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The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problem Areas (symposium)

Howard C. Eglit, *Chicago-Kent College of Law*

THE AGE DISCRIMINATION ACT OF 1975, AS AMENDED: GENESIS AND SELECTED PROBLEM AREAS

HOWARD EGLIT*

Billions of dollars in federal moneys are distributed annually to state and local governments, as well as nongovernmental entities, by way of grants. These may be made in accordance with statutorily set distribution formulas, allowing for little or no choice by the funding agency either as to recipients or levels of funding. Grants may also be distributed as discretionary allocations made by federal agencies which are authorized by statute to fund different programmatic efforts, free of statutory strictures setting either the identity of the grant recipients or specific amounts to be received.¹

The numbers and dollars involved in these federal grant programs are enormous. At least ten federal agencies and twenty-two independent federal entities administer more than 700 programs involving the distribution of grant moneys; the total annual disbursements approximate \$100 billion.² Given the extent of this grant system, it is hardly surprising that Congress has imposed conditions on the receipt and use of this federal financial assistance.³ Among these, statutory prohibitions as to various forms of discrimination by recipients of such assistance stand as critically important limitations.⁴ Title VI of the Civil

* Associate Professor, IIT/Chicago Kent College of Law; J.D., University of Chicago.

1. As to the various types of grants, *see* R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 38-45 (1979).

2. In 1980, 10 federal agencies and 22 independent agencies administered 735 federal programs covered by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979). U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL: AGENCIES WHEN PROVIDING FEDERAL FINANCIAL ASSISTANCE SHOULD ENSURE COMPLIANCE WITH TITLE VI, at 1 (April 15, 1980). This statute is the model for the primary age discrimination law applicable to grantees, the Age Discrimination Act of 1975. 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979). Thus, the same statistics would apply in the age context. By virtue of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981), a small number of block grant programs were established to replace a large number of specific grant programs hitherto administered by the federal government. These block grants transfer primary administrative responsibility to the states and confer substantial discretion on the states as to the use of the grant funds.

3. "Federal financial assistance," for the purposes of the Age Discrimination Act, is defined by the government-wide regulations promulgated by the then Department of Health, Education and Welfare (now the Department of Health and Human Services) to implement the Act. *See, e.g.*, 45 C.F.R. § 90.4 (1980). As to the supplanting of the Department of Health, Education and Welfare by the Department of Health and Human Services, *see* note 55 *infra*.

4. Federal agencies are, of course, empowered to set rules governing the receipt and use of

Rights Act of 1964,⁵ which outlaws discrimination on the bases of race, color and national origin, was the first such major nondiscrimination statute limiting funding recipients. It in turn has served as the model for bans on sex-based discrimination by educational institutions receiving federal financial assistance,⁶ discrimination based on handicap,⁷ and age discrimination, a ban embodied in the Age Discrimination Act of 1975, as amended.⁸

The ADA is the primary statutory vehicle devised by the Congress to secure the amelioration of age discrimination perpetrated by recipients of federal financial assistance.⁹ Almost four years in moving from enactment to actual legal effect,¹⁰ the ADA purports to prohibit dis-

monies by recipients of assistance. *See generally* Yamada, *Rulemaking Requirements Related to Federal Financial Assistance Programs*, 39 FED. B.J. 89 (1980).

5. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

6. 20 U.S.C. §§ 1681-1686 (1976) (commonly referred to as Title IX of the Education Amendments of 1972).

7. 29 U.S.C. § 794 (1976) (amended 1978) (commonly referred to as § 504 of the Rehabilitation Act of 1973).

8. 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979) [hereinafter referred to as the ADA or the Act].

9. The ADA does not stand alone as the sole statutory limit on recipients of federal financial assistance insofar as age discrimination is concerned. *See, e.g.*, Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§ 823(a)(1), 834(a) (1976), *as amended by* Pub. L. No. 95-524, § 2, 92 Stat. 1934, 1948 (1978); State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1242(a)(1) (1976), *as amended by* Pub. L. No. 94-488, § 8(a), 90 Stat. 2350 (1976); Urban Mass Transportation Act, 49 U.S.C. § 1615 (Supp. III 1979); General Education Provisions Act, 20 U.S.C. § 1232i (1976), *as amended by* Pub. L. No. 94-482, § 407-408, 90 Stat. 2232-33 (1976); Public Works Employment Act of 1976, 42 U.S.C. § 6727 (1976), *as amended by* Pub. L. No. 95-30, § 605, 91 Stat. 166 (1977); Energy Conservation and Production Act, 42 U.S.C. § 6870(a) (1976); Disaster Relief Assistance Act, 42 U.S.C. §§ 5151, 5174 (1976).

The Legal Services Corporation, which considers itself not to be a distributor of federal financial assistance, and therefore not covered by the ADA, has issued proposed regulations governing age discrimination nonetheless. 46 Fed. Reg. 18,055 (1981) (to be codified in 45 C.F.R. § 1624). VISTA and Peace Corps, also not covered by the ADA, have issued proposed regulations concerning this issue. *See, e.g.*, 46 Fed. Reg. 1,608 (1981) (to be codified in 45 C.F.R. § 1225). The Department of Agriculture has also issued final regulations vis-à-vis direct beneficiaries of federal assistance, who are not covered by the ADA. *See* 7 C.F.R. §§ 15.50-15.52 (1980).

10. The ADA was signed into law on November 28, 1975. The statute provided for its own deferral, however, as its implementation was made contingent upon the occurrence of two subsequent events. First, the United States Commission on Civil Rights was mandated to conduct a study to identify instances of age discrimination in federally funded programs and to then report its findings and recommendations to Congress. *See* notes 49-54 and accompanying text *infra*. Initially the Commission was given 18 months to perform this task. 42 U.S.C. § 6106(d) (1976) (amended 1977). Congress later gave the Commission an additional six months to complete the job. 42 U.S.C. § 6106(d) (1976), *as amended by* Pub. L. No. 95-65, § 1, 91 Stat. 269 (1977).

Once the Commission so reported, the second event was to occur, *i.e.*, the promulgation of model regulations by the then Department of Health, Education and Welfare, 42 U.S.C. § 6103(a)(1) (1976) (amended 1978) [hereinafter referred to as HEW]. As to the supplanting of HEW by the Department of Education and the Department of Health and Human Services, *see* note 55 *infra*. These model regulations were to serve as the prototype for the agency-specific regulations which would then be issued by each individual federal agency. 42 U.S.C. § 6103(a)(4) (1976) (amended 1978). The issuance dates for the general regulations and the agency-specific regulations were keyed to the completion of the Commission study: the HEW-proposed model

crimination on the basis of age,¹¹ with this prohibition applying across the age spectrum so as to protect victims both young and old.¹² Loss or denial of federal funds is the ultimate penalty imposed for transgression of the Act;¹³ agency administrative enforcement,¹⁴ private suits for

regulations could not be issued until, at the earliest, 90 days after receipt of the study by Congress and the President. Furthermore, the final HEW regulations could not be issued for still another 90 days. 42 U.S.C. § 6103(a)(2)(A) and (3) (1976).

Only after issuance of the HEW government-wide regulations could the individual agencies proceed: they were to issue their regulations within 90 days after HEW's final issuance. In fact, none did so. *See Marlin, Enforcement of the Age Discrimination Act of 1975*, 57 CHI. KENT L. REV. 1049 (1981) [hereinafter cited as Marlin]. Enhancing consistency, but further slowing down the process, was the requirement added by a 1978 amendment to the ADA that each agency's regulations had to be approved by the Secretary of Health, Education and Welfare. 42 U.S.C. § 6103(a)(4) (1976), *as amended by* Pub. L. No. 95-478, § 401(b)(1), 92 Stat. 1555 (1978).

Because of this extensive regulatory prescription set out in the statute, the 1975-passed law was not, according to the original Act, to become effective until January 1, 1979, at the earliest. 42 U.S.C. § 6103(a)(5) (1976) (amended 1978). Subsequently, in 1978, the Act was amended to further postpone the effective date of the statute until July 1, 1979. 42 U.S.C. § 6103(a)(5) (1976), *as amended by* Pub. L. No. 95-478, § 401(b)(2), 92 Stat. 1555 (1978).

In fact, HEW did not issue its final general regulations until June 12, 1979—a year and a half after the Civil Rights Commission report had been transmitted to Congress in December, 1977. *See* 45 C.F.R. § 90.1-90.62 (1980). These were preceded by two issuances. The first was a Notice of Intent to Issue Age Discrimination Regulations, which identified what HEW deemed to be the major issues to be addressed. 43 Fed. Reg. 8,756-58 (1978). Subsequently, the agency issued a Notice of Proposed Rulemaking, which provided an analysis of its proposed regulations, and in certain instances presented alternatives as to which HEW sought public comments. 43 Fed. Reg. 56,428-46 (1978). The final regulations themselves were accompanied, when published in the Federal Register, 44 Fed. Reg. 33,768-88 (1979), by an Overview and a Comment Analysis, neither of which appears in the Code of Federal Regulations.

Several consequences follow from the only recent effective date of the Act, and from the extensive regulations interpreting the statute. First, there is very little by way of direct case law guidance, or even administrative enforcement experience, simply because the 1975 Act is in actuality so new in terms of implementation. Second, an understanding of the Act requires careful attention to the HEW government-wide regulations, since they stand as the model which every federal agency must follow. Third, given the ambiguities of the statute, the HEW regulations are particularly important, inasmuch as they supply substantive guidance and interpretation which the statutory language and the scanty legislative history do not themselves otherwise provide. Finally, the significance of the government-wide regulations, and the agency-specific regulations modeled on them, is heightened by the very considerable deference which the courts will accord to them. *See, e.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (racial discrimination guidelines issued by the Equal Employment Opportunity Commission under 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979)).

11. The ADA provides in part:

[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

42 U.S.C. § 6102 (1976).

12. It is quite clear that the ADA was primarily motivated by a desire to deal with discrimination perpetrated against individuals deemed by federally funded programs as being too old for participation. Nonetheless, the House Committee Report on the bill which ultimately was enacted into law, H.R. REP. NO. 94-67, 94th Cong., 1st Sess. 16 (1975), and the statement of the House manager of the bill on the floor during consideration of the Act, 121 CONG. REC. 9212 (1975) (statement of Rep. Brademas), establish that the Act's scope extends to discrimination at any age, a conclusion consonant with the language of the Act.

13. 42 U.S.C. § 6104(a)(1) (1976).

14. *Id.* § 6104(a)(2).

injunctive relief,¹⁵ and suits by the United States Attorney General¹⁶ are also encompassed within the statute's provisions.

Penalties and multiple enforcement mechanisms notwithstanding, the ADA's reach actually is quite meager, for the statute is brigaded with a series of exceptions from its general prohibition.¹⁷ These cut so deeply as to warrant giving serious credence to the conclusion that the Act actually may be a virtually useless device for effectively dealing with age discrimination.¹⁸ This aside, there are a number of other significant conceptual and practical problems generated by the Act. Some of these will be addressed in this paper; the remainder will be discussed in successive papers in this symposium on the statute.

THE CONCEPTUAL AND FACTUAL UNDERPINNINGS OF THE AGE DISCRIMINATION ACT

Genesis

A persuasive case has been made that older people in America are an identifiable, and at least sometimes victimized, minority group subjected to various forms of deprivation, and deserving of special support because of their physical, social and economic disadvantages. Twenty years ago, one author concisely set out this theme:

In many respects the aged show characteristics of a minority group. They are subject to categorical discrimination, they have relatively high visibility, and, in many parts of our society, they constitute a functioning subgroup. Stereotypes are held about the group, and individuals are judged thereby. Prejudice is not uncommon, especially in industry, where persons over 40 are discriminated against in employment practices. Thus, the ingredients necessary to the development of minority group status are present for the aged.¹⁹

There is of course considerable room for debate about the status of the elderly in our society, even recognizing that they do constitute a minority group. Some would contend that, given the particularly large proportion of the federal budget allocated to entitlement and benefit programs aimed at their problems,²⁰ the old are hardly a group prop-

15. *Id.* § 6104(e) (Supp. III 1979).

16. *Id.* § 6104(a)(2) (1976). See note 161 *infra*.

17. See generally Alexander, *Schucking Off the Rights of the Aged: Congressional Ambivalence and the Exceptions to the Age Discrimination Act of 1975*, 57 CHI. KENT L. REV. 1009 (1981) [hereinafter cited as Alexander].

18. *Id.*

19. Breen, *The Aging Individual*, in HANDBOOK OF SOCIAL GERONTOLOGY 157 (C. Tibbitts ed. 1960).

20. See, e.g., HOUSE SELECT COMM. ON AGING, FEDERAL RESPONSIBILITY TO THE ELDERLY, COMM. PUB. NO. 95-167, 95th Cong., 2d Sess. (Comm. Print 1979).

erly viewed as the victims of adverse treatment.²¹ But dollars, of course, are not the sole benchmark of deprivation, and in any event it can be argued that at least some of the dollar transfer from the young to the old is itself a response to ageism, for this transfer would not be necessary—or at least legislated—if society were more willing to allow older men and women to continue working, rather than forcing them into unwanted retirement and consequent dependence upon Social Security payments and various governmentally funded programs. In any event, advocates for the aged assert that discrimination indeed does exist regardless of some benefits flowing in the direction of the elderly. They focus on discrimination in employment;²² limited access to publicly funded transportation facilities whose bus steps and subway entrances cannot be negotiated by the often infirm older man or woman;²³ denial of credit to the old;²⁴ under-representation in federally funded mental health programs, job training programs and legal services programs;²⁵ pejorative depictions in the media;²⁶ and so on.

Wherever the truth may lie, the fact is that by the mid-1960s the elderly were perceived as being both the objects of mistreatment and the deserving recipients of official solicitude. Both in the courts and the legislatures efforts were afoot by advocacy groups of growing influence and increasing sophistication²⁷ to secure for the old a discrimination-free environment. The Age Discrimination in Employment Act of 1967²⁸ was Congress' first major response to this drive. The Age Discrimination Act of 1975 was the second. Unlike the earlier statute, however, the ADA is not confined to a defined age group—those aged 40 to 70; rather, it extends to persons of all ages from infancy through

21. It has been observed that the very success of the elderly in accumulating governmental benefits and advantages presents a potential serious source of inter-generational conflict, grounded on the jealousy and resentment of the younger, majoritarian group who are footing the bill for these benefits through taxes and paycheck deductions, yet who are foreclosed by their youth from present eligibility. See P. DRUCKER, *THE UNSEEN REVOLUTION* 49 (1976); H. SHEPARD & S. RIX, *THE GRAYING OF WORKING AMERICA* 32 (1977).

22. The federal government has addressed this problem by enactment of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

23. See, e.g., *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); U.S. DEP'T OF TRANSP., *TRAVEL BARRIERS* (1970).

24. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1976 & Supp. III 1979).

25. These programs, and their underserving of the elderly, are discussed in the U. S. COMM'N ON CIVIL RIGHTS, *THE AGE DISCRIMINATION STUDY* (1977) [hereinafter cited as *AGE DISCRIMINATION STUDY*], the study undertaken pursuant to the mandate of the ADA. See notes 49-54 and accompanying text *infra*.

26. See HOUSE SELECT COMM. ON AGING, AGE STEREOTYPING AND TELEVISION, COMM. PUB. NO. 95-109, 95th Cong., 1st Sess. (1977).

27. As to the political power and efforts of seniors generally, see H. PRATT, *THE GRAY LOBBY* (1976).

28. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

death: a benefit for the young apparently derived from a spillover of heightened age discrimination consciousness on the part of the legislators.²⁹

Title VI of the Civil Rights Act of 1964³⁰ was the acknowledged prototype for the ADA. Indeed, the prohibition and enforcement sections of the two statutes are virtually identical. Few would dispute that in enacting Title VI, designed to combat discrimination on the bases of race, color and national origin by recipients of federal financial assistance,³¹ Congress had solid factual basis for concluding that the discrimination addressed indeed existed. More than that, a history of *de jure* segregation throughout the southern states left no doubt that race discrimination was endemic rather than aberrational. The case for establishing that age discrimination was being perpetrated by recipients of federal financial assistance was a far less well documented one when Congress enacted the Age Discrimination Act. The documentation remains scanty today; it has even been seriously contended that such discrimination has not been demonstrated to exist.³²

Certainly the Senate and House committee hearings and reports and the floor debates which accompanied the adoption of the ADA, included as part of the 1975 amendments to the Older Americans Act,³³ made no strong case—indeed, they really made no case at all—for a society pervaded by ageism, needful of legislative firmness to lead it toward a better, discrimination-free tomorrow. The Act was largely written in the House of Representatives. Commissioner on Aging³⁴ Ar-

29. There is no question that the ADA is intended to apply to all age groups, and thus includes within its scope the young as well as the old, and all ages in between. *See* note 12 *supra*. Meager as the legislative record is in support of the Act's being a considered response to the documented discrimination leveled against the old, *see* notes 35-45 and accompanying text *infra*, that record is even more barren insofar as a case is made that the young suffer from age discrimination in federally assisted programs. This is not to say, however, that strong and persuasive arguments cannot be made that the young—particularly children—are the objects of unfair treatment. *See generally* THE YOUNGEST MINORITY I (S. Katz ed. 1974); THE YOUNGEST MINORITY II (S. Katz ed. 1977). On the other hand, a strong argument, well documented, can be made that the young are particularly favored as far as receipt of federal benefits and entitlements is concerned. *See, e.g.,* Teitelbaum, *The Age Discrimination Act and Youth*, 57 CHI. KENT L. REV. 969 (1981) [hereinafter cited as Teitelbaum]. There is nothing in the legislative history of the ADA which explains Congress' thinking in applying the Act to all ages.

30. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

31. Title VI of the Civil Rights Act of 1967 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1976).

32. *See, e.g.,* Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979) [hereinafter cited as Schuck].

33. 42 U.S.C. §§ 3001-3002 (1976) (amended 1978).

34. The Commissioner on Aging heads the Administration on Aging, created pursuant to 42

thur S. Flemming had asserted, when he appeared before the House Committee on Education and Labor to address the then-pending amendments to the Older Americans Act, that he felt that "in this country we have to contend with racism, with sexism and with ageism."³⁵ But virtually nothing else was offered by him, or any other witness, by way of empirical evidence supporting the existence and degree of this latter "ism." The report of the committee accompanying the legislation—the document which typically identifies the bases for legislation which a committee is calling upon the House to adopt—also provided no evidence of actual discriminatory practices warranting legislative remediation.³⁶

The House debates on the bill were largely perfunctory, a series of set speeches inserted in the Congressional Record with no colloquy among the supposed speakers; they offered no concrete indictment, save for the statement of the chairman of the House Select Committee on Aging, Representative William J. Randall. He alone provided some specific figures, to the effect that older persons were underserved in federally funded manpower training programs.³⁷

The Senate considered the Older Americans Act amendments subsequent to the House acting upon them. Rather than following the House's lead, the legislation reported out by the Senate Labor and Public Welfare Committee only provided for a study to be done by the United States Commission on Civil Rights, this to include the Commission's findings and recommendations concerning age discrimination in federally assisted programs. According to the Senate Committee, "[t]here [was] some evidence that older persons [were] unreasonably discriminated against on account of their age in the operation of federally assisted programs."³⁸ By way of specifics, its report further noted that "[t]here [had] been reports of instances of individuals being discriminated against in access to educational institutions or in obtaining mortgages because of their age."³⁹ The study, it was thought, would provide Congress with the data on which to base a decision as to fur-

U.S.C. § 3011 (1976) (amended 1978), and lodged within the Department of Health and Human Services.

35. H.R. REP. NO. 94-67, 94th Cong., 1st Sess. 15 (1975).

36. See H.R. REP. NO. 94-67, 94th Cong., 1st Sess. (1975).

37. 121 CONG. REC. 9217 (1975) (remarks of Rep. Randall).

38. S. REP. NO. 94-255, 94th Cong., 1st Sess. 31 (1975) [hereinafter cited as SENATE REPORT].

39. *Id.* The problem of age bias in credit transactions was addressed in the same year the ADA was enacted by the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1976 & Supp. III 1979).

ther action.⁴⁰

The Senate debates on the Senate bill were as nonsubstantive as the House debates. Of course, there was considerably less to debate, since the Senate bill only proposed a study.

In the conference committee of Senate and House members convened to iron out the differences between the two houses' versions, an awkward compromise was struck. The Senate acceded to adoption of the Age Discrimination Act, with its ban on discrimination and its correlative complicated exceptions⁴¹ to the basic prohibition; the House agreed to mandating the Civil Rights Commission to perform the discrimination study which the Senate Committee had envisioned. This mix was harmonized—such as it could be—by provision for the Act not going into effect until regulations were issued implementing it, these regulations in turn to be delayed until transmittal to Congress of the Civil Rights Commission study.⁴² Thus, Congress was, at the same time, called upon by the conference committee both to legislate against a purported wrong and to mandate a study the very purpose of which would be to determine if the wrong even existed.

Once again the House debates, now focused on the conference bill and the accompanying report,⁴³ afforded no insight as to the existence of the discrimination which the authors of the legislation claimed to be combating.⁴⁴ In the Senate, however, Senator Thomas F. Eagleton expressed considerable reservations, these being articulated notwithstanding that he was manager of the legislation:

The provisions of this bill which prohibit age discrimination in

40. In the Senate Report on the Senate bill, the Committee on Labor and Public Welfare reasoned:

When the results of the Commission's study are available, the Congress will have for the first time a thorough analysis of the causes, scope, nature and extent of age discrimination in federally assisted programs. At that time, the need for additional legislation on this subject can be fairly and reasonably assessed.

SENATE REPORT, *supra* note 38, at 32.

41. The primary statutory exceptions are quoted at text accompanying note 60 *infra*. These are discussed in Alexander, *supra* note 17. There are also further exceptions established by the regulations implementing the Act. See notes 89-129 and accompanying text *infra*.

42. See note 10 *supra*.

43. See, e.g., H.R. CONF. REP. NO. 94-670, 94th Cong., 1st Sess. (1975) [hereinafter cited as HOUSE CONFERENCE REPORT].

44. Representative William J. Randall was the sole legislator to deal in anything close to specifics:

Over the long pull, experience has given us a rather clear picture that whenever the aged are included in programs or activities along with the general population—such as CETA, revenue sharing, mass transit, et cetera, to mention a few—the aged fare very poorly. For such reasons, . . . there is excellent justification for the immediate enactment of the age discrimination provisions of the Conference Report

121 CONG. REC. 37300 (1975).

federally-assisted programs and activities have caused me much difficulty, . . . I share the concern of the Members of the House, who supported these provisions so strenuously, that there may be otherwise qualified individuals who are denied access to such programs solely because of their age, but I could never get satisfactory answers to certain fundamental questions, such as "Which programs? In what numbers? Who decides what age discrimination is unreasonable?"⁴⁵

The conference report was adopted by a vote of 404-6 in the House on November 19, 1975,⁴⁶ and 89-0 in the Senate on November 20, 1975.⁴⁷ President Ford, not without misgivings, signed the bill into law on November 28, 1975.⁴⁸

The Civil Rights Commission Study

Mandated by the Age Discrimination Act to conduct a study,⁴⁹ the Civil Rights Commission selected ten federal programs for scrutiny, as well as the general field of higher education. It ultimately concluded that "discrimination on the basis of age is widespread,"⁵⁰ with deprivation affecting persons within several age categories. Those aged 65 and over were "consistently adversely affected."⁵¹ From the study flowed a

45. *Id.* at 37735. Senator Alan Cranston also adverted to such concerns. *See id.* at 37744.

The Senators' uneasiness was perhaps reflected, although in much more muted tones, in the conference report itself, in which the conferees stressed "the importance of the study . . . to be conducted by the Civil Rights Commission," and further stated:

Where there is found evidence that participation in such programs is affected by distinctions based on age, then the Commission ought to consider the reasonableness of such distinctions. . . . A thorough, objective, and thoughtful study of this subject is essential to a final resolution by the Congress of the difficult policy issues that are left undecided by this legislation.

HOUSE CONFERENCE REPORT, *supra* note 43, at 59. Thus, the conferees revealed that they apparently neither knew if, nor where, age discrimination existed. Nor did they even know—assuming that it did exist—whether it could, or should, be tolerated. *See* 121 CONG. REC. 37300 (1975).

46. *Id.* at 37301.

47. *Id.* at 37752-53.

48. In signing the bill, President Ford stated:

There are . . . provisions of this act with which I disagree. The provisions concerned with age discrimination on the part of all Federal grantees have been modified to meet many, but not all, objections. The delineation of what constitutes unreasonable age discrimination is so imprecise that it gives little guidance in the development of regulations to prohibit such discrimination. Also, the provisions raise a question on the extent to which the Federal Government should seek to regulate private activity, particularly without holding hearings to permit affected persons and institutions to be heard.

The bill does provide, however, for study of the problems of age discrimination by the Commission on Civil Rights, and allows for these issues to be discussed thoroughly. I urge the Congress to reconsider these problems.

PUB. PAPERS: GERALD FORD, 1975, BOOK II, at 1919 (1977). As to the reasonableness standard to which the President adverted, *see* notes 59-65 and accompanying text *infra*.

49. 42 U.S.C. § 6106(a) (1976).

50. AGE DISCRIMINATION STUDY, *supra* note 25, at 3.

51. *Id.*

number of Commission recommendations,⁵² some of which were adopted by Congress when it amended the ADA in 1978.⁵³

The Commission's study at least appeared to finally provide that data base which had hitherto been strikingly meager in both quality and quantity. It must be noted, however, that there is room for considerable criticism of the study. Its methodology can be, and has been, attacked;⁵⁴ thus its conclusions are subject to question. These criticisms were not raised, however, at any point during the debates on the 1978 amendments; as far as Congress was concerned, the study apparently supplied vindication for the proponents of legislation tying the antidiscrimination condition to receipt of federal funds.

DEFINING DISCRIMINATION

The underlying problem throughout the ADA is Congress' inability to come to grips with just what it was that it wanted to prohibit. That problem is manifested in two striking ways: one is the Act's reliance upon a reasonableness standard; the second is the statute's deployment of very deep, albeit sometimes ambiguous, exceptions. Compounding the problem are the government-wide regulations

52. In addition, each agency as to which the Commission made findings was to submit its comments and recommendations regarding the report to the President and the congressional committees having jurisdiction as to the Older Americans Act. 42 U.S.C. § 6106(e) (Supp. III 1979).

53. The Commission made 12 recommendations, some of which were divided into several subsections. See AGE DISCRIMINATION STUDY, *supra* note 25, at 83-102. The first was that age be allowed as a criterion for eligibility in federally assisted programs and services only when a federal law specifically so authorized. In pursuance of this recommendation, the Commission advocated the striking of the word "unreasonable" from § 302, 42 U.S.C. § 6101 (1976), and the related amending of § 304, 42 U.S.C. § 6103 (1976), which embodies the exceptions to the statute's prohibition and which also employs a reasonableness standard. See notes 59-65 and accompanying text *infra*. The former was done in 1978. 42 U.S.C. § 6101 (1976), *as amended by* Comprehensive Older Americans Act, Amendments of 1978, Pub. L. No. 95-478, § 401(a), 92 Stat. 1555.

Second, the Commission recommended the authorization by private individuals of suits for legal and equitable relief. Authorization of suits for injunctive relief was added by the 1978 amendments. 42 U.S.C. § 6104(e) (1976), *as amended by* Pub. L. No. 95-478, § 401(c), 92 Stat. 1555 (1978).

Third, the Commission recommended that HEW be authorized to approve all other agencies' regulations implementing the ADA. The 1978 amendments adopted this proposal. 42 U.S.C. § 6106a(a) (Supp. III 1979). See note 10 *supra*.

Fourth, the Commission proposed an alternative administrative remedy to that of absolute funding termination, advocating that in instances of violation of the ADA, the funding agency be authorized to transfer the funds to an alternative qualified recipient. The 1978 amendments adopted this proposal. 42 U.S.C. § 6104(b) (1976), *as amended by* Pub. L. No. 95-478, § 401(c)-(d), 92 Stat. 1555-56 (1978).

The fifth through tenth recommendations addressed internal agency practices designed to enhance the statute's effectiveness. The remaining recommendations addressed the amending of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976), *as amended by* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, and the matter of discrimination in education programs.

54. See, e.g., Teitelbaum, *supra* note 29; Schuck, *supra* note 32, at 49-52.

promulgated by the then Department of Health, Education and Welfare⁵⁵—regulations which each federal funding agency is to follow in devising its own agency-specific regulations.⁵⁶ This paper will only briefly address the statutory exceptions; they will receive much more trenchant analysis in a later paper included in this symposium treatment of the Age Discrimination Act.⁵⁷ The reasonableness standard, however, deserves some scrutiny inasmuch as it is so revealing as to Congress' difficulties in devising social policy, and in translating what turned out to be ill-defined policy into statutory language.

The Reasonableness Standard

The current form of the ADA's statement of purpose in section 302 of the Act condemns, without caveat, age discrimination:

It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972⁵⁸

The originally enacted version of the statute was not so uncompromising; it only addressed "unreasonable" discrimination.⁵⁹ This standard was carried forward—and remains—in some of the primary statutory exceptions. Thus, as it did prior to the 1978 amendments, section 304 provides:

(b)(1) It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited . . . if, in the program or activity involved—

(A) such action *reasonably* takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity; or

(B) the differentiation made by such action is based upon *reasonable* factors other than age.⁶⁰

The initial version of the ADA—that first passed by the House in

55. Hereinafter referred to as HEW. HEW has since been broken up into the Department of Education and the Department of Health and Human Services, with the latter supplanting HEW in terms of government-wide tasks under the ADA. 20 U.S.C. § 3508 (Supp. III 1979).

56. See note 10 *supra*.

57. See Alexander, *supra* note 17.

58. 42 U.S.C. § 6101 (Supp. III 1979). The State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1242(a)(1) (1976) (amended 1976 & 1980), contains its own age discrimination proscription, and the legislative history makes clear that the ADA does not supplant it. See, e.g., 122 CONG. REC. 29903 (1976) (statement of Sen. Gravel during the debate on the State and Local Fiscal Assistance Act provision). See also H.R. REP. NO. 94-1165, Part 1, 94th Cong., 2d Sess. 98 n.4a (1976).

59. 42 U.S.C. § 6101 (1976) (amended 1978).

60. *Id.* § 6103(b) (emphasis added).

April 1975—did not employ the word “unreasonable” in the Act’s statement of purpose.⁶¹ It was added by the Senate in response to expressions of concern by the Ford Administration as to the ambiguity of the reasonableness language in the exceptions,⁶² and was retained by the House-Senate conferees in the final bill. Of course, by increasing the statute’s use of this word the conferees actually, and inexplicably, compounded the problem. What was explained, however, was Congress’ modest appreciation of the vice of ageism:

The provisions in the House bill relating to age discrimination were modeled on title VI of the Civil Rights Act of 1964—which authorizes the cut off of funds to federally-assisted programs found guilty of racial discrimination—but with a significant difference. Distinguishing among individuals on the basis of race for purposes of determining their eligibility to receive the benefits of, or participate in, federally-assisted programs is per se unfair treatment and violative of the Constitution; in this context, race is an arbitrary distinction. But age may often be a reasonable distinction for these purposes, indeed, the prohibition against age discrimination contained in the House bill excluded cases where age is “a factor necessary to the normal operation of such [federally-assisted] program or activity,” or where the “differentiation . . . is based upon reasonable factors other than age,” or where the program or activity in question “provides any benefits or assistance to persons based on the age of such persons.”

What the House bill implies in this regard, the conference substitute makes explicit. The purpose of the title is stated to be the prohibition of *unreasonable* age discrimination The actual prohibitory language of section 303 that is central to this title is modified by considerations of reasonableness, as the exclusions quoted in the preceding paragraph make clear.⁶³

The conferees were of course not blind to the ambiguity of the standard of reasonableness: “The difficulty, obviously, lies in establishing what age-related distinctions are ‘reasonable’ with respect to each federally-assisted program or activity, and on this there is not a clear consensus among the conferees.”⁶⁴ The conferees offered no answer. Rather they stressed the importance of the Commission study and in-

61. The House bill, Title III of the Older Americans Act Amendments Act of 1975, provided: Section 302. It is the purpose of this title to prohibit discrimination on the basis of age in any program or activity receiving Federal financial assistance.

H.R. 3922, 94th Cong., 1st Sess. (1975).

62. See, e.g., SENATE REPORT, *supra* note 38, at 36-38.

63. HOUSE CONFERENCE REPORT, *supra* note 43, at 56 (emphasis in original).

64. *Id.* The conferees devised two steps which, it was hoped, would enable resolution of this lack of consensus, as well as effective implementation of the ADA. First, the Commission study was mandated to examine federal programs to discern “unreasonable” age discrimination. 42 U.S.C. § 6106(a) (1976) (amended 1978). Second, the House bill was modified so as to provide that the federal agency regulations to be issued to implement the Act would be the “sole means” to

structed that where the Commission indeed did find evidence of age distinctions being employed, "the Commission ought to consider the reasonableness of such distinctions and, where appropriate, review the social, economic, legal, and administrative effects of alternative responses to the question of what is reasonable in each case."⁶⁵ Not surprisingly, the conferees failed to suggest what weight ought to be given such effects, let alone how to identify them.

In 1978 Congress amended the ADA so as to delete the word "unreasonable" from the statement of purpose. As far as the statutory exceptions were concerned, however, the reasonableness standard survived.

It was the House version of the Older Americans Act Amendments which initiated the deletion of the word "unreasonable" from section 302. No explanation of the reasoning underlying this change was provided by the House report on the bill.⁶⁶ The House debate was uninformative. Representative Claude Pepper attributed the change⁶⁷ to a suggestion made by the Civil Rights Commission, which had actually recommended deletion of the reasonableness standard throughout the bill, and not just in section 302.⁶⁸ Beyond that, nothing more was said.

effectuate the policy against age discrimination. HOUSE CONFERENCE REPORT, *supra* note 43, at 57.

As to this latter change in the pending legislation, it must be noted that as the bill passed in the House, enforcement was contemplated both through administrative fund cutoffs, and by "pattern and practice" suits to be brought by the Attorney General. The conferees deleted the latter enforcement mechanism from the Act. Why this exclusion of direct judicial redress should have been seen as an effective response to the problem of determining the reasonableness issue is somewhat obscure. The thinking was that by foreclosing a large number of entities—that is, different judges—from rendering judgments as to what was reasonable in different contexts, and by focusing the question within the confines of the executive branch, with lead guidance being provided for the whole government by one agency—HEW—uniformity of interpretation could be achieved. *Id.* But given the fact that each government program, and the administration thereof, would call into issue differing considerations, the hope that a regulatory approach could achieve a harmonious consistency, which judicial determinations could not otherwise do, seems somewhat shortsighted. The very notion of reasonableness is one which inevitably requires either blind acceptance of any justification offered by the entity whose decision is being challenged, or, if legitimate analysis is to be made, a consideration of the specific facts in the case. Courts as well as agencies can readily opt for the former, perfunctory course. *See, e.g.,* McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Contrarily, if the latter, more responsible course is chosen, no more harmony can be expected from an individual agency's application of regulations, no matter how much they resemble those of other agencies, than would be expected from the courts.

In any event, the Act still authorized judicial review of agency determinations, albeit of a limited nature, 42 U.S.C. § 6105 (1976), as well as Department of Justice enforcement of funding recipients' obligations under the ADA, *id.* § 6104(a)(2) (1976), *see* note 161 *infra*, thus introducing judicial scrutiny after all.

65. HOUSE CONFERENCE REPORT, *supra* note 43, at 59.

66. *See* H.R. REP. NO. 95-1150, 95th Cong., 2d Sess. (1978).

67. 124 CONG. REC. 13599 (1978).

68. AGE DISCRIMINATION STUDY, *supra* note 25, at 86-89. *See also* note 53 *supra*.

The conference committee on the 1978 amendments retained the change. Again, floor debate—both in the House and the Senate—was unenlightening.⁶⁹

Congress, then, had succeeded in first adopting, and later amending, a statute which purported to ban a vice whose contours were unclear, and as to which there were obviously very mixed perceptions. It was left to HEW, in its mandated government-wide regulations, to cope with this situation.⁷⁰ What made this task particularly difficult was the fact that even though the statute's statement of purpose was now shorn of the word "unreasonable," the exceptions still retained the concept of rationality by virtue of their very language. And enormous as the bite of the exceptions would be even absent this standard, reasonableness

69. Representative Claude D. Pepper did endeavor, in his floor speech addressed to the conference bill, to provide some substantive explanation for the change:

The present exemptions are retained, but I believe that the deletion of the word "unreasonable" from the act's statement of purpose gives a good indication of how Congress intends the existing exemptions to be interpreted. The ADA must be viewed as a civil rights statute. As such, exceptions to it must be narrowly construed. I am particularly concerned with certain excuses for not serving older people put forward by program managers interviewed by the Civil Rights Commission in preparing its report. They include the so-called cost-effectiveness argument, which asserts that, since it is often more expensive to reach older clients, a program could reasonably conclude that it could concentrate on younger persons. Other managers argue that the existence of age-specific programs, such as the community service employment program for older Americans, justifies other, more general programs, such as those funded under the Comprehensive Employment and Training Act, ignoring the needs of older applicants.

Mr. Speaker, these excuses are nothing more than that. The deletion of the word "reasonable" [*sic*] from the statement of purpose makes that clear. Such practices are discriminatory. They will be prohibited under the new amendments.

124 CONG. REC. H11451 (Oct. 4, 1978). It is likely that Rep. Pepper was seeking to make the best of a not altogether satisfactory situation, attempting to establish some legislative history which would provide fodder for later court interpretations, and perhaps guidance for the agency regulations which would follow enactment. While his interpretation carries a modicum of weight, it was neither affirmed nor rejected, nor even responded to, by any other member. Most significantly, neither the conference report, nor the manager of the bill, said anything akin to that which Rep. Pepper uttered.

70. The Age Discrimination Study by the Civil Rights Commission, *see* notes 49-54 and accompanying text *supra*, had proposed a "tentative definition": "any act or failure to act, or any law or policy that adversely affects an individual on the basis of age." AGE DISCRIMINATION STUDY, *supra* note 25, at 3. This definition, however, is too simplistic, or at least unrealistic. The 15-year-old denied licensure for driving because he falls one year short of the minimum licensure age set by his state's law is experiencing adverse treatment because of his age. It is clear that Congress, in enacting the ADA, did not intend to legislate so broadly as to outlaw such a use of an age distinction. (One or more of the statutory exceptions likely could sanitize this particular example of any taint under the ADA, in any event. Certainly it would fit under the "any law" exception embodied in 42 U.S.C. § 6103(b)(2) (1976), which exempts from the Act's reach any age distinction embodied in "any law." The HEW government-wide regulations have interpreted this term as including any federal, state or local law or ordinance enacted by a general purpose, elected legislative body. 45 C.F.R. § 90.3 (1980). *See generally* Alexander, *supra* note 17.) Nor is it likely that the federal legislature today would be willing to amend the Act to trench so deeply into a matter of local concern, particularly given the difficulties and expense of devising the only likely alternative to the use of age lines—workable, competency-based testing.

makes their reach even broader.⁷¹

The Regulatory Effort to Define Discrimination

"As a general rule," the Overview of the regulations⁷² states, "separate or different treatment which denies or limits service from or participation in a program receiving Federal financial assistance will be prohibited"⁷³ The regulations purport to provide more formal guidance in determining what constitutes unlawful acts by setting forth "Rules Against Age Discrimination".⁷⁴

The rules stated in this section are limited by the exceptions contained in sections 90.14 [relating to the normal operation and statutory objectives of programs⁷⁵] and 90.15 [relating to reasonable factors other than age⁷⁶] of these regulations.

(a) *General rule*: No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits

71. Actually, HEW, in its government-wide regulations, has attempted to restrict the reasonableness standard by regulatory interpretations which impose more rigor than the statutory language appears to allow. Consequently, the HEW regulations are subject to possible attack as exceeding agency authority. *See* *Bryan v. Koch*, 492 F. Supp. 212, 234 (S.D.N.Y.), *aff'd*, 627 F.2d 612 (2d Cir. 1980).

In interpreting the two exceptions embodied in 42 U.S.C. § 6103(b)(1)(A) (1976), *see* text accompanying note 60 *supra*, HEW devised a four-part test which the user of an age distinction must satisfy in order to be able to successfully invoke one or the other of these statutory caveats. 45 C.F.R. § 90.14 (1980). The test imposes a burden heavier than mere rationality, a task possibly justifiable by the provision's reference to distinctions being reasonable if they are *necessary* to the normal operation of the program or a statutory objective of the program. The test provides:

An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics; and

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

Id. In the analysis accompanying the regulations, HEW explained as to subpart (c) of the test that "[i]mplicit in the requirement that a characteristic be reasonably measured or approximated by the use of age is the idea that there must be a close relationship between age and the characteristic being measured." 44 Fed. Reg. 33,768, at 33,782 (1979).

As to the "reasonable factors other than age" exception embodied in 42 U.S.C. § 6103(b)(1)(B) (1976), *see* text accompanying note 60 *supra*, the government-wide regulations hold that "[a]n action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective." 45 C.F.R. § 90.15 (1980).

72. 44 Fed. Reg. 33,768, at 33,769-71 (1979) [hereinafter referred to as Overview].

73. *Id.* at 33,769.

74. 45 C.F.R. § 90.12 (1980) [hereinafter referred to as Rules].

75. *See* text accompanying note 60 *supra*.

76. *Id.*

of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules*: A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance, or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.⁷⁷

This effort at definition is weakened, in the first instance, by the fact that, as the Rules themselves state in their preface, they are limited by the later provisions of the regulations interpreting three of the statutory exemptions. Secondly, even this preface is inadequate to reveal fully the Rules' limitations because the statute and/or other provisions of the regulations actually set out further exemptions which supersede the Rules—*e.g.*, exemptions dealing with employment practices,⁷⁸ affirmative action⁷⁹ and special benefits programs.⁸⁰

Apart from the Rules being limited by the exceptions provisions of the regulations, and by the additional limitations imposed by statutory and regulatory exceptions not noted in the Rules, there is further difficulty as to the provisions establishing any substantively significant guidance. The Rules fall back on the language of the statute, addressing themselves to "discrimination." Given that "discrimination" is never directly defined, the result is to fashion Rules Against Age Discrimination which erect a ban on age discrimination—a tautological non sequitur which advances the inquiry not at all.⁸¹

77. 45 C.F.R. § 90.12 (1980).

78. 42 U.S.C. § 6103(c) (1976).

79. 45 C.F.R. § 90.49(b) (1980). See notes 89-118 and accompanying text *infra*.

80. 45 C.F.R. § 90.49(c) (1980). See notes 119-29 and accompanying text *infra*.

81. Indeed, given the phrasing of 45 C.F.R. § 90.12 (1980), there is a potential for heightened ambiguity. Both in the "General rule" and in subsection (1) of the "Specific rules," the regulation sets forth a ban on exclusion from programs, denial of benefits, "or" subjection to discrimination. The use of the disjunctive "or" suggests that exclusion and denial are in some manner different than acts which would constitute typical discrimination. Yet it would seem, logically, that exclusion and denial would be the paradigms of discriminatory acts. If the disjunctive presentation is to be given real credence, then, the search for that which constitutes discrimination is made even more difficult and the answer rendered even more elusive. The better reading would likely be to ignore the disjunctive connective, and read the language as actually intending to encompass exclusion from programs, denial of benefits, *and* subjection to additional, or other, forms of discrimination.

Admittedly, the Rules, using the language they do, simply track the statute, 42 U.S.C. § 6102

Conclusion and Rationale

One is left with the conclusion that the most tenable means by which to define what it is the ADA bars is to proceed by negative conclusion: the discrimination which is outlawed is that discrimination which the Act and the regulations do not, through their exemptions, sanitize of taint. This task of addressing the exemptions is in part ventured here, through examination of the affirmative action and special benefits provisions in the government-wide regulations issued by HEW to implement the Act. The primary statutory exceptions are addressed in a later paper in this symposium.⁸² Before that essay, however, some recapitulation is in order as to the Age Discrimination Act's elusive condemnation of ageism.

Why the difficulties in setting forth a coherent scheme? One explanation, no doubt, follows from the lack of empirical data—there simply was no compelling case made to justify this statutory venture. Had there been, and had there been sufficient discrete examples of the places and manner in which discrimination occurred, perhaps Congress might have been better able to design a statutory structure with some coherence and clarity. That is a possibility. Actually, however, the problems go deeper, and it is doubtful that more adequate data would have sufficed. For underlying the statutory ambiguities is a greater concern for opponents of ageism: the congressional perception that distinctions made on the basis of age simply do not carry the same type of taint as does race-based discrimination, or discrimination on the bases of sex, religion or national origin, for that matter.⁸³ Age is, after all, a long-standing criterion for decisionmaking and for the allocation of resources in our society.⁸⁴ Few—and certainly not Congress—are ready to seek an age-blind society, even assuming it were possible,⁸⁵ for age distinctions serve useful ends, such as that of easing bureaucratic

(1976), and that section in turn simply tracks Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976 & Supp. III 1979). The drafters of the ADA cannot necessarily be faulted, then, for employing apparently long-accepted language. But the drafters of the regulations can be faulted for simply retaining the uninformative word "discrimination," and for maintaining the ambiguity of the disjunctive presentation, rather than taking their mandate as an opportunity to provide rather simple clarification by deleting the word "or" and substituting in lieu thereof "and."

82. See Alexander, *supra* note 17.

83. See text accompanying note 63 *supra*.

84. See generally Cain, *The Growing Importance of Legal Age in Determining the Status of the Elderly*, 14 GERONTOLOGIST 167 (1974); Eglit, *Of Age and the Constitution*, 57 CHI. KENT L. REV. 859 (1981) [hereinafter cited as Eglit].

85. But see Neugarten, *Policy for the 1980s: Age or Need Entitlement?*, in NATIONAL JOURNAL ISSUES BOOK 48-52 (1979). Dr. Neugarten urges striving toward an age-irrelevant society, in which age distinctions are used as seldom as possible.

decisionmaking.⁸⁶

Thus, the ADA represents an uncomfortable compromise—a gesture, on the one hand, to the opponents of ageism, while an effort, on the other, to save age as a useful and proper ground for the distribution of governmentally funded benefits and the framing and operation of governmentally subsidized programs. The task, of course, was to draw the line between unacceptable age *discrimination* and acceptable age *differentiation*, and that was an effort which Congress could neither conceptually nor politically handle.

The conceptual difficulty in succeeding with this distinction is compounded by the fact that the ADA applies to all age groups. At least in the instances of race, sex, religion and national origin, it is a comparatively easy matter to identify those individuals who bear the significant trait which triggers the forbidden discrimination and those who do not. An individual is either black or white, male or female, etc. To say that race or sex may not be used as a basis for differentiation, then, is to make a commitment perhaps difficult of enforcement, but at least clear in intent. The task in a given case is to implement that intent by, at the outset, determining whether being black or female or Jewish was indeed the basis for the challenged decision.

In contrast, age is a characteristic which everyone shares, in greater or lesser amount. Thus, an unadorned assault on age distinctions is a tricky task. To say—in the face of a 65-year-old's complaint that she has been wrongfully excluded from a program because of her age—that age is an inappropriate standard for eligibility may quickly lead to a condemnation of all age standards for that program. Yet, while the 65-year criterion may be properly condemnable, exclusion of those, say, under age 16 may not be. Given the fact that all people are possessed of the age trait, but are different as to how much of it they possess, the devising of a scheme which saves some age distinctions while banning others becomes a subtle enterprise.

There are persuasive reasons for distinguishing between age distinctions employed discretely to treat non-adults, and such distinctions used to categorize adults of different ages.⁸⁷ And, there are persuasive arguments to be made for tolerating age distinctions which disadvantage non-old adults for being too young, while condemning as discrimination age lines used to exclude or deprive those deemed too old for

86. See Eglit, *supra* note 84.

87. See generally Teitelbaum, *supra* note 29.

whatever the program or activity at issue is.⁸⁸ In rushing to legislative judgment, Congress simply left these subtleties of age, age distinctions and age discrimination by the way—to no one's gain.

SPECIFIC PROBLEM AREAS

There are a variety of problems generated by the loose language of the ADA and its implementing government-wide model regulations. They are compounded by the number and depth of both the statutory and regulatory exceptions which cut so significantly into the Act's purported prohibition of age discrimination. Over and above these concerns, there are problems of implementation and enforcement. This paper will not undertake a complete survey of all the ADA's problems. It will focus on selected issues, as will other papers in this symposium issue. Here, analysis will be directed to the affirmative action and special benefits exceptions infused into the Act by the HEW government-wide regulations; the problems of settlement involved in administrative treatment of class and representative complaints; the matter of pinpointing the violative entity for purposes of agency enforcement; and the problems of making out a *prima facie* case and of successfully invoking a statutory or regulatory defense.

Affirmative Action

While the ADA itself does not address the issue of affirmative action, the HEW government-wide regulations do: "Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age."⁸⁹ In other contexts, court-ordered class-conscious steps by an entity found to have harmed a class are a well-accepted means to redress the legal wrong perpetrated.⁹⁰ The government-wide regulations obviously move beyond this, however, by authorizing a program to undertake affirmative action "[e]ven in the absence of a finding of discrimination,"⁹¹

Despite the regulatory language, it does not necessarily follow that recipients of federal financial assistance indeed may freely pursue affirmative action efforts. The inquiry as to this question must proceed

88. See Eglit, *supra* note 84.

89. 45 C.F.R. § 90.49(b) (1980).

90. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

91. 45 C.F.R. § 90.49(b) (1980).

on two tracks, one concerning public recipients of federal funding, the other involving private grantees.

Affirmative Action by Governmental Recipients of Federal Financial Assistance

The HEW government-wide regulations simply establish that affirmative action efforts will not violate the ADA. However, they do not—nor could they—relieve governmental grantees of constitutional restraints flowing from the fourteenth amendment's equal protection clause.⁹² And because governmental entities are—in contrast with private actors—subject to such constitutional limits,⁹³ constitutionally based considerations cannot be ignored. Two decisions of the Supreme Court are relevant in assessing the impact of such restraints here.

In *University of California Board of Regents v. Bakke*⁹⁴ the Board had authorized a state medical school to pursue a preferential admissions policy directed towards increasing the numbers of minority group members enrolled in the institution. Bakke was a white male who was denied admission and consequently filed suit, contending that but for the special program which allocated 16 of the 100 openings to minorities, he would have been admitted. He relied both on the equal protection clause of the fourteenth amendment and Title VI of the Civil Rights Act of 1964.⁹⁵ Bakke prevailed; there was, however, no majority opinion. Four Justices rested exclusively on Title VI, and contended that it demanded race-blindness, a requirement obviously not satisfied by the school's program.⁹⁶ Four other Justices equated Title VI with the Constitution and reasoned that neither was offended by the pro-

92. The fourteenth amendment provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

93. The fourteenth amendment applies to governmental action. The mere receipt of government moneys, however, will not be enough to convert a private entity's action into state action. *See, e.g.,* *Greeny v. George Washington Univ.*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir. 1974); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974). *Contra*, *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963).

State action cannot be implied from HEW's regulations. The affirmative action provision, 45 C.F.R. § 90.49(b) (1980), only *permits* affirmative action by grantees. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court held that the government entity with whom the private actor is allegedly aligned must *order* the alleged wrongdoing.

94. 438 U.S. 265 (1978).

95. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

96. 438 U.S. at 408 (Stevens, J., with whom Burger, C.J., and Stewart and Rehnquist, JJ., joined, concurring in part and dissenting in part).

gram.⁹⁷ Justice Powell provided the swing vote. He agreed that neither the Constitution nor Title VI, which he likewise equated, outlaws all consideration of race; he further concluded, however, that the school program failed to satisfy either.⁹⁸

All five Justices who ruled on constitutional grounds to hold that race may be taken into account for affirmative action purposes were in accord that the predicate for such action was the existence of past discrimination. They departed on the issue of whether the Board of Regents was competent to make a finding as to that past wrongdoing. Justice Powell ruled in the negative:

Petitioner does not purport to have made, and is in no position to make, . . . findings [of constitutional or statutory violations]. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.⁹⁹

The four other Justices disagreed, reasoning that the Board was "vested with full legislative (including policymaking), administrative, and adjudicative powers" ¹⁰⁰

In *Fullilove v. Klutznick*,¹⁰¹ a minority-preferential program again was addressed. Here, it was Congress which had statutorily set a requirement that 10% of the federal funds granted for local public works projects had to be used by the state or local governmental grantees to procure services and supplies from businesses owned and controlled by members of minority groups. The Court upheld the statute in the face of constitutional challenge, again without a majority opinion. Again, however, there was majority agreement that such a preference had to be based on the existence of past discrimination. There was also majority agreement that Congress was competent to make findings of such past wrongdoing.

The five *Bakke* Justices, who had held that an affirmative action program taking race into account was acceptable, construed both the Constitution and Title VI of the Civil Rights Act of 1964. Indeed, they

97. 438 U.S. at 328 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

98. 438 U.S. at 319-20 (Powell, J.).

99. 438 U.S. at 309.

100. *Id.* at 367 n.42 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

101. 448 U.S. 448 (1980).

equated the statutory provision with the equal protection clause.¹⁰² Thus the requirements of findings, and competency to make those findings, applied under the statute as well as the Constitution. Given that the ADA is modeled after Title VI,¹⁰³ the constraints placed upon the latter logically devolve upon the ADA as well, absent some compelling reason to the contrary, which is not present here.

The ADA regulations authorize affirmative action "[e]ven in the absence of a finding of discrimination,"¹⁰⁴ Moreover, they set no limits as to which governmental recipients may pursue such action. Conceivably, then, under the regulations, the same medical school involved in *Bakke* could now decide to establish a preferential program for older applicants. It could attempt to implement this program absent any findings of past discrimination, provided simply that there was "limited participation"¹⁰⁵ in the past. But, given *Bakke* and *Fullilove*, it indeed would appear that the ADA regulations, admittedly not a mandate but only an expression of permissiveness, suggest far more than is constitutionally tolerable. For there must be findings of past wrongdoing.¹⁰⁶ And the government institution which is a recipient of federal financial assistance and which seeks to embark upon its prefer-

102. See 438 U.S. at 287 (Powell, J.); 438 U.S. at 325, 328 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

103. See HOUSE CONFERENCE REPORT, *supra* note 43, at 56.

104. 45 C.F.R. § 90.49(b) (1980).

105. *Id.*

106. The HEW government-wide regulations purport to authorize affirmative action to overcome the effects of conditions that resulted in "limited participation" in the recipient's program. However, the Overview to the regulations, at a juncture not referring to the affirmative action provision, is very clear in establishing that disproportionate allocation of resources does not constitute a violation of the ADA. See 44 Fed. Reg. 33,768, at 33,771 (1979). Thus, the fact that in a given program, persons under 45—who make up, say, 50% of the population—constitute three-fourths of the program participants, while the other 50% of the population in terms of age makes up only one-fourth, does not establish that the Act has been transgressed. Were this regulatory prescription for the ADA to be carried over to governmental grantees operating under the constitutional constraints of *Bakke* and *Fullilove*, it is unclear how a grantee could ever establish that there has been "limited participation" in a program so as to warrant affirmative action. The easiest standard of measurement, of course, would be a straightforward proportionality scheme—if 10% of the community served by the program is over 65, then 10% of the client population in the program should be over 65. Statistics revealing a less than 10% participation level would warrant affirmative action to boost the numbers up to that percentage. *Cf.* *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1979) (racial imbalance in work force); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 316 (1977) (racial discrimination in hiring teachers).

While the Overview injects some ambiguity, it addresses the question of what will constitute a violation of the statute, whereas the regulations authorize affirmative action even absent a violation of the ADA. Thus, the Overview's caveat need not be deemed to directly intersect with the affirmative action provision. In any event, since the Overview only goes to violations of the ADA itself, it has no bearing on a governmental grantee's initial endeavors to make findings which will then support an affirmative action effort, which in turn, according to the ADA regulations, will not violate the Act.

ential program further must have the institutional charter to make such findings.

This reading is amplified by a post-*Fullilove* challenge to a federal Department of Transportation regulation relating to preferential treatment for businesses controlled by minorities and women. The court in *Central Alabama Paving, Inc. v. James*¹⁰⁷ stated:

[T]wo related requirements . . . must be satisfied by an administrative agency seeking to establish a preferential classification of the type here challenged.

First, the agency must have been given authority by Congress to take such action. Second, the agency must have made findings of past discrimination and have determined that its actions are responsive to the discrimination.¹⁰⁸

That the ADA can be read on its face as embodying an authorization by Congress for governmental grantee affirmative action free of the constraints imposed by the Constitution is not a tenable interpretation. *Central Alabama Paving* sustains this conclusion. There, the Department of Transportation defended the legitimacy of its regulation by invoking six statutes which it administered, and which the court agreed reflected a national policy to halt discrimination based on race or sex. The court rejected the Department's defense:

[The] third-party defendants [the state officials implementing the regulation as a condition of receiving federal funds] have simply failed to offer sufficient evidence of the sort of "detailed legislative consideration" or conscious conferral of authority required by the decisions of the Supreme Court before an administrative agency can constitutionally impose the sort of race-conscious remedies now under consideration.¹⁰⁹

The defendants also invoked Title VI of the Civil Rights Act of 1964, but the court found the same flaw with this reliance as it had with the other statutes.

The one possible savings for age-directed affirmative action efforts by governmental recipients of federal financial assistance follows from the fact that both *Bakke* and *Fullilove* were couched in terms of race-oriented programs. The courts have made clear that any use by gov-

107. 499 F. Supp. 629 (M.D. Ala. 1980).

108. *Id.* at 636. Where properly empowered legislative or administrative bodies have made determinations of past discrimination, affirmative action employment programs thereupon adopted by such bodies have withstood constitutional challenge. *See, e.g.,* Local Union No. 35, IBEW v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 3148 (1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

109. 499 F. Supp. at 638.

ernment of racial distinctions evokes the most stringent judicial scrutiny;¹¹⁰ in contrast, the courts have shown a very relaxed concern under the Constitution about age distinctions.¹¹¹ Thus, the stringent demands imposed by the Court in *Bakke* and *Fullilove* may accordingly not carry over to the age context. While this reasoning has some merit, it should be noted that in *Central Alabama Paving* the federal district court did not ease the rigor of its holding insofar as the challenged preference was applicable to women, even though gender-based discrimination elicits less constitutional scrutiny than do race classifications.¹¹²

In substance, the HEW government-wide regulations' affirmative action provision does not require grantees to engage in affirmative action; it is only permissive. As a basis for a valid defense by a charged governmental grantee,¹¹³ however, *Bakke* and *Fullilove* likely set the standards and HEW's regulations (or those of the individual agencies which are mandated to model their regulations on those issued by HEW¹¹⁴) likely will not suffice, although the fact that it is age, and not race, which is at issue here may warrant a contrary conclusion.

Affirmative Action by a Private Funding Recipient

Bakke and *Fullilove* speak to the constraints imposed under the Constitution and Title VI of the Civil Rights Act of 1964. Constitutionally based limits only apply to governmental grantees, however, given that the fourteenth amendment only speaks to state action, and that the mere receipt by a private entity of governmental moneys generally is not sufficient to establish the state action element.¹¹⁵ Thus, private recipients of federal financial assistance may not be as limited as are governmental grantees.¹¹⁶ As to private recipients, there need be no

110. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

111. See, e.g., *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). See generally Eglit, *supra* note 84.

112. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

113. The recipient bears the burden of proof as to statutory defenses arising under 42 U.S.C. §§ 6103(b)(1)(A) and (B) (1976). 45 C.F.R. § 90.16 (1980). While the regulations are silent as to defenses invoking the other statutory and regulatory defenses, certainly it must be the defendant who likewise bears the burden.

114. See note 10 and accompanying text *supra*.

115. See note 93 *supra*.

116. While the five Justices in *Bakke* who were willing to allow, in some circumstances, race-oriented affirmative action programs spoke to Title VI, as well as the Constitution, they did so in the context of a governmental grantee. Thus, the question of limits placed upon private grantees was left open, although four did assert that the same standards should apply. 438 U.S. at 327 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

finding of discrimination; by the very terms of the regulations, however, there must have been conditions which led to past limited participation in the given program on the basis of age.

Conclusion

In conclusion, then, it may well be that standing alone the HEW government-wide regulations, notwithstanding their embracing affirmative action, sanction a practice which indeed cannot be legitimated in many instances. After all, affirmative action in favor of one age group can redound to the detriment of another group which is likewise defined by age. In a medical school with a fixed number of openings for new students, preference for those over 40 inevitably will diminish the number of slots for those under 40. That is the type of result which the Constitution may preclude and which the ADA presumably does preclude absent such preferential action fitting within one of the Act's explicit exceptions.¹¹⁷ At the least, to engage in affirmative action, a governmental recipient of federal financial assistance will have to make findings of past discrimination, and will have to be institutionally equipped and authorized to make such findings. These are requirements which the affirmative action regulation unacceptably ignores.¹¹⁸

Special Benefits

There is one particular type of activity which the government-wide regulations identify and approve of as acceptable "voluntary affirmative action":

If a recipient operating a program which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from par-

117. Were an affirmative action plan to be justifiable under one of the specific statutory exceptions, the foregoing analysis of course would not be necessary. Thus, the issue is whether, when a voluntary plan does not qualify under one of the exceptions, it can nonetheless be sustained in the face of a claim that it violates the Act.

118. Assuming that the requirements of *Bakke* and *Fullilove* have been met as to governmental grantees, and the requirements of the regulatory language have been satisfied by private grantees, the question arises as to the scope of affirmative action which may be undertaken. The short answer is that the effort can be no greater than needed to remedy the past wrong. Once the present situation has been brought to the point it would have been at but for the past wrong or past conditions producing the limited participation, the occasion for affirmative action has ended. Cf. *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (temporary plan to correct racial imbalance in work force); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (school desegregation plan not perpetual).

ticipation in the program.¹¹⁹

The Overview to the regulations provides an explanation for this provision. HEW apparently recognized that the statutory language might lead to the downfall of special benefits programs, and concluded that Congress could not have really intended such a result:

[T]he Congress has consistently made clear its support for the concerns of older persons. It is therefore unlikely that Congress intended the Act to call into question the generally accepted special benefits which are provided to older persons in programs that are otherwise available to a wider age range of the population. Public comment on the [proposed] regulations was almost unanimously supportive of these benefits, which often take the form of special discounts. Similarly, no one has suggested that similar benefits for children should be questioned under the Act.¹²⁰

Notwithstanding HEW's obvious support for "the continuation of special benefits for children and older persons,"¹²¹ the regulatory provision is not free from question. There is first the matter of focus. Special age-based benefits programs are described as "voluntary affirmative action." Yet, in the preceding subsection (b) of the same section, the regulation speaks of "affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age."¹²² Thus, affirmative action is viewed, in the prior subsection, as a step to *overcome* past inadequacy. In subsection (c), speaking to special benefits programs, apparently no such predicate—*i.e.*, past disadvantage—is necessary.

It is doubtful, then, whether special benefits programs should be cloaked in the language of affirmative action. Deprived of this rhetorical garb, special benefits programs appear to be nothing more than what they are: special benefits.

A reduced fare program employed in a public mass transit system illustrates the dubious substantive tack of the regulation. One can envision what is, in fact, a common type of program: all persons under 18 and over 60 are allowed to ride a city's public buses at half fare.¹²³ No needs test is applied to determine those who actually require such a subsidy. Rather, age is the sole criterion. According to the regulation,

119. 45 C.F.R. § 90.49(c) (1980).

120. 44 Fed. Reg. 33,768, at 33,771 (1979).

121. 45 C.F.R. § 90.49(c) (1980).

122. *Id.* § 90.49(b). See text accompanying note 89 *supra*.

123. Actually, there is statutory authorization for such programs for older persons, pursuant to § 5(m) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604(m) (1976), and thus the example would in any event fit under the ADA's "any law" exemption, embodied in 42 U.S.C. § 6103(b)(2) (1976). See generally Alexander, *supra* note 17. For the purposes of hypothesis, however, the example—ignoring the existence in reality of the statute—is a useful one.

this special benefits program does not run afoul of the ADA so long as "it does not have the effect of excluding otherwise eligible persons from participation in the program."¹²⁴

The critical task is that of defining the word "program." Inasmuch as the extension of a reduced fare to certain age-defined individuals does not foreclose the ability of those aged 18 to 59 from riding the buses—albeit at the higher, regular fare—presumably the regulation's standard is satisfied, so long as the "program" is the whole system of public transit. However, if the "program" is defined, not as the general transit system, but just as the subsidy fare system, then of course those over 18 and under 60 are indeed excluded from participation in it, and the regulatory provision is transgressed.

The obvious intended reading of the regulation's application is the former, *i.e.*, the "program" is to be considered the whole transit system, rather than just the reduced fare operation. For if the latter interpretation were followed, every special benefits program would fall—the very consequence HEW clearly desired to avert. Whatever HEW's desire, however, its approach seems strained at best, and certainly self-serving. The agency was attempting to save programs which, if they did not fit within one of the specific statutory exceptions—which they may well not—would violate the ADA. The more straightforward approach would be to accept the ADA for what it purports to be—a statutory assault on ageism—and to let special benefits programs either satisfy the statutory requirements or otherwise fall. After all, the 40-year-old unemployed mother of three, unable to afford a car and needful of bus service to seek jobs, is surely a victim of adverse, age-based treatment.¹²⁵ There really is no persuasive reason why the ADA should not protect her. Candor compels the admission that ageism exists—even when some benefit—so long as some are harmed. If it can be shown that the special discount can fit within one of the statutory exceptions, *i.e.*, that it is reasonably necessary to achieving a statutory objective,¹²⁶ or is reasonably necessary to the normal operation of the transit system,¹²⁷ or is established by a specific statute,¹²⁸ or is based on a reasonable factor other than age,¹²⁹ then the program can survive. That is

124. 45 C.F.R. § 90.49(c) (1980).

125. At a more generalized level, it could be argued that absent the fare subsidy for the few, there would be higher transit revenues derived from charging those who are specially benefited the normal fare, thereby perhaps enabling a general fare reduction for everyone.

126. 42 U.S.C. § 6103(b)(1)(A) (1976). *See generally* Alexander, *supra* note 17.

127. 42 U.S.C. § 6103(b)(1)(A) (1976).

128. *Id.* § 6103(b)(2). *See generally* Alexander, *supra* note 17.

129. 42 U.S.C. § 6103(b)(1)(B) (1976). *See generally* Alexander, *supra* note 17.

what Congress wanted, as the ADA reveals. Failing to meet the measure of the statute, an age distinction—even one devised for a beneficent purpose of extending a special benefit—should not survive.

Mediation-Induced and "Initial" Investigation-Induced Settlements in Class Actions and Representative Complaints

A unique feature of the ADA, as implemented by the HEW model government-wide regulations, is the regulatory prescription for mediation to be attempted when a complaint is lodged with the funding agency as to a funding recipient allegedly in violation of the Act.¹³⁰ The mediation itself is to be conducted under the auspices of the Federal Mediation and Conciliation Service.¹³¹

The desired result of mediation is a settlement agreed to by the parties.¹³² If mediation fails, the agency is, at the "initial" investigation stage which follows,¹³³ to in any event attempt to secure a resolution "to the mutual satisfaction of the parties."¹³⁴ Since complaints may be filed not only by individuals, but also by a class representative and by organizations on behalf of their members or on behalf of other individuals,¹³⁵ such settlements can take on considerable complexity inasmuch as interests of individuals not personally participating in the process will be affected.

Assume a situation where a complaint is filed on behalf of a class of grievants, of which the actual complainant may be a member, or on behalf of "other" persons by an organizational representative. It is possible that a mediated settlement, or a settlement induced by the agency, may be satisfactory to the actual complainant but may not be similarly acceptable to other individuals on whose behalf the complaint ostensibly was filed. Were this a federal court action, rule 23(e) of the Federal Rules of Civil Procedure¹³⁶ would require that notice of the proposed settlement be given to all putative class members, even if the class had not yet been certified.¹³⁷ The purpose of that provision, of course, is to protect the interests of those persons whose rights might be affected by

130. 45 C.F.R. § 90.43(c)(3) (1980). See generally Marlin, *supra* note 10.

131. 44 Fed. Reg. 33,788 (1979).

132. 45 C.F.R. § 90.43(c)(3)(ii) (1980).

133. *Id.* § 90.43(c)(4).

134. *Id.*

135. "A complaint may be made by an individual, a class, or by an organization on behalf of its members or on behalf of other persons." 44 Fed. Reg. 33,768, at 33,775 (1979).

136. FED. R. CIV. P. 23(e).

137. See, e.g., Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

the settlement. By being given notice, they then can seek to intervene in the action to safeguard their interests if they feel the settlement is inadequate. Neither the HEW government-wide regulations, nor any agency-specific regulations, require such notice—or any communication for that matter—with parties who are not named complainants.

While the mediation-induced and initial investigation-induced settlements contemplated by the HEW government-wide regulations of course do not arise in a courtroom setting, certainly the interests of class members, as well as individuals on whose behalf an organization files a representative complaint, are deserving of protection. Thus, such settlements should not be deemed final until reasonable notice has been given all class members or other affected individuals as to the terms of a given settlement, which notice should further apprise these persons that they may seek to intervene in the enforcement proceeding if they object to the settlement. This is particularly important given the 180-day time limit for filing which most of the agency-specific regulations have imposed.¹³⁸ A potential grievant may sit on his rights, believing them to be represented in an already filed class or representative complaint, only to learn too late that the complaint was concluded by a settlement at a point so long in the past that the 180 days for filing on his own behalf have run.

At the very least, if a notice requirement is not to be observed, then class members or other persons on whose behalf a complaint was filed ought not to be deemed bound by the agreement. Moreover, during the pendency of the class complaint, the 180-day filing period ought to be deemed tolled as to such class members or other persons.¹³⁹

Admittedly, this process, designed to protect grievants, will likely generate a disincentive for charged recipients to settle. On the one hand, the giving of notice may bring out of the woodwork grievants who might otherwise never have filed complaints, thereby escalating the stakes in the controversy from the recipient's perspective. Such an eventuality will disincline a charged recipient to enter into a settlement in the first place. If the requirement of notice is not imposed, and the suggested correlative ability of dissatisfied class members to initiate their own complaints then follows, the charged recipient may likewise

138. The HEW government-wide regulations do not specify any time period within which a private grievance must be filed with the funding agency. Notwithstanding that these regulations are supposed to serve as a governing model for the individual funding agencies' regulations, almost all of the agency-specific regulations impose a 180-day statute of limitation. *See, e.g.*, 44 Fed. Reg. 55,383-86 (1979) (to be codified in 14 C.F.R. § 378) (Civil Aeronautics Board); 45 Fed. Reg. 46,437-42 (1980) (to be codified in 15 C.F.R. § 8a) (Department of Commerce).

139. *Cf. American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (antitrust).

be disinclined to enter into a settlement, since it knows that that settlement will not, after all, terminate its troubles.

Still and all, the purpose of the ADA is to protect victims of discrimination. Any process which does not ensure that each alleged victim has an opportunity to vindicate his claim, either by knowingly agreeing to be bound by a settlement or by allowing him to seek his own redress, is an inadequate one. In any event, the same disincentive to settlement which arises exists in court-filed class actions, and is one which litigants have been able to deal with in that setting. Moreover, the problem from the recipient's perspective can be unduly overblown. In many instances, a settlement with one individual or organization will after all produce a change in practices or policies which will benefit all, and thus probably negate the likelihood of further complaints.

An additional element ought to be read into the mediation-induced settlement process in class or representative complaints. While the HEW government-wide regulations provide that an agreement be submitted to the agency,¹⁴⁰ they do not provide that the funding agency has any authority regarding approval or disapproval of that agreement. Thus, were a complainant to be "bought off" by a recipient, to the detriment of unnamed members of the class or of unnamed persons who were ostensibly being represented by a complaining organization, the agency would not have authority to reject that tainted agreement. Again, in court-filed class actions, such settlements are subject to the court's scrutiny to a limited extent.¹⁴¹ So, too, should such agreements be subject to agency scrutiny here, so that an agency can assert the authority to disapprove a settlement if it does not properly protect the interests of unnamed, albeit potential, grievants.¹⁴² Of course, inasmuch as individual grievants who are dissatisfied should, in accordance with the foregoing discussion, be able to seek to intervene or at least not be bound by an agreement to which they did not consent, the danger of a representative sabotaging the rights of those he represents is mitigated. Even so, the administrative process should not lend itself to adulterated agreements, as a matter of principle. Moreover, agency rejection of an inadequate agreement at the outset can achieve considerable savings in agency time and, ultimately, in court time.

140. 45 C.F.R. § 90.43(c)(3)(ii) (1980).

141. FED. R. CIV. P. 23(e).

142. *See, e.g.,* Illinois Human Rights Act, ILL. REV. STAT. ch. 68, § 7-103(A) (Supp. 1980).

Pinpointing the Violative Program

The statute and the HEW government-wide regulations are very clear in requiring that a violation of the ADA be pinpointed as to the specific program guilty of wrongdoing, and that the scope of the remedy be limited to only that program. Section 305(b)¹⁴³ provides that enforcement shall be limited to the particular political entity or other recipient with respect to which a finding of a violation has been made, and it further requires that enforcement "shall be limited in its effect to the particular program or activity, or part of such program or activity, with respect to which such finding has been made."¹⁴⁴ A termination of funding, or a refusal to fund, may not "be based in whole or in part on any finding with respect to any program or activity which does not receive Federal financial assistance."¹⁴⁵

Thus, for example, if the Chicago Park District were to be found in violation of the ADA because it excludes children under age 10 from its federally assisted summer recreation program, funding termination as to that particular program could be imposed. However, *in theory*, termination could not be imposed as to other federally assisted programs of the Park District which are in compliance. Moreover, even if it were established that a nonfederally assisted program of the Park District was discriminating in a manner which, if it were receiving federal funds, would violate the ADA, the fact that the discriminatory program receives no federal moneys *theoretically* precludes action under the ADA as to the Park District's programs which do receive federal assistance, as long as those programs themselves are not out of compliance with the Act.

This narrow pinpointing for imposition of a penalty appears to limit the effectiveness of the Act since it removes at least part of the threat of funding loss which might otherwise hang over the head of a recipient which is receiving federal funds for some of its efforts. The program administrators will know that they indeed can engage in age discrimination in their non-assisted activities without any fear of loss of their federal moneys. They will also know that they can engage in discriminatory acts, even in an assisted program, without running the risk of losing their federal moneys for their other, complying assisted programs. On the other hand, the pinpointing of the actually violative program has the benefit of protecting beneficiaries in nondiscrimina-

143. 42 U.S.C. § 6104(b) (Supp. III 1979).

144. *Id. Accord*, 45 C.F.R. § 90.47(b) (1980).

145. 42 U.S.C. § 6104(b) (Supp. III 1979). *Accord*, 45 C.F.R. § 90.47(b) (1980).

tory programs who might otherwise, in the name of the agency's protection of rights under the statute, find themselves without any program at all—no matter how zealously their own program administrators complied with the ADA—because of fund termination.

The case law under Title VI of the Civil Rights Act of 1964,¹⁴⁶ which has an identical pinpointing provision,¹⁴⁷ reveals that the task of identifying the specific unlawful program, and then confining the statutory penalty to it, can generate conflicting conclusions.¹⁴⁸ In *Bob Jones University v. Johnson*,¹⁴⁹ for example, a federal district court held that the receipt by university students of Veterans Administration education benefits should be deemed tantamount to the university's receipt of federal financial assistance, and thus all of the school's programs fell under the onus of funding termination for violation of the statute. The court found, notwithstanding that it was the students who were the direct payees of the federal moneys, that the university in effect received assistance in a number of ways:

First, payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would [otherwise] be spent on the student. Analogously, . . . participation in the HEW administered National Defense Student Loan program . . . relieved the university from the burden of committing its assets to loans to eligible students.

[Second,] participation of veterans who—but for the availability of federal funds—would not enter the educational programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw¹⁵⁰

Bob Jones University represents the most extreme interpretation of the pinpointing requirement of Title VI. In *Flanagan v. President of Georgetown College*¹⁵¹ the court also took a broad view. The plaintiff, a white male law student, alleged that the law school's financial scholarship program, which gave preference to minority students, violated Title VI. Relying upon the fact that the school received federal moneys in the form of grants, loans and interest subsidies totaling over \$7 million for the construction of a new building, and further relying upon a

146. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

147. *Id.* § 2000d-1.

148. See generally Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980).

149. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

150. 396 F. Supp. at 602-03. The court also relied upon the historical background of federal educational benefits. In the past they had been made directly to the schools, and the change in form of payment was not, in the court's view, sufficient to warrant not applying Title VI, which of course would unquestionably apply were the payments still made in that earlier form. *Id.* at 603.

151. 417 F. Supp. 377 (D.D.C. 1976).

broad HEW regulation interpreting Title VI,¹⁵² the court held that the entire school should be deemed to be the program receiving federal financial assistance, and thus should be susceptible to funding termination. Thus, "by accepting federal financial assistance for the construction of the [new building], Georgetown and the Law Center were required to refrain from discriminating on the basis of race in providing any service, financial aid or other benefit to its Law Center students."¹⁵³

The district court in *Stewart v. New York University*¹⁵⁴ took a contrary approach to a very similar factual situation. The plaintiff was a white woman who had been denied admission to the defendant's law school and who contended that Title VI was violated in that the law school operated a minority admissions program which, on the basis of race, admitted minority applicants with lesser qualifications than she possessed.

The plaintiff pointed to the alleged receipt of federal financial assistance; specifically, she noted federal student loans, "restricted purposes" grants, tax deductions and exemptions—all of which benefited the law school. Additionally, she identified a \$625,000 indebtedness to the federal Department of Housing and Urban Development for the construction of a law school dormitory. Notwithstanding these elements of alleged federal financial assistance, the court stated: "[P]laintiff must show that the Federal financial assistance received by the Law School constitutes more than a *de minimus* portion of its annual revenues and that there is some material connection between said assistance and the minority admissions policy challenged herein."¹⁵⁵ Applying this standard, the court reasoned that the "connection" was not shown. None of the moneys at issue were sufficiently related to the minority admissions program, the program allegedly violative of Title VI.

The highest court to construe the pinpointing requirement of Title VI has taken an intermediate position between the extremes of *Bob Jones University* on the one hand and *Stewart* on the other. In *Board of Public Instruction of Taylor County, Florida v. Finch*,¹⁵⁶ the United States Court of Appeals for the Fifth Circuit employed an "infection

152. The HEW government-wide ADA regulations do not clarify the pinpointing requirement of the statute.

153. 417 F. Supp. at 384.

154. 430 F. Supp. 1305 (S.D.N.Y. 1976).

155. *Id.* at 1314. *Accord*, *McLeod v. College of Artesia*, 312 F. Supp. 498 (D. N. Mex. 1970).

156. 414 F.2d 1068 (5th Cir. 1969).

theory." As the basic, necessary approach, the court required a program-by-program examination. Thus, the court vacated an HEW order terminating all federal financial assistance to the Board, requiring instead that HEW look to each Board program receiving federal monies to see if that particular program was in violation of Title VI. At the same time, however, the court did not require that each program had to be considered in complete isolation from its context: "[T]he administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."¹⁵⁷

Given that both *Bob Jones University* and *Finch* had been decided prior to the enactment of the ADA, any effort to impute to Congress knowledge of the manner in which the courts had construed Title VI, whose pinpointing approach was incorporated into the ADA, is not helpful, since the two cases are in disagreement. Given this case law, however, it is clear that the Chicago Park District examples noted earlier are properly stated with caution, with the notation that *in theory* certain consequences could not follow upon discrimination by a given specific program. For both the broad approach in *Bob Jones University* and even the infection theory employed in *Finch* provide strong bases for a reading of the ADA pinpointing provision in a more wide-ranging manner than its literal statutory language might imply.

Private Actions—Establishing a Claim or Defense

The ADA on its face authorizes private actions; this is the product of a 1978 amendment to the Act.¹⁵⁸ In addition, the statute authorizes

157. *Id.* at 1079. *Finch* also made another point which should be noted. The court required that the administrative agency taking funding cutoff action must make findings of fact as to the program at issue being infected by other discriminatory activities of the funding recipient. The ADA, like Title VI, requires on its face "an express finding on the record" as a predicate for fund cutoffs generally. 42 U.S.C. § 6104(a)(1) (1976). *Finch* makes specific the requirement, if the infection theory is to be employed, that findings be made that indeed the particular program at issue is infected with discrimination so that "a reviewing court [can] know that the effects of the order entered by the agency have been limited to programs not in compliance with the . . . Act." 414 F.2d at 1079. That requirement, imposed in the context of a case arising under Title VI, should likewise apply here.

158. The Act, as amended, provides:

(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education, and Welfare, the Attorney General of the United States, and the person against whom the action is di-

administrative enforcement by the funding agency as to violations of the statute.¹⁵⁹ And finally, the Act provides for enforcement by "other means authorized by law,"¹⁶⁰ which includes suit by the Attorney General against recipients which transgress the statute.¹⁶¹

The questions of establishing a claim or defense under the Act are by no means simple ones to address. They require an examination of the case law developed under the equal protection clause of the fourteenth amendment and under Title VI of the Civil Rights Act of 1964,¹⁶² on which the ADA is modeled,¹⁶³ as well as under Title VII of the 1964 Act.¹⁶⁴ The HEW government-wide regulations implementing the statute are also relevant. Complexity is exacerbated because there is need to consider whether the elements necessary to establishing a violation of the Act will vary depending upon whether the defendant is a governmental or a private recipient of federal financial assistance, as well as upon whether the charging party is a litigant in court or the funding agency pursuing a funding cutoff or denial in an administrative proceeding.

The Equal Protection-Title VI Analogy

There are arguments to be made that the ADA should be equated, insofar as establishing a *prima facie* case and allocating burdens are concerned, with the equal protection clause. There are also persuasive arguments to the contrary. The significance of the equation follows from two consequences. First, a *prima facie* case may be quite difficult to establish if that equation is adopted. Second, an equal protection

rected. Such interested person may elect, by a demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff.

(2) The notice referred to in paragraph (1) shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event that the plaintiff prevails. No action described in paragraph (1) shall be brought (A) if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States; or (B) if administrative remedies have not been exhausted.

42 U.S.C. § 6104(e) (Supp. III 1979). Title 42 U.S.C. § 6104(f) (Supp. III 1979) amplifies the exhaustion requirement.

159. 42 U.S.C. § 6104(a)(1) (1976).

160. *Id.* § 6104(a)(2).

161. The case law is well established, albeit not under the ADA—which has been the subject of only minimal court attention thus far—that the Attorney General may sue grant recipients who misuse federal moneys. *See, e.g.,* *King v. Smith*, 392 U.S. 309 (1968); *United States v. Tatum Ind. School Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969).

162. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

163. *See, e.g.,* HOUSE CONFERENCE REPORT, *supra* note 43, at 56.

164. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

analysis would be particularly protective of the defendant, even if the prima facie case could be made out, with the result being that the funding recipient would in almost every instance prevail. Analysis of the potential equation requires an examination of case law developed under both the equal protection clause and Title VI of the Civil Rights Act of 1964.

In *Washington v. Davis*¹⁶⁵ the Supreme Court established that to make out a prima facie case under the equal protection clause the plaintiff must prove that the challenged law or conduct "ultimately [is] traced to a . . . discriminatory purpose."¹⁶⁶ The Court thereby effectively overruled a number of lower courts which had held that it was sufficient for the plaintiff only to show that the challenged law or action, however facially neutral, in fact had a discriminatory effect¹⁶⁷—a considerably easier legal hurdle to surmount because purpose is a particularly elusive matter. Typically, decisionmakers either do not articulate their purposes overtly, or they have multiple motivations. In any event, they are unlikely to admit discriminatory intent; thus proof of its existence other than by inference can be difficult.¹⁶⁸ In contrast, under the effects test, the plaintiff, in order to make out a prima facie case, need only show that the challenged law, regulation or action has a disproportionately adverse impact on members of the group alleging harm. For example, a program may have a policy that only persons able to lift seventy pounds or more are eligible for participation. While neutral on its face, the policy in practice operates to exclude a disproportionate number of older persons. The showing by the grievant of that impact would be sufficient on its own to make out a colorable, or prima facie, violation of the Constitution.

Davis addressed constitutionally based claims and it does not necessarily follow that the purpose requirement imposed on equal protection claimants carries over to statutory proscriptions of discrimination. Indeed, under Title VII of the Civil Rights Act of 1964,¹⁶⁹ for example, which outlaws discrimination in employment on the bases of race, color, national origin, religion and sex, the effects test applies in certain settings.¹⁷⁰ Resolution of the question of whether the ADA must, or should, be read so as to embody the constitutionally derived discrimi-

165. 426 U.S. 229 (1976).

166. *Id.* at 240.

167. See the cases cited in *Washington v. Davis*, 426 U.S. 229, 244 n.12 (1976).

168. See notes 192-95 and accompanying text *infra*.

169. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

170. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

natory purpose requirement is informed by examination of Title VI of the Civil Rights Act of 1964, given that Congress avowedly modeled the ADA on it.¹⁷¹

Until recently, a reading of Title VI as only requiring the showing of a discriminatory impact to make out a *prima facie* case found considerable sustenance in *Lau v. Nichols*,¹⁷² in which the Court held that a school system violated the statute by failing to provide supplemental bilingual and remedial instruction to non-English speaking students of Chinese origin. The *Lau* Court upheld an HEW regulation which asserted the impact, or effects, standard as that properly applicable in construing Title VI:

Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program"¹⁷³

The Court stated that "[d]iscrimination is barred which has that effect even though no purposeful design is present."¹⁷⁴

On the basis of *Lau*, several lower federal courts have held that a *prima facie* case is made out under Title VI by a showing of discriminatory effect alone.¹⁷⁵ *Lau* was decided before *Washington v. Davis*, however, and thus cannot be said to actually address the intent-impact issue in the context of making an overt choice between the two standards. What is more, two Supreme Court decisions subsequent to both *Lau* and *Davis* suggest strongly that the impact interpretation is of dubious continuing validity.

In *University of California Board of Regents v. Bakke*,¹⁷⁶ a divided Supreme Court struck down a medical school admissions program which was attacked on both equal protection and Title VI grounds by a rejected white male applicant, who challenged the program because it gave preference to disadvantaged minority individuals. All of the Justices addressed Title VI, although there was no majority opinion. Jus-

171. See, e.g., HOUSE CONFERENCE REPORT, *supra* note 43, at 56.

172. 414 U.S. 563 (1974).

173. *Id.* at 568 (citing 45 C.F.R. § 80.3(b)(2)) (emphasis in original).

174. *Id.*

175. See, e.g., *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979); *Jackson v. Conway*, 476 F. Supp. 896 (E.D. Mo. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 466 F. Supp. 1273 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 633 F.2d 232 (2d Cir. 1980). *Guardians* was reversed on the effects issue subsequent to the decisions in *University of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265 (1978), discussed at text accompanying notes 176-80 *infra*, and *Board of Educ. v. Harris*, 444 U.S. 130 (1979), discussed at text accompanying notes 181-84 *infra*.

176. 438 U.S. 265 (1978).

tice Powell wrote the opinion of the Court. He concluded, drawing upon the statute's legislative history, that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause" ¹⁷⁷ Justice Brennan, writing for himself and three other Justices, likewise equated the constitutional clause and the statutory provision. ¹⁷⁸ As for *Lau*, he strongly indicated that it was no longer good law. ¹⁷⁹

At least five Justices, then, were of the view that Title VI's contours are defined by the equal protection clause. ¹⁸⁰ It thus follows that for them it is necessary to prove discriminatory purpose in order to establish a violation of the statute. In *Board of Education v. Harris* ¹⁸¹ the Court addressed this issue once more, although more obliquely. The *Harris* Court held that a discriminatory impact standard was mandated by Congress in suits brought to enforce the Emergency School Aid Act of 1972. ¹⁸² In so doing, the majority stated that "[i]t does make sense to us that Congress might impose a stricter standard [*i.e.*, a standard easier for the plaintiff to satisfy] under ESAA than under Title VI of the Civil Rights Act of 1964." ¹⁸³ The clear implication was that the majority understood Title VI as embodying not the discriminatory impact standard, but rather the standard of discriminatory purpose. The three dissenters in *Harris*—Justices Stewart, Powell and Rehnquist—straightforwardly asserted that in their view Title VI did indeed require this latter standard. ¹⁸⁴ Thus, all nine Justices—five of them in *Bakke*, and the full complement in *Harris*—have either intimated or asserted that the standards applicable to the equal protection clause apply as

177. *Id.* at 287.

178. *Id.* at 328 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

179. Justice Brennan stated:

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, . . . which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion . . . that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352 (citation omitted) (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

180. The four remaining Justices in *Bakke* ruled on Title VI grounds alone, and did not address at all the statute's relation to the equal protection clause.

181. 444 U.S. 130 (1979).

182. 20 U.S.C. §§ 1601-1619 (1976) (repealed 1978) [hereinafter referred to as ESAA].

183. 444 U.S. at 150.

184. *Id.* at 160 (Stewart, J., with whom Powell and Rehnquist, JJ., joined, dissenting). Actually, the majority expressly declined to decide the Title VI intent issue. *Id.* at 149.

well to Title VI.¹⁸⁵ And since these two decisions, several lower federal courts have so held.¹⁸⁶

The equal protection clause-Title VI equation, unsettled as it is, embodies at least one additional ambiguity. In *Bakke* and *Harris*, and in the lower court decisions which have since construed the two decisions as establishing the intent requirement as necessary to the plaintiff's making out a prima facie case under the statute, the defendant has been a governmental agency. Thus, at least in one sense, application to that defendant of a test formulated under the Constitution and now incorporated into a statute does not break any new jurisprudential ground. If the defendant agency were sued directly under the Constitution, it would be the discriminatory purpose standard imposed upon the plaintiff which would apply in any event; to hold, then, that that same standard applies in the context of a suit brought under Title VI places no new burden upon the plaintiff nor does it impose upon the defendant any new legal exposure.

Private organizations, however, also receive federal financial assistance. Being nongovernmental, such entities do not fall under the sway of the fourteenth amendment's equal protection clause.¹⁸⁷ As to them, then, application of the constitutionally based test in the context of Title VI does pose a departure. Even if the Justices in *Bakke* and *Harris* were correct in reading congressional intent in enacting Title VI as being to parallel exactly the equal protection clause, that logic need not carry over to private entities made subject to liability under the statute. For as to them Congress was creating potential liability under a statute which, but for the statute, would not have existed under the Constitution in the first place.

Four Justices in *Bakke* were of the view that the same constitutionally derived standards applicable under Title VI to governmental discriminators were likewise to be applied to private recipients of feder-

185. It has not been held that the effects test, approved in *Lau*, is overruled. An argument for its continuing validity can be drawn from the approving citation of *Lau* in the plurality opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980).

186. See, e.g., *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981); *Guardians Ass'n v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980); *Lora v. Board of Educ.*, 623 F.2d 248 (2d Cir. 1980); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988 (D. Mass. 1981); *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290 (D. Del. 1980); *Harris v. White*, 479 F. Supp. 996 (D. Mass. 1979). But see *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980).

187. The case law is well established that the mere receipt of governmental funds by a private entity is not sufficient to satisfy the state action requirement of the fourteenth amendment. See note 93 *supra*.

al financial assistance.¹⁸⁸ No majority has spoken to the issue, however. Thus, it is unclear, even assuming the discriminatory purpose standard applies under Title VI to a plaintiff seeking to make out a prima facie case as to defendants such as that in *Bakke*, whether the same standard carries over to private recipients of federal funds sued under the statute.

Application of the Equal Protection Equation to the ADA

If the equal protection clause is equated with the ADA, the consequences both for establishing a prima facie case and for allocating burdens between the parties are significant. Where there is an overt age distinction employed by a recipient, discriminatory purpose can be inferred from the policy itself. There may be no such openly utilized policy, however. Rather, a claim of discrimination may arise out of alleged discriminatory treatment: *i.e.*, the recipient purports to treat all people without regard to age, yet persons of a certain age—say, all those 50 and over—are rejected. In such an instance, the task of establishing discriminatory purpose will be somewhat more difficult. Title VI case law is not instructive. That developed under Title VII of the Civil Rights Act of 1964,¹⁸⁹ which bans discrimination in employment on the bases of race, color, national origin, sex and religion, is. In *McDonnell Douglas Corp. v. Green*¹⁹⁰ the Supreme Court set out the standard Title VII formula for establishment of a prima facie case of discriminatory treatment. Transposed into the context of the ADA, this would require that the plaintiff (or the enforcement agency) establish that the individual was qualified (but for her age) for the program, that she applied for participation and was rejected, and that other persons with the same qualifications (but for the age factor) were accepted, or that the program at least held itself open to such individuals. By making such a showing, an inference of discriminatory motivation will have been established.¹⁹¹

188. 438 U.S. at 335-36 (Brennan, J., with whom White, Marshall and Blackmun, JJ., joined, concurring in part and dissenting in part).

189. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

190. 411 U.S. 792 (1973).

191. It should be stressed that the foregoing formulation is not an exclusive one. In the context of Title VII, the Supreme Court has observed: "The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Thus, as one district court has observed:

[T]he notion of a prima facie case in a [Title VII] discrimination action is a fluid one. Because the principle essentially embodies a rule of common sense, corresponding to the inferences that will ordinarily be drawn from a particular set of circumstances, we see no reason to hold that it can or must be expressed by a single formula.

Finally, alleged discrimination may arise as the consequence of an ostensibly neutral policy which has a disproportionate impact upon a given age group. In such a case, the task of establishing discriminatory purpose will be a particularly difficult one. The discriminatory impact, or effect, of a facially neutral law or action is, although a relevant factor to be taken into account in establishing discriminatory purpose, insufficient in and of itself to establish that purpose.¹⁹² Moreover, although the foreseeability of an adverse impact is a proper consideration in determining discriminatory purpose, a foreseeable adverse impact is in itself insufficient to establish such purpose;¹⁹³ discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of [ostensibly neutral] action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁹⁴

Obviously, identification of discriminatory purpose will be a function of the particular facts in a given case. Given that only in rare instances will a decisionmaker openly avow such a purpose, and given the inherent subjective nature of this critical element of the *prima facie* case, the task for the ADA grievant, enforcement agency or Attorney

Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 362 (N.D. Ga. 1979).

192. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

193. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979).

194. *Id.* at 279. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), dealing with race discrimination, the Supreme Court offered some suggestions of general application as to how discriminatory purpose might be established under the equal protection clause, even while recognizing the difficulty of the task. If the equal protection standards carry over into the ADA so as to likewise require a showing of discriminatory purpose under the statute, those guidelines are of utility here:

Determining whether invidious discriminatory purpose was a[], although not necessarily the sole[,] motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a [virtually 100% disparity of treatment as between the victimized class and the favored group, demonstrating a] pattern as stark as that in *Gomillion* [v. *Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo* [v. *Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Id. at 266-68 (citations and footnotes omitted).

General will by no means be a simple one.¹⁹⁵ There is, moreover, a contribution made by the Overview to the HEW government-wide regulations which aggravates the problem. HEW there asserts that a disproportionate allocation of resources by age or a disproportionate enrollment of participants in terms of age will not, standing alone, establish a violation of the Act.¹⁹⁶ Thus these factors presumably would not make out a *prima facie* case in the first instance.¹⁹⁷

In each instance—overt age policy, discriminatory treatment and ostensibly neutral policy with a disproportionate impact—the *prima facie* case will have to be established by a preponderance of the evidence.¹⁹⁸ Even if the *prima facie* case can be successfully established, however, the plaintiff's (or enforcement agency's) task will hardly be over. The burden will still lie with the proponent of the claim to further establish by a preponderance of the evidence that the recipient's policy is irrational. This follows from the treatment of age distinctions under the equal protection clause.

In *Massachusetts Board of Retirement v. Murgia*,¹⁹⁹ for example,

195. In *Bryan v. Koch*, 492 F. Supp. 212 (S.D.N.Y.), *aff'd*, 627 F.2d 612 (2d Cir. 1980), the district court analyzed the impact-intent issue in a suit filed by private plaintiffs under Title VI of the Civil Rights Act of 1964. The court concluded that as to their suit itself, the discriminatory purpose standard applied. It then went on in dictum to suggest that a different standard would apply, at least as to the pre-administrative hearing stages, in the agency enforcement process:

To subject . . . federal agencies responsible for monitoring federal expenditures to the same procedural standards applicable to private litigants would undermine the utility of Title VI. [The agency] should be permitted to impose a burden of justification whenever evidence is developed of a disparate impact probative of discriminatory motive. This would not justify a finding of discrimination under *Washington v. Davis*, but it would enable [the agency] to examine the justifications advanced to ascertain whether evidence for such a finding had been developed. For this reason, at the least, decisions such as *Lau [v. Nichols]* . . . should retain their validity.

Id. at 236.

It is hardly surprising that a funding agency would not be held, in seeking to secure compliance with a funding statute, to the task of establishing discriminatory purpose by the recipient (assuming the equal protection-Title VI-ADA equation pertains). No actual penalty accompanies compliance activities; moreover, it would be particularly difficult to separate out discrete stages in the process, yet if that were not done, even an agency inquiry of a recipient as to its activities could conceivably have to be preceded by the agency's establishing—to some tribunal's satisfaction—that discrimination was occurring, and that it was based on a discriminatory purpose.

However, it is clear that at the actual fund termination or denial stage before an administrative law judge, the funding agency—effectively the plaintiff in the proceeding—would bear the burden of establishing discriminatory purpose if the equal protection analogy were to be adopted.

196. 44 Fed. Reg. 33,768, at 33,771 (1979).

197. This assertion is in accord with the Court's formulation of suggested means by which to establish discriminatory purpose in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977), *see note 194 supra*, where the Court asserted that disparities of treatment as between different groups do not alone establish purpose—at least absent a virtual 100% differential between the favored and the disfavored classes.

198. *See Addington v. Texas*, 441 U.S. 418, 423 (1979); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

199. 427 U.S. 307 (1976). *See generally* Eglit, *supra* note 84.

which involved an unsuccessful challenge to a state mandatory retirement law, the Court said: "[T]he rational-basis standard . . . employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."²⁰⁰ In *Vance v. Bradley*,²⁰¹ also involving an unsuccessful attack on a mandatory retirement law—in this instance, one applicable to federal foreign service officers—the Court expressed even greater deference to the legislative judgment: "In an equal protection case of this type, . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."²⁰²

There is one matter of some perplexity, however. The HEW government-wide regulation specifies that "[t]he burden of proving that an age distinction or other action falls within the exceptions outlined in sections 90.14 and 90.15 [of the regulations] is on the recipient of Federal financial assistance."²⁰³ Under the minimum rationality test, the burden of justification never shifts—at least in the constitutional cases—to the defendant.²⁰⁴ The regulation, then, being inconsistent with judicial authority, presumably falls.²⁰⁵ The burden of proving that the statutory exceptions do not apply thus will be with the plaintiff.

The consequence, of course, of applying equal protection standards is to make extremely unlikely any chance of a plaintiff prevailing. The discriminatory purpose requirement for establishing a violation is itself an extremely difficult one to manage in those instances where the funding recipient's program ostensibly operates in a neutral manner. Even if the plaintiff or funding agency succeeds at that stage of the process, he or it still bears the burden of proving irrationality—a task doomed to failure in almost every instance.

Rejection of the Equal Protection-Title VI Analogy

If the equal protection-Title VI analogy is rejected as applying to

200. 427 U.S. at 314.

201. 440 U.S. 93 (1979). See generally Eglit, *supra* note 84.

202. 440 U.S. at 111.

203. 45 C.F.R. § 90.16 (1980) Section 90.14 addresses the "normal operation" and "statutory objective" exceptions. See text accompanying note 60 *supra*. Section 90.15 addresses the "reasonable factors other than age" exception. See text accompanying note 60 *supra*.

204. See generally Eglit, *supra* note 84.

205. See, e.g., *Bryan v. Koch*, 492 F. Supp. 212, 234 (S.D.N.Y.), *aff'd*, 627 F.2d 612 (2d Cir. 1980).

the ADA, the statute assumes considerably more rigor. The *prima facie* case would still be established in the same manner insofar as the alleged violation of the ADA arises out of an overt policy²⁰⁶ or out of discriminatory treatment.²⁰⁷ As to an ostensibly neutral policy having a disproportionate impact upon people of a certain age, however, the task for the plaintiff or enforcement agency would be eased. Discriminatory purpose would not have to be shown; discriminatory effect would suffice.

Typically, a case would be made out under the discriminatory effects standard by way of statistics. Suppose, for example, a funded program which provides adult education courses sets as a requirement the possession of a college degree. Suppose further that the program is challenged by a 65-year-old and an 18-year-old, both of whom have been excluded for lack of having degrees. The plaintiffs would plead a violation of the ADA and would allege that as a result of the degree requirement persons under 22 and over 60 are discriminated against. They would further allege that, as a matter of statistics, few people over 60 and under 22 have degrees. They might further allege, on information and belief, or with specific figures if they have them, that only a handful of the total number of persons enrolled in the program fall within the allegedly discriminated-against age ranges—numbers considerably disproportionate to the number of people in the community of such ages.²⁰⁸

These allegations should be sufficient, absent any externally imposed caveats, to establish a *prima facie* case of a violation under the

206. See notes 189-91 and accompanying text *supra*.

207. *Id.*

208. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979), the discriminatory effects test is used. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is some lack of clarity as to how much of an adverse impact need be shown under Title VII. The impact must be substantial, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), but that still leaves considerable ambiguity. A number of courts have used a guideline prescribed by the Office of Federal Contract Compliance: adverse effect occurs when the acceptance rate of the protected group is less than 80% of the acceptance rate of the remaining group. See cases cited in B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 35 n.28 (Supp. 1979). The same 4/5 rule is utilized in the Uniform Guidelines on Employee Selection Procedures adopted to implement Title VII by the Equal Employment Opportunity Commission and the Department of Justice, along with other federal enforcement agencies. See, e.g., 29 C.F.R. pt. 1607 (1980) (EEOC); 28 C.F.R. pt. 50 (1980) (Department of Justice).

Under Title VI, when the effects test has been used, a few courts have asserted that the impact must be one which affects more than just a few individuals. See, e.g., *Serna v. Portales Mun. Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974); *Valadez v. Graham*, 474 F. Supp. 149, 159 (M.D. Fla. 1979). See also *Lau v. Nichols*, 414 U.S. 563, 572 (1974) (Blackmun, J., concurring). In *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290 (D. Del. 1980), the court concluded that discriminatory effect was not demonstrated under the ADA by a merely *de minimis* discriminatory impact. *Id.* at 318.

statute. The problem is that there is indeed just such a caveat: the Overview to the HEW government-wide regulations asserts that the Act does "not require proportional program participation by age or the proportional allocation of funds by age."²⁰⁹ The rigor of this statement is then somewhat tempered by the further assertion that "disproportionate allocation of funds or program participation may be one of the elements which triggers an examination of whether age discrimination exists in the federally funded program or activity."²¹⁰

If taken literally, the Overview is extremely deleterious to the ADA plaintiff. The classic means of establishing discriminatory effect is to show just what the Overview discounts: disproportionate allocation of resources or disproportionate client participation. These are at the heart of the statistically based *prima facie* case. To say, as the Overview does, that disproportionality may trigger an examination of whether age discrimination exists is irrelevant because in the courtroom that examination will never see the light of day. The plaintiff will have already been dismissed for failure to state a claim for which relief may be granted,²¹¹ inasmuch as he will have failed to make out his *prima facie* case—at least if all he alleged was the kinds of disproportionality which the Overview addresses.

Regulations which are unreasonable may be struck down.²¹² Were this discounting of disproportionality data embodied in an actual regulation, it would likely meet that fate. Inasmuch as it is only the Overview of the regulations which raises this issue, the courts and administrative law judges should feel free to ignore it, for to honor it would be to drastically undercut the Act.

Once the *prima facie* case is established, the question then arises as to the burdens which the plaintiff (or enforcement agency) and the defendant (or respondent in an agency enforcement proceeding) carry.

The HEW government-wide regulations offer an answer as to invocation of some of the statutory exceptions:

The burden of proving that an age distinction or other action falls within the exceptions outlined in Sections 90.14 [taking age into account as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity] and 90.15 [reliance upon a reasonable factor other than age] is on the recipient of Federal financial assistance.²¹³

209. 44 Fed. Reg. 33,768, at 33,771 (1979).

210. *Id.*

211. FED. R. CIV. P. 12(b)(6).

212. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

213. 45 C.F.R. § 90.16 (1980).

While this provision is silent as to the other exceptions embodied in the statute and the regulations, it is only sensible to apply the same standard to them. It should be noted that this provision has been read—*notwithstanding its explicit mention of the “burden of proving”*—as leaving open the nature of the defendant’s burden.²¹⁴

Case law developed under Title VII of the Civil Rights Act of 1964²¹⁵ offers support for the conclusion that in the discriminatory treatment setting, the funding recipient need only carry the burden of production, absent invocation of a statutory exception, as explained in *Texas Department of Community Affairs v. Burdine*:²¹⁶

It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff’s rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption [of discrimination] raised by the prima facie case is rebutted,²¹⁷

Under this formulation, if applied indiscriminately, it is the plaintiff who, throughout the proceeding, would carry the burden of persuasion. Thus, once the recipient sets forth either a denial or invokes one of the exceptions, the plaintiff (or enforcement agency) must persuade the factfinder “that a discriminatory reason more likely motivated the [recipient] or . . . that the [recipient’s] proffered explanation is unworthy of credence.”²¹⁸

As for discriminatory effects situations arising out of ostensibly neutral policies, the Title VII case law holds that the defendant may rebut the prima facie case by proving that “the challenged requirements are job related”²¹⁹ The plaintiff is then afforded an opportunity to show “that other selection devices without a similar discriminatory effect would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’ ”²²⁰

Only one court has addressed the defendant’s burden under the ADA,²²¹ doing so in the context of the plaintiffs’ challenge to a policy

214. *See, e.g.*, *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290 (D. Del. 1980).

215. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

216. 101 S. Ct. 1089 (1981).

217. *Id.* at 1094-95 (footnotes omitted).

218. *Id.* at 1095.

219. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

220. *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

221. *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290, 316-17 (D. Del. 1980). The plaintiffs argued that a planned relocation of a medical center from a central city location to the suburbs would have the effect of discriminating against older persons, who would be less able

neutral on its face, but allegedly discriminatory in effect. The court asserted that the Title VII model applicable in discriminatory treatment cases should apply, *i.e.*, the burden of persuasion always remains with the plaintiff, so that "in a private cause of action . . . the defendant has only the burden of going forward [,]" even when an exception is invoked.²²² This conclusion, however, is not in keeping with the thrust of the ADA, and runs counter to what the HEW regulations at least imply, even if they do not overtly so state. In the Comment Analysis accompanying the HEW regulations, the agency supported the burden of proof provision thusly:

HEW believes that the recipient is best able to demonstrate that an age distinction or factor other than age is entitled to an exception under § 90.14 or § 90.15. The recipient (rather than the complainant) is the party most knowledgeable about its program or activity, the normal operation of the program or activity, and any statutory objective governing the program or activity.²²³

The HEW statement is an apt one. Typically, it will be the challenged program's administrator who best will know why a particular exception arguably applies. He will have the relevant information readily at hand, if there is any such information. It is proper, then, to place upon the admitted age user the task of justifying that use.²²⁴

than previously to gain access to the center's services. The plaintiffs contended that the impact, or effects, standard should apply; the defendants argued for the intent standard. The court avoided resolving the issue, reasoning that whichever standard were to be employed, the plaintiffs would in any event have failed to make out a *prima facie* case. It then proceeded to apply the impact standard to demonstrate that even under the test most favorable to the plaintiffs, they still would lose. The court first assessed the elements of a *prima facie* case:

The impact test is, in general, characterized by a shifting burden of proof. The plaintiff bears the burden of proving discriminatory effect. If it meets this burden, the burden shifts to the defendant to "prove" or to "articulate" a non-discriminatory justification for the challenged actions.

. . . [I]t is the burden of going forward with evidence which shifts, while the burden of persuasion remains, throughout, with the plaintiff. Thus, the plaintiff first has both the burden of adducing evidence of a discriminatory impact and the burden of persuasion on the issue of discriminatory impact If the plaintiff meets both of these burdens, the burden shifts to the defendant to go forward with evidence showing that he took the challenged action for a non-discriminatory reason. If he meets that burden and can produce some evidence showing a non-discriminatory reason for the action, the burden of going forward shifts back to the plaintiff who must then adduce evidence showing that the reason is a pretext. At all times, the burden of persuasion remains with the plaintiff.

The nature of the justification that will serve to rebut a *prima facie* case of discrimination varies according to the civil rights act which is invoked.

Id. at 314-15 (citations omitted).

222. *Id.* at 316-17.

223. 44 Fed. Reg. 33,768, at 33,783 (1979).

224. Of course, one could engage in semantics, reasoning that only that which the Act outlaws constitutes discrimination, and therefore any action in conformance with one of the statutory exceptions does not constitute discrimination. Thus, it would follow, the recipient, by invoking an exception, has articulated a non-discriminatory reason for its action. Even were that so—and it is

Thus, when one of the statutory exceptions is invoked by a funding recipient, it should be the burden of persuasion—not merely of going forward—which should fall upon it to prove that indeed that exception does apply.²²⁵ The HEW government-wide regulations of course prescribe the elements which must be established by the defendant as to each exception.²²⁶ If the recipient meets that burden, then the burden of persuasion should shift back to the grievant to persuade the factfinder that the recipient's proffered explanation cannot stand.

by no means obvious that this argument has merit—the fact still remains that it is the recipient who is invoking a specific statutory standard and it is thus the recipient who best knows why that standard properly applies. To simply allow a recipient to mouth one of the exceptions, and then place upon the plaintiff the burden of first figuring out why the recipient thinks that exception applies and then having to rebut its application, is to verge on giving the recipient a free ride: Congress prescribes the magic words to articulate, and that is all the recipient need do; all the work of demonstrating the applicability of those words is foisted upon the plaintiff or enforcement agency.

225. The *NAACP* court made one further point, as to the reasonable-factors-other-than-age exception, which is also subject to question. The court stated:

It should be noted that the Age Discrimination Act and the HEW regulations promulgated thereunder contain no requirement that the least discriminatory alternative be adopted. Of course, the presence of less discriminatory alternatives that would better meet the non-age-related objective is relevant to the question of whether the discriminatory action was actually taken to accomplish that objective. However, where the defendant actually adduces some evidence showing that he based his action upon a non-age-related factor that meets the criteria set out in the act and the regulations, he need not also adduce evidence showing that his action was the least discriminatory alternative. This interpretation is in accord with the Congressional intent to apply a lesser degree of scrutiny to actions resulting in age discrimination than to those resulting in racial discrimination. Congress intended only to prohibit "unreasonable age discrimination."

491 F. Supp. at 317 (quoting HOUSE CONFERENCE REPORT, *supra* note 43, at 56) (emphasis in original).

In terms of authority—and the court also cited to the Comment Analysis accompanying the HEW government-wide regulations, 491 F. Supp. at 317 n.187, citing 44 Fed. Reg. 33,768, at 33,782-83 (1979)—the court is not accurate. While noting that in 1975 Congress sought to outlaw "unreasonable" age discrimination, the court failed to note that in 1978 Congress amended the ADA so as to delete the word "unreasonable" from the statute. While the full meaning of that amendment is not elucidated by the legislative history, *see* text accompanying notes 66-69 *supra*, the fact of its existence was deserving of note by the court.

Second, the court is accurate in observing that neither the statute nor regulations requires that the least restrictive alternative be used, a requirement which would apply under Title VI, assuming that that statute tracks the equal protection clause, since the constitutional provision has been so construed in the context of constitutionally based race discrimination cases. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). However, again the *NAACP* court sinned by omission. The HEW regulations specify that in order for the "reasonable factors other than age" exception to apply, "[a]n action may be based on a factor other than age only if the factor bears a *direct and substantial* relationship to the normal operation of the program or activity or to the achievement of a statutory objective." 45 C.F.R. § 90.15 (1980) (emphasis added). Thus, if a factor other than age only indirectly or insubstantially relates to the normal operation of a program, the statutory exception does not hold. While imposing upon a funding recipient the requirement of showing that his use of such a factor bears a direct and substantial relationship is less rigorous than the imposition of a showing that his action was the least restrictive alternative, that imposition is at the same time one which is more demanding than a mere showing of a rational relationship and one, again, which should have been noted by the court.

226. *See, e.g.*, 45 C.F.R. §§ 90.3, 90.14, 90.15, 90.49(b), 90.49(c) (1980).

Application of Equal Protection and Title VI Standards
to the ADA—The Better Course

Since Congress avowedly modeled the ADA on Title VI of the Civil Rights Act of 1964,²²⁷ the latter statute provides a powerful analogy. It does not necessarily follow, however, that as to the issue of making out a *prima facie* case, the two statutes need be, or should be, read in tandem. Even if Title VI is read as requiring a showing of discriminatory intent, there are both persuasive legal and policy arguments disputing the need to read the ADA as embodying a like requirement.

Two primary arguments favor equating the two statutes. First, there is the matter of legislative history: Congress, in drafting and passing the ADA, looked to Title VI as its model. Second, there is an arguable policy basis for making the equation. There can be no question that Congress viewed age discrimination as a vice less pernicious than race discrimination; the exceptions embodied in the ADA reveal that at least in some circumstances Congress was willing to tolerate ageism, whereas Title VI, addressing race discrimination, allows for no caveats. In the conference report accompanying the 1975 bill which became law,²²⁸ Congress indeed stated that it viewed age discrimination as a lesser evil. It could be considered anomalous, given this perception of comparative evils, to read Title VI as requiring a standard—discriminatory purpose—making the task of an aggrieved plaintiff particularly difficult in the race discrimination context, and at the same time to read the ADA, aimed at a lesser evil, as embodying a standard whereby the claimed victim of ageism has a much easier task of setting out a viable *prima facie* claim.

Several factors cut against the Title VI-ADA equation, however. First, the very existence of a number of significant statutorily prescribed exceptions to the ADA's ban on age discrimination shows that the Title VI-ADA equation is far from a perfect one, given that Title VI itself embodies no such exceptions to its proscription on race discrimination. The ADA is not a virtual clone of its predecessor, and thus the interpretations of Title VI, while useful, are by no means necessarily determinative. More than that, these exceptions in the ADA can be understood as expressing Congress' willingness to impose certain barriers to a plaintiff obtaining relief under the Act, and at the same time Congress' intent to exclude all other barriers. Given the

227. See, e.g., HOUSE CONFERENCE REPORT, *supra* note 43, at 56.

228. See text accompanying note 63 *supra*.

drastic remedy of funding termination, protection for the defendant against too easy an application of the remedy is understandably needed. This is particularly so under Title VI since, if the plaintiff successfully makes out his *prima facie* case, the defendant presumably will then face a particularly difficult burden, *i.e.*, proving that its racial distinction serves a compelling interest, and that that distinction is the narrowest means possible to achieve that interest.²²⁹ Imposition of the discriminatory purpose standard affords the necessary initial protection to the Title VI defendant. The statutory exceptions in the ADA serve a like role as the source of defendant protection and no more protection is needed. This is particularly so inasmuch as the defendant in an ADA action will have an easier task of avoiding liability, since once a *prima facie* case is made out, it will not have to prove that it has a compelling interest for its age use, and that such use of an age distinction is the least restrictive alternative. Rather, it will only have to prove the applicability of one of the numerous elastic exceptions.

Second, there is the matter of the interpretation given the statute in the HEW government-wide regulations, although admittedly that interpretation is not altogether clear. In stating the "Rules Against Age Discrimination,"²³⁰ the regulations assert that a funding recipient may not, save if it acts in accordance with the regulations implementing the primary statutory exceptions, "use age distinctions or take any other actions which have *the effect*, on the basis of age," of excluding persons, denying them benefits, etc.²³¹ Considerable judicial deference is accorded interpretations given to a statute by the officers or agency charged with its administration and interpretation; these interpretations are to be followed unless unreasonable.²³² Thus, the fact that HEW

229. This burden on the defendant follows from incorporating equal protection standards into Title VI, since these standards are established in the equal protection-based race discrimination decisions of the Supreme Court, with which Title VI has been equated. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). *But see* *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980), where the court indicated that the defendant in a Title VI case might not have to show that its challenged action was the best alternative.

230. *See* text accompanying note 75 *supra*.

231. 45 C.F.R. § 90.12(b) (1980) (emphasis added). This caveat—sanctioning age distinctions which have the effect of excluding persons, but only when such distinctions are made pursuant to one of the statutory exceptions, as interpreted by the regulations—is reaffirmed as to the "reasonable factors other than age" exception by the regulatory provision addressing that exception: "A recipient is permitted to take an action otherwise prohibited by section 90.12 [*i.e.*, the 'rules against age discrimination'] which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages." 45 C.F.R. § 90.15 (1980).

232. *See* *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-67 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Of course, the bottom line is that "no agency may lawfully adopt a standard by regulation that squarely conflicts with the standard which has been adopted by Congress or authoritatively legislated by the courts." *Bryan v. Koch*, 492 F. Supp. 212, 234 (S.D.N.Y.), *aff'd*,

opted for the effects test is persuasive.²³³

There is a third basis for disputing the equal protection-Title VI analogy. Under Title VI, once a *prima facie* case is made out, the burden presumably shifts to the defendant to establish that it has a compelling interest for its racial distinction, and that that distinction is the least restrictive means to achieve that interest.²³⁴ This follows, as already noted, from the fact that a similar formula has been constructed in the equal protection race discrimination decisions. Since the ADA does not deal with race—a suspect classification under the Constitution—but rather with age, only a minimum rationality test would apply, entailing extreme deference to the challenged decisionmaker.²³⁵ This is a test which is virtually outcome-predictive, dooming the plaintiff in likely every instance to defeat.²³⁶ An aspect of this approach, moreover, is that the burden of proof does not shift to the defendant to prove rationality; rather, it remains with the plaintiff to prove irrationality.

The language and history of the ADA and its regulations belie such a result being tolerable. So does common sense. If the total upshot of the Act were simply that if a funding recipient failed to meet the somewhat onerous burden of proving the applicability of an exception, it would then fall upon the plaintiff or enforcement agency to prove the age distinction's irrationality, the Act would prove to be a cipher. A charged recipient would be better off not invoking any exception, and thus the exceptions would effectively mean nothing in practice.

627 F.2d 612 (2d Cir. 1980). Thus, if indeed the equal protection standard is incorporated in Title VI, and if the ADA must follow that course, the regulations cannot overcome this train of legal logic.

233. Admittedly, HEW itself muddled the waters somewhat by asserting in the Overview to the regulations that "proportional program participation by age or the proportional allocation of funds by age" is not required under the Act, although it did acknowledge that disproportionality "may be one of the elements which triggers an examination of whether age discrimination exists." 44 Fed. Reg. 33,768, at 33,771 (1979). Thus, a showing of at least one type of discriminatory impact—the structuring of a program in terms of funding or client participation in such a way that it underserves a given age group—possibly does not suffice to make out a *prima facie* violation of the Act. *But see* text accompanying notes 211-12 *supra*.

It should also be noted that HEW's regulation interpreting Title VI as embodying an effects standard, while persuasive in *Lau v. Nichols*, 414 U.S. 563 (1974), *see* text accompanying notes 172-75 *supra*, was apparently not sufficient—at least for five Justices in *University of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 352 (1978), and all nine in *Board of Educ. v. Harris*, 444 U.S. 130 (1979)—to override the constitutionally based reading of Title VI importing into the statute the discriminatory purpose standard. *See* notes 176-85 and accompanying text *supra*.

234. *But see* *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980), indicating that the defendant would not be required to demonstrate that the challenged action was the best alternative.

235. *See, e.g., Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

236. *See id.* at 317 (Marshall, J., dissenting).

The history of the Act further confirms that the equal protection-Title VI analogy which would ultimately lead to the mere rationality test applying under the ADA is inappropriate. In 1978 Congress amended the Act, deleting the word "unreasonable" from the statement of purpose.²³⁷ While the legislative history as to this change is unenlightening,²³⁸ the impetus for the amendment must have been to make clear that if a funding recipient could not successfully invoke one of the exceptions, it would stand in violation of the Act. In other words, deletion of "unreasonable" established that the recipient would not and could not still have the opportunity to prevail just as long as its alleged wrong was rational.²³⁹ And yet, were the ADA to be equated with the equal protection clause insofar as making out a *prima facie* case is concerned, the mere rationality test indeed would apply, thereby undercutting Congress' 1978 effort.

Thus far there is no certain answer to the ADA impact-intent question. Only one court has been called upon to address the issue, and it avoided providing an answer, reasoning that regardless of which test were to be used under the ADA, the plaintiff would lose in any event and thus it did not have to definitively rule as to which test should apply as a matter of law.²⁴⁰ Moreover, added ambiguity is generated by the fact that a constitutionally derived test may be appropriate for dealing with governmental defendants, while not necessarily appropriate, or even dictated by the Title VI analogy, for private de-

237. See text accompanying notes 66-69 *supra*.

238. *Id.*

239. Clearly Congress has the authority to outlaw actions by a statute employing a lesser defendant-protective standard—*e.g.*, the effects test—than the Court has read into the equal protection clause. Congress has done so under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1976 & Supp. III 1979), as interpreted by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Title VII has been read as an exercise of Congress' commerce power embodied in article I, § 8 of the Constitution. The ADA is an exercise of Congress' spending power, embodied in the same constitutional provision. That distinction is not significant, however. Congress may impose conditions on the moneys it appropriates, as long as such conditions do not contravene any specific provision of the Constitution, and as long as such conditions are rational. *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1947). Clearly, neither the ADA nor the ADA implemented by use of an effects standard violates any other provision of the Constitution, nor is the rationality requirement offended.

Even were the ADA to be read as an exercise of the Congress' fourteenth amendment enforcement authority to implement the equal protection clause under § 5 of that amendment, there is strong basis for upholding a discriminatory effects interpretation, notwithstanding that the equal protection clause itself embodies a discriminatory purpose standard. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Burger, C.J., with whom White and Powell, JJ., join). *Cf.* *City of Rome v. United States*, 446 U.S. 156 (1980), where the Court held that even if the fifteenth amendment only banned purposeful discrimination, Congress could—pursuant to its enforcement powers under the amendment—render unlawful by statute acts which merely had a discriminatory effect.

240. *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290 (D. Del. 1980).

fendants.²⁴¹

As a matter of optimum interpretation, the effects standard should apply both to governmental and private recipients of federal funding. Given that the ADA is a civil rights statute, clearly designed to provide relief to victims of what Congress perceived as a wrongful form of discrimination, the statute should be construed in that manner which facilitates, rather than inhibits, redress.²⁴² To read the ADA as imposing the plaintiff-protective standard of discriminatory effect as being sufficient to make out a *prima facie* case accords with that thrust. It also accords with the language of the statute. Moreover, it does not unduly prejudice defendants since they have available to them a number of statutory and regulatory exceptions to the Act's prohibition.

CONCLUSION

There are both global and specific problems generated by the Age Discrimination Act. The basic problem which permeates the statute—as revealed by its history and its language—is the Congress' inability to come to grips with just what it was that it wanted to proscribe. "Age discrimination" is an easy rallying cry; the tough task is translating a condemnation of the vice into workable, intelligible legislative language. Congress, unable to master this effort, first looked to the United States Commission on Civil Rights to resolve its conceptual difficulties, and then to the Department of Health, Education and Welfare. Given the problems with the statute itself, it was hardly surprising that these two agencies were unable to achieve a satisfactory resolution.

At more discrete levels, there are a variety of issues which arise under the Act, concerning such matters as the problem of establishing a *prima facie* case, of countenancing affirmative action and special benefits, of pinpointing violators of the statute, etc. The unifying idea which should be applied in addressing these issues is that which follows from the nature of the statute: by design it is a remedial piece of legislation, aimed at securing relief for individuals from discrimination. Thus, it should be interpreted in a manner to further this end, rather than restrictively so as to curtail or negate attacks on ageism.

Ultimately, Congress must wrestle with the matter of ageism again. The ADA is simply too flawed to be allowed to stand as the final legislative word. Congress must collect, in the first instance, the

241. See text accompanying notes 115-16 *supra*.

242. Cf. *Sanches v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Beck v. Borough of Manheim*, 505 F. Supp. 923 (E.D. Pa. 1981) (civil rights statutes to be liberally construed).

data to determine the extent of discrimination. Assuming the data exists—and there are of course significant problems just in designing the methodology for that determination—Congress must then decide who it really wants to help. Perhaps the best tack would be to single out that group typically thought of as being the most common victims of age discrimination—the elderly—and limit the statute to their protection. That, at least, would resolve some of the difficulties inherent in a statute which, as it is now written, applies to all age groups.

Most importantly, Congress must renew examination of the perniciousness of age discrimination. When the ADA was passed, Congress did not think it a very significant problem in terms of invidiousness. Congress was wrong: denial or deprivation on the basis of age has very little redeeming merit, at least in those instances where the imposed disadvantage follows from the individual being too old and thus flows from a condition which he may never escape.²⁴³ But even if Congress was correct, as a general matter, in placing ageism below racism and sexism in the list of societal evils, the ADA simply does too little to address the evil that it did perceive to exist.

Perhaps Congress may, upon reexamination, conclude that ageism perpetrated by recipients of federal financial assistance is, after all, a vice of such limited dimensions that no statutory condemnation is even warranted. At least, should that ensue, a now-flawed statute, born of obviously confused legislators, would no longer stand as a lightning rod for false hopes. If, to the contrary, Congress properly captures in legislation a coherent proscription of discrimination, it will have advanced a cause as yet unfulfilled.

243. See generally Eglit, *supra* note 84.