (1978) (Marshall, J., concurring and dissenting in part) (discussion of history of treatment of Black people in United States).

76. 163 U.S. 537 (1896).

77. The leading standard historical works describing the pervasive place of eugenics and its decisive role against immigrants, African-Americans, and persons with disabilities include: M. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* (1963); L. KAMIN, *THE SCIENCE AND POLITICS OF I. Q.* (1974); K. LUDMERER, *GENETICS AND AMERICAN SOCIETY: AN HISTORICAL APPRAISAL* (1972); Kevles, *Annals of Eugenics*, *THE NEW YORKER*, Oct. 8, 1984, at 99-115; *Id.* Oct. 15, 1984, at 99-125; *Id.* Oct. 22, 1984, at 92-93.

78. Official government reports issued in the southwestern states focused more on minority races other than African-Americans. For example, one government survey in California found that Merced County "possess[ed] an exceptionally high proportion of foreign-born in its population," and concluded that it was "evident, therefore, that much of the feeble-mindedness in this country is due to the immigration of undesirable types." CALIFORNIA BD. OF CHARITIES AND CORRECTIONS, *SURVEYS IN MENTAL DEVIATION IN PRISONS, PUBLIC SCHOOLS AND ORPHANAGES IN CALIFORNIA* 27-35 (1918). As for Mexican-Americans and Portuguese-Americans, it was "no wonder there-

as unfit, and therefore, official action imposed mandatory exclusion and segregation upon both groups.⁷⁹ Government-supported segregation of African-Americans and persons with disabilities evoked, reinforced, and legitimated public and private prejudices and the actions based upon those prejudices. This historical period was—as Kenneth M. Stampp writes in his classic historiographic analysis—“a time when xenophobia had become almost a national disease.”⁸⁰

The solution for the then-recognized “common problem” was precisely similar: state-imposed segregation of “the Negro” and persons with disabilities. Justice Marshall’s opinion in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*⁸¹ noted with horror and disgust the social segregation of persons with disabilities in “[m]assive custodial institutions,” the categorical exclusions of children with disabilities from public schools, the eugenic marriage and sterilization laws, and the prohibitions on the exercise of the right to vote.⁸² Justice Marshall concluded that “[a] regime of state-mandated segregation [of persons with disabilities] soon emerged that in its virulence and bigotry rivaled, and indeed paral-

fore that these nationalities are present in the reform schools and state prisons in far greater proportions than their numbers in the state would seem to warrant.” *Id.* at 35-36. The survey determined that “[t]he ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than those of native American stock.” *Id.* at 19. The survey concluded that “California has drawn a large proportion of immigrants of an undesirable type.” *Id.* at 14.

79. The standard historical works on the government response to immigration, the official adoption of Jim Crow laws, and the identification of immigrants as so fearfully subhuman as to also require state controlling actions, include: T. ARCHDEACON, *BECOMING AMERICAN* 158-72 (1983) (discusses immigration restrictions in America from 1865-1924); S. HALLER, *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY* 170-75 (1971); O. HANDLIN, *THE UPROOTED* 247-67 (2d ed. 1973); J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM* 131-75 (1978).

80. K. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1867* 20 (1965). The xenophobia of the time was such that not only African-Americans and persons with disabilities were affected. It was also a time “when Negroes and immigrants were being lumped together in the category of unassimilable aliens.” *Id.*

In 1913, the United States Public Health Service administered Binet’s newly invented IQ test to the immigrants arriving in steerage at Ellis Island. “[G]iv[ing] the immigrant the benefit of every doubt,” its professional social science researchers found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews, and 87% of the Russians were feeble-minded. Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQ. 243, 249, 252 (1917). Additional “findings” were extensively reported. See, e.g., *Alien Defectives*, N.Y. Times, Jan. 13, 1913, at 10. During this era:

[T]he new immigrant groups had become the victims of cruel racial stereotypes. Taken collectively it would appear that they were, among other things, innately inferior to the Anglo-Saxons in their intellectual and physical traits, dirty and immoral in their habits, inclined toward criminality, receptive to dangerous political beliefs and shiftless and irresponsible.

In due time, those who repeated these stereotypes awoke to the realization that what they were saying was not really very original — that, as a matter of fact, these generalizations were *precisely* the ones that southern men had been making about Negroes for years.

STAMPP, *supra*, at 19-20 (emphasis in original).

81. 473 U.S. 432 (1985).

82. *Id.* at 462-64 (Marshall, J., concurring and dissenting in part).

leled, the worst excesses of Jim Crow.”⁸³ After reviewing several of the works of the day advocating the social isolation of persons with disabilities, Justice Marshall observed that “[t]he resemblance [of] such works” to the Jim Crow literature of the day “is striking, and not coincidental.”⁸⁴

Champions of segregation for persons with disabilities explicitly and shamelessly evoked the exploding prejudice against African-Americans. One New York official addressed the virtues of segregation for persons with disabilities in these terms: “[T]hey partake of the industrial and manual training given in the antebellum days on the plantation, which were in fact—as the world is fast acknowledging—training schools for a backward race, many of whom were feeble-minded.”⁸⁵ The recitations of the arguments supporting segregation of persons with disabilities matched the recitations on behalf of Jim Crow: “the shibboleths of . . . the Negro’s innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man’s civilization”; invocation of “the supreme law of self-preservation”; and the necessity of “the stronger and cleverer race, free to impose its will upon new caught, sullen peoples.”⁸⁶ Others attempted to establish “the irremedial backwardness of the Negro and the futility of efforts to improve him.”⁸⁷ As Richard Kluger has written: “Keeping blacks separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the face from generation to generation . . . [T]heir very blackness bespoke their low and brutish nature.”⁸⁸ The State of Kentucky stated in 1908, in its brief to the Supreme Court in *Berea College v. Kentucky*: “If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left, not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, *but to the highest types* and geniuses of that race.”⁸⁹

State-imposed segregation on the basis of race, and on the basis of disability, was justified by the “qualified professionals” of the day as benign and even beneficial to its victims, according to the constant declarations of those who established it. Segregation of persons with disabilities, the rationale went, is “consistent with a deep and abiding charity [that] . . . permits all to live under those circumstances best suited to make each useful and happy.”⁹⁰ As to segregation by race, another professional wrote, “both races believe that a separate

83. *Id.* at 462 (Marshall J., concurring and dissenting in part).

84. *Id.* at 462 n.8 (Marshall, J., concurring and dissenting in part) (citing R. SHUFELDT, *THE NEGRO: A MENACE TO AMERICAN CIVILIZATION* (1907) as an example of Jim Crow literature).

85. Barr, *State Care of the Feeble-minded*, 76 N.Y. MED. J. 1159 (1903). For similar language advocating segregating the races in the public schools, see C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 95 (3d rev. ed. 1974) (quoting the 1900 Address of the president of the Southern Education Ass’n).

86. C. WOODWARD, *supra* note 85, at 70, 72-73.

87. R. KLUGER, *SIMPLE JUSTICE* 86 (1975) (citing W. SUMNER, *FOLKWAYS* (1907)).

88. *Id.* at 305.

89. *Id.* at 87 (emphasis added) (citing *Berea College v. Kentucky*, 211 U.S. 45 (1908)).

90. Yoakum, *Care of the Feeble-minded in Texas*, BULLETIN OF THE UNIV. OF TEX., 83 (Nov. 5, 1914).

social life is most desirable and most practical.”⁹¹ Jim Crow laws were said to be enacted not for “‘petty persecution of the Negro,’ . . . and attributed to a desire to ‘humiliate, stigmatise, [sic] and degrade him’ . . . [they are] the embodiment of enlightened public policy.”⁹² Separation, President Woodrow Wilson said, “was not humiliating, but a benefit . . . ‘rendering them more safe in their possession of office and less likely to be discriminated against.’ ”⁹³

The views and practices of state officials today are the vestigial fruits of this historical legacy. State-imposed exclusion and segregation of hundreds of thousands of persons with disabilities throughout the nation is the singular exception to the otherwise fundamental commitment of educators and other public officials to integrate children and adults from diverse backgrounds into the public services of the community.

III. THE LEGACY ENDURES: OUR CONTINUED SEGREGATION; DESPITE THE SEVERE INJURIES IT VISITS UPON US, AND DESPITE ITS NEEDLESSNESS

The stark, purposeful, state-mandated segregation and exclusion of persons with disabilities demonstrates incontrovertibly the error in the Supreme Court’s casual dicta in *Alexander v. Choate*⁹⁴ that “discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.”⁹⁵ Indeed, in the term following *Choate*, five Justices of the *Cleburne* Court specifically acknowledged that disability discrimination was not based merely on insensitivity, but was embedded in the “history of unfair and often grotesque mistreatment” that was imposed by the states through prejudice and ignorance.⁹⁶ In *School Board of Nassau County v. Arline*,⁹⁷ the Court further emphasized that persons with disabilities historically have been subjected to “discrimination stemming not only from simple prejudice, but also from ‘archaic attitudes and laws.’ ”⁹⁸

Because official classifications that segregate, exclude, or isolate persons with disabilities are based upon the tradition and history of purposeful unequal treatment, they are “more likely than others to reflect deep-seated prejudice.”⁹⁹

91. J. OLDHAM SMITH, *CHRISTIANITY AND THE RACE PROBLEM* 10 (1922).

92. A. STONE, *STUDIES IN THE AMERICAN RACE PROBLEM* 64 (1908).

93. R. KLUGER, *supra* note 87, at 87.

94. 469 U.S. 287 (1985).

95. *Id.* at 296.

96. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (quoting the appellate court, 726 F.2d 191, 197 (5th Cir. 1984)); *see also id.* at 462 (Marshall, J., concurring and dissenting in part).

97. 481 U.S. 273 (1987).

98. *Id.* at 279 (quoting S. REP. NO. 1297, 93d Cong., 2nd Sess. 50 (1974)).

99. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). *See also* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (classifying persons according to race reflects racial prejudice); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (state police officers not included in same category as those who have been subjected to history of purposeful unequal treatment); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (history of purposeful unequal treatment is a traditional indicia of suspect class).

Once the power of the state becomes so engaged, thereby legitimating the prejudices of the populace, it is not an easy task to reverse those practices. The extraordinary undertakings of the states to segregate persons with disabilities "put the weight of government behind . . . hatred and separatism" as virulent as racial hatred and separatism.¹⁰⁰ "Prejudice" based upon disability, like that based upon race, "once let loose, is not easily cabined."¹⁰¹

During the fourteen hearings held by the Congress on the ADA at the Capitol, and as a result of the sixty-three field hearings and the hundreds of discrimination diaries submitted for the legislative record by persons with disabilities,¹⁰² the members of Congress heard first-hand about the severe prejudice and disability discrimination persisting in this country. Persons with disabilities, especially those with severe, noticeable disabilities, still are told outright that they have been excluded because others would feel uncomfortable around them.¹⁰³ Much of the testimony was akin to that of one witness who stated that

the general public doesn't want to see you doing your laundry, being a case worker, a shopper, or a Mom. It is difficult to see yourself as a valuable member of society, and sometimes it is hard to see yourself as a person worthy of so much more respect than you get from the general public.¹⁰⁴

Congress documented the exclusion of persons with disabilities from a whole panoply of services because of simple prejudice. Persons with disabilities have been excluded from hospitals,¹⁰⁵ theatres,¹⁰⁶ restaurants,¹⁰⁷ bookstores,¹⁰⁸

100. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

101. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in part and dissenting in part) (citing *Bakke*, 438 U.S. at 395 (Marshall, J. concurring and dissenting in part)). See also *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (official policies and practices originally motivated by discriminatory purpose violate Equal Protection Clause of fourteenth amendment even though might be permissible if implemented today without discriminatory motive).

102. *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped Comm.*, 101st Cong., 1st Sess. (1989) (testimony of Justin Dart, Chairman of Task Force on Rights and Empowerment of Americans with Disabilities).

103. See 135 CONG. REC. S10720 (daily ed. Sept. 7, 1989) (statement of Sen. Durenberger) (applicant with cerebral palsy told she was not qualified for job in metropolitan hospital because fellow employees not comfortable working with her); SENATE COMM. ON LABOR AND HUMAN RESOURCES, REP. ON THE AMERICANS WITH DISABILITIES ACT, S. REP. NO. 116, 101st Cong., 1st Sess. 7 (1989) (applicant "crippled by arthritis" denied employment in higher education because "college trustees [thought] 'normal students shouldn't see her'").

104. HOUSE COMM. ON EDUCATION AND LABOR, REP. ON THE AMERICANS WITH DISABILITIES ACT, H.R. REP. NO. 485, 101st Cong., 2nd Sess., at 42, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 324 (1990) (testimony of Virginia Domini).

105. 135 CONG. REC. S10720 (daily ed. Sept. 7, 1989) (statement of Sen. Durenberger).

106. *Americans with Disabilities Act: Hearing before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 66 (1989) [hereinafter *Hearing*] (statement of Ms. Carl); *id.* (statement of Sen. Durenberger).

107. *Hearing*, *supra* note 106, at 62 (statement of Mr. Tice).

and auction houses.¹⁰⁹ Congress realized that persons with disabilities constantly are subjected to “stares, ridicule, and harassment, all of which stem from the ignorance of the population to the abilities” of persons with disabilities.¹¹⁰ In floor debate, Senator Durenberger, the ranking minority member of the Committee on Labor and Human Resources, stated that Senators had “heard much testimony to this fact before this committee,” and concluded that “[p]eople with disabilities remain the only major segment of our society who can be outrightly discriminated against.”¹¹¹ Practically every member of Congress who spoke on the bill made similar statements.¹¹²

These statements were distilled into the Senate Report, which acknowledged that

[o]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.¹¹³

The Senators found it to be a “disgrace that discrimination and bigotry of this kind exist in our society.”¹¹⁴

The Executive branch echoed the congressional sentiments. The Attorney General testified that the administration believed that “precisely these sorts of antiquated attitudes . . . have blocked people with disabilities from entering the mainstream of American life.”¹¹⁵ The Attorney General also reported that the President too “believes that discrimination against people with disabilities is pervasive.”¹¹⁶

The injuries, of course, from discrimination and segregation are manifest, as we have known at least since the decision in *Brown v. Board of Education*.¹¹⁷ In *Brown*, the Supreme Court found that state-supported segregation may affect

108. COMM. ON EDUCATION AND LABOR, *supra* note 104, at 42, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 324.

109. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 7 (auction house staff attempted to forcibly remove two people with disabilities because they were “disgusting to look at”).

110. 136 CONG. REC. H2444 (daily ed. May 17, 1990) (statement of Rep. Matsui).

111. 135 CONG. REC. S10720 (daily ed. Sept. 7, 1989) (statement of Sen. Durenberger).

112. *See, e.g.*, 136 CONG. REC. H2450 (daily ed. May 17, 1990) (statement of Rep. Coyne) (persons with disabilities subjected to “prejudice, fear and misinformation on the part of non-disabled persons”); *Id.* at H2449 (statement of Rep. AuCoin) (persons with disabilities subjected to “myths, stereotypes, and irrational fears”); 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) (persons with disabilities subjected to “false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies”).

113. *See* COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 8-9.

114. 135 CONG. REC. S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger); *see also id.* at S4984 (statement of Sen. Harkin); 136 CONG. REC. S10711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

115. *Hearing, supra* note 106, at 201 (statement of former Attorney General Dick Thornburgh).

116. *Id.* at 205.

117. 347 U.S. 483 (1954).

children's "hearts and minds in a way unlikely ever to be undone"¹¹⁸ and that "[s]eparate . . . facilities are inherently unequal."¹¹⁹ Congress made it plain in the ADA's legislative history that it believed the evils of segregation by race to be the same as the evils of segregation by disability. Congress regarded *Brown* as an equally important basis for eradicating disability segregation as it had been in striking down classifications based upon race.¹²⁰

So plain and obvious are the injuries stemming from segregation that, since *Brown*, both the courts and Congress have freely acknowledged them. The Supreme Court frequently has taken judicial notice that the personal stigma stemming from segregation and discrimination is "beyond any doubt, not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system."¹²¹ Congress has also recognized that severe stigmatic injuries stem from discrimination and segregation based upon disability. Senator Harkin, Chair of the Senate Hearings, stated that disability discrimination "is one of the most debilitating things that you can imagine."¹²² The Senate Report similarly stated that "[o]ne of the most debilitating forms of discrimination is segre-

118. *Id.* at 494.

119. *Id.* at 495.

120. 136 CONG. REC. H2438 (daily ed. May 17, 1990) (statement of Rep. Mineta) ('Separate but equal' is not civil rights. So we must turn back those amendments that may provide that kind of 'separate but equal' treatment"). For examples of *Brown's* impact on those who spoke in favor of the ADA, see, e.g., HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 3, at 26, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 448 ("[A]s in the finding 35 years ago by the Supreme Court in *Brown v. Board of Education*, in referring to the segregation of black students, . . . segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone' " (quoting *Brown*, 347 U.S. at 494)); COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 6 ("As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in *Brown v. Board of Education*, segregation 'affects one's heart and mind in ways that may never be undone. Separate but equal is inherently unequal' " (quoting Committee testimony that quoted and cited *Brown*)); 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums) ("The story of our Nation's disparate treatment of disabled individuals is a sad conclusion. As a black American, I am especially proud to stand here as part of the coalition that has brought equal standing for the disabled in the eyes of the law. All minority Americans have shared the suffering of 'separate but equal,' and we rejoice collectively when that unjust standard can no longer be legally applied"); *Id.* at H2611 (statement of Rep. Collins) ("[e]xperience has taught us that separate is never equal"); *Id.* at H2607 (statement of Rep. Anderson) ("[r]emember, separate but equal is inherently unequal").

121. *Allen v. Wright*, 468 U.S. 737, 756 (1984). The Court has stressed repeatedly that segregation perpetuates "archaic and stereotypic" attitudes and stigmatizes members of a disfavored group as "innately inferior," thereby defining them as less worthy participants in the political community. *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984). Segregation, therefore, "can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* See also *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) ("stigmatizing injury, and the denial of equal opportunities that accompanies it," is felt strongly by persons suffering discrimination); *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (commitment to a mental hospital has significant "adverse social consequences to the individual," a phenomenon sometimes characterized as "stigma" (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979))).

122. *Hearing, supra* note 106, at 114 (statement of Sen. Harkin).

gation imposed by others,"¹²³ which "has very serious consequences. It destroys healthy self-concepts and slowly erodes the human spirit."¹²⁴

Congress understood, as reflected in the floor statements of its members, that segregation was "humiliating"¹²⁵ and "destructive,"¹²⁶ and that "[s]uch practices severely stigmatize children with disabilities" in particular.¹²⁷ The Senate Report quoted a witness's statement that "[t]his forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity [T]his stigma scars for life."¹²⁸ Another witness at the Senate Hearings described how she felt after she had been excluded from a public facility because of her cerebral palsy: "I left. I felt embarrassed. I went home. I was not crying outside, but I was crying inside. . . . Discrimination really hurts. It hurts very much. We need to stop discrimination now."¹²⁹

As noted by numerous members of Congress, many persons with disabilities express "fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced."¹³⁰ Even the apprehension of such treatment causes intense anxiety. One family with a son with epilepsy refused to let him attend public school because of their embarrassment.¹³¹ A Harris Poll, relied upon by Congress, found that as a result of the fear and self-consciousness of persons with disabilities about the way they will be treated, they "participate much less often in a host of social activities that other Americans regularly enjoy, including going to movies, plays, sports events, and going out to eat at restaurants."¹³² The House Judiciary Committee Report, relying on the Harris Poll, as well as other studies, determined that "Americans with disabilities are notably underprivileged and disadvantaged. Compared with persons without disabilities, persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regu-

123. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 6.

124. *Id.* at 16; *see also* 135 CONG. REC. S4996 (daily ed. May 9, 1989) (statement of Sen. Simon) ("[d]iscrimination in all its forms is a destroyer of the human spirit"); *Hearing, supra* note 106, at 13 (statement of Dr. Jordan, President, Gallaudet University) (discrimination destroys healthy self-concepts and erodes the human spirit.; it does not belong in lives of disabled people).

125. COMM. OF EDUCATION AND LABOR, *supra* note 104, at 47, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 329.

126. 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums).

127. 135 CONG. REC. S10721 (daily ed. Sept. 7, 1989) (statement of Sen. Dodd).

128. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 16 (quoting with approval Judith Heumann's statement at Senate Hearings).

129. *Hearing, supra* note 106, at 62 (statement of Lisa Carl).

130. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 11; *see also*, 135 CONG. REC. S10712 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

131. *Hearing, supra* note 106, at 10 (testimony of former Rep. Coelho). Even relatively non-severe disabilities can provoke anxiety and self-consciousness. As Senator Simon related, "It was very interesting after I first got my hearing aid that a member of Congress in his 80's came to me and said, 'Did people talk much when you got your hearing aid?' " *Id.* at 17 (statement of Sen. Simon).

132. *Id.* at 131 (statement of Sen. Harkin); *see also id.* at 99-100 (testimony of Robert Burgdorf Jr.); 135 CONG. REC. S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin).

larly enjoy, and express less satisfaction with life."¹³³

Aside from being less involved in community activities because of their fears of prejudice, persons with disabilities continue to be forcibly and officially segregated throughout this nation by public officials who refuse to provide essential services in an integrated fashion. A number of the eugenic-based laws from the earlier historical era requiring segregated treatment remain in effect still,¹³⁴ and for those laws that have been repealed, their legacy continues to be implemented through official policy and practice.

Persons with disabilities and their families experience daily the virulence of segregating classifications. Over 100,000 persons with developmental disabilities¹³⁵ continue to be forced to live in isolated, congregate, state-operated institutions throughout the country, subject to their decried, yet ultimately condoned, brutality.¹³⁶ These practices persist despite congressional findings rendered over fifteen years ago that "the vast majority" of those residents need not be so segregated.¹³⁷ Over 1.5 million persons with disabilities have been segregated in nursing homes and other socially segregated facilities¹³⁸ due to the lack of community alternatives. Such facilities have been judicially recognized as being among "the most isolated and restrictive"¹³⁹ and "almost totally impersonal"¹⁴⁰ settings in which a person can live. Residents of these segregated facilities have no privacy—"they sleep in large, overcrowded wards, spend their waking hours together in large day rooms, and eat in a large group setting. They must conform to the schedule of the institution, which allows for no individual flexibility."¹⁴¹ As Senator Durenberger and others speaking to the issue during

133. COMM. ON THE JUDICIARY, *supra* note 120, at 25, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 447, (citing with approval LOUIS HARRIS AND ASSOCIATES, THE ICD [INTERNATIONAL CENTER FOR THE DISABLED] SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986); LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS (1987); NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986); NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (1988); U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983)).

134. See *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 463 n.12 (1985) (Marshall, J., concurring and dissenting in part) (as of 1985, marriage restrictions for retarded people still in effect in Kentucky, Michigan, and Mississippi).

135. D. BRADDOCK, R. HEMP, G. FUJIURA, L. BACHELDER, & D. MITCHELL, THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 13 (1990).

136. See *Youngberg v. Romeo*, 457 U.S. 307, 310 (1982); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981); *Parham v. J.R.*, 442 U.S. 584, 628 (1979) (Brennan, J., concurring in part and dissenting in part); see generally B. BLATT & F. KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1966).

137. S. REP. NO. 160, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 951-52.

138. AMERICAN HEALTH CARE ASS'N, NURSING FACILITY RESIDENTS: FACTS AND FIGURES (fact sheet, quoting 1986 data from National Center for Health Statistics).

139. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1303 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 447 U.S. 904 (1980), *rev'd on other grounds*, 451 U.S. 1 (1981).

140. *Id.*

141. *Id.*

the floor debates on the ADA acknowledged, residents of such facilities are simply "denied the opportunity to control their own lives."¹⁴² Persons with disabilities and their advocates have long condemned the use of segregated institutions because, once there, the residents lose "the basic rights that [persons without disabilities] take for granted, like choosing where they live, who they live with, what they eat, when to eat, who their friends are or if they are going to have sex."¹⁴³ There is now a consensus among disability researchers that institutions and other segregated settings are simply unacceptable.¹⁴⁴

Even when persons with disabilities live in the community with their families and friends, they usually are forced to attend educational, recreational, and employment programs that are segregated. Depending upon the jurisdiction, an estimated ten to fifty-five percent of students with severe disabilities are barred

142. See, e.g., 135 CONG. REC. S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger). The disqualifications imposed by our official segregation are among the most severe imaginable: persons with disabilities have been "not only deprived of their physical liberty, [but] they are also deprived of friends, family, and community." *Parham v. J.R.*, 442 U.S. 584, 626 (1979) (Brennan, J., concurring and dissenting in part). A 36 year-old resident of a nursing home, Jeff Gunderson, was put there by the state because he has cerebral palsy. Joseph P. Shapiro, *The Visitor*, THE DISABILITY RAG March/April 1991, at 1, 4. The state refused to spend its Medicaid subsidies on community services for Gunderson but, nevertheless, in a vestige of earlier policies and practices which segregate persons with disabilities, fully paid for the more expensive institutionalized services. *Id.* Gunderson called the facility "the concentration camp." *Id.* at 1. At the nursing home, Gunderson reports:

[T]he staff tried to break him. Sometimes aides tied him to his bed. They would drag him into cold showers as punishment. To make him use the bathroom, on a schedule convenient for the nurses, they would put ice cubes down his pants. It was a form of torture for Gunderson, since the cold set off his spastic muscles. On several occasions, Gunderson says he was given a suppository before sleep and, since he could not move by himself, he would spend the night lying in his own feces.

Id. at 4. Gunderson finally was permitted to move to an apartment, which he shares with an attendant who assists him to "dress, bathe, [use the] toilet, cook, eat, do housework," and travel around the community. *Id.* at 5.

Another resident of a nursing home has described her futile attempts to obtain privacy and intimacy:

Carol, who has a congenital spinal cord injury, has lived in a nursing home for nearly all of her adult life. When she was 52, she met Larry, who had multiple sclerosis. They fell in love and wanted to have sexual intercourse. . . . When the director of the nursing home learned about what had happened, she was shocked and infuriated. She threatened to discharge them both if she learned they were having sex on the premises. Fearing that any nursing home would impose the same restrictions on them, Carol and Larry gave up their sexual relationship.

Barbara Faye Waxman, *It's Time to Politicize Our Sexual Oppression*, THE DISABILITY RAG March/April, 1991 at 23, 24. Gunderson's experience, and that of Carol and Larry, are typical of conditions in socially isolated facilities.

143. Shapiro, *supra* note 142, at 5 (quoting Tom Hlavacek of United Cerebral Palsy).

144. C. Lakin, *An Overview of the Concept and Research on Community Living* (unpublished paper prepared for the Leadership Institute on Community Living, National Institute on Disability and Rehabilitation Research, U.S. Dep't of Educ.); CENTER ON HUMAN POLICY, THE COMMUNITY IMPERATIVE: A REFUTATION OF ALL ARGUMENTS IN SUPPORT OF INSTITUTIONALIZING ANYBODY BECAUSE OF MENTAL RETARDATION (1979).

from attending the neighborhood schools their siblings and friends attend.¹⁴⁵ Instead, these students are forced to ride segregated buses away from their communities to "special" educational sites.¹⁴⁶ In California, for example, over 21,000 students with disabilities were attending segregated programs as of 1987.¹⁴⁷ In some states, such as Massachusetts, segregated services for students with disabilities continue to increase dramatically. A 1987 study reported a 243% increase from 1974 to 1985 in the number of students with disabilities taught in segregated classrooms and separate schools in Massachusetts, while the number of students educated in integrated settings decreased by 61%.¹⁴⁸ Thousands of adults with disabilities are similarly transported to segregated training, employment, and recreational sites. Persons with disabilities seeking integrated community services from which they have been excluded continue to face rejection, antipathy, and hostility from organized society.¹⁴⁹

As a result of the three years of debate on the ADA, the numerous hearings, and the studies relied on by the committees and members, Congress learned that "millions of Americans with disabilities are still subjected to widespread discrimination and segregation in all significant areas of their lives."¹⁵⁰ "[I]n the process [of passing the ADA], policymakers and the public have been educated to the indignities suffered by the country's largest minority, who want and deserve equal access to the American mainstream."¹⁵¹ "Congressional testimony has revealed a picture of rampant, daily discrimination in every sphere of American life."¹⁵² Based on this legislative record, the Congress was

moved by the continuing destructive effect of segregation, and [is] acting now to reverse those practices, root and branch, and to eliminate their legacy. In short, [Congress concluded] that a severe, lifelong disability may be handicapping, but more handicapping has been the practice of congregating services for persons with disabilities in settings different or separate from those in which [others] are provided those services.¹⁵³

145. Meyer & Putnam, *Social Integration*, in HANDBOOK OF DEVELOPMENTAL AND PHYSICAL DISABILITIES 107, 114 (V. B. Van Hasselt, P. Strain, & M. Hersen, eds., 1988).

146. *Id.* at 114-15.

147. F. FARRON-DAVIS & A. HALVORSEN, SURVEY OF CALIFORNIA'S SPECIAL CENTERS FOR SEVERELY DISABLED STUDENTS (1987).

148. J. LANDAU, OUT OF THE MAINSTREAM: EDUCATION OF DISABLED YOUTH IN MASSACHUSETTS (1987).

149. See DOKECKI, ANDERSON, & STRAIN, STIGMATIZATION AND LABELING, DEINSTITUTIONALIZATION: PROGRAM AND POLICY DEVELOPMENT 37, 49 (J. Paul, D. Stedman, & G. Neufeld eds., 1977) (social roles acquired by labeling and admission to "treatment"); E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 12 (1963) ("mixed contacts" between "normals" and "stigmatized" lead to uncertainty of status); see also, Christensen, "Not My Block" Reactions Greet Group Homes, Dayton Daily News, Mar. 18, 1984, at B1; Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982, at 3-A; Keating, *The War Against the Retarded*, N.Y. MAG., Sept. 17, 1979, at 87.

150. 136 CONG. REC. H2627 (daily ed. May 22, 1990) (statement of Rep. Wolpe).

151. *Id.* at H2447 (daily ed. May 17, 1990) (statement of Rep. Miller).

152. *Id.* at H2633 (daily ed. May 22, 1990) (statement of Rep. Schroeder).

153. *Id.* at H2639 (statement of Rep. Dellums).

IV. THE CONGRESSIONAL MANDATE IN THE AMERICANS WITH DISABILITIES ACT TO DISESTABLISH THE SYSTEMATIC SEGREGATION OF CITIZENS WITH DISABILITIES

In the ADA, Congress explicitly invoked its full authority to enforce both the fourteenth amendment and the Commerce Clause of the Constitution¹⁵⁴ to reverse the regime of official discrimination and segregation on the basis of disability. Congress concluded that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁵⁵

Congress broadly defined “public entity” to include “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”¹⁵⁶ This definitional language was similar to that in section 504 of the Rehabilitation Act of 1973,¹⁵⁷ and Congress incorporated the remedies, procedures and rights pertaining to section 504 that were enacted by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act Amendments of 1978.¹⁵⁸ Congress also required the Attorney General to publish enforcement regulations consistent with the section 504 rules published by the Secretary of Health, Education, and Welfare in 1978.¹⁵⁹

Title II requires that ADA enforcement rules be consistent with the section 504 rules. One might argue that Congress merely intended to extend the present requirements of section 504 to those government entities that do not receive federal assistance, and did not intend to substantively clarify any of section 504’s requirements. However, section 504, the disability rights legislation enacted as part of the Rehabilitation Act of 1973 covering recipients of federal assistance, was but a single sentence tacked on to vocational rehabilitation legislation. Clarification of its meaning was left largely to the Judiciary and the Executive. The result has been a potpourri of substantially inconsistent regulations even among particular federal agencies¹⁶⁰ with widely divergent court decisions on critical questions such as the degree to which section 504 prohibits or permits segrega-

154. 42 U.S.C.A. § 12101(b)(4).

155. *Id.* § 12132.

156. *Id.* §§ 12131(1)(A) - (B). “The term ‘State’ means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.” *Id.* § 12102(3). The public services title also covers the National Railroad Passenger Corporation and any commuter authority. *Id.* § 12131(1)(C).

157. See 29 U.S.C. §§ 794(b)(1)(A) - (B) (1988) (covering acts of “instrumentality of a state or of a local government” and an entity of government that distributes or receives federal financial assistance).

158. 42 U.S.C.A. § 12133 (incorporating by reference 29 U.S.C. § 794(a) (1973)).

159. *Id.* §§ 12134(a) - (b). The HEW regulation originally was published at 43 Fed. Reg. 2132 (1978), and is presently codified at 28 C.F.R. § 41 (1990).

160. For example, the inconsistencies between the HEW coordination regulation for recipients of federal assistance, 45 C.F.R. § 84 (1990), and the Department of Justice coordination regulation for federally conducted activities, 28 C.F.R. § 39 (1990), were pointed out by the Congress. See

tion,¹⁶¹ the standard of review for classifications based upon disability,¹⁶² and the defenses available in disability discrimination cases.¹⁶³ In the ADA, however, Congress took no such gamble with the courts or with the federal agencies. Congress provided, in the body of the legislation itself—not just in the legislative history, although it is explicit there also—specific congressional findings and purposes that express the legislature's intent in no uncertain terms.

In the ADA, Congress determined, as apparently did the Executive, that section 504 simply was not working as a means of eradicating discrimination and segregation in this country. Congress found that, even though section 504 had been the law for seventeen years, "society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."¹⁶⁴ Given Congress's understanding that public officials historically have been among the major perpetrators of segregated services in this country,¹⁶⁵ and given the congressional findings, legislative history, and case law regarding the continued persistency¹⁶⁶ and the stigmatic evils¹⁶⁷ of segregation, Congress would not have simply reenacted without clarification the identical requirements it enacted seventeen years previously to little effect.

The Executive branch apparently agreed that the ADA was not simply a reenactment of previous legislation when it presented testimony on Capitol Hill in support of the ADA. The Attorney General stressed at a 1989 Senate hearing that "[f]ifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life."¹⁶⁸ A Department of Transportation official made a similar statement one year later before a House committee and

infra notes 426-63 and accompanying text for a discussion of the ADA's resolution of the conflict between the HEW and Justice Department regulations.

161. See *supra* note 24 for a collection of contradictory decisions, some cases prohibiting and some permitting segregation under § 504.

162. Compare *Barnett v. Fairfax County School Bd.*, 927 F.2d 146, 151 (4th Cir. 1991) (per curiam) (any rational basis will do), *petition for cert. filed*, 60 U.S.L.W. 3045 (U.S. July 8, 1991) (No. 91-62) with *Kampmeier v. Nyquist*, 553 F.2d 296, 299-300 (2d Cir. 1977) (requiring a substantial justification).

163. Compare *Southeastern Community Coll. v. Davis*, 442 U.S. 397, 411-12 (1979) (stating that § 504 does not permit any "affirmative action obligation" and seemingly permitting a defense based upon "undue financial and administrative burdens") with *Alexander v. Choate*, 469 U.S. 287, 297-301 nn.20-21 (1985) (noting that *Davis* had been "severely criticized, and requiring specific affirmative steps, including modifications to programs and the provision of auxiliary aides and services, to accommodate persons with disabilities) and *School Bd. of Nassau Cty., Florida v. Arline*, 480 U.S. 273, 289 n.19 (1987) (§ 504 entails "affirmative obligation[s]"), *reh'g denied*, 481 U.S. 1024 (1987).

164. 42 U.S.C.A. § 12101(a)(2).

165. See *supra* notes 47-76 and accompanying text for a discussion of state laws mandating the segregation of persons with disabilities.

166. See *supra* notes 103-16 and accompanying text for a discussion of the evidence of continued segregation.

167. See *supra* notes 117-33 and accompanying text for a discussion of the stigmatic injuries associated with segregation.

168. *Americans with Disabilities Act: Hearing before the Subcomm. on the Handicapped, of the*

added that “[t]he Americans With Disabilities Act would directly address that problem.”¹⁶⁹

The problem was not coverage; the vast majority of governmental entities in this country were already subject to section 504 as recipients of federal assistance. Rather, the problem was the mandate itself and the standards for enforcing that mandate.

Throughout the legislative history, the committees and members of Congress took pains to clarify section 504, even going so far as to specifically cite the case law that, in their judgment, was correctly decided. For example, the House Judiciary Report analyzed numerous decisions of the federal courts construing section 504.¹⁷⁰ Judge Mansmann’s opinions regarding section 504’s prohibition of segregated services in *ADAPT v. Skinner*¹⁷¹ were discussed approvingly in the House Judiciary Report,¹⁷² the Senate Report,¹⁷³ and throughout the floor debate. This legislative appraisal would have been unnecessary had Congress intended to leave current section 504 rules and case law untouched.

Congress confirmed its intent to clarify section 504 in the ADA’s statutory purposes. The ADA’s first purpose was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁷⁴ The plain import of this language is that Congress decided that a more comprehensive mandate to reach that goal was needed, and that that mandate should be “clear”—it should clarify existing law rather than leaving it be.

The ADA’s second statutory purpose was “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”¹⁷⁵ The use of the terms “clear, strong, [and] consistent” again powerfully suggests the need to clarify existing law, to strengthen it, and to ensure that the various federal disability rights statutes, particularly section 504 and the ADA, were construed consistently.

Reading section 504 and its eighteen years of contradictory regulatory and judicial constructions verbatim into the ADA would not be consistent with the overriding Congressional intent to “eliminat[e] . . . discrimination against individuals with disabilities,”¹⁷⁶ in all of its forms, including the practices of “iso-

Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 195 (1989) (statement of former Attorney General Dick Thornburgh).

169. *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 111 (1989) (statement of Mr. Jeffrey N. Shane).

170. COMM. ON THE JUDICIARY, *supra* note 120, at 448, 453.

171. *ADAPT v. Skinner*, 881 F.2d 1184, 1206 (3d Cir. 1989) (Mansmann, J., concurring and dissenting in part) (critical analysis of the plurality holding; reasoning that adding a wheelchair lift to a public bus is a modest modification and thus should be required under § 504).

172. COMM. ON THE JUDICIARY, *supra* note 120, at 473.

173. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 13.

174. 42 U.S.C.A. § 12101(b)(1).

175. *Id.* § 12101(b)(2).

176. *Id.* § 12101(b)(1).

lat[ion] and segregat[ion].”¹⁷⁷ Certainly it would be “consistent” with section 504 to take those actions necessary to fulfill that directive, and to eliminate segregation, as one representative put it, “root and branch.”¹⁷⁸

In passing the ADA, Congress exercised its power under section 5 of the fourteenth amendment to enforce the Equal Protection Clause of that amendment. Congress expressed this intent directly by invoking that authority in the ADA’s fourth statutory purpose.¹⁷⁹ The importance of Congress’s decision to place the ADA squarely within the parameters of equal protection legislation was stressed on the floor of Congress. One representative quoted the Supreme Court’s controlling case regarding section 5: “It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.”¹⁸⁰

Thus, in enforcing the ADA, it is important to initially examine the language of the ADA, particularly its legislative history and its statutory Statement of Findings and Purposes before considering other sources of guidance such as the regulations and case law construing section 504. These statutory Findings and Purposes leave no room for doubt as to the express congressional intent regarding two critical areas: (A) What constitutes “discrimination” by public entities under the ADA? and (B) What are the standards for reviewing discriminatory and segregating classifications based upon disability?¹⁸¹ These questions are addressed in turn below.

A. The Prohibitions of Discrimination by Public Officials Under the ADA

Since section 504’s enactment in 1973, its language has not taken us very far down the road to eliminating segregated public services for persons with disabilities.¹⁸² Public officials and the courts have considered numerous practices permissible under section 504 that surely would have been considered violative of laws and constitutional provisions prohibiting race discrimination. In the ADA, however, Congress left no room for such misinterpretation. The ADA prohibits disability segregation and requires that all manner of auxiliary aides be provided in integrated settings to ensure that services offered to the public are also offered to persons with disabilities in an effective and meaningful fashion.

177. *Id.* § 12101(a)(2).

178. *See supra* note 153 and accompanying text for Representative Dellums’ use of this analogy.

179. 42 U.S.C.A. § 12101(b)(4) (“to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities”).

180. 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980)).

181. The Statement of Findings also vitiates many of the defenses that in the past have been utilized by public officials to justify discrimination. These defenses will be more fully discussed in section V, *infra* pages 439-67.

182. *See supra* notes 7-24 and accompanying text for a discussion of the relatively small impact that § 504 has had on changing the practices of segregation.

1. The Prohibition of Segregated Public Services

First and foremost, Congress expressed in the ADA its determination that "segregation,"¹⁸³ "isolat[ion],"¹⁸⁴ and "institutionalization"¹⁸⁵ of persons with disabilities were "forms of discrimination"¹⁸⁶ to be disestablished. From the vantage point of the disability community, requiring us to ride segregated buses or to attend segregated public programs where signs read "For the Handicapped," is no different, and no less reprehensible, than hanging a sign on a row of classroom seats that reads "Reserved for Colored."¹⁸⁷ Such a badge of inferiority "serves only to call attention"¹⁸⁸ to treatment that Congress has prohibited. Congress thus has approved those court cases that have ruled that such practices constitute discrimination under section 504.¹⁸⁹ In doing so, Congress has adopted the prohibition of *Brown v. Board of Education* of separate but equal public services for persons with disabilities,¹⁹⁰ and has provided in the ADA a very specific statutory basis for eliminating such segregation, isolation, and institutionalization. Henceforth, government officials must discontinue their support of, and eliminate, such practices.

Congress particularly focused on the segregation issue in the context of

183. 42 U.S.C.A. §§ 12101(a)(2), (5).

184. *Id.* § 12101(a)(2).

185. *Id.* § 12101(a)(3).

186. *Id.* § 12101(a)(5).

187. Senator Metzenbaum used this analogy in the floor debate on the ADA, indicating that treating a person differently on the basis of disability was "tantamount to dredging up a 'whites only' sign and hanging it on a nearby lunch counter." 135 CONG. REC. S10,797 (daily ed. Sept. 7, 1989) (statement of Sen. Metzenbaum). *See also*, *McLaurin v. Oklahoma*, 339 U.S. 637, 640 (1950) (minority student admitted to graduate college but required to sit at designated desk in segregated area violates equal protection).

188. *Cf.* *Henderson v. United States*, 339 U.S. 816, 824-25 (1950) (one table in railroad dining car designated for Negroes is unreasonably prejudicial).

189. *See, e.g.*, *ADAPT v. Skinner*, 881 F.2d 1184, 1204 (3d Cir. 1989) (en banc) (Mansmann, J., concurring) (newly purchased buses should be required to contain lifts); *Homeward Bound, Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Okla. July 24, 1987) (1987 WL 27104) ("people are harmed educationally if they are kept in an unnecessarily segregated environment. Segregation is harmful to retarded persons; it leads to reduced learning, reduced freedom, and reduced growth"; segregation of persons with disabilities in institutions also violates Equal Protection Clause under *Brown* and violates § 504). Such decisions are consistent with § 504's legislative history revealing the firm intent of its sponsors to end "the segregation of millions of [disabled] Americans." 118 CONG. REC. 9495 (1972) (statement of Sen. Humphrey); *see also id.* at 9497 (society has found it easy to segregate handicapped; segregation of handicapped and their resulting invisibility affects the basic relationship between handicapped people and so-called "normal" society); *id.* at 32,310 ("intent . . . to end the virtual isolation of [disabled] children and adults"); 117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik) ("handicapped [are] . . . often shunted aside"). Segregation has continued despite federal rules enforcing § 504 prohibitions against segregated services. Examples of such prohibition include: 34 C.F.R. §§ 104.4(b)(1)(iv), (b)(2) (1990) (separated services prohibited unless necessary to achieve level of benefit as nonhandicapped individuals); 28 C.F.R. §§ 41.52(b)(1)(iii), 41.51(b)(1)(iv), 41.51(b)(2) (1990) (prohibiting unnecessarily segregated services); 43 Fed. Reg. 2135 (1978) (prohibition of segregation "intrinsic to § 504").

190. *Brown* is cited throughout the ADA's legislative history as the controlling, authoritative standard for the Act's desegregation requirements. *See supra* notes 117-27, and accompanying text for a discussion of *Brown's* influence on the creation of the ADA.

public transportation, both because of the importance of transportation in accessing all other public services and because of the mounting number of conflicting court decisions regarding public transportation. As the Senate Report explained: "Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society. . . . [It is] the key to opening up education, employment, recreation; and other provisions of the [ADA] are meaningless unless we put together an accessible public transportation system in this country."¹⁹¹ The disability community highlighted the critical role of public transportation by litigating this issue under section 504 in several cities and by requesting Congress to make integrated public transportation a cornerstone of the ADA.

Few of the court cases brought by disability groups to obtain accessible buses were successful. The judiciary's misunderstanding of the integration imperative central to section 504 is exemplified by the many court decisions holding that the 1973 law does not require integrated services, and certainly does not require access to regular buses taking regular passengers to regular destinations.¹⁹² These decisions upheld the Department of Transportation's previous policies permitting the use of special, segregated "paratransit" services as a municipality's sole means of providing public transportation to persons with disabilities.¹⁹³

In hearings before the Senate and the House on the ADA, Congress was made well-aware of the transportation controversy, including the adverse court

191. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 13 (1989); *Comm. on Education and Labor, Rep. on the Americans with Disabilities Act*, H.R. REP. NO. 485, 101st Cong., 2nd Sess., part 2, at 37 (1990).

192. *Rhode Islander Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 499-500 (1st Cir. 1983) (§ 504 relief limited to situations where line between overt discrimination and affirmative action is hard to draw); *APTA v. Lewis*, 655 F.2d 1272, 1280 (D.C. Cir. 1981) (affirmative action to make each mode of public transit accessible to handicapped not required under § 504); *Disabled in Action v. Bridwell*, 593 F. Supp. 1241, 1250-52 (D. Md. 1984) (§ 504 does require public transit to be fully accessible to handicapped), *appeal dismissed*, 820 F.2d 1219 (4th Cir. 1987); *Vanko v. Finley*, 440 F. Supp. 656, 662-63 (N.D. Ohio, 1977) (immediate access to all mass transit vehicles by handicapped not required under § 504 as long as peak hour and community transit accessible); *Snowdon v. Birmingham Transit Auth.*, 407 F. Supp. 394, 397 (N.D. Ala. 1977), (no requirement to make facilities accessible to wheelchairs where other measures taken for the benefit of handicapped), *aff'd without opinion*, 551 F.2d 862 (5th Cir. 1977); *but see ADAPT*, 881 F.2d at 1204 (Mansmann, J., concurring and dissenting in part) (affirmative, aggressive steps necessary, including wheelchair lifts on all newly purchased buses); *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982); (§ 504 requires "at least 'modest, affirmative' steps to accomodate the handicapped in public transportation"); *Bartels v. Biernat*, 405 F. Supp. 1012, 1018, (E.D. Wis. 1975) (mem.) (preliminary injunction granted to prevent execution of contract for new passenger buses until needs of mobility handicapped were considered); *cf. Jones v. Chicago Transit Auth.*, Charge Nos. 1984 CP50, -49, -52, -47, -84, -54, Interim Recommended Order and Decision (January 15, 1988) (Illinois disability rights law requires nonsegregated, accessible public bus service); *Maine Human Rights Comm'n. v. City of South Portland*, 508 A.2d 948, 953 (Me. 1986) (Maine disability rights law requires nonsegregated, accessible public bus service).

193. *See* 49 C.F.R. §§ 27.81 - 27.119 (1991) (level of effort specified for mass-transit services to fulfill requirements).

decisions.¹⁹⁴ Witnesses entreated members of Congress to endorse and codify in the ADA Judge Mansmann's opinions in the panel and en banc decisions of *ADAPT v. Skinner*.¹⁹⁵ Congress responded with mandatory desegregation requirements, and clarified that this meant that all newly purchased public buses were to be accessible to persons with disabilities.¹⁹⁶ Furthermore, Congress required public school systems to purchase sufficient numbers of accessible buses so that no student with a disability need ride a segregated school bus.¹⁹⁷

194. See *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 753-59 (1989).

195. See, e.g., *Americans with Disabilities Act: Hearing Before the Subcomm. on the Handicapped, of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 144-46 (1989) (statement of Mark Johnson); *Americans With Disabilities Act: Hearing before the Subcomm. on Transportation and Hazardous Materials, of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 762-64 (1989); cf. *ADAPT*, 881 F.2d at 1204.

196. 42 U.S.C.A. § 12142(a). Public transit systems henceforth are required to purchase or lease only fully accessible vehicles — bus, rail, and other fixed route vehicles — in any solicitation for new vehicles made on or after August 25, 1990 (i.e., 30 days or more after enactment of the ADA). *Id.* If purchasing or leasing used vehicles, the public entity must make a good faith effort to obtain accessible vehicles. *Id.* § 12142(b). Remanufactured vehicles, to the maximum extent feasible, are to be made accessible. *Id.* §§ 12142(c), 12162(d). The Department of Transportation ("DOT") may "temporarily relieve" a public entity from purchasing a lift-equipped bus if a lift is unavailable and the public entity has made a good faith effort to locate a lift-equipped bus. *Id.* § 12145(a)(3).

Public transit systems providing fixed-route service must provide a comparable level of paratransit service to persons with disabilities, but only to those who cannot otherwise use the fixed-route service. *Id.* § 12143. Those public entities that only provide demand responsive service must buy or lease accessible vehicles, unless they are able to demonstrate that their system provides a level of service to persons with disabilities equivalent to that provided to the general public. *Id.* § 12144.

All new stations built by a public entity must be barrier-free. *Id.* §§ 12146, 12162(e)(1). Existing facilities with major alterations must, to the maximum extent feasible, be made accessible in the altered areas. *Id.* §§ 12147, 12162(e)(2)(B). For older existing stations that have not been altered, all key stations are required to be retrofitted for accessibility within three years. DOT is authorized to extend this period to up to thirty years for any station requiring "extraordinarily expensive structural changes to, or replacement of, existing facilities," with at least two-thirds of such stations made accessible within twenty years. *Id.* § 12147(b)(2)(B). All rail systems also must insure that at least one car per train is accessible, as soon as practicable, but in any event within five years. *Id.* §§ 12148, 12162(a)(1), 12162(b)(1). All newly purchased cars must be accessible. *Id.* §§ 12142, 12162(a)(2), 12162(b)(2).

Title III of the ADA also imposes accessibility requirements on public transportation provided by private entities, including terminals used for public transportation. *Id.* § 12183. Hotel and airport shuttle services and around-the-mall parking lot vans, when they offer demand-responsive services, would be required to provide adequate levels of service to individuals with disabilities, although they do not need to equip all of their vehicles with lifts. *Id.* § 12184. Further, Title III requires substantial changes in private intercity bus operations. Within seven years, all new buses purchased by small operators must be accessible. A similar requirement goes into effect within six years for all other intercity bus operators. *Id.* § 12186.

197. "This does not mean that all school buses need to be accessible; only that equal nonsegregated opportunities are provided to all children." COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 45. See also, 135 CONG. REC. S10762 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) (transportation provided for children with disabilities under this Act will also include children without disabilities).

The plain intentions of Congress in imposing these requirements were to reject those court decisions and agency policies that permitted segregated services under section 504. Congress intended to codify the standard set forth in Judge Mansmann's two opinions in *ADAPT v. Skinner*.¹⁹⁸ The Senate Report indicated its understanding of, and deep concern over, "misinterpretations by executive agencies and some courts regarding transportation by public entities."¹⁹⁹ As Senator Harkin explained on the Senate floor, "there is also a need to clarify the applicability of section 504 of the Rehabilitation Act of 1973 to public transportation because the Reagan administration and some Federal courts have totally misconstrued the meaning of section 504."²⁰⁰ Congressional clarification, according to Senator Harkin, would, therefore, "ensure once and for all that no Federal agency or judge will ever again misconstrue the congressional mandate to integrate people with disabilities into the mainstream."²⁰¹

Numerous statements in the legislative history specifically endorsed the prohibition of segregated public services contained in Judge Mansmann's opinions in *ADAPT*.²⁰² As Senator Cranston explained, "[o]ur bill would codify the reasoning of the recent decision of the U.S. Court of Appeals for the Third Circuit in *Americans Disabled for Accessible Public Transportation ("ADAPT") v. Burnley*, 867 F.2d 1471 (1989)."²⁰³ Similarly, the House Judiciary Committee Report stressed, "[I]ntegrated services are essential to accomplishing the purposes of title II [of the ADA]. As stated by Judge Mansmann in *ADAPT v. Skinner*, 'the goal [is to] eradicat[e] the 'invisibility of the handicapped.' Separate-but-equal services do not accomplish this central goal and should be rejected."²⁰⁴

Congress severely criticized the Administration's decision to seek en banc review of Judge Mansmann's decision for the three-judge panel in *ADAPT*. Noting the irony of the President's statement in his State of the Union address that he wanted to bring Americans with disabilities into the mainstream, Senator Kerry stated, "[I]n the President's decision to appeal, . . . he clearly missed his

198. See *infra* notes 202-06 and accompanying text for a discussion of legislative and executive branch reactions to *ADAPT*.

199. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 19.

200. 135 CONG. REC. S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin).

201. *Id.* at S4986 (statement of Sen. Harkin).

202. See, e.g., 135 CONG. REC. S4985-86 (daily ed. May 9, 1989) (statement of Sen. Harkin); *id.* at S4997 (statement of Sen. Cranston).

203. 135 CONG. REC. S4997 (daily ed. May 9, 1989) (statement of Sen. Cranston) (The citation contained in the Senator's statement refers to the advanced sheet edition of the Federal Reporter; that panel's decision was vacated by the en banc court, and it was not included in the bound edition of the Federal Reporter).

204. COMM. ON THE JUDICIARY, *supra* note 120, at 50 n.52, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 473 n.52 (quoting and citing *ADAPT*, 881 F.2d 1184, 1204 (3d Cir. 1989) (en banc) (Mansmann, J., concurring and dissenting in part)); *accord*, 135 CONG. REC. S4985-86 (daily ed. May 9, 1989) (statement of Sen. Harkin) (*ADAPT* court was correct; § 504 designed to emancipate people with disabilities—mainstreaming is required; public transit authorities are compelled under § 504 to make reasonable accommodations such as purchase new wheelchair-accessible buses to fulfill statute's integration goal).

first opportunity to take action on these convictions.”²⁰⁵ Similarly, numerous members of Congress expressed their delight when DOT finally issued a proposed rule altering its prior, longstanding position, and requiring, pursuant to the authority of section 504, that federally-assisted transit systems purchase only nonsegregated, accessible buses.²⁰⁶

The legislative record demonstrates Congress’s intent to eliminate all segregated public services, not just transportation, wherever they existed so that no person with a disability would ever again be forced into segregated programs and activities. Former Senator Lowell Weicker, the original sponsor of the ADA, and formerly the Chair of the Senate Subcommittee on the Handicapped, testified before that Committee as to the intent of the legislation:

For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.²⁰⁷

Justin Dart, Chair of the Council for the Empowerment of Persons with Disabilities,²⁰⁸ testified during the Senate Hearings to the critical need to end segregation in residential, educational, recreational, and all other public programs: “We appeal to you not for more welfare, not for more segregation in nursing homes, but to be recognized as equal human beings, to have equal opportunities to succeed or to fail in the productive mainstream of society.”²⁰⁹

Congress agreed on the need to end the overall pattern of segregation. Consistent with its statutory findings defining segregation, isolation, and institutionalization as forms of discrimination,²¹⁰ and its determinations regarding the persistency of prejudice and segregation in our nation,²¹¹ the committee reports and floor statements determined that “[m]any persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and depen-

205. 135 CONG. REC. S4996 (daily ed. May 9, 1989)(statement of Sen. Kerry).

206. 136 CONG. REC. H2607 (daily ed. May 22, 1990) (statement of Rep. Anderson) (“how can we pass an amendment which takes away a civil right which the Senate, the White House, and even the Department of Transportation in its recent notice of proposed rulemaking are willing to extend to individuals with disabilities. The answer is — we cannot”); *id.* at H2608 (statement of Rep. Mineta) (“How can we tell a disabled individual gladdened by the recent notice of proposed rulemaking issued by DOT, which will allow that individual to use a public transit bus for the first time, that this Congress is withdrawing that promise of access?”); *id.* at H2614 (statement of Rep. Vento) (noting with approval that “the Department of Transportation indicated that mainline access will be required for transit systems which receive Federal funds to comply with section 504”).

207. *Hearing, supra* note 106, at 215 (statement of former Sen. Weicker).

208. The Council for the Empowerment of Persons with Disabilities conducted over sixty ADA hearings, at least one in each state, on behalf of the House Committee on Select Education. *Americans with Disabilities Act: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 215 (1989) (statement of Justin Dart).

209. *Id.*

210. 42 U.S.C.A. §§ 12101(a)(2), (3), (5).

211. *See supra* notes 105-16 and accompanying text for a discussion of the continued persistency of segregation on the basis of disability.

dence.”²¹² Senator Lieberman agreed that “[w]e have discriminated against people with disabilities and segregated them from our daily lives.”²¹³ “In fact,” according to Congressman Miller, “it has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities”²¹⁴

Congress provided the same solution for the problem of segregated services in general as it prescribed for segregated transportation services: a phase out, to occur as soon as feasible. As Senator Kennedy explained: “The Americans With Disabilities Act will end this American apartheid. It will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.”²¹⁵ Representative Collins similarly articulated the “basic goal which runs throughout this landmark civil rights legislation: that goal is to fully integrate disabled Americans into all aspects of life in our country.”²¹⁶ The Act “guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated.”²¹⁷ As the House Judiciary Committee Report warranted, “[i]ntegration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status.”²¹⁸ The Committee Report assured persons with disabilities that the Act “is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.”²¹⁹

212. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 9.

213. 135 CONG. REC. S4996 (daily ed. May 9, 1989) (statement of Sen. Lieberman).

214. 136 CONG. REC. H2447 (daily ed. May 17, 1990) (statement of Rep. Miller).

215. 135 CONG. REC. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy); *accord* 135 CONG. REC. S10717 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

216. 136 CONG. REC. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins).

217. 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin); *accord*, 135 CONG. REC. S4996 (daily ed. May 9, 1989) (statement of Sen. Kerry) (“integration of disabled citizens into every aspect of everyday life”); 136 CONG. REC. H2438 (daily ed. May 17, 1990) (statement of Rep. Mineta) (“Ending discrimination against disabled citizens, citizens often stripped of their independence by neglect and insensitivity by the majority communities, must now be chief among our priorities”).

218. HOUSE COMM. ON THE JUDICIARY, *supra* note 120, at 56, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 479. The Attorney General also used this language to explain the purpose of the Department of Justice’s regulation enforcing Title II of the ADA—56 Fed. Reg. 35,703 (1991). *See infra* notes 220-23 and accompanying text for a discussion of the Attorney General’s regulation.

219. HOUSE COMM. ON THE JUDICIARY, *supra* note 120, at 26, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 449. Similar assurances may be found throughout the ADA’s legislative history. *See, e.g.*, 135 CONG. REC. S10717 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) (ADA is “legislation to end segregation”); *Id.* at S10779 (statement of Sen. Chafee) (ADA “will integrate fully those with disabilities into everyday American life”); 136 CONG. REC. H2442 (daily ed. May 17, 1990) (statement of Congressman Weiss) (“long overdue legislation remedying the separatism” of disabled citizens); 135 CONG. REC. S10758 (daily ed. Sept. 7, 1989) (statement of

2. The Obligation to Modify Programs and to Provide Auxiliary Aids and Services in Regular, Integrated Settings

The Attorney General's Title II rule also requires a comprehensive attack on segregated services. That rule prohibits the provision of "different or separate" public services,²²⁰ the only exception being if the service provider can demonstrate that segregation is "necessary" to provide effective services.²²¹ Even then, a person with a disability retains the right to choose to participate in the regular program.²²² The Attorney General explained that this requirement was "an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities."²²³

Congress recognized that simply mandating eligibility for persons with disabilities to regular public programs and activities would be ineffectual without the assistance necessary to ensure meaningful participation in those programs. Thus, as the Senate Report indicates, under the ADA, "[d]iscrimination also includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others."²²⁴

The requirement to provide effective opportunities is derived from *Lau v. Nichols*,²²⁵ the Supreme Court's leading decision enforcing Title VI of the Civil Rights Act of 1964,²²⁶ which prohibits discrimination on grounds of race in terms almost identical to Title II of the ADA. In *Lau*, the lower court had ruled that Title VI did not require any affirmative efforts by the state to accommodate the needs of racial minorities who, speaking no English, could not meaningfully participate in public school programs.²²⁷ Judge Hufstedler, in a dissenting opinion, argued that Title VI required the state to provide assistance to the minority students.²²⁸ Analogizing the minority students' needs to the corresponding needs of persons with disabilities, Judge Hufstedler explained that "discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk"; without language assistance, the minority students were "functionally deaf and mute."²²⁹

The Supreme Court vindicated Judge Hufstedler's dissent, holding that

Sen. Wirth) ("a comprehensive ban . . . facilitat[ing] an end to segregation and exclusion for our disabled citizens").

220. 56 Fed. Reg. 35,718 (1991) (to be codified at 28 C.F.R. § 35.130(b)(1)(iv)).

221. *Id.*; see also 56 Fed. Reg. 35,703 (1991) (former Attorney General Dick Thornburgh's explanation of § 35.130(b)(1)(iv)).

222. 28 C.F.R. § 35.130(b)(2) (qualified person with a disability cannot be deprived of the opportunity to participate in nonseparate services, programs, and activities despite existence of permissibly separate or different programs).

223. 56 Fed. Reg. 35,703 (1991).

224. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 6.

225. 414 U.S. 563 (1974).

226. 42 U.S.C.A. § 2000d.

227. *Lau v. Nichols*, 483 F.2d 791, 794 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

228. *Id.* at 805-08 (Hufstedler, J., dissenting).

229. *Id.* at 805-06 (Hufstedler, J., dissenting).

"there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."²³⁰ The Court concluded: "It seems obvious that the Chinese-speaking minority receive fewer benefits from respondents' school system which denies them a meaningful opportunity to participate in the educational program"²³¹

In *Alexander v. Choate*,²³² the Supreme Court's analysis of section 504 relied heavily upon the "meaningful access" requirement of *Lau v. Nichols*,²³³ and the government's concession that "special measures for the handicapped, as the *Lau* case shows, may sometimes be necessary."²³⁴ Moreover, the Court's determination in *Choate* that section 504 outlawed both intentional and unintentional discrimination was based in part upon its conclusion that the accommodations requirements intended by Congress in enacting section 504 "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design."²³⁵ This approach was adopted in the ADA,²³⁶ and was endorsed in its legislative history²³⁷ and by the enforcement regulation.²³⁸

The ADA, like section 504, "mandates significant accommodation for the capabilities and conditions of the handicapped."²³⁹ In the ADA, however, Con-

230. *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

231. *Id.* at 568. Akin to *Lau*'s analysis of Title VI of the Civil Rights Act of 1964 is Chief Justice Burger's analysis of Title VII of that act in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Construing a plain statutory mandate against discrimination in employment, the Chief Justice wrote for a unanimous Court:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use.

Id. at 431.

232. 469 U.S. 287 (1985).

233. *Id.* at 301 n.21 (citing *Lau v. Nichols*, 414 U.S. 563 (1974)).

234. *Id.*

235. *Id.* at 297.

236. 42 U.S.C.A. § 12182(b)(2)(A)(1).

237. See 136 CONG. REC. H2434 (daily ed. May 17, 1990) (statement of Rep. Unsoell) ("Discrimination against the handicapped, be it unintentional or deliberate, has the same impact. It is cruel and serves to segregate, exclude, and deny the opportunity to fully participate in programs and activities"); *id.* at H2433 (1990) (statement of Rep. Luken) ("[d]iscrimination, whether produced by overt actions or thoughtless attitudes, produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities"); *Hearings on H.R. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 1 (1989) (statement of Rep. Luken) ("[t]he premise of the bill is unassailable. Discrimination, whether produced by overt actions or thoughtless attitudes, produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities").

238. 56 Fed. Reg. 35,719 (1991) (to be codified at 28 C.F.R. § 35.130(b)(8)); see also 56 Fed. Reg. 35,704 (1991) (former Attorney General Dick Thornburgh's explanation of this provision).

239. HOUSE COMM. ON THE JUDICIARY, *supra* note 120, at 51, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 474 (quoting *Bentivegna v. Department of Labor*, 694 F.2d 619, 621 (9th Cir. 1982)).

gress provided important clarifications regarding that requirement. The ADA expressly prohibits discriminatory practices that are either intentional²⁴⁰ or unintentional.²⁴¹ As with section 504, Congress's intent in doing so was to ensure that "[d]iscrimination made illegal under the ADA includes harms—such as segregation, exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others—resulting from actions or inactions that discriminate by effect as well as by intent or design."²⁴² In addition, however, the ADA expressly makes it a "form of discrimination" to "fail[] to make modifications to existing facilities and practices,"²⁴³ and prohibits any similar conduct that results in persons with disabilities being "relegat[ed] to lesser services, programs, activities, [and] benefits"²⁴⁴

Consistent with these requirements concerning the provision of meaningful opportunities, Title II of the ADA prohibits any public entity from excluding or segregating any "qualified individual with a disability,"²⁴⁵ and statutorily defines that term to mean "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . 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."²⁴⁶ The term "auxiliary aids and services," in turn, is defined to include, in addition to readers and interpreters, the "acquisition or modification of equipment or devices" and "other similar services and actions."²⁴⁷ These provisions, and their legislative history, clarify the content of the ADA's requirements in the context of public services in three critical ways.

First, for most public services, there are few, if any, "eligibility requirements." Aside from the employment practices of public entities (which permit job applicants to be required to meet specific qualifications), or the admissions practices of public colleges and universities (which permit student applicants to be required to meet academic admittance standards), public programs and activities are, as a practical matter, open to all. For example, there are no eligibility requirements for using public parks, libraries, swimming pools, transportation facilities, or museums other than perhaps the ability to afford an entrance fee. Nor is there any eligibility requirement for living in an apartment or home in the community, rather than a segregated nursing home or other institution, other than the ability to pay the rent or mortgage, and to keep the residence adequately maintained.²⁴⁸ Nor is there any eligibility requirement for attending

240. 42 U.S.C.A. §§ 12101(a)(5), (7).

241. *Id.* § 12101(a)(5).

242. 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin); *accord*, 135 CONG. REC. S10795 (daily ed. Sept. 7, 1989) (statement of Sen. Lieberman).

243. 42 U.S.C.A. § 12101(a)(5).

244. *Id.*

245. *Id.* § 12132.

246. *Id.* § 12131(2).

247. *Id.* § 12102(1).

248. *Cf.* HUD regulations enforcing the Fair Housing Act Amendments. 24 C.F.R. §§ 100.1-100.400 (1991).

one's neighborhood public elementary or secondary school, rather than a segregated school, other than being of the proper age.²⁴⁹

Senator Dodd focused on the importance of this central concept underlying the ADA, especially to children with disabilities and their families, who may not yet have been subjected to the stigma of segregation and exclusion:

The Americans With Disabilities Act will create an expanded community for children with disabilities and their families. The bill is a statement that we want their participation and that they have a place among all of us.

The ADA requires that children with disabilities, regardless of the severity of their disabilities, be permitted to utilize the same public services that others without disabilities utilize as a matter of course.

They are to be permitted to utilize the same health clinics, day care centers, playgrounds, schools, restaurants, and stores that they would normally utilize, in their communities, if they were not disabled. Children will have new social and recreational and educational opportunities that most Americans take for granted.²⁵⁰

Congressman Miller, speaking on the House floor, agreed that passage of the ADA "will mean that all children, regardless of whether they are disabled or not, and regardless of the extent of their disability, will be able to go where other children go, to play and interact with their peers."²⁵¹

Second, Congress realized that in order for persons with disabilities to effectively benefit from regular public services and programs, modifications would be necessary, and auxiliary aids and services would have to be provided, in regular, nonsegregated settings in the community.²⁵² In particular, Congress rejected Justice Powell's reasoning in the first Supreme Court case concerning section 504, *Southeastern Community College v. Davis*.²⁵³ Justice Powell reasoned that section 504 did not require publicly funded programs to provide individual attention, assistance, or other services of a personal nature to persons with disabilities.²⁵⁴ Persons with disabilities always have been perplexed by Justice Powell's statements. Excluding individual assistance is inconsistent with a civil rights law that has as its keystone individualized attention and approaches. This keystone is necessary to counteract stereotypes about persons with disabilities, and to integrate us fully. In many cases, individualized, personal assistance will be the most reasonable and efficient way to provide meaningful public services in regular settings. To avoid similar misinterpretations of the ADA, Congress added a subsection to the definition of "auxiliary aids and services" to clarify that the Act does include the accommodation requirements disallowed by Justice

249. Cf. 34 C.F.R. § 104.3(k)(2) (1980). The Attorney General stated, without qualification, in his explanation of the Title II implementing rules, that "[p]ublic school systems must comply with the ADA in all of their services." 56 Fed. Reg. 35,696 (1991).

250. 135 CONG. REC. S10721 (daily ed. Sept. 7, 1989) (statement of Sen. Dodd).

251. 136 CONG. REC. H2448 (daily ed. May 17, 1990) (statement of Rep. Miller).

252. 42 U.S.C.A. § 12131(2).

253. 442 U.S. 397 (1979).

254. *Id.* at 411.

Powell. As Senator Harkin, the floor manager for the ADA in the Senate, explained, "The definition of auxiliary aids and services in section 3 specifically includes interpreters and readers. Subsection (D) refers to 'other similar services and actions.' It is critical to make clear that 'similar services' includes the services of attendants and personal assistance providers."²⁵⁵ Thus, if a student with a disability requires a teacher's aide in order to attend class at his neighborhood school, or a resident of a publicly funded nursing home or other segregated facility requires a personal attendant in order to live in a regular home or apartment in the community, the ADA demands that such services be provided.

Third, and perhaps most importantly, Congress made certain that public entities could not comply with the requirements of the ADA by providing auxiliary aids and services only in segregated settings. Various courts have upheld such practices both under the United States Constitution²⁵⁶ and under section 504.²⁵⁷ Congress rejected these decisions by requiring the full inclusion of persons with disabilities in regular public services, "*with or without* reasonable modifications to rules, policies, or practices . . .," or "*with or without* . . . the provision of auxiliary aids and services . . ."²⁵⁸ Congress's intent in the ADA was to bar such segregationist policies and to enable persons with disabilities to obtain the auxiliary aids and services and program modifications they need in regular settings. As the House Judiciary Report explained:

The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title. Nor is the fact that the separate service is equal to or better than the service offered to others sufficient justification for involuntary different treatment for persons with disabilities. While Section 504 of the Rehabilitation Act and this title do not prohibit the existence of all separate services which are designed to provide a benefit for persons with disabilities, such as specialized recreation programs, the existence of such programs can never be used as a basis to exclude a person with a disability from a program that is offered to persons without disabilities, *or to refuse to provide an accommodation in a regular setting*.²⁵⁹

255. 135 CONG. REC. S10773 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) (quoting 42 U.S.C.A. § 12102(1)).

256. See, e.g., *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 902 F.2d 1085 (2d Cir. 1990) (faculty can restrain patients).

257. See, e.g., *Barnett v. Fairfax County School Bd.*, 721 F. Supp. 757, 761 (E.D. Va. 1989) (school system can centralize program for hearing impaired), *aff'd*, 927 F.2d 146 (4th Cir. 1991) (per curiam), *petition for cert. filed*, 60 U.S.L.W. 3045 (U.S. July 8, 1991) (No. 91-62); *St. Louis Developmental Disabilities Treatment Center v. Mallory*, 591 F. Supp. 1416, 1464 (W.D. Mo. 1984) (school district can congregate services for students with disabilities), *aff'd*, 767 F.2d 518 (8th Cir. 1985); *Troutman v. School Dist. of Greenville County*, 554 Ed. Hdcpd. L. Rep. 487, (D.S.C. 1983); *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981) (county can provide program for child that is outside the child's community).

258. 42 U.S.C.A. § 12131(2) (emphasis added).

259. HOUSE COMM. ON THE JUDICIARY, *supra* note 120, at 50, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 473 (emphasis added).

The Judiciary Report stressed that "[n]othing in the ADA is intended to permit [such] discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability."²⁶⁰ Thus, for example, under the ADA, a state Medicaid agency that spends its funds on auxiliary aids and services for persons with disabilities only in segregated settings such as nursing homes and other institutions, without providing those same programs, aids, and services in regular community settings, plainly runs afoul of the ADA. Moreover, under the ADA, "[n]o longer will children be subjected to forced busing to programs outside of their neighborhoods because that is where the 'handicapped' program is located,"²⁶¹ and adults with disabilities no longer will "be automatically herded into the disabled opportunity or program."²⁶² Congressman Hoyer called this justification for maintaining segregated programs the "old and tired argument, the notion that localities should have the option of deciding to maintain segregated facilities and practices. We rejected that a long time ago. Let us reject it today."²⁶³

The Attorney General's regulation specifies that all public services are to be provided to persons with disabilities in a manner that is "as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."²⁶⁴ Two sections of the rule explain this obligation in somewhat greater detail. Regarding the elimination of communication barriers, the rule states: "A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."²⁶⁵ A further proviso specifies that this section "does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."²⁶⁶ Regarding program modifications to eliminate barriers to participation by persons with disabilities outside of the area of communications, the regulation specifies similar obligations, but with a far narrower exculpatory proviso: "A public entity shall make reasonable modifications in policies, practices, and procedures when modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or

260. *Id.* at 69, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 492; *id.* at 57, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 480 ("critical that the existence of separate specialized services never be used as a justification for exclusion from programs that are not separate or different").

261. 135 CONG. REC. S10721 (daily ed. Sept. 7, 1989) (statement of Sen. Dodd).

262. *Id.* at S10787 (statement of Sen. Domenici).

263. 136 CONG. REC. H2610 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

264. 56 Fed. Reg. 35,718 (1991) (to be codified at 28 C.F.R. § 35.130(b)(1)(iii)).

265. *Id.* at 35,721 (to be codified at 28 C.F.R. § 35.160(b)(1)).

266. *Id.* (to be codified at 28 C.F.R. § 35.164).

activity.”²⁶⁷

The difference between these sections is that the communications barriers rule includes an “undue financial and administrative burdens” exception to the obligation to provide auxiliary aids and services, whereas the rule codifying the same requirement for other types of barriers to participation by persons with disabilities contains no such exclusion. This distinction is apparently based upon the statutory instruction²⁶⁸ that the Justice Department’s ADA rules governing communication and architectural barriers be consistent with the Justice Department’s federally conducted section 504 rule (which permits defenses based upon undue financial burden or fundamental alteration in the nature of the program).²⁶⁹ The congressional instruction, however, also specified that all other barriers to participation be governed by the Justice Department’s section 504 coordination rule for recipients of federal assistance (which allows neither of these defenses).²⁷⁰

Reliance on the statutory instructions may explain the Attorney General’s inclusion of the “burdens” defense in the communications barriers provision, but it does not explain why the “fundamental alteration” defense is included in both the communication barriers provisions and the noncommunication barriers provisions. Allowing the defense in the latter provisions would seem to be inconsistent with the specific congressional instruction in the ADA to the Attorney General. Most importantly, however, the Attorney General expressly acknowledged in the ADA rule the obligation of all public entities to modify regular programs and provide auxiliary aids and services for persons with disabilities in regular programs, *even where such program modifications and services already are appropriately offered to persons with disabilities in a segregated setting*. If an individual with a disability chooses not to participate in the separate program, the public entity is required to provide the necessary program modifications and auxiliary aids and services in the regular setting, for example, a student’s regular community school.²⁷¹

267. *Id.* 35,718-19 (1991) (to be codified at 28 C.F.R. § 35.130(b)(7)).

268. 42 U.S.C.A. § 12134(b).

269. 28 C.F.R. § 39.150(a)(2) pt. 39 (1981).

270. *Id.* § 41.4-.7 pt. 41, app. A. 476-92. See notes 441-54 and accompanying text for additional analysis of this rule and its abrogation of cost as a defense.

271. 56 Fed. Reg. 35,703-04 (1991). The Justice Department refused to establish any specific regulatory standards or to “make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.” *Id.* at 35,704.

It is interesting and very important to note that while the Justice Department refers generally to the ADA rule’s “limitations and defenses” concerning the provision of necessary modifications to

3. "Freedom of Choice" Plans

Some state agencies, school boards, and other public entities may contend that the persons with disabilities in their segregated programs opted for that choice "voluntarily." Such an assertion should not be automatically accepted. Voluntary entry into a segregated setting surely cannot preclude a desire to move to an integrated setting,²⁷² especially since that entry may have resulted from a lack of needed services in regular community settings. Segregated services might well have absorbed all or most of the public resources appropriated to assist persons with disabilities, resulting in few viable alternatives outside the segregated setting. Moreover, that public officials today may believe that they can continue to segregate not out of animus, but only for benevolent reasons, is of no import. Where a policy or practice, such as the state-supported segregation of persons with disabilities, historically was motivated by such animus, that policy is so infected with discrimination that it must be abandoned, so that others may not be subjected to the infected policies or practices in the future.²⁷³

The original HEW regulations enforcing section 504, which were incorporated by reference into the ADA,²⁷⁴ require "remedial action" to overcome the present effects of past segregation,²⁷⁵ and "remedial steps to eliminate the effects of any discrimination" stemming from past policies and practices.²⁷⁶

Similarly, the cases governing the dismantling of Jim Crow schools and other public services require that government agencies, such as state Medicaid agencies and school boards, take whatever remedial steps are necessary to tear down the system of disability apartheid that they or their predecessors con-

activities provided in integrated settings, the only specific example the Department chose to provide refers to a possible "undue burden" defense to the elimination of a communication barrier, i.e., the provision of an interpreter to a hearing-impaired person. As discussed elsewhere, communication barriers are the singular statutory and regulatory exception to the general requirement that auxiliary aids and program modifications be provided without regard to financial and administrative burden. However, the Attorney General's discussion unfairly fails to mention this critical caveat. *See supra* notes 453-54 and accompanying text for a discussion of the limited exception provided by Congress.

272. *See Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984) (individuals do not lose their "liberty" interest under the fourteenth amendment by voluntarily subjecting themselves to confinement); *see also Association for Retarded Citizens v. Olsen*, 561 F. Supp. 473, 485 (D.N.D. 1982) (consent does not waive "liberty" right); *Garrity v. Gallen*, 522 F. Supp. 171, 239 (D.N.H. 1981) (residence "involuntary" by virtue of absence of other choices); *Kentucky Ass'n for Retarded Citizens v. Conn.*, 510 F. Supp. 1233, 1248 (W.D. Ky. 1980) (most commitments "involuntary" because most residents incapable of making that decision), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *cert. denied*, 459 U.S. 1041 (1983); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1318 (E.D. Pa. 1977) (voluntary commitment is illusory concept), *aff'd*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd on other grounds*, 451 U.S. 1 (1981); *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715, 718 (E.D.N.Y. 1975) (even those voluntarily committed entitled to minimum quality of care).

273. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

274. *See infra* notes 441-54 and accompanying text for a discussion of the ADA's incorporation of HEW section 504 regulations instead of contrary Justice Department regulations.

275. 45 C.F.R. § 84.6(a)(1990).

276. *Id.* § 84.6(c).

structed.²⁷⁷ Moreover, public officials may not simply establish, as their remedial action, a "freedom of choice" system and simply invite persons with disabilities to begin attending regular public programs. As specified in *Green v. County School Board*,²⁷⁸ the effectiveness of such a system must be measured by whether, as a practical matter, it works to overcome the decades of animus and discriminatory practices whereby public agencies routinely channeled persons with disabilities into segregated services.

Just before the ADA's final passage in the House, Congressman Dellums quoted the *Green* case and spoke of the "significance, historic and legal, of our decision to establish disability as a basis for civil rights protection," which, he said,

cannot be overstated. We have been moved by the continuing destructive effect of segregation, and we are acting now to reverse those practices, root and branch, and to eliminate their legacy. In short, what we are saying is that a severe, lifelong disability may be handicapping, but more handicapping has been the practice of congregating services for persons with disabilities in settings different or separate from those in which the rest of us are provided those services.²⁷⁹

B. The Standard of Review Intended by Congress for Segregating Classifications Based upon Disability

The courts and, most recently and notably, Justice White's decision for the Supreme Court in *Cleburne*, have given a deferential standard of review to state-imposed classifications based upon disability. Such classifications have withstood challenges under the Equal Protection Clause of the fourteenth amendment so long as they have been rationally related to some articulated governmental interest.²⁸⁰ The *Cleburne* decision did acknowledge, however, that this was entirely a Court-devised standard, to be employed only "absent controlling congressional direction."²⁸¹ As Justice Marshall wrote in that same decision: "It is natural that evolving standards of equality come to be embodied in legislation."²⁸² This is especially so when Congress enacts such legislation

277. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (specific educational remedies necessary to restore victims to non-discriminatory position); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) (school district must go beyond racially neutral plan to remedy past discrimination).

278. 391 U.S. 430 (1968). In *Green*, a school system was required to take necessary steps to convert to a unitary system in which racial discrimination was eliminated. *Id.* at 437-38.

279. 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums).

280. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-47 (1985). See also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (unlike classification based on gender, classification based on disability does not require strict scrutiny but only minimum rationality); but see 473 U.S. at 451-55 & n.6 (Stevens, J., joined by Burger, C.J., concurring) (characteristics of groups may or may not be relevant to validity of public purpose).

281. *Cleburne*, 473 U.S. at 439.

282. *Id.* at 466 (Marshall, J., joined by Brennan & Blackmun, JJ.).

pursuant to its authority under section 5 of the fourteenth amendment.²⁸³

Congress included precisely such "controlling direction" regarding the level of scrutiny to be employed in determining the validity of disability classifications under the ADA in the ADA's Statement of Findings.²⁸⁴ Those findings indicate unambiguously that Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations that are given "strict" or "heightened" scrutiny, sustainable by the courts only if they are tailored to serve a "compelling" governmental interest.²⁸⁵ As Congressman Brooks stated flatly, the ADA was "intended as the final step necessary to accord to individuals with disabilities the same protection against discrimination that the law provides to racial minorities."²⁸⁶ Senator Harkin similarly emphasized the need for civil rights guarantees like those governing classifications based upon race: "I think perhaps only minorities, maybe blacks and others who have really suffered from abject discrimination, understand really, fully, what it means to be handicapped and what those instances of discrimination mean."²⁸⁷ Although, on occasion, courts already have imposed strict standards in reviewing exclusionary actions of public officials under the Rehabilitation Act²⁸⁸ and the Individuals with Disabilities Education Act,²⁸⁹ the ADA Findings leave no doubt that Congress intended the use of heightened scrutiny for suits brought under the ADA.

Congress understood the evil of the historical regime. It determined in the ADA Findings that disability classifications "historically" have been "purposeful[ly]" wrought upon persons with disabilities—and not for benevolent purposes.²⁹⁰ Congress found that "society has tended to isolate and segregate individuals with disabilities," and that this "continues to be a serious and pervasive social problem."²⁹¹ "For too long, the disabled have lived in the shadows of American life. They have been denied rights and opportunities afforded to others in our society. They have had a vague and imperfect imitation of the

283. 42 U.S.C.A. § 12101(b)(4). See *supra* notes 179-80 and accompanying text for a discussion of Congress' decision to legislate under the authority of the fourteenth amendment.

284. Arguably, the congressional findings also bear upon the level of scrutiny to be applied to disability classifications under the Equal Protection Clause of the fourteenth amendment. That question, however, is beyond the scope of this article.

285. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (classification based on alienage subject to strict scrutiny); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (racial classifications subject to strict scrutiny).

286. 136 CONG. REC. H2421 (daily ed. May 17, 1990) (statement of Rep. Brooks).

287. *Hearing, supra* note 106, at 114 (statement of Sen. Harkin). *Accord, id.* at 196, 201 (statement of former Attorney General Thornburgh) (same rights as minorities and women); 135 CONG. REC. 10801 (1989) (statement of Sen. Conrad) (same protections as those now afforded to race); 136 CONG. REC. 4624 (1990) (statement of Rep. Edwards) (protections comparable to those afforded to race).

288. E.g., *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977).

289. E.g., *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 458 (3d Cir. 1981).

290. 42 U.S.C.A. §§ 12101(a)(2), (7).

291. *Id.* § 12101(a)(2); see also 135 CONG. REC. S10708 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("[h]istorically, people with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society").

rights we take for granted”²⁹²

Moreover, Congress also understood that the evils of segregation were not caused by persons with disabilities themselves, or by some cosmological or divine act. The original sponsor of the ADA, Lowell Weicker, stated that “people with disabilities spend a lifetime ‘overcoming not what God wrought but what man imposed by custom and law.’ ”²⁹³ That historical treatment of discrimination, rooted in the same causes as racial bigotry and segregation,²⁹⁴ requires the same degree of scrutiny under the ADA as that imposed under the Constitution on classifications based upon race, especially in the view of these express congressional findings. “The unfortunate truth,” Senator Harkin stated,

is that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the ability of such individuals to participate in and contribute to society.²⁹⁵

The terrible, purposeful segregation of persons with disabilities undertaken by government officials, now acknowledged by the Congress, constitutes the “history of purposeful unequal treatment” that is the predicate of strict and searching scrutiny of official classifications.²⁹⁶ Precisely because classifications that segregate, exclude, or isolate persons with disabilities stem from this history of purposeful unequal treatment, they are “more likely than others to reflect deepseated prejudice.”²⁹⁷ Such classifications embody exactly the kind of class or caste treatment that Congress determined must be eliminated. As Congressman Dellums stated:

The history of different, separate, and unequal treatment of persons with disabilities, especially those with severe disabilities, could not be clearer. That history is in fact a stark reminder of the prejudice and misunderstanding that has characterized the treatment of minority citizens. This disparate treatment establishes an abundant factual predicate for the relief granted by [the ADA]. The Americans With Disabilities Act is a plenary civil rights statute designed to halt all practices that segregate persons with disabilities and those which treat them inferior [sic] or differently. By enacting the ADA, we are making a conscious decision to reverse a sad legacy of segregation and

292. 136 CONG. REC. H2599 (daily ed. May 22, 1990) (statement of Rep. Vento).

293. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 11 (quoting former Sen. Weicker); 135 CONG. REC. S10708 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) (quoting former Sen. Weicker).

294. *See supra* notes 42-47, 75-93, and accompanying text for a discussion of the xenophobic attitudes that gave rise to multiple forms of discrimination.

295. 135 CONG. REC. S4979 (daily ed. May 9, 1989) (statement of Sen. Harkin); *accord*, COMM. OF EDUCATION AND LABOR, *supra* note 104, at 40, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 322; COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 15.

296. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

297. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *see also Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

degradation.²⁹⁸

Congressman Owens similarly insisted that the ADA be crafted to end "the legacy of disability discrimination in our country."²⁹⁹

In his *Cleburne* opinion, Justice White refused to apply heightened scrutiny to disability classifications. In doing so, Justice White ignored the historical legacy, and instead asserted that the "distinctive legislative response" of federal and state lawmakers to address disability discrimination "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."³⁰⁰ Current legislation, continued Justice White, "negates any claim" that persons with disabilities are "politically powerless."³⁰¹ In the ADA, Congress took issue with Justice White's declaration in *Cleburne*, and to the contrary, found that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."³⁰² Congress further determined that persons with disabilities have been "relegated to a position of political powerlessness in our society."³⁰³

Justice White, writing in *Cleburne*, also thought it critical, for the purposes of devising an appropriate constitutional level of scrutiny of disability classifications, that persons with disabilities in some ways were different from those without disabilities.³⁰⁴ Justice White assumed that persons with disabilities had a "reduced ability to cope with and function in the everyday world,"³⁰⁵ and that discriminatory treatment could be justified on that basis. Congress now has codified the counter-supposition, however, and determined in the ADA that much of what nondisabled people presume about disability "result[s] from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."³⁰⁶

The point of the ADA is to eliminate the severe "restrictions and limitations"³⁰⁷ to which persons with disabilities have been subjected "on the basis of stereotypical characteristics not truly indicative of their abilities."³⁰⁸ At the ADA hearings, there was poignant testimony regarding the everyday experiences of persons with disabilities being subjected to awful stereotypes, the most

298. 136 CONG. REC. H2599 (daily ed. May 22, 1990) (statement of Rep. Dellums).

299. 136 CONG. REC. H4614 (daily ed. May 22, 1990) (statement of Rep. Owens).

300. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 443 (1985).

301. *Id.* at 445.

302. 42 U.S.C.A. § 12101(a)(4).

303. *Id.* § 12101(a)(7).

304. *Cleburne*, 473 U.S. at 443.

305. *Id.* The stereotypes indulged by Justice White were perhaps not so harsh as those employed by Justice Powell in the Court's first § 504 decision where he purported to "admire" the deaf plaintiff's "desire and determination to overcome her handicap," and expressed the hope that she and other persons with disabilities might someday be able to engage in "some useful employment." *Southeastern Community College v. Davis*, 442 U.S. 397, 412, 414 (1979).

306. 42 U.S.C.A. § 12101(a)(7).

307. *Id.*

308. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

common one being that if you have an impairment, you must have diminished capacity in other respects as well. If you cannot walk, it is thought, you probably cannot hear or speak either, so better to ask your friends what you would like to order from the restaurant menu. A person with cerebral palsy testified that a merchant refused to sell him a book because the merchant thought he could not read. Others warned him not to marry or have children because they too would have cerebral palsy; he had also heard strangers muttering that he should "be put away" in an institution.³⁰⁹ Another witness at a House hearing spoke about the origins of such stereotypes among those without disabilities who may have had little contact with persons with disabilities:

The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical 'inferiority' of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk — it has meant being excluded from public schools, being denied employment opportunities, and being deemed an "unfit parent."³¹⁰

The counter-stereotypic facts presented at the ADA hearings, and at hearings held in connection with other disability rights laws recently enacted, were not lost on the Congress. Through these various hearings the Congress has come to a knowledge of the capabilities and prospects for persons with disabilities entirely different from that which underlies the historic legacy and that continues today still to be boldly offered in justification of services that are separate or different. We have found that persons with severe disabilities, as a matter of fact, can live and work productively in the same settings in which their neighbors live and work.³¹¹

Congress's ADA Findings provide the criteria for strict scrutiny of segregating disability classifications. The courts and the executive may no longer uphold such classifications based upon stereotypical assumptions as to persons with disabilities who, perhaps with some assistance, certainly can live successfully in the community.

Congress also expressly determined that "individuals with disabilities are a discrete and insular minority."³¹² This phrase, of course, is Chief Justice Stone's classic formulation, which appears in his often-cited footnote in *United*

309. COMM. ON EDUCATION AND LABOR, *supra* note 104, at 42, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 324 (quoting *Hearings before the House Subcommittee on Select Education*, 100th Cong., 2d Sess. 188 (1988) (testimony of Larry Espling)).

310. *Id.* at 41, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 323, (quoting *Hearings before the House Subcommittees on Select Education and Employment Opportunities*, 101st Cong., 1st Sess. 78-79 (1989)).

311. 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums).

312. 42 U.S.C.A. § 12101(a)(7).

*States v. Carolene Products Co.*³¹³ This formulation has been universally relied upon ever since to determine whether a discriminatory classification should be given a "more exacting judicial inquiry,"³¹⁴ or whether such classification requires only a rational basis to be upheld. A "more exacting inquiry," employing heightened scrutiny, requires that classifications based upon disability be analyzed with the utmost skepticism.

Consistent with the general corpus of discrimination law, once persons with disabilities make a prima facie showing of categorization, classification, segregation, or other disparate treatment or effect based upon disability, the burdens of persuasion and production fall upon government officials to justify such conduct.³¹⁵ The government's burden is especially "heavy" when an individual is excluded from a publicly provided program or service, such as public education.³¹⁶ Moreover, decisions enforcing the Rehabilitation Act³¹⁷ and the Education of the Handicapped Act³¹⁸ have imposed the burdens of proof and production on government officials, as have the administrative rules enforcing those laws.³¹⁹ Thus, consistent with prior case law, Congress set forth in no uncertain terms the same strict and searching standard of review for disability classifications as that employed in race cases. Congress expects enforcement agencies and the courts to apply this strict standard in reviewing practices that segregate or otherwise classify persons with disabilities. To this end, Congress imposed a strict burden of proof on government officials to demonstrate a compelling justification for such discriminatory practices.³²⁰ Title II of the ADA was "carefully crafted to give disabled persons the same protections from dis-

313. 304 U.S. 144 (1938).

314. *Id.* at 153 n.4.

315. See *Western Air Lines v. Criswell*, 472 U.S. 400, 419 n.29 (1985); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *E.E.O.C. v. Pennsylvania*, 829 F.2d 392, 394-95 (3d Cir. 1987); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 (4th Cir. 1982).

316. See *Green v. County School Bd.*, 391 U.S. 430, 439 (1968); *accord*, *O'Connor v. Board of Educ.*, 449 U.S. 1301, 1305 (1980) (Stevens, Cir. J.); *Larry P. v. Riles*, 793 F.2d 969, 982 n.10 (9th Cir. 1984); *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172 (1976), *aff'd*, 438 U.S. 265 (1978); *cf.* *Plyler v. Doe*, 457 U.S. 202 (1982); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

317. See *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981); *S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *NYSARC v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984); *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *NMARC v. New Mexico*, 495 F. Supp. 391, 396 (D. N. Mex. 1980), *rev'd on other grounds*, 678 F.2d 847 (10th Cir. 1982); *West Covina Unif. School Dist.*, 3 Ed. Hdcp. L. Rep. 502:209 (CRR) (Cal. Dep't Ed. 1980).

318. See *Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir. 1982); *S-1 v. Turlington*, 635 F.2d at 349; *Lang v. Braintree School Comm.*, 545 F. Supp. 1221, 1228 (D. Mass. 1982); *Campbell v. Talladega City School Bd.*, 518 F. Supp. 47, 56 (N.D. Ala. 1981).

319. *E.g.*, 34 C.F.R. § 104.34(a) (1980); *id.* §§ 300.552(a)(3), (c) (1989). Decisions construing these rules also place the burdens of proof and production on public officials. See, *e.g.*, *Hawaii Dep't of Educ. v. Katherine D.*, 531 F. Supp. 517 (D. Haw. 1982), *aff'd*, 727 F.2d 809 (9th Cir. 1983).

320. To the extent anyone might suggest that strict and searching scrutiny of disability classifications could result in the elimination of programs that benefit exclusively persons with disabilities,

crimination that apply to racial minorities,"³²¹ with language modeled upon that of Title VI of the Civil Rights Act of 1964.³²² The ADA's legislative history is replete with statements indicating Congress's intent to enact the same prohibitions of discrimination as those enacted in 1964 regarding race.³²³ The ADA thus "acknowledges, for the first time, that discrimination—on the basis of disability—is as shameful as all the other types of discrimination now illegal under the Constitution and existing civil rights laws."³²⁴ As Congressman Dellums concluded:

The story of our Nation's disparate treatment of disabled individuals is a sad [one]. As a black American, I am especially proud to stand here as part of the coalition that has brought equal standing for the disabled in the eyes of the law. All minority Americans have shared the suffering of "separate but equal," and we rejoice collectively when that unjust standard can no longer be legally applied.³²⁵

V. THE JUSTIFICATIONS FOR CONTINUED SEGREGATION THAT WILL CONTINUE TO HAUNT PERSONS WITH DISABILITIES

Despite the plain intent of the ADA, we know, from our historical legacy

the simple answer is that non-disability is not a protected status under the the United States Constitution, the ADA, or any other law.

321. *Hearing, supra* note 106, at 189 (statement of Sen. Kennedy).

322. *Compare* 42 U.S.C.A. § 12132 with 42 U.S.C. § 2000d. *See also* 135 CONG. REC. S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin); 136 CONG. REC. 2604 (daily ed. May 22, 1990) (statement of Rep. Mineta).

323. 136 CONG. REC. H2413-14 (daily ed. May 24, 1990) (statement of Rep. Bennett) ("bill extends to disabled Americans the same protections afforded other minorities in the civil rights bill"); *id.* at 2427 (statement of Rep. Owens) (ADA "will provide parallel protections for people with disabilities as have long existed for other minority groups and women"); *id.* at 2438 (statement of Rep. Edwards) ("[c]omparable in scope to the great Civil Rights Act of 1964"); *id.* at 2440 (statement of Rep. Fish) ("more than 25 years since the passage of the 1964 Civil Rights Act, we will be passing the Americans With Disabilities Act. We will thus ensure that persons with disabilities are finally granted the same equal protection of the laws enjoyed by all other Americans"); *id.* at 2444 (statement of Rep. Ford) (ADA "affirms the principles of the Civil Rights Act of 1964 for the America of 1990"); *id.* at 2445 (statement of Rep. Levine) ("landmark legislation which would guarantee disabled Americans the rights and recourse codified in the Civil Rights Act of 1964" and "extend freedom from discrimination based on race, religion, or gender to include America's largest minority, the disabled"); *id.* at 2615 (statement of Rep. Edwards) ("heart of the Americans With Disabilities Act is to give the same civil rights protections to persons with disabilities that racial minorities and women have"); *id.* at 2622 (statement of Rep. Hoyer) ("we are about to take a historical action on the floor of this House. It is akin to the action we took in 1964, when we said to all Americans that you are not to be discriminated against, irrespective of your race, your color, your national origin, your sex, or other arbitrary distinctions"); *id.* at 4637 (statement of Rep. Oberstar) ("[j]ustice demands that we provide those individuals with disabilities the same protections as those covered under the Civil Rights Act of 1964"); 135 CONG. REC. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy) ("we celebrate the 25th anniversary of the Civil Rights Act of 1964. That legislation helped bring about one of the greatest peaceful transformations in our history for millions of Americans who were victims of racial discrimination, and this legislation can do the same for millions of citizens who are disabled").

324. 136 CONG. REC. H2430 (daily ed. May 24, 1990) (statement of Rep. Conte).

325. 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums).

and experiences in attempting to enforce section 504, that public officials will seek to maintain disability segregation. But we also know by now what the arguments of government officials will be. We now can be prepared to address these arguments and either show that they are counterfactual or that they were rejected by Congress as valid considerations.

The justifications offered to continue disability segregation fall generally into five categories: (A) Societal prejudice prevents persons with disabilities from being accepted and, therefore, integrated; (B) Many persons with disabilities cannot or should not be integrated, because integration provides no benefit to persons with disabilities; (C) Higher quality services can be delivered in congregate settings; (D) On a cost-benefit analysis, ending segregation is financially and administratively too costly; and (E) Courts should defer to the judgments of state professionals and officials as to the services to be provided to persons with disabilities.

Many of these same contentions were used for decades to uphold the Jim Crow system in many parts of this country. They are, if not morally bankrupt, plainly contrary to the integration imperative ordained by Congress in the ADA. They also are contrary to the substantial—indeed, overwhelming—body of data-based social science research on integration. Moreover, these assertions were considered by Congress during the enactment of the ADA, and were rejected. Congress, made clear throughout the ADA's legislative history that it was well-aware of the research on integration, and that it would not permit the legacy of disability segregation to continue in this nation unabated.

A. Prejudice Cannot Be Utilized as Its Own Justification for Continued Discrimination

The existence of societal discrimination against persons with disabilities,³²⁶ especially the historically grotesque intolerance toward persons with disabilities detailed above,³²⁷ continues in somewhat more patronizing and benign forms today.³²⁸ Ironically, the intolerance of others is still often used as an excuse for continuing the segregation of persons with disabilities in warm, cozy environments where they will not be teased or ridiculed.³²⁹ As Representative Schroeder observed: "The attitudes nondisabled persons have toward fellow disabled citizens are often the most important factor leading to segregation, exclusion, discrimination, and unemployment."³³⁰ Congress understood that "[t]o be seg-

326. D. BIKLEN, *ACHIEVING THE COMPLETE SCHOOL: STRATEGIES FOR EFFECTIVE MAINSTREAMING* 112 (1985).

327. See *supra* notes 35-74 and accompanying text for a discussion of the official practices and policies that existed in our country's recent past.

328. See generally Ashmore, *Background Considerations in Developing Strategies for Changing Attitudes and Behavior Toward the Mentally Retarded*, in *THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE* 164 (M.T. Beghab & S.A. Richardson eds., 1975); Donaldson, *Changing Attitudes Toward Handicapped Persons: A Review and Analysis of Research*, 46 *EXCEPTIONAL CHILDREN* 504 (1980).

329. Donaldson, *supra* note 328, at 509.

330. 136 CONG. REC. H2633 (daily ed. May 22, 1990) (statement of Rep. Schroeder).

regated is to be misunderstood, even feared. If we have learned any lessons in the last 30 years, it is that only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression."³³¹ The whole idea behind the ADA was to "help to break down the psychological barriers which disabled Americans face by fostering a spirit of familiarity and cooperation."³³²

Congress was well-aware in enacting the ADA that severe prejudicial attitudes are "faced day-to-day by people with disabilities."³³³ Congress's solution was not to maintain the isolation of persons with disabilities but, strongly to the contrary, to "assur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."³³⁴ The Bush Administration endorsed this approach as well.³³⁵

The research data shows, without doubt, what should be obvious, that prejudice is lessened through integration.³³⁶ When individuals, especially young people, associate with one another, learn one another's attributes, and are able to use those perceptions and facts, prejudice is lessened.³³⁷ This effect is increased the longer and greater the interaction between persons who are and are not disabled is.³³⁸ As Justice Marshall observed in *Cleburne*, "[m]ost important,

331. *Id.* at H2603 (statement of Rep. Collins).

332. 136 CONG. REC. H2445 (daily ed. May 17, 1990) (statement of Rep. Levine).

333. 42 U.S.C.A. §§ 12101(a)(9), 12101(b)(4).

334. *Id.* § 12101(a)(8).

335. The Attorney General stated: "Attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities, schools, and workplaces." *Americans with Disabilities Act of 1989, Hearings Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 202 (1989) (statement of former Attorney General Dick Thornburgh).

336. McHale & Simeonsson, *Effects of Interaction on Nonhandicapped Children's Attitudes Toward Autistic Children*, 85 AM. J. MENTAL DEFICIENCY 18 (1980); Voeltz, *Effects of Structured Interactions With Severely Handicapped Peers On Children's Attitudes*, 86 AM. J. MENTAL DEFICIENCY 380 (1982); Voeltz, *Children's Attitudes Toward Handicapped Peers*, 84 AM. J. MENTAL DEFICIENCY 455 (1980). Research examining parents' attitudes regarding community placement for their children reveals that, once the children have had the opportunity to leave the institutionalized setting and live in the community, parents see the community setting as more desirable. Conroy, *Reactions to Deinstitutionalization Among Parents of Mentally Retarded Persons*, in LIVING AND LEARNING IN THE LEAST RESTRICTIVE ENVIRONMENT 142 (R. Bruininks & K. Lakin eds., 1985); Rudie & Riedl, *Attitudes of Parents and Guardians of Mentally Retarded Former State Hospital Placements Toward Current Community Placement*, 89 AM. J. MENTAL DEFICIENCY 295, 296 (1984).

337. Donaldson, *supra* note 328, at 508; Johnson & Meyer, *Program Design and Research to Normalize Peer Interactions*, in INTEGRATING MODERATELY AND SEVERELY HANDICAPPED LEARNERS: STRATEGIES THAT WORK 79, 84 (1985); Siperstein & Bak, *Effects of Social Behaviors on Children's Attitudes Toward their Mildly and Moderately Mentally Retarded Peers*, 90 AM. J. MENTAL DEFICIENCY 319 (1985).

338. Bricker & Bricker, *A Developmentally Integrated Approach To Early Intervention*, 12 EDUC. & TRAINING OF THE MENTALLY RETARDED 100 (1977); Odom, DeKlyen, & Jenkins, *Integrating Handicapped and Nonhandicapped Preschoolers: Developmental Impact On Nonhandicapped*

lengthy and continuing isolation" of any group, including people with disabilities, "perpetuate[s] the ignorance, irrational fears, and stereotyping that long have plagued them."³³⁹ In other contexts, the Supreme Court has rejected summarily the argument that "discrimination may be justified by a desire to discriminate" as "unpersuasive on its face."³⁴⁰ Even Justice White's opinion in *Cleburne* concluded that such purported justifications "[were] not permissible bases" for discriminatory disability classifications even under the minimum rationality test of the equal protection clause.³⁴¹

B. Virtually All People with Disabilities Can and Should Live and Receive the Services They Need in Community Settings

It is still asserted that some persons with disabilities cannot be effectively trained and educated at all, let alone live and receive services in community settings, because of their severe or profound retardation, their behavior and emotional difficulties, or because they are deemed to be medically fragile. These stereotypes of persons with severe disabilities, which are purely vestiges of the eugenic era, continue to linger with us today.³⁴² With regard to retardation, for example, the Supreme Court in *Youngberg v. Romeo*³⁴³ insisted that "[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question of whether effective training of all severely or profoundly retarded individuals is even possible."³⁴⁴ This statement is, quite simply, wrong as a factual matter. In an amicus curiae brief submitted to the Court in a later case, all of the major national professional organizations whose members conduct social science research on persons with severe intellectual disabilities, including the American Association on Mental Deficiency (now the American Association on Mental Retardation), the Association for Persons with Severe Handicaps, the

Children, 51 EXCEPTIONAL CHILDREN 40 (1984); Peck, Apolloni, Cooke, & Raver, *Teaching Retarded Preschoolers To Imitate the Free Play Behavior of Nonretarded Classmates: Trained and Generalized Effects*, 12 J. SPECIAL EDUC., 195 (1978).

339. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 464 n.16 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ. concurring and dissenting in part) (citing G. ALLPORT, *THE NATURE OF PREJUDICE* (1958), for the proposition that "separateness among groups exaggerates differences").

340. *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 605 (1976); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1981); *Buchanan v. Worley*, 214 U.S. 60 (1916).

341. *Cleburne*, 473 U.S. at 448.

342. See generally Burton & Hirschoren, *Some Further Thoughts and Clarification On the Education of Severely and Profoundly Retarded Children*, 45 EXCEPTIONAL CHILDREN 618, 619 (1979); Goldberg & Cruickshank, *The Trainable but Noneducable: Whose Responsibility*, 47 NAT'L EDUC. ASS'N J. 47 (1958); Stainback, Stainback, Strathe, & Dedrick, *Preparing Regular Classroom Teachers For the Integration of Severely Handicapped Students: An Experimental Study*, 18 EDUC. & TRAINING OF THE MENTALLY RETARDED 204 (1983); Tawney & Smith, *An Analysis of the Forum: Issues in Education of Severely and Profoundly Retarded*, 48 EXCEPTIONAL CHILDREN 5, 14 (1981). See also the defendants' arguments and the arguments of the court in *Timothy W. v. New Hampshire Dep't Educ.*, 875 F.2d 954 (1st Cir.), cert. denied, 110 S. Ct. 519 (1989).

343. 457 U.S. 307 (1982).

344. *Id.* at 316-17 n.20.

American Association of University Affiliated Programs for the Developmentally Disabled, and the National Rehabilitation Association, stated the following:

Amici respectfully suggest that this Court previously may have misperceived the degree of consensus among professionals on the question whether severely and profoundly mentally retarded adults and children can benefit from education and habilitation. Methods for the education of severely and profoundly retarded individuals are universally accepted among professionals. Collectively, Amici encompass the broadest available spectrum of professional opinions about appropriate services for handicapped people, and can assure this Court while disagreements exist about terminology, priorities, and particular techniques, there is no substantial professional opinion that holds severely and profoundly handicapped individuals to be incapable of benefiting from appropriately designed education and habilitation. . . .

. . . [T]he increased accessibility of generic services which has accompanied the implementation of Section 504 has made it possible for virtually all of the nation's handicapped citizens to live in their own communities. This is as true for children as it is for adults. . . .

. . . [S]ome members of this Court may be in doubt as to whether there is a substantial sub-class of mentally retarded people who are so severely retarded that they are incapable of living and receiving services in the community. The professional experience of those most directly involved in serving those individuals indicates that no such sub-class exists.³⁴⁵

In the *Romeo* decision, the Court noted that even the plaintiff's attorney had stipulated that his client was so severely disabled that he would never be able to live and receive services outside the institution.³⁴⁶ That even advocates for persons with disabilities fall prey to false stereotypes and assumptions is reflected in the fact that ten months after the Court's decision, Nicholas Romeo moved to a community residence in Philadelphia. Since April 1983, Romeo has been living, receiving services, and working part-time in his neighborhood.³⁴⁷ The increasing number of states moving toward full community-based programs demonstrates incontrovertibly that it can be done. In 1990, New Hampshire became the nation's first "institution-free" state when it closed its sole mental

345. Brief of Am. Ass'n on Mental Deficiency as Amici Curiae in Support of Petitioners at 7 n.7, 8 & n.8, 10-11 & n.16, *Heckler v. American Hosp. Ass'n*, 472 U.S. 1016 (1985) (citing, *inter alia*, J. Conroy & V. Bradley, *Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (Temple Univ. Human Services Research Inst., Mar. 1985) (finding that all residents of segregated institution in Pennsylvania — regardless of severity of their disabilities — could be served successfully in the community); K. Casey, J. McGee, J. Stark, & F. Menolascino, *A Community-Based System for the Mentally Retarded: The Encor Experience* (1985) (describing a major metropolitan area serving virtually all of its residents with severe disabilities — regardless of severity of disability — in the community)).

346. *Romeo*, 457 U.S. at 318 & n.23.

347. Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, *Phila. Inquirer*, May 27, 1984 (Magazine), at 18.

retardation institution.³⁴⁸ New York also has established an official goal of closing all of its institutions by the year 2000.³⁴⁹

Numerous studies have now demonstrated that persons with disabilities can live successfully in integrated settings. This is true even though they may possess low skill levels, exhibit severe aberrant behavior difficulties, or live in sparsely populated rural areas with lesser services available.³⁵⁰ Research shows that practically all people with disabilities can live and work in community settings, so long as they receive appropriate supports. All of the resources in institutional settings can be replicated in community settings.³⁵¹ So long as there is sufficient planning and coordination among the relevant service providers, including the public schools, employment training programs, and job sites—those who are initially thought to have poor prospects for living in the community are able to adapt and thrive when they leave behind their segregated settings.³⁵² Educators and habilitation professionals also are able to design community living programs and education and training programs in regular settings for persons with disabilities who have been labelled medically fragile.³⁵³ These programs are also more effective in integrated environments.³⁵⁴

348. H. Schneider, *Families Defend Care at Md. Mental Health Facility*, Wash. Post, July 8, 1991, at D-1, D-5.

349. *Id.* at D-5.

350. B. HILL, *LIVING IN THE COMMUNITY: A COMPARATIVE STUDY OF FOSTER HOMES AND SMALL GROUP HOMES FOR PEOPLE WHO ARE MENTALLY RETARDED* (1991); Hill, Bruininks, & Lakin, *Physical and Behavioral Characteristics of Mentally Retarded People in Residential Facilities*, 8 HEALTH & SOC. WORK 85 (1983); Singer, Close, Irvin, Gersten, & Sailor, *An Alternative to the Institution For Young People With Severely Handicapping Conditions in a Rural Community*, 9 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 251 (1984). Singer's study indicated that some of the clients of the project had behavioral difficulties so severe that they were thought to be a "threat to the community" at the start of the program. *Id.* See also Borthwick-Duffy, Eyman & White, *Client Characteristics and Residential Placement Patterns*, 92 AM. J. MENTAL DEFICIENCY 24 (1987); Jacobson & Janicki, *Clinical Need Variations of Disabled Persons Residing in Group Homes*, 13 J. COMMUNITY PSYCHOL. 54 (1985).

351. C. Lakin, *An Overview of the Concept and Research on Community Living* (unpublished paper prepared for the Leadership Institute on Community Living, National Institute on Disability and Rehabilitation Research, U.S. Dep't of Educ.).

352. Close, *Community Living For Severely and Profoundly Retarded Adults: A Group Home Study*, AM. J. MENTAL DEFICIENCY 579 (1977); Conroy, Efthimiou, & Lemanowicz, *A Matched Comparison of the Developmental Growth of Institutionalized and Deinstitutionalized Mentally Retarded Clients*, 86 AM. J. MENTAL DEFICIENCY 581 (1982); Gage, Fredericks, Baldwin, Moore & Grove, *Group Homes for Handicapped Children*, in 3 TEACHING THE SEVERELY HANDICAPPED 263 (1987).

353. A study of the medical needs of 27 severely or profoundly disabled residents of community facilities found that while the residents had more extensive health care needs than the population in general, their medical needs were not in any way uncommon. In practically every case, generic health care resources available in the community were adequate to meet the medical needs of each of the residents. McDonald, *Medical Needs of Severely Developmentally Disabled People Residing in the Community*, 90 AM. J. MENTAL DEFICIENCY 171 (1985).

354. Campbell, *Integrated Programming for Students With Multiple Handicaps*, in INNOVATIVE PROGRAM DESIGN FOR INDIVIDUALS WITH DUAL SENSORY IMPAIRMENTS 185 (1987); McCormick & Goldman, *The Transdisciplinary Model: Implications for Service Delivery and Personnel Preparation for the Severely and Profoundly Handicapped*, 4 AAESPH REV. 152, 155 (1979); Frassi-

The ADA was enacted to overcome the stereotypes about the abilities of persons with disabilities. As the House Judiciary Committee Report explained:

Historically, the inferior economic and social status of disabled people has been viewed as an inevitable consequence of the physical and mental limitations imposed by disability.

Over the years, this assumption has been challenged by policy makers, citizens with disabilities, the courts and Congress. Gradually, public policy affecting persons with disabilities recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities. These discriminatory policies and practices affect people with disabilities in every aspect of their lives, from securing employment, to participating fully in community life, to securing custody of their children, to enjoying all of the rights that Americans take for granted.³⁵⁵

Similarly, members of Congress stressed in floor debate that "[e]rroneous assumptions about the skills and inclinations of disabled persons are being made,"³⁵⁶ that "[a]s a society we have been guilty of underestimating their talents and the contributions they can make to this country,"³⁵⁷ and that "[t]oo many Americans for too long have failed to see the promise and abilities of disabled Americans. By focusing unduly on what disabled persons could not do, we as a society have often missed what they could."³⁵⁸ On the contrary, the ADA will "encourage society to recognize disabled persons for their abilities and contributions and not for their physical limitations."³⁵⁹ As Senator Harkin stated in floor debate:

We have a vision. Dr. King dreamed of an America "where a person is judged not by the color of his skin, but by the content of his character." ADA's vision is of an America where persons are judged by their abilities and not on the basis of their disabilities.³⁶⁰

C. The Benefits to Persons with Disabilities of Living, Learning, Working, and Recreating in Integrated Settings Are Overwhelming

The research data on the benefits of integration to persons with disabilities is so one-sided that Professors Halvorsen and Sailor have stated that "[v]irtually all available research reviews indicate better educational outcomes associated with integrated as compared to their segregated counterparts."³⁶¹ These disabil-

nelly, Superior, & Meyers, *A Consultation Model for Speech and Language Intervention*, ASHA NEWSLETTER, (November 25-30, 1983).

355. COMM. ON THE JUDICIARY, *supra* note 120, at 25, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 447.

356. 136 CONG. REC. H2625 (daily ed. May 22, 1990) (statement of Rep. Morrison).

357. 135 CONG. REC. S4996 (daily ed. May 9, 1989) (statement of Sen. Lieberman).

358. 135 CONG. REC. S10,793 (daily ed. Sept. 7, 1989) (statement of Sen. Biden).

359. 136 CONG. REC. H2443 (daily ed. May 22, 1990) (statement of Rep. Weiss).

360. 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

361. Halvorsen & Sailor, *Integration of Students with Severe and Profound Disabilities: A Re-*

ity researchers conclude that the outcome studies are so "overwhelming[ly]" in support of integrated environments that "further research on the efficacy of integrated instruction is probably not needed. The case has been made."³⁶² Moreover, only in integrated settings can those techniques and practices that lead to positive outcomes be fully and effectively utilized.³⁶³

Yet, a disturbingly high percentage of public officials who administer educational, habilitative, and residential programs and activities for persons with disabilities continue to advocate segregated services, either out of simple ignorance or, perhaps, a desire to maintain the status quo. Two disability researchers recently bemoaned the fact that "some states, regions, and localities have developed exemplary systems of services for severely handicapped children and youth while others maintain archaic systems of segregated education, residential, and support services."³⁶⁴ Some officials purport to be unaware of the positive outcomes or benefits of integration. For example, the assistant superintendent in charge of providing educational services to students with disabilities in the Pinellas County, Florida Public Schools, one of the twenty largest school districts in the nation, testified at a hearing that he was unaware of any research data showing any benefits to integrated educational programs for children with disabilities.³⁶⁵ He testified that he did not believe that a student with cerebral palsy would have any increased opportunities for socialization with nondisabled students if he were transferred from a segregated program to a regular school.³⁶⁶ Furthermore, he knew of no potential injuries to the student stem-

view of Research, in 1 ISSUES AND RESEARCH IN SPECIAL EDUCATION 110, 143, 152-53 (R. Gaylord Ross ed., 1990). In their chapter of this book, Halvorsen and Sailor review many of the studies discussed in this article.

362. *Id.* at 153; accord Sailor, Goetz, Anderson, Hunt, & Gee, *Research on Community Intensive Instruction as a Model for Building Functional, Generalized Skills*, in GENERALIZATION AND MAINTENANCE: LIFESTYLE CHANGES IN APPLIED SETTINGS 67 (R. Horner, G. Dunlap, & R. Koegel eds. 1988).

363. See generally R. BRINKER & M. THORPE, EVALUATION OF THE INTEGRATION OF SEVERELY HANDICAPPED STUDENTS IN REGULAR EDUCATION AND COMMUNITY SETTINGS (1984); W. SAILOR, J. ANDERSON, A. HALVORSEN, J. FILLER, & L. GOETZ, THE COMPREHENSIVE LOCAL SCHOOL: REGULAR EDUCATION FOR ALL STUDENTS WITH DISABILITIES (1989); Sailor, Halvorsen, Anderson, Goetz, Gee, Doering, & Hunt, *Community Intensive Instruction*, in EDUCATION OF LEARNERS WITH SEVERE HANDICAPS: EXEMPLARY SERVICE STRATEGIES 276 (R. Horner, L. Meyer, & B. Fredericks eds., 1986); Meyer, Eichinger & Park-Lee, *A Validation of Program Quality Indicators in Educational Services for Students With Severe Disabilities*, 12 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 251-63 (1987); Voeltz, *Children's Attitudes Toward Handicapped Peers*, 84 AM. J. MENTAL DEFICIENCY 455 (1980); I.R. Pumpian, Variables Affecting Attitudes Toward the Employability of Severely Handicapped Adults, (unpublished doctoral dissertation, University of Wisconsin, Madison (1981)); M. Falvey, Changes in Academic and Social Competence of Kindergarten Aged Handicapped Children as a Result of an Integrated Classroom, (unpublished doctoral dissertation, University of Wisconsin, Madison (1980)).

364. LIVING AND LEARNING IN THE LEAST RESTRICTIVE ENVIRONMENT 195 (R. Bruininks & K. Lakin eds., 1985).

365. Hearing Transcript at 173-76, Kirby v. Pinellas County School Bd. (Fla. Div. of Admin. Hearings, Sept. 7, 1990) (No. 90-5163E) (testimony of Dr. John R. Lamb).

366. *Id.* at 173.

ming from the school system's imposition of segregated activities.³⁶⁷

Some school systems have reported opposition by regular education teachers and teachers' aids to their educating students with disabilities. Teachers' unions have even negotiated contract provisions that release regular education teachers from any duty to educate students with disabilities.³⁶⁸ Committed administrators, however, have overcome such resistance and established successful integrated programs by providing in-service training. In-service training programs have addressed the modifications needed for students with disabilities in the regular education curricula and classroom configurations,³⁶⁹ the desirability of consistent participation of all teachers, and students in school social events, sports, and school organizations,³⁷⁰ and the need for a single administrative responsibility in each school for students, with and without disabilities, and their educators.³⁷¹ Numerous studies have demonstrated that effective integration in education simply cannot be achieved in the public schools without close and supportive cooperation and sharing of responsibilities among those committed to the concept of integration; i.e., administrators, regular education teachers, and those trained in the education of students with disabilities.³⁷² As one researcher

367. *Id.*

368. *Id.* at 165.

369. See Voeltz, *Program and Curriculum Innovations to Prepare Children for Integration*, in PUBLIC SCHOOL INTEGRATION OF SEVERELY HANDICAPPED STUDENTS: RATIONAL ISSUES AND PROGRESSIVE ALTERNATIVES 155, 161 (N. Certo, N. Haring, & R. York, eds., 1984); Odom, & Strain, *Peer-mediated Approaches to Promoting Children's Social Interaction: A Review*, 54 AM. J. ORTHOPSYCHIATRY 544, 544-55 (1984); Odom, Hoysun, Jamieson, & Strain, *Increasing Handicapped Preschoolers Peer Social Interactions: Cross-setting and Component Analysis*, 18 J. APPLIED BEHAVIOR ANALYSIS 3 (1985); Stainback, Stainback, Courtneage, & Jaben, *Facilitating Mainstreaming By Modifying the Mainstream*, 52 EXCEPTIONAL CHILDREN 144, 155 (1985).

370. See generally Meyer & Kishi, *School Integration Strategies*, in STRATEGIES FOR ACHIEVING COMMUNITY INTEGRATION OF DEVELOPMENTALLY DISABLED CITIZENS 237 (K. Lakin & R. Bruininks eds., 1985); Proceedings of the Conference on the Transition of Students with Severe Disabilities into Integrated School Environments (LRE Module II), San Francisco State University and San Jose State University, California Research Institute (A. Halvorsen ed., 1984); Proceedings of the Bay Area Conference on the Integration of Students with Severe Disabilities (LRE Module I), San Francisco State University, California Research Institute (A. Halvorsen ed., 1983).

371. See D. BIKLEN, *ACHIEVING THE COMPLETE SCHOOL: STRATEGIES FOR EFFECTIVE MAINSTREAMING* (1985); C. Piuma, A. Halvorsen, C. Murray, S. Beckstead, & W. Sailor, *Project REACH Administrators Manual*, San Francisco State University & San Francisco Unified School District (Eric Reproduction Service Document No. ED 242-185 (1983)); Stetson, *Critical Factors That Facilitate Integration: A Theory of Administrative Responsibility*, in PUBLIC SCHOOL INTEGRATION OF SEVERELY HANDICAPPED STUDENTS 65, 67 (N. Certo, N. Haring, & R. York eds., 1984); Taylor, *From Segregation to Integration: Strategies for Integrating Severely Handicapped Students in Normal School and Community Settings*, 7 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 42 (1982).

372. Stainback & Stainback, *Facilitating Integration Through Personnel Preparation*, in PUBLIC SCHOOL INTEGRATION OF SEVERELY HANDICAPPED STUDENTS 143 (N. Certo, N. Haring, & R. York eds., 1984); Brinker & Thorpe, *Features of Integrated Educational Ecologies That Predict Social Behavior Among Severely Mentally Retarded And Nonretarded Students*, 91 AM. J. MENTAL DEFICIENCY 150 (1986); Brinker & Thorpe, *Integration of Severely Handicapped Students and the Proportion of IEP Objectives Achieved*, 51 EXCEP. CHILDREN 168 (1984); Brinker & Thorpe, *Some Empirically Derived Hypotheses About the Influence of State Policy on Degree of Integration of Se-*

has concluded: "When we no longer need the term 'special' we will have achieved equality."³⁷³

It is essential that we provide the data on integration to all involved in issues concerning persons with disabilities. These people include administrators and employees of programs involving persons with disabilities either as participants or potential participants, parents, relatives, advocates, friends of persons with disabilities, people with disabilities themselves, and enforcement authorities, including the courts. Indeed, one of the express requirements of the ADA is that the Department of Justice provide just such information assistance to public officials and others.³⁷⁴ A broad summary of some of the most important results of the major research studies regarding integration, of which Congress was well aware in enacting the ADA, is provided below.

1. Integration Substantially Improves the Perspective of Nondisabled People Regarding Disability

Segregation begets prejudice and stereotyping. Thus, it cannot be surprising that the research data demonstrate, beyond question, much more positive attitudes regarding persons with disabilities if they are in regular, integrated settings. As discussed below, this is the case even among those one might not expect to have misapprehensions regarding disabilities, such as the parents and relatives of persons with disabilities.

It is well documented that when peers with and without disabilities receive accurate information about one another and are provided with opportunities to interact with one another on an ongoing basis, social acceptance occurs.³⁷⁵ The research demonstrates that these types of longitudinal interactions lead to

verely Handicapped Students, 6 RASE 18 (1985); Meyer, Eichinger & Park-Lee, *A Validation of Program Quality Indicators in Educational Services for Students With Severe Disabilities*, 12 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 251 (1987); Stainback, & Stainback, *A Rationale for the Merger of Special and Regular Education*, 51 EXCEP. CHILDREN 102 (1984); Stainback & Stainback, *Preparing Regular Class Teachers for the Integration of Severely Retarded Students*, 17 EDUC. & TRAINING OF THE MENTALLY RETARDED 273-277 (1982); C. Murray, *Integration in High School: A Qualitative Study of Social Relationships Between Nondisabled Students and Students With Severe Handicaps*, (unpublished doctoral dissertation, San Francisco State University/University of California, Berkeley, Joint Doctoral Program, Department of Special Education (1986)); S. Pellegrini, *Principals' ownership of programs for students with severe disabilities and associated factors on integrated sites*, (unpublished paper, San Jose State University/San Francisco State University, California Research Institute (1986)).

373. D. BIKLEN, *supra* note 371, at 176.

374. 42 U.S.C.A. § 12206.

375. See generally Johnson & Meyer, *Program Design and Research to Normalize Peer Interactions*, in *INTEGRATING MODERATELY AND SEVERELY HANDICAPPED LEARNERS: STRATEGIES THAT WORK* (M. Brady & P. Gunter eds., 1985); Donaldson, *supra* note 328; McHale & Simeonsson, *Effects of Interaction on Nonhandicapped Children's Attitudes Toward Autistic Children*, 85 AM. J. MENTAL DEFICIENCY 18 (1980); Siperstein & Bak, *Effects of Social Behavior on Children's Attitudes Toward Their Mildly and Moderately Mentally Retarded Peers*, 90 AM. J. MENTAL DEFICIENCY 319 (1985); Voeltz, *Effects of Structured Interactions with Severely Handicapped Peers on Children's Attitudes*, 86 AM. J. MENTAL DEFICIENCY 380 (1982); Voeltz, *Children's Attitudes Toward Handicapped Peers*, 84 AM. J. MENTAL DEFICIENCY 455 (1980).

greater tolerance for diversity and difference by persons without disabilities.³⁷⁶ The research similarly assures us that integration leads to more positive attitudes and interactions not just among nondisabled peers of persons with disabilities, but also among teachers, employers, neighbors, and other persons without disabilities in the community. It is particularly critical that educational programs for children with disabilities be integrated because the research indicates incontrovertibly that students with disabilities who attend integrated education and training programs experience far better community attitudes,³⁷⁷ especially among employers, but also among others in the community, and are more likely to obtain jobs at integrated job sites.³⁷⁸ Neighbors of persons with disabilities living in the community also experience a significantly positive shift in attitudes toward disability.³⁷⁹ The expectations even of parents of persons with disabilities improve when their child is living and provided public services in integrated settings. Researchers have documented the changes in parental attitudes resulting from integration,³⁸⁰ and numerous parents have reported the same outcomes anecdotally.³⁸¹

376. See C. Murray, *supra* note 372; Voeltz, *Effects of Structured Interactions With Severely Handicapped Peers on Children's Attitudes*, *supra* note 375.

377. Additionally, regular education teachers who later receive in-service training for teaching students with disabilities do far better than teachers with degrees solely in "special" education. Researchers have documented that regular education teachers with specialized training create higher quality program plans, documented quantitatively and qualitatively higher levels of instruction, and attain specified objectives for their students. See generally Stainback, Stainback, Strathe, & Dedrick, *Preparing Regular Classroom Teachers for the Integration of Severely Handicapped Students: An Experimental Study*, 18 EDUC. & TRAINING OF THE MENTALLY RETARDED 204 (1983); Stainback & Stainback, *Preparing Regular Class Teachers for the Integration of Severely Retarded Students*, 17 EDUC. & TRAINING OF THE MENTALLY RETARDED 273 (1982); Stainback & Stainback, *The Merger of Special and Regular Education*, 51 EXCEPTIONAL CHILDREN 517 (1985).

378. See generally Hurd, Costell, Pajor, & Freagon, *Administrative Considerations in Changing From a School-Contained to a Community-Based Program for Severely Handicapped Students*, in TEACHING SEVERELY HANDICAPPED STUDENTS IN THE COMMUNITY 29 (S. Freagon, M. Pajor, G. Brankin, A. Galloway, D. Rich, P. Karel, M. Wilson, D. Costello, W. Peters, & D. Hurd eds. 1981); Bates, Morrow, Panscofar, & Sedlak, *The Effect of Functional vs. Nonfunctional Activities on Attitudes/ Expectations of Nonhandicapped College Students: What They See is What We Get*, 9 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 73 (1984); I.R. Pumpian, *Variables affecting attitudes toward the employability of severely handicapped adults* (unpublished doctoral dissertation, University of Wisconsin, Madison (1981)).

379. See R. WALBRIDGE & J. CONROY, CHANGES IN COMMUNITY ATTITUDES.

380. J. ANDERSON & F. FARRON-DAVIS, A LONGITUDINAL COMPARISON OF PARENTAL EXPECTATIONS FOR THEIR SEVERELY DISABLED SONS AND DAUGHTERS ATTENDING INTEGRATED AND SEGREGATED PROGRAMS (San Francisco State University, Department of Special Education, California Research Institute (1987)); S. FREAGON, J. WHEELER, G. BRANKIN, K. MCDANNEL, D. COSTELLO, & W. PETERS, CURRICULAR PROCESSES FOR THE SCHOOL AND COMMUNITY: INTEGRATION OF SEVERELY HANDICAPPED STUDENTS AGED 6-21 (1983).

381. E.g., Hanline & Halvorsen, *Parental Perception of the Integration Transition Process*, 55 EXCEPTIONAL CHILDREN 487, 488 (1989); D. Vesey, *The Perspective of a Parent and Special Education Commissioner on the Benefits of Integration and Plans for Statewide Implementation* (unpublished paper presented at 13th annual conference, The Association for Persons with Severe Handicaps (TASH), San Francisco, Cal. (Nov. 1986)).

2. Integration Significantly Improves the Socialization of Persons with Disabilities with Non-Disabled Peers

As Justice Marshall observed in *Cleburne*, excluding persons with disabilities from community activities deprives us of "much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of the community."³⁸² A number of studies have documented the importance of social relationships to persons with disabilities.³⁸³ Studies demonstrate that social relationships can be successfully established and maintained in community settings.³⁸⁴ Moreover, when persons with disabilities live in the community, they are able to use the community resources. As compared to those living in institutions, persons with disabilities in the community attend more movies and go to more restaurants, shops, libraries, museums, parks, and sports events, and are more likely to participate in organized sports and recreational activities. They leave the grounds of their residence more often, attend community churches, go to more parties, and enjoy more visits to friends—disabled and especially nondisabled—in the community.³⁸⁵

Much stronger bonds are formed when persons with disabilities are able to make a high degree of contact with those without disabilities. The research data support the intuitive proposition that there is a significantly higher likelihood of such contacts being made in integrated settings. In segregated settings, the contacts of students with disabilities with nondisabled persons are limited solely to contacts with adults. However, when an integrated setting is provided, 89% of

382. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ.).

383. See generally, S. TAYLOR, D. BIKLIN & J. KNOLL, *COMMUNITY INTEGRATION OF PEOPLE WITH SEVERE DISABILITIES* (1987); O'Brien, *A Guide to Personal Futures Planning*, in *THE ACTIVITIES CATALOG: A COMMUNITY PROGRAMMING GUIDE FOR YOUTH AND ADULTS WITH SEVERE DISABILITIES* 177 (1987); Strully & Strully, *Friendship and Our Children*, 10 J. ASS'N PERSONS WITH SEVERE HANDICAPS 224 (1985).

384. S. Schleien & L. Meyer, *Community-Based Recreation Programs for Persons with Severe Developmental Disabilities*, in *EXPANDING SYSTEMS OF SERVICE DELIVERY FOR PERSONS WITH DEVELOPMENTAL DISABILITIES* (M. Powers ed., 1988).

385. J. CONROY & V. BRADLEY, *THE PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS* (1985); B. HILL & R. BRUININKS, *FAMILY, LEISURE, AND SOCIAL ACTIVITIES OF MENTALLY RETARDED PEOPLE IN RESIDENTIAL FACILITIES* (1981); C. LAKIN, D. ANDERSON & B. HILL, *COMMUNITY INTEGRATION OF OLDER PERSONS WITH MENTAL RETARDATION* (1988); Intagliata, Willer & Wicks, *Factors Related to the Quality of Community Adjustment in Family Care Homes*, in *DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE* 217 (R. Bruininks, C. Meyers, B. Sigford & C. Lakin eds. 1981); Felce, de Kock & Repp, *An Eco-Behavioral Analysis of Small Community-Based Houses and Traditional Large Hospitals for Severely and Profoundly Mentally Handicapped Adults*, 7 APPLIED RESEARCH IN MENTAL RETARDATION 393 (1986); O'Neil, Brown, Gordon, Schonhorn & Green, *Activity Patterns of Mentally Retarded Adults in Institutions and Communities — A Longitudinal Study*, 2 APPLIED RES. IN MENTAL RETARDATION 367 (1981); R. Horner, S. Stoner & D. Ferguson, *An Activity Based Analysis of Deinstitutionalization: The Effects of Community Re-Entry on the Lives of Residents Leaving Oregon's Fairview Training Center* (Oregon Developmental Disabilities Office, 1988); C. Lakin, *An Overview of the Concept and Research on Community Living* (unpublished paper prepared for the Leadership Institute on Community Living, National Institute on Disability and Rehabilitation Research, U.S. Dep't of Educ.).

those contacts are with fellow students without disabilities.³⁸⁶ Another study documented that, despite substantial physical and behavioral limitations, students with severe disabilities in an integrated setting engaged in more than double the social interactions than did a comparable group in a segregated program, and the proportion of those interactions that was delineated as positive also was substantially greater for the integrated group.³⁸⁷ Further, numerous investigators have found decreased rates of inappropriate social behavior among persons with disabilities who have been placed in integrated settings.³⁸⁸ Such higher and more positive contacts may contribute to the development of genuine friendships and bonding between persons with and without disabilities.³⁸⁹

386. J. Anderson & L. Goetz, Opportunities for Social Interaction Between Severely Disabled and Nondisabled Students in Segregated and Integrated Educational Settings (unpublished paper presented at 10th Annual Conference, The Association for Persons with Severe Handicaps (TASH), San Francisco, Cal. (Nov. 1983)).

387. Brinker, *Interactions Between Severely Mentally Retarded Students and Other Students in Integrated and Segregated Public School Settings*, 89 AM. J. MENTAL DEFICIENCY, 587 (1985). See also Brinker & Thorpe, *Features of Integrated Educational Ecologies That Predict Social Behavior Among Severely Mentally Retarded and Nonretarded Students*, 91 AM. J. MENTAL DEFICIENCY, 150 (1986).

388. See Gaylord-Ross & Pitts-Conway, *Social Behavior Development in Integrated Secondary Autistic Programs*, in PUBLIC SCHOOL INTEGRATION OF THE SEVERELY HANDICAPPED: RATIONAL ISSUES AND PROGRESSIVE ALTERNATIVES 200, 204 (N. Certo, N. Haring, & R. York eds., 1984); Hunt, Alwell, & Goetz, *Acquisition of Conversation Skills and the Reduction of Inappropriate Social Interaction Behaviors*, 13 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 20 (1988); Strain, Shores, & Trimm, *Effects of Peer's Social Initiation on the Behavior of Withdrawn Preschool Children*, 10 J. APPLIED BEHAVIOR ANALYSIS 289 (1977); L. Schactili, *The Effects Of Trained and Untrained Peer Tutors on Social Behavior of Severely Disabled Students* (master's thesis, California State University at Hayward, Department of Special Education (1987)); M. Falvey, *Changes in Academic and Social Competence of Kindergarten Aged Handicapped Children as a Result of an Integrated Classroom*, (unpublished doctoral dissertation, University of Wisconsin, Madison (1980)).

389. See generally R. BRINKER & M. THORPE, *EVALUATION OF THE INTEGRATION OF SEVERELY HANDICAPPED STUDENTS IN REGULAR EDUCATION AND COMMUNITY SETTINGS* (1984); Guralnick, *The Peer Interactions of Young Developmentally Delayed Children in Specialized and Integrated Settings*, in FRIENDSHIPS IN NORMAL AND HANDICAPPED CHILDREN 141 (T. Field, J. Roopnarine, & M. Segal eds., 1984); Hamre-Nietupski, Nietupski, Stainback, & Stainback, *Preparing School Systems for Longitudinal Integration Efforts*, in PUBLIC SCHOOL INTEGRATION OF SEVERELY HANDICAPPED STUDENTS: RATIONAL ISSUES AND PROGRESSIVE ALTERNATIVES 135 (N. Certo, N. Haring, & R. York eds., 1984); Murata, *The Effects of an Indirect Training Procedure for Non-handicapped Peers on Interaction Response Class Behaviors of Autistic Children*, in THE SOCIAL DEVELOPMENT OF HANDICAPPED STUDENTS (R. Ross ed., 1984); Sailor, Halvorsen, Anderson, Goetz, Gee, Doering, & Hunt, *Community Intensive Instruction*, in EDUCATION OF LEARNERS WITH SEVERE HANDICAPS: EXEMPLARY SERVICE STRATEGIES 251 (R. Horner, L. Meyer, & B. Fredericks eds., 1986); Brady, Shores, Bunter, McEvoy, & White, *Generalization of an Adolescent's Social Interaction Behavior via Multiple Peers in a Classroom Setting*, 9 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 278-88 (1984); Brinker & Thorpe, *Some Empirically Derived Hypotheses About the Influence of State Policy on Degree of Integration of Severely Handicapped Students*, 6 RASE 18 (1985); Cole, *Facilitating Play Children's Peer Relationships: Are We Having Fun Yet?*, 23 AM. EDUC. RES. J. 201 (1986); Cole, Meyer, Vandercook, & McQuarter, *Interactions Between Peers With and Without Severe Handicaps: The Dynamics of Teacher Intervention*, 91 AM. J. MENTAL DEFICIENCY 160 (1986); Goldstein & Wickstrom, *Peer Intervention Effects on Communicative Interaction Among Handicapped and Nonhandicapped Preschoolers*, 19 J. APPLIED BEHAVIOR ANALYSIS 209 (1986); Guralnick, *The Value of Integrating Handicapped and Non-Handicapped Preschool Children*,

3. Integrated Educational and Training Programs Enhance the Skills Learned by Persons with Disabilities and Better Prepares Persons with Disabilities for Employment

Persons with disabilities who are educated and trained in integrated settings do far better than their counterparts in segregated programs. This may be explained, in part, by the qualitative and quantitative differences in the educational objectives and training programs developed by educators for integrated programs. As compared to education plans developed by teachers for segregated programs, integrated education plans are of significantly higher quality, contain a greater number of objectives, and specify more objectives to be taught in regular settings.³⁹⁰ Moreover, students in integrated settings meet far more of their educational objectives than those in segregated programs.³⁹¹ One study, covering a ten-year period, showed that students in integrated settings consistently outperformed those with comparable disabilities in segregated settings.³⁹²

Training provided to persons with disabilities is more effective in community settings because of the natural reinforcements the community provides when skills are practiced (e.g., purchasing products, making positive social contacts, being a part of normal recreational activities), and because of the wide variety of opportunities which promotes the generalization of skills.³⁹³ Profes-

46 AM. J. ORTHOPSYCHIATRY 236 (1976); Haring, Breen, Pitts-Conway, Lee, & Gaylord-Ross, *Adolescent Peer Tutoring and Special Friend Experiences*, 12 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 280-86 (1987); James & Egel, *A Direct Prompting Strategy for Increasing Reciprocal Interactions Between Handicapped and Nonhandicapped Siblings*, 19 J. APPLIED BEHAVIOR ANALYSIS 173 (1986); Johnson & Johnson, *Mainstreaming and Cooperative Learning Strategies*, 52 EXCEPTIONAL CHILDREN 553 (1986); Johnson & Johnson, *Effects of Cooperative, Competitive, and Individualistic Learning Experiences on Social Development*, 49 EXCEPTIONAL CHILDREN 323 (1983); Kohler & Fowler, *Training Prosocial Behaviors to Young Children: An Analysis of Reciprocity with Untrained Peers*, 18 J. APPLIED BEHAVIOR ANALYSIS 187 (1985); Lord & Hopkins, *The Social Behavior of Autistic Children With Younger and Same-Age Nonhandicapped Peers*, 16 J. AUTISM & DEV. DISORDERS 249 (1986); Meyer, Fox, Schermer Ketetson, Montan Maley, & Cole, *The Effects of Teacher Intrusion on Social Play Interactions Between Children With Autism and Their Nonhandicapped Peers*, 17 J. AUTISM & DEV. DISORDERS 315 (1987); Odom & Strain, *Peer-Mediated Approaches to Promoting Children's Social Interaction: A Review*, 54 AM. J. ORTHOPSYCHIATRY 544, 555 (1984); S. Meyers-Winton, *The Comparative Effects of Peers and Adults Instructing Severely Handicapped Students on the Generalization of Social Skills* (doctoral dissertation, University of California-Berkeley/San Francisco State University Joint Doctoral Program (1980)); C. Murray, *Integration in High School: A Qualitative Study of Social Relationships Between Nondisabled Students and Students With Severe Handicaps* (doctoral dissertation, San Francisco State University/University of California, Berkeley, Joint Doctoral Program, Dep't of Special Educ. (1986)).

390. Hunt, Goetz, & Anderson, *The Quality of IEP Objectives Associated with Placement on Integrated Versus Segregated School Sites*, 11 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 125 (1986).

391. Brinker & Thorpe, *Integration of Severely Handicapped Students and the Proportion of IEP Objectives Achieved*, 51 EXCEPTIONAL CHILDREN 168 (1984).

392. Wang & Baker, *Mainstreaming Programs: Design Features and Effects*, 19 J. SPECIAL EDUC. 503 (1986).

393. Liberty, *Enhancing Instruction for Maintenance, Generalization, and Adaptation*, in STRATEGIES FOR ACHIEVING COMMUNITY INTEGRATION OF DEVELOPMENTALLY DISABLED CITIZENS (C. Lakin & R. Bruininks eds., 1985).

sor Lakin, in his review of the literature,³⁹⁴ lists several studies that have found advantages to instructional technology provided to persons with disabilities in integrated settings in such areas as vocational skills,³⁹⁵ self-care skills,³⁹⁶ domestic skills,³⁹⁷ and community use skills.³⁹⁸ Professionals in these fields are increasing their efforts to develop better techniques for training the staff who work with persons with disabilities in integrated settings.³⁹⁹

Researchers are beginning to understand that these enhanced skills are supported to a great extent by the peer interactions available in integrated settings.⁴⁰⁰ These findings are particularly significant with regard to communication⁴⁰¹ and social skills.⁴⁰² Investigators have known for some time

394. C. Lakin, An Overview of the Concept and Research on Community Living (unpublished paper prepared for the Leadership Institute on Community Living, National Institute on Disability and Rehabilitation Research, U.S. Dep't of Educ.).

395. T. BELLAMY, R. HORNER & D. INMAN, VOCATIONAL HABILITATION OF SEVERELY RETARDED ADULTS: A DIRECT SERVICE TECHNOLOGY (1979); P. WEHMAN, COMPETITIVE EMPLOYMENT: NEW HORIZONS FOR SEVERELY DISABLED INDIVIDUALS (1981); Bellamy, Rhodes & Albin, *Supported Employment*, in PATHWAYS TO EMPLOYMENT OF ADULTS WITH DEVELOPMENTAL DISABILITIES 129 (W. Kiernan & J. Stark eds., 1986); Gold, *Research on the Vocational Habilitation of the Retarded*, in 6 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 97, 112 (N. Ellis ed., 1973).

396. Azrin, Schaffer & Wesolowski, *A Rapid Method of Teaching Profoundly Retarded Persons to Dress by a Reinforcement-Guidance Method*, 14 MENTAL RETARDATION 29 (1976); Giles & Wolf, *Toilet Training Institutionalized, Severe Retardates: An Application of Operant Behavior Modification Techniques*, 70 AM. J. MENTAL DEFICIENCY 765 (1966); O'Brian, Bugle & Azrin, *Training and Maintaining a Retarded Child's Proper Eating*, 5 J. APPLIED BEHAVIOR ANALYSIS 67 (1972); Westling & Murden, *Self-Help Skills Training: A Review of Operant Studies*, 12 J. SPECIAL EDUC. 253 (1978).

397. See generally Gaule, Netupski & Certo, *Teaching Supermarket Skills Using an Adaptive Shopping List*, 20 EDUC. & TRAINING MENTALLY RETARDED 53 (1985); Nietupski, Welch & Wacker, *Acquisition, Maintenance and Transfer of Grocery Item Purchasing Skills by Moderately and Severely Handicapped Students*, 18 EDUC. & TRAINING MENTALLY RETARDED 279 (1983); Thompson, Braam & Fuqua, *Training and Generalization of Laundry Skills*, 15 J. APPLIED BEHAVIOR ANALYSIS, 177 (1982).

398. See Horner, Jones & Williams, *A Functional Approach to Teaching Generalized Street Crossing*, 10 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 71 (1985); Sowers, Rusch & Hudson, *Training a Severely Retarded Young Adult to Ride the City Bus to and from Work*, 4 AAESPH REV. 15 (1979); Story, Bates & Hanson, *Acquisition and Generalization of Coffee Purchase Skills by Adults with Severe Disabilities*, 9 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 178 (1984).

399. M. SNELL, SYSTEMATIC INSTRUCTION OF PERSONS WITH SEVERE HANDICAPS (3d ed. 1987); Gage, Fredericks, Johnson & Lindley-Southard, *Inservice Training for Staffs of Group Homes and Work Activity Centers Serving Developmentally Disabled Adults*, 7 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 60 (1982).

400. See generally W. SAILOR, J. ANDERSON, A. HALVORSEN, J. FILLER, & L. GOETZ, THE COMPREHENSIVE LOCAL SCHOOL: REGULAR EDUCATION FOR ALL STUDENTS WITH DISABILITIES (1989).

401. See generally Goldstein & Wickstrom, *Peer Intervention Effects on Communicative Interaction Among Handicapped and Nonhandicapped Preschoolers*, 19 J. APPLIED BEHAVIOR ANALYSIS 209-14 (1986); Hunt, Alwell, & Goetz, *Acquisition of Conversation Skills and the Reduction of Inappropriate Social Interaction Behaviors*, 13 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 20-27 (1988).

402. See generally Burney, Russell & Shores, *Developing Social Responses in Two Profoundly Retarded Children*, 2 J. OF ASS'N FOR PERSONS WITH SEVERE HANDICAPS 117 (1977); Cone, An-

now that integrated educational programs lead to much better functioning and more participation in integrated post-education environments.⁴⁰³ Students moving from integrated educational settings to work settings are more likely to obtain traditional jobs in integrated work settings,⁴⁰⁴ and at higher wages.⁴⁰⁵ As a United States District Court recently found, persons with severe disabilities "gain skills when they leave the institution for the community and those labeled profoundly retarded are the ones who gain the most."⁴⁰⁶ A working group at the United States Department of Health and Human Services has evaluated the outcome studies and has concluded:

[T]heir findings are consistent and reflect important behavioral change clearly associated with movement from institutions to community-based arrangements. More specifically, these studies demonstrate a consistent positive correlation between community integrated experience and the acquisition of adaptive behavior, particularly, in the areas of self-care, social behavior, and communication . . . [T]here is substantial empirical data to support the philosophical and social principles of continued depopulation of institutional settings and expansion of family and community care.⁴⁰⁷

derson, Harris, Goff & Fox, *Developing and Maintaining Social Interaction in Profoundly Retarded Young Males*, 6 J. ABNORMAL CHILD PSYCHOL. 351 (1978); Lord, & Hopkins, *The Social Behavior of Autistic Children With Younger and Same-Age Nonhandicapped Peers*, 16 J. AUTISM & DEV. DISORDERS 249 (1986).

403. See generally R. SCHIEFELBUSCH, *BASES OF LANGUAGE INTERVENTION* (1978); Brown, Wilcox, Sontag, Vincent, Dodd, & Gruenewald, *Toward the Realization of the Least Restrictive Educational Environments for Severely Handicapped Students*, 4 AESPH REV. 3 (1977); Karlin & Lloyd, *Consideration in Planning Communication Intervention: Selecting a Lexicon*, 8 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 13 (1983); Wutz, Myers, Klein, Hall & Waldo, *Unobtrusive Training: A Home-Centered Model for Communication Training*, 7 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 36 (1982).

404. See Brown, Shiraga, York, Solner, Albright, Rogan, McCarthy, & Loomis, *On Integrated Work*, in 15 EDUCATIONAL PROGRAMS FOR STUDENTS WITH SEVERE INTELLECTUAL DISABILITIES 1 (1985); Crapps, Langone, & Swaim, *Quantity and Quality of Participation in Community Environments by Mentally Retarded Adults*, 20 EDUC. & TRAINING MENTALLY RETARDED 124 (1985).

405. See generally Bellamy, Wilcox, Rose, & McDonnell, *Education and Career Preparation for Youth with Disabilities*, 6 J. ADOLESCENT HEALTH CARE 125, 127 (1986); Hasazi, Gordon, Roe, Finch, Hull, & Salembier, *A Statewide Follow-up on Post High School Employment and Residential Status of Students Labeled "Mentally Retarded,"* 20 EDUC. & TRAINING MENTALLY RETARDED 222 (1985); Hill & Wehman, *Cost Benefit Analysis of Placing Moderately and Severely Handicapped Individuals into Competitive Employment*, 8 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 30 (1983); Wehman, Hill, Goodall, Cleveland, Brooke, & Pentecost, *Job Placement and Follow-Up of Moderately and Severely Handicapped Individuals after Three Years*, 7 J. OF THE ASS'N OF PERSONS WITH SEVERE HANDICAPS 5 (1982).

406. *Homeward Bound, Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Okla. July 24, 1987) (1987 WL 27104, *17).

407. R. HELMS, DEPARTMENT OF HEALTH AND HUMAN SERVICES REPORT TO THE SECRETARY FROM THE WORKING GROUP ON POLICIES AFFECTING PERSONS WITH MENTAL RETARDATION AND OTHER DEVELOPMENTAL DISABILITIES (1988).

4. Integration Improves the Health, Independence, and Affect of Persons with Disabilities, and Renders Persons with Disabilities More Likely to Live, Work, and Recreate in Regular Community Settings

Integration dramatically improves the overall quality of life for persons with disabilities in a number of ways that are more impressionistic, yet still capable of evaluation. Researchers have measured, for example, a significantly more positive affect and appearance for persons with disabilities who have been integrated than for matched groups that were segregated.⁴⁰⁸ This is particularly important for children with disabilities. It is well-accepted in our society that children should grow up in families. Children with disabilities suffer significant adverse effects if they are deprived of that opportunity by being isolated in a segregated environment.⁴⁰⁹

Educators and disability researchers report improved appearance and responsiveness of persons with disabilities once they have been integrated, even in those who previously had been largely unresponsive in the absence of contact with others without disabilities.⁴¹⁰ Persons with disabilities living in the community are more likely to participate in the management of their activities, to make their own decisions and to be more involved in all decisions which affect their lives.⁴¹¹ Community residences have been found to be more oriented toward individual autonomy and decisionmaking.⁴¹² A number of published reports discuss parents who attribute the better general health and increased independence of their children with disabilities to the movement from segre-

408. See H. P. Parker & L. Goetz, *Affect Differences Between Students with Severe Disabilities in Differing Educational Programs* (unpublished study (1985)). The researchers utilized a scale for measuring affect that they adapted from one previously validated by others. See Dunlap & Koegel, *Motivating Autistic Children Through Stimulus-Change*, 13 J. APPLIED BEHAVIOR ANALYSIS 619 (1980).

409. S. TAYLOR, C. LAKIN, & B. HILL, *PERMANENCY PLANNING FOR ALL CHILDREN AND YOUTH: POLICY AND PHILOSOPHY TO GOVERN OUT OF HOME PLACEMENTS* (1991).

410. See generally Brown, Nisbet, Ford, Sweet, Shiraga, York, & Loomis, *The Critical Need for Nonschool Instruction in Educational Programs for Severely Handicapped Students*, 8 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 71 (1983); Brady, Shores, Bunter, McEvoy, & White, *Generalization of an Adolescent's Social Interaction Behavior Via Multiple Peers in a Classroom Setting*, 9 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 278 (1984); Breen, Haring, Pitts-Conway, & Gaylord-Ross, *The Training and Generalization of Social Interaction During Breaktime at Two Job Sites in the Natural Environment*, 10 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 41 (1985); Kahan, *Social Skills and the Disabled Child: A Guide to Appearance*, EXCEPTIONAL PARENT 47 (Aug. 1984).

411. See generally L. ROTEGARD, B. HILL & R. BRUININKS, *ENVIRONMENTAL CHARACTERISTICS OF RESIDENTIAL FACILITIES FOR MENTALLY RETARDED PEOPLE* (1982); Silverstein, McLain, Hubbell & Brownlee, *Characteristics of the Treatment Environment: A Factor-Analytic Study*, 36 EDUC. & PSYCHOL. MEASUREMENT 367 (1977).

412. See generally R. KING, N. RAYNES & J. TIZARD, *PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN* (1971); Seltzer, *Community Residential Adjustment: The Relationship Among Environments, Performance and Satisfaction*, 85 AM. J. MENTAL DEFICIENCY 624 (1981).

gated to integrated settings.⁴¹³ Persons with disabilities who are trained, work, and live in integrated settings are much more likely to enjoy a variety of living circumstances, residually and socially.⁴¹⁴ It is well documented that integrated education and training programs better prepare persons with disabilities for normal life in the community.⁴¹⁵ The skills needed to live in the community are of minimal value when taught in simulated, segregated settings.⁴¹⁶

5. Congregate Services Are of No Higher Quality than Integrated Ones, and, in Any Event, that Contention Is Not a Legally Permissible Justification for Continued State-Imposed Segregation.

Although segregation causes severe injuries,⁴¹⁷ and integration produces notable benefits,⁴¹⁸ there are still many public officials who would uphold segregated settings in the belief that higher quality services can be mustered in congregate settings.⁴¹⁹ This view is not only counter-factual, but is also contrary to Congress's intent to preclude the rationale of "quality" as an excuse for continued segregation.

The quality contention is essentially the assertion that education and service needs for persons with disabilities can be more easily met in congregate settings. Researchers are finding, however, that such settings frequently are over-adapted, negating the ability of persons with disabilities to generalize the skills they learn to normal environments.⁴²⁰ Investigators also have noted what they term the "coffee pot syndrome"—when all services are congregated in the same setting, service providers tend to spend less time providing services needed by their clients with disabilities and more time socializing with one another.⁴²¹ The coffee

413. See Turnbull & Turnbull, *Developing Independence*, 6 J. ADOLESCENT HEALTH CARE 108, 112 (1985); Lipton, *A Parent's Perspective on Integration*, in Proceedings of Bay Area Conference on the Integration of Students with Severe Disabilities (LRE Module I) 22-30 (San Francisco State University, California Research Institute (A. Halvorsen ed., 1983); Strully & Strully, *Teach Your Children*, 35 CANADIAN J. MENTAL RETARDATION 3 (1985).

414. See Conroy, Efthimiou, & Lemanowicz, *A Matched Comparison of the Developmental Growth of Institutionalized and Deinstitutionalized Mentally Retarded Clients*, 86 AM. J. MENTAL DEFICIENCY 581 (1982).

415. See generally A. HALVORSEN, PARENTS AND COMMUNITY TOGETHER [PACT MANUAL] (San Francisco State University 1983); Nietupski, Schutz, & Ockwood, *The Delivery of Communication Services to Severely Handicapped Students: A Plan for Change*, 5 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 13 (1980).

416. See generally Billingsley, *Where Are the Generalized Outcomes? An Examination of Instructional Objectives*, 9 J. OF THE ASS'N FOR PERSONS WITH SEVERE HANDICAPS 186, 191 (1984).

417. See *supra* notes 117-33 and accompanying text for a discussion of the stigmatic injuries caused by segregation and discrimination.

418. See *supra* notes 375-416 and accompanying text for a discussion of the benefits of integration for persons with and without disabilities.

419. See *supra* notes 364-68 and accompanying text for a discussion of the persistence of beliefs concerning the "benefits" of segregated services.

420. See Voeltz, *Program and Curriculum Innovations to Prepare Children for Integration*, in PUBLIC SCHOOL INTEGRATION OF SEVERELY HANDICAPPED STUDENTS: RATIONAL ISSUES AND PROGRESSIVE ALTERNATIVES 155 (N. Certo, N. Haring, & R. York eds., 1984).

421. *Id.* at 158.

pot syndrome appears to occur less often when specialized services are provided itinerantly in regular settings.⁴²² Moreover, the higher quality that might be obtained in terms of greater services, if indeed there is any, must be weighed against the far better outcomes for persons with disabilities obtained in integrated settings.

The provision of “higher quality” services to racial minorities—but in segregated settings—was a strategy successfully utilized for years in some parts of this country in attempting to circumvent Supreme Court decisions mandating integration. In cases that laid the groundwork for *Brown v. Board of Education*,⁴²³ the Supreme Court ruled unequivocally that the provision of “substantially equivalent”—or even higher quality—educational services in a segregated setting simply “does not remove the discrimination.”⁴²⁴ The Court similarly enjoined a railroad from excluding an African-American passenger from a dining car despite the railroad’s offer to provide service at his seat without additional charge.⁴²⁵ The fact that some segregated settings may manage to offer high quality programs is quite “beside the point.”⁴²⁶ The moral imperative of integration—for persons with disabilities, as for other minorities—cannot be avoided on that ground.

That Congress did not view “quality” as an acceptable justification for segregated settings is evident from the legislative history of the ADA. The House Judiciary Committee Report explained that “the fact the separate service is equal to or better than the service offered to others” cannot constitute “sufficient justification for involuntary different treatment for persons with disabilities.”⁴²⁷ The Attorney General also denied the validity of the “quality contention” in his ADA enforcement regulation.⁴²⁸

D. Congress Has Determined that the Benefits of Integrating Persons with Disabilities Far Outweigh the Costs

In the ADA, Congress expressly determined that the costs of continued segregation of persons with disabilities were outweighed by the benefits of integration—on both an economic and a moral basis. In its statutory findings, Congress established that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent

422. Notes of Transcript, *Barnett v. Fairfax County School Bd.*, 721 F. Supp. 757, 761 (E.D. Va. 1989) (No. 89-0567-A) (testimony of Dr. Edwin Sontag), *aff’d*, 927 F.2d 146 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3045 (U.S. July 8, 1991).

423. 349 U.S. 294 (1954).

424. *Sweatt v. Painter*, 339 U.S. 629, 632 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938).

425. *Henderson v. United States*, 339 U.S. 816, 819-20 (1950).

426. *Watson v. City of Memphis*, 373 U.S. 526, 538 (1963); *Missouri ex rel. Gaines*, 305 U.S. at 349.

427. COMM. ON THE JUDICIARY, *supra* note 120, at 473.

428. The “important and overarching principle” of the ADA is that [s]eparate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.” 56 Fed. Reg. 35,703 (1991).

living, and economic self-sufficiency for such individuals."⁴²⁹ Congress further declared that

the continued existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.⁴³⁰

The legislative history affirms Congress's determination that disability discrimination and segregation "impose staggering economic and social costs"⁴³¹ upon the nation. Both Congress and the President were persuaded by reports submitted by the National Council on Disability and by the testimony of witnesses that "[w]e are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever-increasing millions of potentially productive Americans in unjust, unwanted dependency."⁴³² Congress accepted and relied upon figures submitted by the National Council on Disability, an independent federal agency, indicating that disability discrimination costs the federal government as much as sixty billion dollars each year in payments for Supplemental Security Income, Supplemental Security Disability Income, Medicaid, Medicare, education, training, and rehabilitation.⁴³³ The President also accepted the sixty billion dollar figure as the projected annual federal cost savings attributable to the ADA's passage.⁴³⁴ Congress estimated additionally that as much as \$200 billion more is lost each year in tax revenues, lost expenditures by persons with disabilities on consumer goods, and in the expenditures of non-profit organizations and family members of persons with disabilities due to the nation's failure to integrate individuals with disabilities into regular community settings.⁴³⁵ Congress relied upon a Harris Poll indicating that eighty-two percent of persons with disabilities would give up their government benefits gladly if they were provided employment.⁴³⁶

Floor debate on the ADA reflects Congress's belief that "the investment that you make to enable the disabled to become productive members of our society will pay handsome dividends. Statistics indicate that funds generated by

429. 42 U.S.C.A. § 12101(a)(8).

430. *Id.* § 12101(a)(9).

431. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 18.

432. *Hearing*, *supra* note 106, at 19 (statement of Mr. Dart).

433. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 17; COMM. ON THE JUDICIARY *supra* note 120, at 25; 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin).

434. COMM. ON EDUCATION AND LABOR, *supra* note 104, at 43, (quoting statement of President Bush); 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) (quoting statement of President Bush).

435. COMM. OF EDUCATION AND LABOR, *supra* note 104, at 43-44; 135 CONG. REC. S4995-96 (daily ed. May 9, 1989) (statement of Sen. Simon). *See also* 135 CONG. REC. S10,718 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) (private sector unnecessarily spends \$77.8 billion annually for dependent care for persons with disabilities).

436. 135 CONG. REC. S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin).

eliminating discrimination would return more than \$3 for every \$1 spent,"⁴³⁷ garnering an annual cost savings to the public and private sectors of as much as \$246 billion.⁴³⁸ Congress believed that

focusing on the costs of compliance by covered entities was totally inappropriate given the economic benefits to society of reducing the deficit by getting people off of welfare, out of institutions, and onto the tax rolls. This bill must be part of our overall strategy to get our Nation's economic house in order.⁴³⁹

Furthermore, as the Chair of the President's Committee on Employment of Persons with Disabilities testified before the Senate Committee:

Is ADA affordable? Equality affordable in America? Would this question be asked about black, Hispanic or Jewish people?

The very question reveals an unconscious assumption of inequality. The very question demonstrates most dramatically the absolute necessity for a national mandate of equality. Not since the abolition of slavery has the principle of equality been negotiable for money in the United States of America.

It is the status quo discrimination and segregation that are unaffordable, that are preventing persons with disabilities from becoming self-reliant, and that are driving us inevitably towards an economic and moral disaster of giant, paternalistic welfare bureaucracy.⁴⁴⁰

Congress was well aware that there were costs, as well as benefits, associated with the ADA. Congress addressed this issue in its provisions requiring the executive agencies to promulgate regulations enforcing the ADA's public services provisions. Here, Congress provided specific guidance regarding the extent to which cost factors might be utilized as a defense to compliance with the ADA. Because the current section 504 enforcement rules were in conflict regarding this issue, Congress wisely took the opportunity to specify which portions of those regulations would govern the public services title of the ADA.

In regulations issued in 1977 and 1978,⁴⁴¹ the Secretary of the Department of Health, Education and Welfare ("HEW") considered the costs of compliance with section 504, but also properly insisted that those burdens could not abrogate the section 504 right to meaningful, integrated participation by persons

437. 136 CONG. REC. H4627 (daily ed. July 12, 1990) (statement of Rep. Oberstar).

438. *Americans with Disabilities Act: Hearings Before the House Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 143 (1989) (statement of Mr. Calkins of the President's Committee on Employment of Persons with Disabilities).

439. 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) *accord*, COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 17; 136 CONG. REC. 2627 (daily ed. May 22, 1990) (statement of Rep. Wolpe).

440. *Hearing, supra* note 106, at 19 (statement of Mr. Dart).

441. 45 C.F.R. §§ 84, 85 (1990) (coverage of recipients of federal assistance from HEW); 43 Fed. Reg. 2135 (1978) (coordination rule for other federal agencies). Following the 1979 separation of HEW into the Departments of Health and Human Services ("HHS") and Education, the HEW rule was recodified in identical form to the HHS rule. 34 C.F.R. § 104 (1990). In 1980, President Carter issued Executive Order No. 12,250, transferring the coordination of § 504 rules to the Attorney General. On August 11, 1981, the HEW coordination rule was transferred in identical form to

with disabilities in all federally assisted programs. According to the HEW Secretary's explanatory preamble, the HEW regulations established "a mandate to end discrimination and to bring handicapped persons into the mainstream of American life."⁴⁴²

In view of the importance of this mandate, HEW's Secretary decided that its requirements would not be waivable based upon cost considerations. The Secretary acknowledged, as did Congress in enacting section 504,⁴⁴³ that providing access to, and integration of, federally assisted programs "may involve major burdens on some recipients" of federal assistance.⁴⁴⁴ Yet, the Secretary stressed, "Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation. Congress's mandate to end discrimination is clear."⁴⁴⁵ The Regulatory Impact Analysis for the HEW regulation concluded

its present location in the Justice Department's regulations. 28 C.F.R. § 41 (1990). *See also* 46 Fed. Reg. 40,686 (1981).

The 1978 coordination regulation was issued closely on the heels of, and was based largely upon, the recipient regulation that had been issued the previous year. *See* 43 Fed. Reg. 2135 (1978).

442. 42 Fed. Reg. 22,676 (1977). A cabinet Secretary's explanation of a regulation, when accompanied by the regulation's final promulgation is entitled to substantial deference, especially if the cabinet official publishing the regulation is also responsible for administering the underlying statute. *See, e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (agency's construction of own regulations given considerable respect). The Supreme Court relied upon the explanatory comments of the Secretary of HEW accompanying the § 504 rule in three of its decisions: *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987); *Alexander v. Choate*, 469 U.S. 287, 305 n.26 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397, 406-07 & n.7 (1979). *See also Nelson v. Thornburgh*, 567 F. Supp. 369, 380 (E.D. Pa. 1983), *aff'd*, 732 F.2d 147 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

443. The legislative history of § 504 demonstrates Congress's belief that the evil of segregation and exclusion would economically and morally outweigh the financial burdens of integrating persons with disabilities. "The measure before us today provides that . . . our Nation's handicapped may return to their rightful place in their families and their communities as effective participating members as well as become contributors to our economy." 119 CONG. REC. 24,587 (1973) (statement of Sen. Taft). Section 504 also was thought to make good economic sense because it would free persons with disabilities from dependence upon public assistance and expensive segregated, institutional services. As Senator Humphrey questioned, "Where is the cost-effectiveness in consigning them to public assistance or 'terminal' care in an institution?" 118 CONG. REC. 525 (1972). Senator Percy asked, "What is the cost effectiveness or the sense of banishing our handicapped Americans to life on welfare . . . ?" *Id.* at 11,789. The floor debate acknowledged that public officials in each state had "plead[ed] lack of funds," *Id.* at 4341 (statement of Rep. Vanik), and had asserted that including students with disabilities would be "burdensome to the schools," 117 CONG. REC. 45,975 (1971) (Rep. Vanik). Nonetheless, Congress enacted the integration requirements of § 504, with full knowledge of the substantial burdens it would entail.

444. 42 Fed. Reg. 22,676 (1977).

445. *Id.* Having set forth integrated participation as the general touchstone of the HEW § 504 rule, the Secretary permitted substantial flexibility for compliance with that standard. The regulation permitted any method that would open an already-existing program or activity to persons with disabilities, including "such means as" reassigning programs and activities to integrated settings, redesigning equipment, assigning of aides and attendants, altering existing facilities, and constructing new facilities. 45 C.F.R. § 84.22(b) (1990). Structural or substantial alterations were required "only where there [was] no other feasible way" of opening the program to persons with disabilities. 42 Fed. Reg. 22,689 (1977). Even then, the rules allowed up to three years to make such changes. 45 C.F.R. § 84.22(d) (1990). Therefore, although the regulation permitted a choice of the "means,"

that the rule's

benefits . . . (psychic as well as pecuniary), provide a substantial offset to the costs that will be incurred. The costs involved will not be as great as widely thought and the compelling situation of some of the handicapped persons involved tips the balance in favor of proceeding with immediate implementation of the regulation.⁴⁴⁶

In the Justice Department's regulation enforcing the 1978 amendments to the Rehabilitation Act,⁴⁴⁷ which added federally conducted programs to the coverage of section 504,⁴⁴⁸ the Attorney General took a very different approach than HEW to the cost issue. Both HEW and the Department of Justice adopted flexible compliance provisions.⁴⁴⁹ The Attorney General's regulation, however, *additionally* permitted an across-the-board waiver, eliminating the duty to take "any action" in situations that "would result . . . in undue financial or administrative burdens" or in a fundamental alteration in the nature of the program.⁴⁵⁰ This action was not based upon the language or legislative history of section 504 or upon any factual determination as part of the administrative process that such defenses were necessary. The actions were based solely upon statements made in dictum by the Supreme Court in *Southeastern Community College v. Davis*,⁴⁵¹ which the Attorney General chose to embrace.⁴⁵²

of compliance, a choice had to be made; the access and integration requirements would not be waived.

To understand the congressional mandate cited by the HEW Secretary, one need only look to the statements of Representative Vanik and Senators Humphrey and Percy. As the original sponsors of § 504, their views are to be given particular weight in interpreting the legislative history of § 504. *See Alexander*, 469 U.S. at 295 n.13, 296 n.15 (citing Sen. Humphrey and Rep. Vanik as introducers of bill); *Arlene*, 480 U.S. at 282-83 n.9 (Representative Vanik's remarks constitute "primary signpost" for interpreting § 504). Representative Vanik stressed that "the handicapped are . . . hidden Only the most daring and brave risk the dangers and humiliations they encounter But the time has come when we can no longer tolerate their invisibility." 117 CONG. REC. 45,974 (1971). As the Supreme Court acknowledged in *Alexander*, § 504 was intended to commission "a national commitment to eliminate the 'glaring neglect' of the handicapped" that "caused [them] . . . to live among society 'shunted aside, hidden, and ignored.'" *Alexander*, 469 U.S. at 296 (quoting 118 CONG. REC. 526 (1972) (statement of Sen. Percy) and 117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik)). The intent was "to end the virtual isolation of millions of children and adults from society," 118 CONG. REC. 32,310 (1972) (statement of Sen. Humphrey), especially "the most severely handicapped," 117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik); 118 CONG. REC. 525 (1972) (statement of Sen. Humphrey), in order to achieve the "full integration of the handicapped into normal community living, working, and service patterns." 118 CONG. REC. 3320 (1972) (statement of Sen. Williams).

446. *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 Fed. Reg. 20,312, 20,320 (1976). The Regulatory Impact Analysis further determined that "in all cases there was evidence for pecuniary benefits that provide substantial offsets to the pecuniary costs involved. Indeed, even if non-pecuniary benefits are not added, the balance of benefits and costs appears in favor of implementation of the regulation." *Id.* at 20,364.

447. 28 C.F.R. § 39 (1990).

448. *Cf.* 29 U.S.C. § 794(a).

449. *See* 28 C.F.R. §§ 39.150(b), (c).

450. *Id.* §§ 39.150(a), 39.160(d).

451. 442 U.S. 397 (1979).

No action was ever taken to amend the earlier issued HEW regulations to conform to the Attorney General's regulation. Therefore, Congress, in looking to incorporate section 504 enforcement precepts into the ADA, was faced with conflicting standards. As a statutory compromise, Congress adopted the weaker standard permitting waivers for undue burdens and fundamental alterations of programs, but *only* for those portions of the ADA rules governing "program accessibility, existing facilities," and "communications," (i.e., architectural and communications barriers).⁴⁵³ Congress then specified that every other aspect of the public services title was to be governed by the more stringent HEW regulation, which permitted no waiver of obligations based upon cost.⁴⁵⁴ Moreover, consistent with long-settled civil rights law,⁴⁵⁵ the Supreme Court had previously ruled that Congress had "determined that it would require" entities covered by section 504 "to bear the costs" of eliminating practices that subjected persons with disabilities to discrimination.⁴⁵⁶ Section 504's sponsors acknowledged that doing so would be "burdensome to the schools," but despite the fact that schools "plead[ed] lack of funds," Congress insisted that students with disabilities be provided equal educational benefits "as U.S. citizens."⁴⁵⁷

452. The Attorney General's 1986 rule relied upon language taken from *Davis*, 442 U.S. at 411, the Supreme Court's first attempt to construe § 504. In *Davis*, the Court stated that § 504 did not require "affirmative action" in the context of that case. *Id.* The Court has, however, in its later § 504 decisions, clarified what it meant by that puzzling language and, in its latest decision, appears to have abandoned that language entirely. In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court acknowledged the race and gender discrimination antecedents to § 504, and stated that its use of the term "affirmative action" in *Davis* was an "unfortunate" and "severely criticized" choice of words. *Id.* at 300-01 & n. 20. The Court specifically clarified its *Davis* language by stating that it was limited to "'modifications' to existing programs" that were so "substantial" as to "constitute 'fundamental alteration[s] in the nature of a program' " that would jeopardize the program's very integrity. *Id.* at n.20. The Supreme Court's latest § 504 decision seems to have put to rest, finally, *Davis*'s "affirmative action" language, stating that § 504 entails an "affirmative obligation" on the part of school systems to eliminate disability discrimination. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987). The legislative history of the ADA shows that Congress expressed its agreement with the *Alexander* decision and the clarifications of the *Davis* decision included in that case. *Hearing, supra* note 106, at 46 (statement of Sen. Harkin); see also *id.* (statement of Ms. Mayerson).

453. 42 U.S.C.A. § 12134(b).

454. See 135 CONG. REC. S4996 (daily ed. May 9, 1989) (statements of Sen. Landformer and Connecticut Attorney General Lieberman) ("maximum extent feasible" standard endorsed).

455. See *Plyler v. Doe*, 457 U.S. 202, 227, 229 n.25 (1983) ("concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"); *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them"); *Mitchell v. United States*, 313 U.S. 80, 97 (1941) ("no room . . . for administrative or expert judgment with respect to practical difficulties"). See Also *Owen v. City of Independence*, 445 U.S. 622, 639 n.19 (1980); *Monell v. City of New York*, 436 U.S. 658, 681 (1978); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Griffin v. County School Bd.*, 377 U.S. 218, 232-33 (1964); *Boynton v. Virginia*, 364 U.S. 454, 459 (1960); *Smallwood v. United Air Lines*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

456. *ConRail v. Darrone*, 465 U.S. 624, 632 n.13 (1984).

457. 117 CONG. REC. 45,974-975 (1971) (statement of Rep. Vanik); 118 CONG. REC. 4341 (1972) (statement of Rep. Vanik).

The Supreme Court recently reaffirmed the principle that the expenditures required to remedy discriminatory conduct cannot abrogate the duty to do so. In *International Union v. Johnson Controls, Inc.*, the Court, construing the Civil Rights Act of 1964, held, flatly, that "the incremental cost of hiring women cannot justify discriminating against them," unless the "costs would be so prohibitive as to threaten the survival of the employer's business."⁴⁵⁸ This standard is akin to that employed by courts enforcing section 504, where, for example, the costs of eliminating disability discrimination could not justify continuing those practices unless the financial burdens were so massive as to "jeopardize the overall operations of the school system."⁴⁵⁹

The ADA's requirements are no different than requirements that a high school alter its gymnasium and athletic programs to provide equal services, such as locker facilities and sports teams, for female students. No school system would seriously attempt to bus its female athletes to congregate programs or to programs at another high school solely to avoid the construction costs of new locker space, and no court would permit such an arrangement under the gender discrimination prohibitions of the Civil Rights Act.⁴⁶⁰ Nor have the enormous costs (amounting in some cases to several millions of dollars) of eliminating race discrimination in public schools ever been allowed as an excuse for failing to do so,⁴⁶¹ even when a legislature has refused to authorize or appropriate the funds needed to cover those expenditures.⁴⁶²

This does not mean the ADA requires the impossible or the infeasible. The Attorney General certainly has the authority to permit the phasing in of integrated services for persons with disabilities for whom integration technology may not yet have been developed. This would be analogous to the approach taken in the transportation provisions of the Act, in which transit systems are permitted longer compliance times for more difficult projects necessary to provide integrated services. But the desegregation mandate itself must not be quali-

458. 111 S. Ct. 1196, 1199 (1991) (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-18 & n.32 (1978)).

459. *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982).

460. See *Manhart*, 435 U.S. at 716-18 & n.32. *Manhart* also is quite instructive. There, the defendant sought to provide a different package of benefits to males and females due to the enormously higher costs of providing equal benefits to women, as a result of their physical and actuarial attributes. The Supreme Court had no difficulty whatsoever in ruling that such practices violated the Civil Rights Act, despite the quite substantial expenditures required to eliminate the discrimination. *Id.* at 719-20.

461. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 12 (1971) (financial concerns may not be used as guise to perpetuate racial segregation in schools). The ADA's legislative history acknowledges the fears expressed in 1964 regarding the costs of implementing the Civil Rights Act. As one witness testified before the Senate Committee: "I am old enough to remember before we passed that Civil Rights Act 25 years ago, and that question was asked. And the people said it would cost too much to pass that Civil Rights Act. It was going to cause disruption in factories and businesses and the schools and everywhere else." *Hearing, supra* note 106, at 22 (statement of Mr. Dart.).

462. See, e.g., *Missouri v. Jenkins*, 110 S. Ct. 1651, 1663 (1990) (property tax levied by school district ordered increased to fund desegregation measures).

fied; otherwise, persons with disabilities in this country would be in danger of remaining segregated forever, a result that the ADA plainly precludes.

It is well-settled that when Congress has intended the employment of a cost-benefit analysis as an aid in statutory interpretation, "it has clearly indicated such intent on the face of the statute."⁴⁶³ In the ADA's statutory findings and legislative history, Congress determined that the benefits of integration far outweighed the costs of compliance with the ADA. Moreover, in instructing the executive to issue regulations, Congress carefully limited the circumstances in which costs were to be considered to the areas of architectural and communications barriers.⁴⁶⁴

The experience of public service providers and the research data are making it increasingly evident that the costs of congregate services are at least equivalent to, if not substantially more expensive than, integrated services. The provision of services in separate settings requires significant additional expenditures for facility and vehicle maintenance, utilities, and other fixed costs for the operation of the separate facilities, as well as compensation for a workforce of cafeteria workers, janitors, and bus drivers. All of these items replicate services and personnel that are already being provided in regular settings. Cost savings have been verified by a study of fifty school systems that switched from segregated to integrated programs.⁴⁶⁵ These school systems achieved specific cost savings in transportation and overhead costs.⁴⁶⁶ Putting the nonpecuniary benefits of integration aside, public officials operating in tight economies increasingly are integrating persons with disabilities into regular settings in order to take advantage of the substantial cost savings.⁴⁶⁷

In the legislative history of the ADA, Congress acknowledged that, at least in the short run, the ADA would

impose considerable expenses and rightly so. It is time that we did these things. It is time that we brought persons with disabilities into full freedom, economic and otherwise, with other citizens in our society. This bill will do that. In doing so, we should be aware that it is going to be costly and difficult and that there will be some complaints.⁴⁶⁸

While Congress accepted that

it may be more cost efficient in some cases to congregate services for

463. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 510 (1981).

464. 42 U.S.C.A. § 12134(b). The Judiciary Committee confirmed this understanding. COMM. ON THE JUDICIARY, *supra* note 120, at 51.

465. F. STETSON, S. ELTING, & S. RAIMONDI, REPORT ON PROJECT IMPACT WITH REGARD TO COST EFFECTIVENESS OF SERVICE DELIVERY TO HANDICAPPED STUDENTS IN THE LEAST RESTRICTIVE ENVIRONMENT (1982).

466. *Id.*

467. See Tousignant, *Parents Battle to Save Special Woodbridge School: Dollars v. Needs of Children Called the Issue, as Board Seeks to Mainstream the Disabled*, Wash. Post, March 11, 1991, at E-1, E-3 (Prince William County, Va. School Bd. determined it would realize annual savings of \$195,000 by closing two segregated schools and transferring students to their neighborhood schools providing identical services in regular setting).

468. 135 CONG. REC. S10,737 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

children with disabilities in a centralized location, it has been determined that such costs are outweighed by the benefits to children with disabilities and their families of being able to obtain services in their neighborhoods with their friends and family around.⁴⁶⁹

That it may be "more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services" either under section 504 or under the ADA.⁴⁷⁰ Thus, Congress understood that while the full integration of individuals with disabilities would sometimes involve substantial short-term burdens, both financial and administrative, those costs were thought to be exaggerated, and, in any event, the long-range effects of integration would benefit society as a whole.⁴⁷¹

Congress determined that "[c]osts do not provide the basis for an exemption from the basic principles in a civil rights statute, like the ADA. The mandate to end discrimination must be clear and unequivocal."⁴⁷² Congress concluded, as Senator Simon put it, that "there is simply no way to put a price tag on the lost dignity and independence of people who want to be contributing members of their families, their communities, and their country."⁴⁷³

E. Through the ADA, Pursuant to the Fourteenth Amendment, Congress Has Imposed Upon the States the Obligation to End the Continued Segregation of Persons with Disabilities, Root and Branch

In both constitutional cases⁴⁷⁴ and decisions based upon section 504,⁴⁷⁵ courts have deferred to the states' professional judgments concerning the type,

469. *Id.* at S10,721 (statement of Sen. Dodd).

470. COMM. ON THE JUDICIARY, *supra* note 120, at 50.

471. *Id.*, pt. 3, at 26; 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin). Nor was there great concern expressed about increased burdens that might be imposed by increased litigation under the ADA. As one Senator stated:

If you look back at the history of section 504, you do not find many individuals who have mental and physical disabilities that have the time or the resources to go down to the courthouse to be able to get that injunction and bring the case. For the most part, they are spending their full time just coping with the difficulties and challenges of life. What we have seen in the areas of the disability movement is a different pattern in terms of litigation than has been in the case of some of the other violations of the basic civil rights.

135 CONG. REC. S10,742 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

It was Congress's intent that a "full panoply of remedies" be available to enforce the requirements of Title II. COMM. ON THE JUDICIARY *supra* note 120, at 52, (*citing* *Meiner v. Missouri*, 673 F.2d 969 (8th Cir. 1982)). Those remedies, as the *Meiner* case held, and as the legislative history confirms, include compensatory damages. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 86 (remedies under Title II include those "both at law and in equity"). Moreover, where public entities are involved, the remedies provided by the Civil Rights Act of 1871, 42 U.S.C. § 1983, may be invoked. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980).

472. 135 CONG. REC. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin).

473. 135 CONG. REC. S10,798 (daily ed. Sept. 7, 1989) (statement of Sen. Simon); *accord, id.* at 10,718 (statement of Sen. Kennedy) ("In human terms, the cost of discrimination against people with disabilities is staggering").

474. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (deference given to judgments of qualified state officials concerning interests of retarded individuals).

manner, and level of services provided to persons with disabilities. In accepting the states' judgments as valid, courts have required persons with disabilities to prove a substantial departure from those judgments in order to prevail.⁴⁷⁶ In the ADA, Congress abrogated this approach. In the ADA's statement of intent, Congress expressly delegated to the federal government "a central role in enforcing the standards established in this Act on behalf of individuals with disabilities."⁴⁷⁷ Additionally, Congress's invocation of section 5 of the fourteenth amendment⁴⁷⁸ is strong evidence of the legislative aim to end the states' unchallenged authority to provide services in segregated settings. Moreover, Congress abrogated the states' immunity under the eleventh amendment to suits brought to enforce the ADA.⁴⁷⁹ The legislative history confirms Congress's intent to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life."⁴⁸⁰ Congress's expectation was that the "full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by excluding them, or by denying them equally effective and meaningful opportunity to benefit from all aspects of life in America."⁴⁸¹ The ADA does not require deference to the judgments of state officials because Congress knew that the states' treatment of persons with disabilities has been fraught with illegitimate judgments⁴⁸² concerning the supposed efficacy of separate, isolated public services.⁴⁸³ As Justice Brandeis once warned:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁴⁸⁴

Similar sentiments were expressed in the ADA floor debates.⁴⁸⁵

475. See, e.g., *Barnett v. Fairfax County School Bd.*, 927 F.2d 146 (4th Cir. 1991) (local school system may decide not to provide interpreter to deaf student at his community school).

476. *Youngberg*, 457 U.S. at 321-22.

477. 42 U.S.C.A. § 12101(b)(3).

478. *Id.* § 12101(b)(4).

479. *Id.* § 12202.

480. COMM. ON LABOR AND HUMAN RESOURCES, *supra* note 103, at 20; COMM. OF EDUCATION AND LABOR, *supra* note 103, at 50; HOUSE COMM. ON ENERGY AND COMMERCE, H.R. REP. NO. 485, 101st Cong., 2nd Sess., pt 4, at 25 (1990).

481. 135 CONG. REC. S4984 (daily ed. May 9, 1989) (statement of Sen. Harkin).

482. Courts have long expressed their concern over the "tentativeness of professional judgment." *Greenwood v. United States*, 350 U.S. 366, 375 (1956). See also *Estelle v. Smith*, 451 U.S. 454, 472 (1981) (validity of clinical predictions of person's future propensity for violence questioned); *Powell v. Texas*, 392 U.S. 514, 535-37 (1968) (court refused to define insanity test in constitutional terms where neither doctors nor lawyers fully understood meaning of insanity test).

483. See *supra* notes 417-28 and accompanying text for a discussion of the contention that higher quality services can be provided in segregated settings.

484. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

485. See, e.g., 135 CONG. REC. S10,717 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) ("The road to discrimination is paved with good intentions. For years, because of our concern for

Deference to the judgments of state officials thus has no more a place in enforcing the ADA than it does in enforcing the prohibitions of race discrimination in the Civil Rights Act of 1964. In *Lau v. Nichols*,⁴⁸⁶ a lower court attempted to create a defense to Title VI actions based upon such deference, ruling that the provision of public educational services solely in English to non-English-speaking students did not violate the Civil Rights Act. The court of appeals opined that

[T]he determination of what special educational difficulties faced by some students within a state or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant amounts of executive and legislative expertise and non-judicial value judgments. . . . States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their command⁴⁸⁷

On appeal, however, the Supreme Court rejected this approach and ordered that meaningful access to educational services must be provided.⁴⁸⁸ As the Court observed, the minority students in *Lau* "ask[ed] only that the Board of Education be directed to *apply its expertise* to the problem and *rectify the situation*" as required by the Civil Rights Act of 1964.⁴⁸⁹

VI. CONCLUSION

In *United States v. University Hospital, State University of New York*,⁴⁹⁰ a circuit court of appeals refused to enforce the right of a child with a disability to receive services from a public entity because this would present too onerous a burden upon the state.⁴⁹¹ In reaching this decision, the court rejected the anal-

the less fortunate, we have tolerated a status of second class citizenship for our disabled fellow citizens").

486. 483 F.2d 791 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

487. *Id.* at 799.

488. *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

489. *Id.* at 565 (emphasis added). The Supreme Court has recognized, as a "basic premise," that "the evolution of Title VI regulatory and judicial law is . . . relevant to ascertaining the intended scope of 504." *Alexander v. Choate*, 469 U.S. 287, 293 n.7 (1985). See also *Community Television v. Gottfried*, 459 U.S. 498, 509 (1983) (§ 504 patterned after Title VI of Civil Rights Act of 1964). As the Senate Report accompanying the 1974 amendments to § 504 stated: "Section 504 was patterned after and is almost identical to" Title VI. S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6400; *accord*, 120 CONG. REC. 11128 (1974) (statement of Rep. Vanik) ("section 504 . . . guarantees, without qualification, equal rights for the handicapped in federally funded or assisted programs. Its similarity to Title VI of the 1964 Civil Rights Act, in this respect, gives reason to describe section 504 as a Civil Rights Act for the handicapped"). The ADA, in turn, was patterned after both § 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964. See *supra* notes 156-78 for a discussion of the role of the Rehabilitation Act of 1973 in the genesis of the ADA. See *supra* notes 215-31 for a discussion of the incorporation of key Civil Rights Act concepts into the ADA.

490. 729 F.2d 144 (2d Cir. 1984).

491. *Id.* at 157-60.

ogy between the child's discriminatory treatment and discriminatory treatment based upon race.⁴⁹² In a particularly blunt dissent, however, Judge Winter pointed out that the section 504 requirements were based directly upon the requirements under the Civil Rights Act of 1964.⁴⁹³ Judge Winter observed that "Congress was persuaded that a handicapped condition is analogous to race," and that "discrimination on the basis of handicap should be on a statutory par with discrimination on the basis of race."⁴⁹⁴ Applying this analysis to the case before him, Judge Winter stated that a

judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment. . . . [O]nce the . . . analogy to race is acknowledged, the intrusion on state authority becomes insignificant.⁴⁹⁵

Judge Winter accused the majority of essentially abrogating a legislative victory duly and fairly won by the disability community:

The logic of the government's position on these aspects of the case is thus about as flawless as a legal argument can be. Any doubt must stem not from a deficiency in the argument based on the analogy to Title VI of the Civil Rights Act, but from a disagreement as to whether a handicapped condition is fully analogous to race. . . . Whether that doubt is justified or not, however, courts are not the proper fora in which the reasonableness of the analogy to race is to be judged.

Selective refusals to be guided by precedents under Title VI of the Civil Rights Act are likely to lead to an incoherent body of interpretive law under Section 504. . . . If that interpretation stands, the handicapped will be deprived of a fairly won political victory

Also, I would respectfully suggest that we act outside our legitimate area of authority in declining to follow the path staked out by Title VI of the Civil Rights Act. Congress did not adopt the analogy to race merely as a legislative means to a policy goal but was persuaded and politically energized by the view that the analogy was correct. A judicial failure to follow the analogy where it leads is an outright disagreement with Congress's judgment⁴⁹⁶

492. *Id.* at 157.

493. *Id.* at 162 (Winter, J., dissenting).

494. *Id.* (Winter, J., dissenting).

495. *Id.* (Winter, J., dissenting).

496. *Id.* at 162-63 (Winter, J., dissenting). Judge Winter also wrote that:

Finally, we facilitate the democratic legislative process by applying the analogy to race as adopted by the Congress. . . . If courts are perceived as ready to "correct" overbroad legislation, Congress will find it ever more tempting to avoid its responsibility to resolve the highly delicate issues which may lurk in seemingly unobjectionable legislative proposals. Rhetorical flourishes will be substituted for statutory precision and "voids" in legislative histories will be ever more frequent. This is particularly so in cases involving legislative analogies to race. The moral and legal successes of the civil rights movement have prompted many groups to seek legislation which puts a particular characteristic or condition on a legal par with race. So long as the courts are perceived to stand ready to consider

With the ADA's enactment, the disability rights movement stands at a crossroads. If the integration requirements of the Act are enforced in a fashion identical to the way analogous requirements have been enforced by the judiciary and executive branches under section 504, little will be done to end the historic segregation and isolation of persons with disabilities. Indeed, as demonstrated in this article, Congress's intent to prescribe the race discrimination standards under the Civil Rights Act of 1964 as the standards for disability discrimination under the ADA could not be clearer.

If Judge Winter's statements are taken to heart, there will be true enforcement of the ADA, and the regime of segregation and degradation on grounds of disability will be ended "root and branch"⁴⁹⁷ as Congress intended. However, if by judicial or executive fiat the ADA's desegregation mandate is watered down or abrogated, as has happened in section 504 enforcement, persons with disabilities will be deprived of their "fairly won political victory," and will continue to be subjected to segregation and exclusion.

tempering such legislation where it leads to controversial results, the path of least political resistance will always be for the Congress to avoid serious consideration of the actual consequences of legislating particular analogies to race. Only an apprehension that such legislative analogies will be enforced by courts as written can provide a counter incentive to induce Congress to address its legislative responsibilities.

Id. at 163 (Winter, J., dissenting).

497. See *supra* note 153 and accompanying text for Representative Dellum's use of this analogy.

