THE AMERICANS WITH DISABILITIES ACT: FEDERAL MANDATE TO CREATE AN INTEGRATED SOCIETY

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I. Introduction

On July 26, 1990, President Bush signed into law the Americans With Disabilities Act (ADA).[1] For forty-three million Americans with disabilities, the ADA, which bars discrimination by public and private entities, represents the culmination of a long struggle to secure legislatively-created civil rights. For the private sector, employers and public service businesses alike, the ADA represents a new federal mandate that is expected to increase litigation and cause widespread confusion as businesses scramble to comply with the provisions that require equal access to employment, public accommodations and the removal of architectural barriers.[2]

Titles I and III of the ADA concern employment and public accommodations, respectively, and employers and businesses throughout the country are particularly concerned. This article examines the ADA's impact on the private sector. Additionally, this article analyzes the constitutional and legislative framework which attempts to move the nation toward full integration of per-

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[1] 42 U.S.C. §§ 12101-12213 (1991). The United States Senate passed its version of the ADA, S.933, on September 7, 1989, by a vote of 76 to 8. 136 CONG. REC. S10803 (daily ed. Sept. 7, 1989). The United States House of Representatives passed a nearly identical piece of legislation, H.R. 2273, on May 22, 1990, by a vote of 403 to 20. 136 CONG. REC. H2638 (daily ed. May 22, 1990).

[2] *See 20 Percent Increase In EEOC Workload Predicted*, 138 LAB. REL. REP. (BNA) 335 (Nov. 11, 1991); *see also* Randall Samborn, *No Flood of ADA Suits—Yet*, NAT'L L.J., Mar. 16, 1992, at 3, 12 (Although the flood of agency complaints and lawsuits that were predicted has yet to materialize, " '[t]his is the tip of the iceberg. . . . As the disabled see suits being brought, they will become gradually educated and empowered.' " *Id.* (quoting Michael D. Esposito, Esq., of Blank, Rome, Cominsky & McCauley, Philadelphia, PA)).

sons with disabilities. Finally, this article also discusses important litigation resulting from predecessor legislation.

II. Legislative Overview

As noted, the ADA bars job discrimination against persons with disabilities and is designed to provide equal access to public services and accommodations. The law prohibits private employers engaged in commerce, and businesses that provide public services and accommodations, from discriminating against individuals who are qualified for the job or who are otherwise entitled to receive services.

Title I of the ADA covers employers, employment agencies, labor organizations, and joint labor-management committees with fifteen or more employees that are engaged in an industry affecting commerce.[3] Titles II and III cover public and private providers of services, transportation and accommodations that affect commerce.[4] Title IV concerns miscellaneous provisions, including the creation of a private cause of action and the waiver of the states' sovereign immunity.[5]

A. *Who is Protected*

The ADA is designed to protect a "qualified individual with a disability," which is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[6] "Disability" is defined as: 1) a physical or mental impairment that limits substantially one or more of an individual's major life activities; 2) a record of the individual's impairment; or 3) the individual regarded as having such impairment.[7]

While the first two definitions of disability can be measured or demonstrated, the third definition concerns so-called "attitudinal barriers."[8] The United States Supreme Court articulated

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[3] *See* 42 U.S.C. §§ 12111-12117 (1991).
[4] *See id.* §§ 12131-12189.
[5] *See id.* §§ 12201-12213.
[6] *Id.* § 12111(8).
[7] *Id.* § 12102(2).
[8] *See* Act of July 1990, Pub. L. No. 101-336, 1990 H.R. REP. No. 101-485(I), U.S.C.C.A.N. (327 Stat.) 267, 335 (codified at 42 U.S.C. §§ 12101-12213).

the rationale for this third definition in *School Board of Nassau County v. Arline*.[9] The Court noted that Congress included this third definition in a predecessor statute because it was concerned that the negative attitudes of others could potentially stigmatize an otherwise qualified person with a disability. As the Court explained, "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[10] Consequently, the ADA protects recovering alcoholics and drug abusers[11] and persons with infectious or communicable diseases who do not pose a significant risk to the health and safety of others.[12]

While the ADA broadly defines "disability," only "qualified" persons are entitled to protection. Persons are qualified if they can perform the "essential functions" of a job, "with or without reasonable accommodation."[13] A reasonable accommodation may include making existing facilities physically accessible, restructuring a job or providing auxiliary aids.[14] Employers are required to provide reasonable accommodations unless it poses an "undue hardship."[15] Moreover, the ADA encompasses recruitment, hiring, promotion, compensation, job training, medical benefits, and any other term, condition or privilege of employment.[16] Thus, if a person with a disability can perform the essential functions of a job with a reasonable accommodation, an employer cannot discriminate against that person on the basis of

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9 480 U.S. 273 (1987).

10 *Id.* at 283 (footnote omitted).

11 42 U.S.C. § 12114 (1991). For purposes of this section, the ADA emphasizes that a qualified individual is one who is participating in or has completed successfully a supervised drug-rehabilitation program or otherwise has been rehabilitated. The individual must no longer be using illegal drugs. *Id.* § 12114(b).

12 *Id.* § 12113. *See, e.g.*, Doe v. Attorney General, 723 F. Supp. 452 (N.D. Cal. 1989) (AIDS is a handicap within the meaning of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 (1976))); Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (drug addiction considered a handicap within the meaning of the Rehabilitation Act); Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737 (7th Cir. 1988) (while alcoholism is a handicap within the meaning of the Rehabilitation Act, the Act does not preclude decisions based on the actual attributes of the handicap as opposed to stereotypes).

13 42 U.S.C. § 12111(8), (9) (1991).

14 *Id.* § 12111(9).

15 *Id.* § 12112(b)(5)(A).

16 *Id.* § 12112(a).

the individual's disability. Clearly, the ADA urges employers to evaluate their employment policies in light of the legal and equitable remedies provided to litigants.

B. *The Private Cause of Action*

Significantly, the ADA mandates that federal law enforcement officials shall investigate alleged violations of the ADA and shall undertake periodic reviews of employers and businesses.[17] Additionally, the ADA provides a private cause of action for injunctive relief.[18]

As well as creating a private cause of action for individuals, the ADA may also give legal standing to sue in federal court to an individual or entity associated with or related to a person with a disability.[19] Conceivably, an advocacy, service or professional organization, or a parent or guardian may have standing to bring an action under the ADA. In addition to ordering traditional legal or equitable relief, the United States District Court is empowered to order an employer to provide a reasonable accommodation or to order a business to provide physical access.[20] The court may also award attorney's fees and costs to a prevailing party.[21]

C. *Defenses*

In cases of job discrimination, an employer may exercise its judgment when deciding which job functions are "essential."[22] Moreover, as noted, a proposed accommodation may pose an "undue hardship"[23] and, therefore, be deemed unreasonable. However, the refusal by an employer to provide, without undue hardship, a reasonable accommodation for a qualified individual with a disability is discriminatory.[24] No statutory language in the ADA bars an employer from obtaining voluntary medical histories or from making inquiries into the ability of an applicant or

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17 *Id.* § 12188(b).
18 *Id.* § 12188(a).
19 *See id.* § 12182(b)(1).
20 *Id.* § 12188(a)(2).
21 *Id.* § 12205.
22 *Id.* § 12111(8).
23 *See supra* note 15 and accompanying text.
24 42 U.S.C. § 12112(b)(5)(B) (1991).

employee to perform job-related functions.[25]

The primary employer defense to a claim for employment discrimination is that the discriminatory practice is "job-related and consistent with business necessity[.]"[26] Thus, employers may set qualification standards or administer employment and aptitude tests so long as applicants with disabilities are given an equal opportunity to meet the qualifications or take the test. For example, an employer may accommodate an applicant who is visually impaired with a large print test, a reader or a scribe.

The ADA's primary approach to public accommodations is to require that services be provided "in the most integrated setting appropriate to the needs of the individual."[27] Thus, architectural barriers must be removed unless removal is cost-prohibitive.[28]

D. *Legislative Intent*

The primary intent of the ADA is to eradicate day-to-day discrimination against persons with disabilities.[29] The ADA represents an attempt to legislate comprehensive social policy by barring attitudinal as well as environmental barriers. Such an effort demonstrates a society working to transform itself by striking a balance between the morality of the marketplace and the imperative of equal opportunity.

III. Legislative and Moral Transformation

In 1927, the United States Supreme Court upheld the constitutionality of a Virginia statute that promoted the sterilization of "mental defectives."[30] Writing for the majority, Justice Holmes declared that:

> It 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. The principle that sustains com-

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25 *Id.* § 12112(c)(4)(B).

26 *Id.* § 12113(a). A reasonable accommodation to the qualified individual will not eradicate the discriminatory practice. *Id.*

27 *Id.* § 12182(b)(1)(B).

28 *Id.* §§ 12182(b)(2)(A)(iv) & (v), 12181(9).

29 *See id.* § 12101(b)(4).

30 Buck v. Bell, 274 U.S. 200 (1927).

> pulsory vaccination is broad enough to cover the Fallopian tubes. Three generations of imbeciles are enough.[31]

Although Justice Holmes once admonished his brethren for applying Spencerian economic theory to constitutional jurisprudence,[32] he apparently had little difficulty applying Social-Darwinian theory to the Virginia sterilization statute. Indeed, during this time, the American Eugenics movement was advocating the killing of all "unfit persons," particularly persons with disabilities who were "routinely referred to as 'mere animals,' 'sub-human creatures' and 'waste products' who were draining the economy and producing only 'pauperism, degeneracy, and crime.' "[33] Holmes' Social-Darwinian thinking, masked by a thin legal analysis, merely reflected the societal views of his time.

The long struggle for human rights and the transformation of the moral foundation of the United States reflect, perhaps, the primary historical current of our time. Suffice it to say, economic growth, technological advancement and an increasing belief in the dignity and worth of all persons fostered the moral and legislative climate for the passage of federal laws protecting the rights of persons with disabilities.[34] In less than a century, the national attitude had moved from eradicating "unfit persons" to guaranteeing fundamental rights for people with disabilities, culminating in the enactment of a comprehensive national law prohibiting discrimination. Prior to the ADA, Congress passed laws in piecemeal fashion reflecting the gradual transformation of societal attitudes. The Rehabilitation Act of 1973 was the most significant legislation enacted.[35]

Section 504 of the Rehabilitation Act of 1973 (section 504) provides in relevant part: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving

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31 *Id.* at 207 (citation omitted).

32 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

33 John J. Sarno, *Born to Live or Born to Die: The Handicapped Newborn in New Jersey*, 11 SETON HALL LEGIS. J. 201, 214 n.93 (1987) (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 19, 20 (1983)).

34 *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

35 29 U.S.C. §§ 701-795 (1976).

Federal financial assistance."[36] Patterned after Title VI of the Civil Rights Act of 1964,[37] section 504 prohibits discrimination against an "otherwise qualified handicapped individual" by federally-funded programs. However, as will be discussed, while section 504 provides minimal protection in nonfederally-funded employment situations, it does provide the basic legislative foundation for the ADA. Accordingly, federal litigation involving section 504 will influence significantly the interpretation and enforcement of the ADA.[38]

IV. Comprehensive Federal Protection

The enactment of the ADA secures the preeminence of the federal role in eradicating discrimination against persons with disabilities and has been characterized as "an unabashed venture into social engineering" by the federal government.[39] The ADA ensures "that the Federal Government [will play] a central role in enforcing the standards established [by the Act] on behalf of individuals with disabilities[.]"[40] The federal government involvement is necessary because "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services[.]"[41]

Moreover, the purpose of the ADA, among other things, is "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

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36 *Id.* § 794.

37 42 U.S.C. § 2000d (1976).

38 The ADA provides unprecedented protection to persons with disabilities. Heretofore, no court has ever declared that persons with disabilities constitute a suspect class for the purpose of constitutional protection. Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981). Moreover, Congress failed to amend the Civil Rights Act of 1964 to prohibit discrimination against persons with disabilities in nonfederally-funded employment situations. S. Rep. No. 316, 96th Cong., 1st Sess. (1979). Further, while the United Nations General Assembly adopted a Declaration on the Rights of Disabled Persons, it has taken nearly a quarter of a century to enact the ADA. *See generally* JAMES HASKINS AND J.M. STIFLE, THE QUIET REVOLUTION 9-10 (1979).

39 Peter T. Kilborn, *Major Shift Likely As Law Bans Bias Toward Disabled*, N.Y. TIMES, July 19, 1992, at A1.

40 42 U.S.C. § 12101(b)(3) (1991).

41 *Id.* § 12101(a)(3).

faced day-to-day by people with disabilities."[42] Thus, in terms of regulating private industry and business, the ADA relies upon the national government's plenary power to regulate commerce among the several states.[43] Accordingly, while the ADA preempts state law, it does so only if state law provides less protection to persons with disabilities.[44]

The federal government has invoked the full sweep of its power to regulate commerce to nationalize, among others, economic policy,[45] consumer protection,[46] labor standards,[47] environmental protection,[48] and, of course, civil rights.[49] With the passage of the ADA, the federal government has provided "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"[50]

A. *The Sweep Of The Commerce Clause*

The ADA provides: "No individual shall be discriminated

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42 *Id.* § 12101(b)(4).

43 U.S. CONST. art. I, § 8, cl. 3. *See* Champion v. Ames, 188 U.S. 321 (1903).

44 42 U.S.C. § 12201(b) (1991). A majority of the states have statutes that provide a legal remedy for various discriminatory practices against persons with disabilities. *See* Jane Massey Draper, Annotation, *What Constitutes Handicap Under State Legislation Forbidding Job Discrimination On Account Of Handicap*, 82 A.L.R.4th 26 (1990); W.A. Harrington, Annotation, *Construction And Effect Of State Legislation Forbidding Job Discrimination On Account of Physical Handicap*, 90 A.L.R.3d 393 (1979). In terms of employment, "[s]tate laws enacted to prohibit job discrimination on account of handicap have as a common ideal the protection of individuals who are at a disadvantage in the workplace because of physical or mental conditions which appear to make them less efficient or able workers." 82 A.L.R.4th at 34.

45 Wickard v. Filburn, 317 U.S. 111 (1942).

46 Perez v. United States, 402 U.S. 146 (1971).

47 United States v. Darby, 312 U.S. 100 (1941).

48 Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

49 Katzenbach v. McClung, 379 U.S. 294 (1964).

50 42 U.S.C. § 12101(b)(1) (1991). Passage of the ADA was the result of vigorous support from both the legislative and executive branches of the national government. In testimony before the House Subcommittee on Civil and Constitutional Rights, Attorney General Thornburgh, on behalf of President Bush, noted:

> One of the . . . most impressive strengths [of the ADA] is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

Act of July 1990, Pub. L. No. 101-336, 1990 H.R. REP. No. 101-485(I), U.S.C.C.A.N. (327 Stat.) 267, 330 (codified at 42 U.S.C. §§ 12101-12213).

against on the basis of disability in the full enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[51]

While the ADA's prohibition against "public discrimination" by private entities closely follows the landmark Civil Rights Act of 1964, which protects Americans of African descent and other minorities from public discrimination,[52] the ADA defines "public accommodation" with remarkable specificity.[53] For example, along with the traditional private entities that affect interstate commerce, such as hotels, restaurants and theaters, the ADA specifically defines a "public accommodation" as a bakery, grocery store, clothing store, hardware store, shopping center, laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, pharmacy, library, health spa, bowling alley, golf course, professional service, hospital, educational facility, entertainment or recreation center, public transportation, rail and bus stations, or any other place of public gathering.[54] In short, the ADA prohibits discrimination against persons with disabilities by any private entity affecting commerce, excluding, perhaps, a church, synagogue or other place of worship.

The ADA broadly defines "commerce" as "travel, trade, traffic, commerce, transportation, or communication—(A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country."[55] However, although the ADA apparently extends federal protection to most places of public accommodation,

> it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce.

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51 42 U.S.C. § 12182(a) (1991).
52 *See id.* § 2000a.
53 *Id.* § 12181(7).
54 *Id.*
55 *Id.* § 12181(1).

> [The United States Supreme Court has] consistently held that the regulated activity must have a *substantial* effect on interstate commerce.[56]

In *Heart of Atlanta Motel v. United States*,[57] the United States Supreme Court held that a 216-room motel located in downtown Atlanta, Georgia could not refuse the rental of rooms to Americans of African descent by virtue of the Civil Rights Act of 1964. In finding the federal law constitutional, the Court rejected the argument that the operations of the motel were purely local in character. Rather, the Court made a limited inquiry in determining whether an exercise of congressional power is valid under the Commerce Clause.[58] In short, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[59]

The "rational basis test," articulated by the Court and later reaffirmed in an environmental protection context,[60] has been sharply criticized as a vehicle for expanding federal power at the expense of a state's right to regulate local activities within its borders.[61] Justice, now Chief Justice, Rehnquist explained that there must be a showing that the regulated activity have a "substantial effect" on interstate commerce.[62]

In *United States v. Lansdowne Swim Club*,[63] the Third Circuit Court of Appeals affirmed a trial court's finding that a community swimming pool located in Lansdowne, Pennsylvania affected commerce because a sliding board was manufactured in Texas and a substantial portion of the food served by the pool's snack bar was transported via interstate commerce, including soft drinks produced in Maryland.[64] Moreover, approximately one in ten guests were out-of-state residents.[65]

Under the "rational basis test," a court construing the ADA

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56 Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring).

57 379 U.S. 241 (1964).

58 *Id.* at 258.

59 *Hodel*, 452 U.S. at 276 (citing *Heart of Atlanta Motel*, 379 U.S. at 258).

60 Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989).

61 *Hodel*, 452 U.S. at 310-11.

62 *Id.*

63 894 F.2d 83 (3d Cir. 1990).

64 *Id.* at 87-88.

65 *Id.* at 87.

would first look at the statute. Finding that the ADA defines a public accommodation as any place of recreation or public gathering, presumably a court would defer to congressional findings for any rational basis. Since Congress has specifically found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency[,]"[66] ADA protection will most likely apply to the community swimming pool given the facts in *Lansdowne Swim Club*.

Under the "substantial effects test," however, it is unclear whether federal power could reach into the community swimming pool, or the bakery, beauty shop or shoe repair service. Even in *Heart of Atlanta Motel*, the Supreme Court emphasized that Congress had the power to regulate local activities "which might have a substantial and harmful effect upon that commerce."[67] If the current majority of the United States Supreme Court firmly adopts the "substantial effects test" in determining whether local activity falls within the statutory scope of the ADA, there may very well be a constitutional confrontation between Congress and the Court over ADA's proper scope.[68]

B. *The Economic Implications*

The ADA prohibits employers, engaged in an industry affecting commerce, who have fifteen or more employees, from discriminating against such qualified persons with disabilities.[69] An estimated 1.25 million employers must comply with the ADA.[70] As will be discussed, an employer is required to accommodate the employee with a disability, unless the accommodation poses an "undue hardship" on the employer.[71] Additionally, a job re-

66 42 U.S.C. § 12101(a)(8) (1991).

67 379 U.S. at 258.

68 There is no doubt that, by enacting the ADA, Congress has invoked the "sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) (1991). Unlike the Civil Rights Act of 1991 that "reversed" at least seven Supreme Court cases, *see* Timothy Noah & Albert R. Karr, *What New Civil Rights Law Will Mean*, WALL ST. J., Nov. 4, 1991, at B1, Congress may not expand its power beyond that granted by the United States Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

69 42 U.S.C. §§ 12111(5)(A), 12112(a) (1991).

70 Kilborn, *supra* note 39, at 1.

71 42 U.S.C. § 12111(10) (1991).

quirement cannot screen out an applicant with a disability, unless the requirement is "job-related and consistent with business necessity[.]"[72]

Commentators have noted that there is considerable dispute between various approaches to solving job discrimination.[73] Critics claim that such solutions should not focus on the activities of employers who are the source of most wealth in a society.[74] It has been estimated that employers will spend $2 billion annually as a direct consequence of the ADA.[75]

While employers of various sizes may collectively incur substantial cost in recruiting, hiring and accommodating employees with disabilities, evidence suggests that the nation will ultimately save over $60 billion annually in federal and state support payments and added tax revenue.[76] In any event, an employer should determine whether an accommodation would impose an undue hardship by considering its cost, the size and financial resources of the business, the type of activity, and the ability to pay for the accommodation.[77]

V. Special Considerations in Cases Involving Employment Discrimination

As previously discussed, the ADA bars employers from discriminating against qualified persons with disabilities by, among other things, requiring reasonable accommodations, unless the accommodation would pose an undue hardship. While the ADA opens up an entirely new area of employment law, there are cases that have been litigated under section 504 which will guide the development of the ADA.

In *Southeastern Community College v. Davis*,[78] an individual with a hearing impairment applied for entrance into a nursing program at a community college. The applicant was denied entrance

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72 *Id.* §§ 12112(b)(6), 12113(a).

73 LESTER C. THUROW, THE ZERO-SUM SOCIETY 184-89 (1980).

74 *Id.* at 180.

75 *See* Bob Davis, *January Surprise: Bush Plans to Unveil a 90-Day Ban On New Regulations to Spur Economy, Quiet Critics*, WALL ST. J., Jan. 20, 1992, at 1.

76 Act of July 1990, Pub. L. No. 101-336, 1990 H.R. REP. No. 101-485(I), U.S.C.C.A.N. (327 Stat.) 267, 325-26 (codified at 42 U.S.C. §§ 12101-12213).

77 42 U.S.C. § 12111(10)(B) (1991).

78 442 U.S. 397 (1979).

to the program because of her hearing disability, although she met all of the other entrance criteria. Finding that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap[,]"[79] the Court emphasized that "legitimate physical qualifications may be essential to participation in particular programs."[80]

Having firmly held that an individual with a disability must meet all of the program's requirements, the remaining question was whether the physical qualifications demanded by the nursing program were necessary.[81] Conceding that the ability to hear was indispensable for many of the functions that a nurse performs, the applicant nevertheless argued that the college was obligated to accommodate her by providing individual attention from a nursing instructor.[82] The Court rejected her argument holding that such an accommodation would "fundamentally alter" the program and that section 504 did not require the college to make "substantial adjustments . . . to eliminate discrimination against otherwise qualified individuals[.]"[83]

The ADA appears to adopt the guiding principle in *Davis* that a qualified person must meet job standards by requiring that qualified persons with disabilities perform "the essential functions of the employment position," with or without a reasonable accommodation.[84] Refining the "essential functions" analysis in *Davis*, the ADA places the burden on the employer to show the critical nature of the function.[85]

Additionally, the ADA seeks to codify the concept of reasonable accommodation. In *Davis*, the Supreme Court held that an accommodation is "reasonable" if it does not fundamentally or substantially alter the job.[86] The ADA attempts to define what is reasonable, including making existing facilities "readily accessible" and modifying the context of the employees' performance, i.e., part-time or modified work schedules, job restructuring, or

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79 *Id.* at 406.
80 *Id.* at 407 (footnote omitted).
81 *Id.*
82 *Id.* at 408-09.
83 *Id.* at 410.
84 42 U.S.C. § 12111(8) (1991).
85 *Id.*
86 *Davis*, 442 U.S. at 412-13.

reassignment, as opposed to modifying the level of performance.[87] Additionally, an employer may be required to acquire technology which may enhance job performance.[88] For example, voice-activated computers could enable an individual who is blind, but otherwise qualified, to perform essential job functions. On the other hand, telecommunications technology can translate speech into the written word for individuals who are deaf.

Moreover, the ADA elaborates on the *Davis* Court's rationale on how far an employer must go to accommodate an employee with a disability by incorporating an "undue hardship" standard, measured by the employer's overall financial resources and the expense of the accommodation.[89] Likewise, an otherwise discriminatory standard may be a "business necessity."[90]

In *School Board of Nassau County v. Arline*,[91] the United States Supreme Court held that a teacher with tuberculosis, a contagious disease, may be protected by section 504. Noting that the legislative history of section 504 demonstrated that Congress "was as concerned about the effect of an impairment on others as it was about its effect on the individual[,]"[92] the Court held that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[93] The Court went on to add that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[94]

The ADA clearly acknowledges the myths and fears referenced in *Arline* and adopts its reasoning.[95] However, if an employer can show that an individual with a disability or disease is a significant risk to the health or safety of others, that person may

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87 42 U.S.C. § 12111(9) (1991).
88 *Id.* § 12111(9)(B).
89 *Id.* § 12111(10).
90 *Id.* § 12113.
91 480 U.S. 273 (1987).
92 *Id.* at 282.
93 *Id.* at 284.
94 *Id.* (footnote omitted).
95 *See* 42 U.S.C. §§ 12101, 12113(d) (1991).

be excluded from employment.[96]

Also, in *Alexander v. Choate*,[97] the Supreme Court held that a plaintiff may bring a private action pursuant to section 504 by utilizing a "disparate impact theory." In other words, a claim may be brought for *unintentional* discrimination. The ADA clearly adopts the disparate impact theory of discrimination by making it illegal for an employer to utilize standards and criteria which have a discriminatory impact,[98] unless the discriminatory criteria is "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation[.]"[99]

Finally, while the ADA is silent on the appropriate burden of proofs carried by potential litigants, the Tenth Circuit Court of Appeals, relying upon *Davis*, has set forth the following standards:

> 1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from* his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;
> 2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements *in spite of* his handicap, or that his rejection from the program was for reasons other than his handicap;
> 3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.[100]

Critics have predicted that the ADA will result in an explosion of federal litigation.[101] However, the ADA specifically encourages alternate dispute resolution, such as conciliation, mediation and ar-

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96 *Id.*
97 469 U.S. 287 (1985).
98 42 U.S.C. § 12112(b) (1991).
99 *Id.* § 12113.
100 Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).
101 *See supra* notes 2, 39 and 73.

bitration.[102] While an aggrieved party may not choose to submit the adjudication of important federal claims to an arbitrator, the United States Supreme Court has held that a federal age-discrimination claim was subject to mandatory arbitration by virtue of an arbitration clause contained in a securities registration form.[103]

VI. Removal of Existing Architectural Barriers

While the case law involving section 504 will most likely guide interpretation of the employment provisions of the ADA, the ADA requirements to remove architectural barriers by public accommodations is unprecedented. In short, removal of such barriers must be "readily achievable," which means "easily accomplishable and able to be carried out without much difficulty or expense."[104]

This provision to remove architectural barriers may prove to be the most controversial part of the ADA because potentially it may carry the greatest cost to public accommodations. While the ADA allows a public accommodation to consider the cost of the removal,[105] the provision will surely be tested in a future legal proceeding. Of primary importance is that the ADA makes unequal or separate benefits illegal,[106] and requires "the most integrated setting appropriate to the needs of the individual."[107]

VII. Conclusion

The ADA embodies the nation's highest aspirations by mandating an integrated society. ADA's scope is unprecedented, and it is certainly the most comprehensive civil rights legislation in the last quarter century. Arguably, the ADA represents the culmination of the civil rights movement in the twentieth century and, with its emphasis on technology and human development, may initiate new movements in the next century.

The private sector is required legally to provide an integrated workplace and marketplace. The costs of achieving this

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102 42 U.S.C. § 12212 (1991).
103 Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).
104 42 U.S.C. § 12181(9) (1991).
105 *Id.* § 12181(9)(A).
106 *Id.* § 12182(b)(1)(A)(ii), (iii).
107 *Id.* § 12182(b)(1)(B).

integration fall squarely on the private sector, with the intervention of federal power in virtually every commercial activity. Like other civil rights laws, the ADA reflects the great paradox of our time: increased government intervention affording greater personal freedom and equality of opportunity to individuals with disabilities. No doubt, litigants will square off, and society, through the courts, will attempt to strike the appropriate balance.

Further, similar to other federal civil rights laws, the ADA may force a constitutional confrontation between Congress and the Supreme Court over the legislation's proper scope. While the federal government has intervened in the day-to-day activities of the marketplace, this exercise of national power may lead to new scrutiny of the grant of congressional authority by the courts.