Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse

By Gary Thomas Brooks*

Converse College is a small, private, liberal arts college for women located in Spartanburg, South Carolina. Nelda Barnes is an English teacher at a school for the deaf and blind, also located in Spartanburg. Converse accepted Nelda Barnes upon her application to attend a summer session at the College in order to earn graduate level English credits necessary to maintain her permit to teach in the public schools of South Carolina. Nelda Barnes has a hearing handicap requiring the assistance of an interpreter in order to participate in classroom activities. Converse is a recipient of a nominal amount of federal funds.

Without more, the preceding statement of facts would appear to be innocuous enough. Now add the following ingredient: Nelda Barnes sues Converse College in federal district court seeking injunctive relief against Converse for failure to provide funds for an interpreter. The result: Judge Hemphill, finding Converse to be in violation of the Rehabilitation Act of 1973,[1] and the regulations promulgated thereunder, orders Converse to procure and compensate a qualified interpreter to assist Nelda Barnes in her summer school classes.[2]

The implications of the decision in *Barnes v. Converse College*[3] for financially-strapped private institutions of higher education are deeply troublesome. No one can quarrel with the goal of full access and participation by handicapped citizens in the life and affairs of this nation, but

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1. 29 U.S.C.A. §§701-794 (1975 & Supp. 1977).

2. Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). On March 31, 1978, after this article was written, but prior to publication, Judge Hemphill lifted the preliminary injunction on the grounds that Ms. Barnes should have first exhausted her administrative remedies and that H.E.W. had responsibility for implementing a uniform enforcement policy. Docket No. 77-1116 (D.S.C. March 31, 1978). On May 9, 1978, a motion for reconsideration was denied. Plaintiff has filed notice of appeal. The arguments presented herein will be subject to further judicial consideration in *Barnes* and also in Doe v. New York Univ., 442 F. Supp. 533 (S.D.N.Y. 1978).

3. 436 F. Supp. 635.

questions are legitimately raised as to who can and should bear the costs inherent in serving that goal. These are policy arguments, ultimately worthy of the most serious consideration. The inquiry attempted herein, however, begins with the fundamentals: an examination of the law, administrative regulations and their respective histories. Focusing on *Barnes* and its case law underpinnings, an attempt will be made to challenge the finding of an implied private right of action under §504 of the Rehabilitation Act. The Article will conclude with a discussion of the argument that the rules promulgated thereunder as applied to private post-secondary educational institutions may be unconstitutional and against public policy.

I. LEGISLATIVE HISTORY OF THE REHABILITATION ACT OF 1973

Congress first expressed its concern in the area of rehabilitation of the handicapped in the Smith-Fess Act of 1920.[4] Spurred by the plight of many returning World War I veterans, the legislation initially addressed only the needs of disabled GI's. What started then as a limited attempt to provide training, counselling, and placement services for the physically handicapped is now, 58 years later, one of the nation's oldest grant-in-aid programs.[5] Successive amendments to the law[6] provided a steady increase in the scope and authority of the program, until by 1971, Congress could boast that over three million handicapped persons had been rehabilitated since the program's inception.[7]

In 1972, after extensive hearings[8] and a review of the existing program, Senate and House committees concluded that substantial changes were needed in the existing law.[9] In particular, the committees reported that the majority of handicapped persons, including those with the most severe handicaps, were not being reached or served by existing federal-state efforts.[10]

On September 26, 1973, the Rehabilitation Act of 1973 became law. Two previous versions of the legislation had been vetoed as inflationary by

4. Ch. 219, 41 Stat. 735 (1920) (also known as the Fess-Kenyon Act).

5. S. REP. No. 318, 93d Cong., 1st Sess. (1973) *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2082 [hereinafter cited as SENATE REHABILITATION ACT REPORT].

6. In particular: ch. 190, §1, 57 Stat. 374 (1943); ch. 655, §2, 68 Stat. 652 (1954); Pub. L. No. 89-333, §2(a), 79 Stat. 1282 (1965); Pub. L. No. 90-99, §2, 81 Stat. 250 (1967); Pub. L. No. 90-391, §§2,7(c), 82 Stat. 298, 300 (1968); Pub. L. No. 91-610, §1, 84 Stat. 1817 (1970).

7. SENATE REHABILITATION ACT REPORT, note 5, *supra*, at 2084.

8. *Hearings on H.R. 8395, H.R. 9847, H.R. 12742, H.R. 7949, H.R. 7526 and H.R. 12644 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972); *Hearings on H.R. 8395, S. 3368, S. 3158, S. 1030, S. 41 and S. 2812 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972).

9. H.R. CONF. REP. No. 1581, 92d Cong., 2d Sess. (1972) on the Rehabilitation Act of 1972.

10. SENATE REHABILITATION ACT REPORT, note 5, *supra*, at 2086.

President Nixon.[11] The compromise legislation finally approved was the result of negotiations between Congressional sponsors of the bill and administration officials.[12] Primarily aimed at delivering rehabilitation services to a broader class of handicapped persons, with special attention to services to individuals with the most severe handicaps, the new law also emphasized research and development of rehabilitation technology under the direction of an upgraded Rehabilitation Services Administration.[13]

Among the provisions of the new Act receiving scant attention or notice at the time was an isolated section prohibiting discrimination against otherwise qualified handicapped individuals in federally assisted programs or activities. In language closely mirroring provisions in Title VI of the Civil Rights Act of 1964,[14] and the Education Amendments of 1972,[15] §504 stated:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[16]

The definition of "handicapped individuals" incorporated by reference in §504 reflected the emphasis of the entire Act on vocational rehabilitation and employment. As originally enacted, §706(6) provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.[17]

Without further illumination of Congressional intent, a reasonable interpretation of §504 at that time would have limited its application to those persons handicapped specifically with respect to employment.

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11. On October 27, 1972, President Nixon announced his pocket veto of H.R. 8395 by means of a Memorandum of Disapproval. On March 27, 1973, President Nixon vetoed S. 7, and on April 3, 1973, the Senate failed to override by a 60-36 vote. SENATE REHABILITATION ACT REPORT, note 5, *supra*, at 2087-40.

12. SENATE REHABILITATION ACT REPORT, note 5, *supra*, at 2077.

13. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, now codified as amended at 29 U.S.C.A. §§ 701-794 (1975 & Supp. 1977). For the legislative history of the Act see S. REP. No. 318 H.R. CONF. No. 500, 93d Cong., 1st Sess. (1973) *reprinted in* SENATE REHABILITATION ACT REPORT, note 5, *supra* 2076, 2143.

14. 42 U.S.C.A. §2000d (1974) [hereinafter referred to as "Section 601" or "Title VI"].

15. 20 U.S.C.A. §§1681-1686 (1974) [hereinafter referred to as "Section 901" or "Title IX"].

16. 29 U.S.C.A. §794 (1975) [hereinafter referred to as "Section 504"].

17. Pub. L. No. 93-112, §7(6), 87 Stat. 361 (1973) (current version at 29 U.S.C.A. §706(6) (1975).

Subsequent to the enactment of the legislation, meetings between Congressional leaders and administration officials were held to facilitate effective implementation and enforcement of the provisions of the Act.[18] As a result of questions raised at those meetings, including questions concerning §504, legislation was introduced in the next session of Congress to clarify and perfect changes in the Act in order to reflect more accurately the intent[19] of Congress. The outcome of these legislative efforts was the Rehabilitation Act Amendments of 1974.[20]

One of the items addressed in the Amendments was the application of the definition of "handicapped individual" in §706(6) to the provisions of §504. The Senate Report[21] issued in connection with the Amendments explained that it was the intent of Congress in adopting "section 504 (nondiscrimination) that the term 'handicapped individual' in those sections was not to be narrowly limited to employment . . . nor to the individual's potential benefit from vocational rehabilitation services under titles I and III . . . of the Act. . . ."[22]

As a means of remedying the apparently inadvertent limitation, §706(6) was amended to add a new definition of "handicapped individual" for purposes of §504: "Any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."[23]

The Senate Report accompanying the Rehabilitation Act Amendments

18. S. REP. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6376 [hereinafter referred to as SENATE REHABILITATION ACT AMENDMENTS REPORT].

19. *Id.*

20. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617. The original legislation, H.R. 14225, had an unusual history. President Ford attempted to exercise a pocket veto of the bill, but on October 29, 1974, he returned the legislation to Congress stating: "I am advised by the Attorney General and I have determined that the absence of my signature from this bill prevents it from becoming law. Without in any way qualifying this determination, I am also returning it without my approval to those designated by Congress to receive messages at this time. . . ." [1974] U.S. CODE CONG. & AD. NEWS 6373.

In a later message following the Congressional adjournment, President Ford elaborated: ". . . If the Congress should elect to challenge [this veto] by overriding [it], there could be a prolonged legal uncertainty over this legislation. However, I would welcome new legislation to replace the measure . . . which [was] vetoed." President's Message to Congress dated November 18, 1974, as reported in [1974] U.S. CODE CONG. & AD. NEWS 6374.

On November 20, 1974, the House overrode the veto by a 398-7 vote margin. The Senate followed suit the next day by a 90-1 margin. Apparently to avoid the legal impasse, new identical legislation, S. 4194, was introduced, and passed in both Houses on November 26, 1974. S. REP. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373.

21. SENATE REHABILITATION ACT AMENDMENTS REPORT, note 18, *supra*, at 6373.

22. *Id.* at 6388.

23. 29 U.S.C.A. §706(6) (1975).

of 1974 for the first time articulated Congressional intent concerning §504. In language which would be cited,[24] the Report stated:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 20 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. . . . The Secretary of the Department of Health, Education and Welfare, because of that department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort . . . the conferees fully expect that H.E.W.'s section 504 regulation should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973. . . .[25]

The conferees were to be disappointed. It was not until May 4, 1977 that final regulations under §504 were promulgated.[26] In the interim, a federal district judge had entered an order compelling the Secretary of H.E.W. to issue final regulations.[27]

II. The Promulgation of Regulations Under §504

Congressional sponsors of §504 compared it with §601 of Title VI of the Civil Rights Act of 1964[28] and §901 of Title IX of the Education Amendments of 1972.[29] Unlike those statutory provisions, however, §504 has no companion section authorizing enforcement and delegating rule-making authority to the appropriate administrative agencies.

On April 28, 1976, President Ford, acting under his constitutional mandate to enforce the law and his statutory authority to delegate that function,[30] issued Executive Order 11914, providing, in part that, "in order to implement the provisions of section 504, each federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations and directives, consistent with the standards and procedures

24. Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977).
25. Senate Rehabilitation Act Amendments Report, note 18, *supra*, at 6390.
26. 42 Fed. Reg. 22,675 (1977) (to be codified in 45 C.F.R. §80.1-84).
27. Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976). *See* text accompanying notes 34-35 *infra*.
28. 42 U.S.C.A. §2000d (1974).
29. 20 U.S.C.A. §1681 (1974).
30. 3 U.S.C.A. §301 (1977).

established by the Secretary of Health, Education and Welfare."[31] Draft regulations were issued by the Secretary on May 17, 1976,[32] with proposed regulations following on July 16, 1976.[33]

For some time prior to these developments, a case had been pending in the Federal District Court for the District of Columbia.[34] The action, brought by James L. Cherry and The Action League for Physically Handicapped Adults, sought to compel the Secretary of H.E.W. to promulgate regulations implementing §504.

The decision of the court on the plaintiffs' motion for summary judgment came down on July 19, 1976, three days after the proposed regulations had been issued. Attorneys for the government contended that the Secretary had no explicit duty to issue regulations, but the court decided that Congress had not intended the provisions to be self-executing and that the regulations were needed to implement §504.[35]

Ten months later the final regulations were issued.[36] Subpart E of those regulations applies to post-secondary education programs and activities.[37] In addition to a general prohibition against discrimination against handicapped persons in admission or recruitment policies, the regulations impose affirmative obligations upon post-secondary educational institutions with respect to treatment of handicapped persons. Among these obligations is the provision of auxiliary aids, as follows:

> (d) *Auxiliary Aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
> (2) Auxiliary aids may include taped texts, interpreters or other effective method of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature. . . .[38]

The procedures for enforcement and compliance review applicable to

31. 41 Fed. reg. 17,871 (1976).
32. 41 Fed. Reg. 20,295 (1976).
33. 41 Fed. Reg. 29,547 (1976).
34. Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976).
35. *Id.* at 924.
36. 42 Fed. Reg. 22,675 (1977) (to be codified in 45 C.F.R. §§80.1-84).
37. 42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. §§84.41-84.47) [hereinafter referred to as "Subpart E"].
38. 42 Fed. Reg. 22,684 (1977) (to be codified in 45 C.F.R. §84.44(d)).

Title VI of the Civil Rights Act of 1964 were incorporated by reference into the regulations implementing §504.[39]

III. Private Right of Action Under §504

A. *Reliance on Lau v. Nichols*

Once the steamroller of judicial precedent begins to gather speed, it may be foolhardy to attempt to reverse its course. So tenuous are the supposed case law foundations of the argument for a private right of action under §504, however, that one feels compelled to raise the question.

The major decisions, including *Barnes*, now developing in support of a private right of action under §504,[40] in addition to pyramiding by cross-reference to each other, find ultimate authority in *Lau v. Nichols*.[41] *Lau* was a class action brought by non-English speaking Chinese students in the San Francisco public school system seeking bilingual compensatory English language instruction. Plaintiffs alleged violations of the Equal Protection Clause of the Fourteenth Amendment[42] and of §601 of the Civil Rights Act of 1964,[43] the Title VI analog to §504.

The Ninth Circuit affirmed the decision of the trial court, holding that plaintiff's lingual deficiencies were not related to past discrimination, and that plaintiff had not been denied equal protection. In the only reference to the fact that the action had also been brought under §601 of the Civil Rights Act of 1964, the court observed in a footnote that the determination of the merits of the other claims disposed of the claims made under the Civil Rights Act.[44]

The Supreme Court in its decision reversing the Ninth Circuit, never reached the equal protection argument, but instead relied solely on §601 of the Civil Rights Act of 1964. Despite this reliance, there is no discussion in the majority decision of the standing of plaintiffs, as private citizens, to bring the action under §601.[45] Indeed, the standing issue with respect

39. 42 Fed. Reg. 22,685 (1977) (to be codified in 45 C.F.R. §84.61, incorporating by reference 45 C.F.R. §§80.6-80.10 (1976) which includes provisions for compliance reports, investigations, procedures for effecting compliance including termination of federal financial assistance, opportunity for hearing, and post administrative judicial review).

40. Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W.Va. 1976); Davis v. Southeastern Community College, 424 F. Supp. 1341 (E.D.N.C. 1976); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W.Va. 1976); Brennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D.Pa. 1977); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977).

41. 414 U.S. 563 (1974).

42. U.S. Const. amend. XIV, §1.

43. 42 U.S.C.A. 2000d (1974).

44. 483 F.2d 791, 794 n.6 (9th Cir. 1973).

45. In a footnote to his concurring opinion, 414 U.S. at 571, Justice Stewart observes that

to §601 apparently was never raised by defendants at the trial level, since it is not even mentioned in the circuit court opinion.[46] On the basis of this, the argument could be made rather persuasively that the issue of standing of private citizens to bring an action under §601 is still in question, at least as far as the Supreme Court is concerned. Unlike questions of jurisdiction, standing or capacity to sue is generally treated as a waivable defense[47] with no affirmative obligation on the part of the court to raise the issue, sua sponte.[48]

Despite the foregoing, the §504 decisions,[49] including *Barnes*, generally cite *Lau* as authority for a private right of action under §601, and therefore as precedent for a private right of action under §504. The most egregious example of this also happens to be the leading case finding a private right of action under §504, *Lloyd v. Regional Transportation Authority.*[50] *Lloyd* involved a class action brought on behalf of mobility disabled persons against two public transportation authorities in Illinois.

In discussing the issue of a private right of action under §504, the *Lloyd* court said that §504 closely tracks §601 of the Civil Rights Act of 1964 which was construed by a unanimous Supreme Court in *Lau v. Nichols* to provide a private cause of action.[51] The foregoing interpretation of *Lau* by the *Lloyd* court is simply not supported by the record.[52] Nevertheless, *Lloyd* set the stage for all subsequent §504 private actions.

By way of comparison, the leading Title IX decision with respect to a private right of action under §901, *Cannon v. University of Chicago*,[53] rejects *Lau* as authority for an argument by analogy to §601. In *Cannon*, the plaintiff brought an action against the university based in part on §901

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respondents did not contest the petitioners' right to sue as beneficiaries of the federal funding contract between HEW and the school district. This is the so-called "Third Party Beneficiary" theory of standing which is sometimes asserted as an alternative argument in Title VI, Title IX and §504 cases. Such a theory was approved in Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) (Title VI case). *See also* Crawford v. University of North Carolina, C-77-173-D (D.N.C. Nov. 1, 1977). Few, if any, other cases have relied upon this theory to confer standing. In addition, distinctions have been drawn suggesting *Bossier* may only be applicable when there are large numbers of persons affected.

46. The plaintiff's complain in *Lau* contained the following jurisdictional statement which makes no reference to §601: "Jurisdiction is conferred upon this court by 28 U.S.C. Section 1331 and by 28 U.S.C. Section 1343(4), which provide original jurisdiction in suits authorized by 42 U.S.C. Section 1983." *Quoted* in Cannon v. University of Chicago, 559 F.2d 1063, 1083 n.7 (7th Cir. 1977).

47. FED. R. CIV. P. 9(a) requires an issue as to capacity of a party to be raised by specific negative averment. *See* 3A MOORE'S FEDERAL PRACTICE ¶ 17.15, at 175-179 and cases cited at n.12 therein (2d ed. 1948).

48. FED. R. CIV. P. 12(h)(3).

49. *See* note 40, *supra.*

50. 548 F.2d 1277 (7th Cir. 1977).

51. *Id.* at 1280.

52. *See* text accompanying notes 44-45 *supra.*

53. 559 F.2d 1063 (7th Cir. 1977).

of Title IX. She alleged discrimination on the basis of sex in denying her admission to medical school. The trial court held that no private right of action existed under Title IX.[54] Calling the question one of "first impression," the Seventh Circuit in affirming the lower court said:

> Plaintiffs rely heavily upon previous decisions based upon Title VI of the Civil Rights Act of 1964, . . . the language of which is identical to Title IX except that it bars racial discrimination. But our reading of the cases does not indicate that Title VI provides a right of action for each individual discriminatee. Those cases involved an attempt by a large number of plaintiffs to enforce a national Constitutional right. [Citing *Lau* and *Bossier Parrish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967).] It appears that *Lau* and *Bossier* were desegregation cases involving attempts to deprive large groups of minorities of their right to equal educational opportunities. But they simply do not give any real support to plaintiff's argument that we must infer an individual right of action under Title IX in favor of the person who has a grievance based on sexual discrimination against a private educational institution receiving government funds.[55]

On rehearing,[56] the court reconsidered the argument that *Lau* was controlling with respect to the standing issue, and again rejected the authority:

> . . . [W]e would still adhere to our statement that *Lau* provides no real support for plaintiff in the circumstances of this case. Our conclusion would remain the same because *Lau* was brought under the authority of 42 U.S.C. §1983, and the question of whether an implied private right of action lay directly under the provisions of title VI was never presented to the Supreme Court. Because plaintiffs' cause of action in *Lau* arose under 42 U.S.C. §1983, *Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a private right of action here under the comparable provisions of Title IX. . . .[57]

Lau has thus been discredited as authority for a private right of action under §601, and to the extent that decisions like *Barnes* rely on *Lau* in finding a private right of action under §504, they must be reconsidered.

B. Standing by Implication

An alternative argument asserted in the §504 cases in support of a private right of action thereunder has been application of the doctrine of

54. 406 F. Supp. 1257 (N.D. Ill. 1976).
55. 559 F.2d at 1072.
56. *Id.* at 1077.
57. *Id.* at 1083.

implication.[58] In *Cort v. Ash*,[59] the Supreme Court described four factors as being relevant in determining whether a private remedy is implicit in a statute not expressly providing one. They are:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted."—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.[60]

The *Lloyd* court found all four *Cort v. Ash* tests satisfied in the case of §504. This conclusion may be questioned, especially with regard to the second and third tests which relate to legislative intent.

When the Rehabilitation Act of 1973 was originally enacted,[61] the record was devoid of any expression of Congressional intent with respect to §504. The Senate Report issued in connection with the Rehabilitation Act Amendments of 1974,[62] however, addressed the issue of §504 at some length, and stated:

> The language of section 504 . . . further envisions the implementation of a compliance program which is similar to [section 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972], including promulgation of regulations providing for investigation and review of recipients of federal financial assistance, attempts to bring noncomplying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the federal government as well as rela-

58. First recognized in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); *see also* Note, 77 HARV. L. REV. 285 (1963).

59. 422 U.S. 66 (1974).

60. *Id.* at 78 (emphasis added).

61. *See* text accompanying notes 14-15 *supra*.

62. SENATE REHABILITATION ACT AMENDMENTS REPORT, note 18, *supra*.

> tive ease of implementation, *and permit a judicial remedy through a private action.*[63]

The last sentence quoted, while mentioning the possibility of a judicial remedy through a private action, could reasonably be construed to refer to judicial review of final administrative enforcement or action, especially in view of the administrative mechanism and procedures established by the regulations. Indeed, application of the doctrines of exhaustion of remedies[64] and primary jurisdiction[65] would require such an interpretation.

The *Lloyd* court apparently recognized and adopted the foregoing interpretation, but permitted an independent cause of action to be asserted in the absence of the existence of administrative remedial machinery. In a footnote, the court explained: "We expressly leave open as premature the question of whether, after consolidated procedural enforcement regulations are issued to implement section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under section 504 should be limited to *a posteriori* judicial review."[66]

This was also the approach taken by both the trial and appellate courts in *Cannon,* where the Seventh Circuit decision observed that, "a private cause of action should not be lightly implied under a statute where Congress has not specifically provided one—especially where Congress has provided for other means of enforcement."[67]

Section 504 provides such an enforcement mechanism but Nelda Barnes made no attempt to utilize it.[68] The question before the court in *Barnes,* whether a plaintiff can sue directly in federal court without first exhausting administrative remedies, could therefore, not be answered by reference to *Lau* or *Lloyd.* Application of the *Cort v. Ash* tests dealing with legislative intent and the underlying purposes of the legislative scheme could reasonably yield a conclusion that only *a posteriori* judicial review of administrative actions should be implied. Thus the court in *Barnes* and other lower courts adopting a presumption of a private cause of action under

63. *Id.* at 6390-91 (emphasis added).

64. Bottany Worsted Mills v. United States, 278 U.S. 282 (1929); Cort v. Ash, 422 U.S. 66 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975). *See also* Barnes v. Chatterton, 515 F.2d 916 (3d Cir. 1975) (exhaustion of remedies doctrine applies even when the result is a delay which may adversely affect the plaintiff).

65. MCI Communications Corp. v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974).

66. 548 F.2d at 1286 n.29.

67. 559 F.2d at 1074. In a footnote, the court observed: "In *Goldman* v. *First Federal Savings & Loan,* 518 F.2d 1247, 1250 n. 6 (7th Cir. 1975), this Court commented, but did not decide, that a private cause of action may not be permissible where Congress has provided for other means of enforcement." (*Id.* at 1074 n.14).

See also Johnson v. REA, 421 U.S. 454 (1974).

68. Defendants Memorandum on Summary Judgment Motion.

§504, by reference to *Lau, Lloyd,* and the *Cort v. Ash* tests, are building on rather fragile foundations.

IV. THE CONSTITUTIONALITY OF THE REGULATIONS PROMULGATED UNDER §504 (SUBPART E) AS APPLIED TO PRIVATE POST-SECONDARY EDUCATIONAL INSTITUTIONS

Article I, §1, of the Constitution mandates that all legislative power is vested in the Congress of the United States.[69] While the Supreme Court has steadfastly maintained that the legislative power may not be delegated,[70] it has regularly approved delegations of rulemaking authority to administrative agencies and justified such approval by the use of certain fictions.[71] Nevertheless, as noted in *Amalgamated Meat Cutters v. Connally:*[72] "There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the statute. The problem is one of limits."[73]

The validity of regulations issued by an administrative agency to implement a statutory provision is therefore subject to a constitutional standard, sometimes expressed in terms of whether the regulations transcend the limits of the Congressional delegation.[74] Under this standard, valid rules are those which come within the policy framework established by the Congress in the particular legislation. Understandably, the courts have only infrequently found a violation of that standard.[75]

In a recent line of cases dealing with the validity of regulations promulgated under an empowering provision of a statute,[76] the Supreme Court has held that the validity will be sustained so long as the regulations are "reasonably related to the purposes of the enabling legislation."[77]More

69. U.S. CONST. art. 1, §1.

70. Field v. Clark, 143 U.S. 649 (1892).

71. ". . . In the earliest cases, it was the existence of a mere 'triggering event' announced by a Presidential Proclamation, that brought the congressional enactment into effect. Thereafter, judicial decisions evolved certain new standards to guide, and presumably limit, executive and administrative activity. These included the theory that the administrator was merely 'filling in the details' of the legislation or that the administrator had been furnished with a sufficiently 'intelligible principle' in the underlying legislation to confine his activities. Repeatedly, the Court has emphasized that these (and other variant justifications) were required by the complexity or the fluidity of the situation and left Congress no practical alternative except not to legislate on the subject at all. . . ." B. MEZINES, J. STEIN, J. GRUFF, 1 ADMINISTRATIVE LAW §303[5] (1977).

72. 337 F. Supp. 737 (D.D.C. 1971).

73. *Id.* at 745.

74. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

75. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

76. Mourning v. Family Serv. Pub., Inc. 411 U.S. 356 (1973); Thorpe v. Housing Auth., 393 U.S. 268 (1969); American Trucking Ass'n v. United States, 344 U.S. 298 (1953).

77. 411 U.S. 356; 393 U.S. 268; 344 U.S. 298, 314.

relevant to a consideration of §504 regulations is the recent case of *General Electric v. Gilbert.*[78] In *Gilbert,* the Supreme Court drew a distinction in the judicial treatment of administrative guidelines promulgated under an implied congressional delegation and guidelines promulgated under an express congressional delegation. *Gilbert* involved a claim that General Electric Company's disability benefits plan violated Title VII of the Civil Rights Act of 1964 because it failed to cover pregnancy-related disabilities. Plaintiffs had relied in part on certain guidelines issued by the Equal Employment Opportunity Commission on the subject as reflecting Congressional intent with respect to Title VII. Speaking for the Court, Justice Rehnquist said:

> In evaluating this contention it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. . . . But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law. . . .[79]

Since §504 has no companion statutory provision authorizing administrative rule-making, regulations promulgated thereunder are based on an implied delegation of authority. It may reasonably be argued that regulations based on an implied authority must be subject to stricter scrutiny and perhaps a more rigorous application of the Constitutional standard.

The purpose of §504, as set forth in the 1974 Senate Report, is to establish a "broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap."[80] Even assuming that §504 confers affirmative rights and imposes affirmative obligations, can it legitimately be maintained that the Subpart E regulations (relating to post-secondary educational institutions) are reasonably related to that purpose, imposing as they do an obligation on the part of the private institutions to expend their own scarce funds to provide auxiliary aids? Certainly the effect of such regulations, if unchallenged, will be beneficial to certain handicapped persons, but did Congress intend to shift the burden of the provision of such services to private institutions?

The whole scheme of the Rehabilitation Act of 1973, as amended, reflects a Congressional intent to expand and improve federal-state programs of assistance to the handicapped.[81] To read into its antidiscrimination provision an affirmative obligation for private institutions to provide services at their own expense is contrary to the thrust of the entire Act.

78. 429 U.S. 125 (1977).
79. *Id.* at 141.
80. SENATE REHABILITATION ACT AMENDMENTS REPORT, note 18, *supra,* at 6390.
81. *See* in particular 29 U.S.C.A. §§720-750, 760-766, 770-776, 780-787 (1975).

The argument can and is made that admitting a handicapped student and providing that student with complete access to classrooms and facilities, is not enough to satisfy §504. Auxiliary aids are necessary, so the argument goes, lest the student be denied the full benefits of the program.[82] This is the H.E.W. position as expressed in its comments accompanying the final §504 regulations.[83]

It is submitted, however, that failure to pay for auxiliary aids does not constitute discrimination within the meaning of §504. It is not "solely by reason of his handicap" that the handicapped individual may be denied full participation in the classroom. Rather, it is by reason of the absence of some necessary person or thing constituting an auxiliary aid. The affirmative obligation of the institution is arguably satisfied by admission of the student and the provision of barrier-free access to the facilities.[84] Therefore, providing additional services to the student should be voluntary on the part of the private institution, or at least any such obligation should be limited to assisting the student in finding such services or funds to pay for such services from existing federal-state programs or other external sources.

The requirement of additional services exceeds Congressional intent and ignores relevant differences in ability to pay.[85] Moreover, it subjects private institutions to a "catch-22" situation in which they are forbidden to deny admission to an otherwise qualified handicapped individual, but once that individual is admitted, are required to pay for auxiliary aids. Presumably the regulations would prohibit an institution from denying admission on the grounds that it had insufficient funds to pay for the auxiliary aid which would be required.

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82. "Identical treatment may, in fact, constitute discrimination." HEW Statement of Policy on interpreting §504, 41 Fed. Reg. 20296 (1976).

83. "In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts, in order to ensure equal opportunity. Thus, for example, it is meaningless to 'admit' a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction." 42 Fed. Reg. 22676 (1977).

84. Snowden v. Birmingham—Jefferson City Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977); United Handicapped Fed. v. Andre, 409 F. Supp. 1297 (D. Minn. 1976). In *Snowden*, the court stressed the "solely by reason of his handicap" language in holding that §504 did not require the provision of auxiliary mechanical aids to lift persons in wheelchairs from the street to the bus. The court found that the provision of access, by permitting persons in wheelchairs to ride the bus, was all that §504 required.

85. In Mourning v. Family Serv. Pub., Inc., 411 U.S. 356 (1973) and Thorpe v. Housing Auth., 393 U.S. 268 (1969), there is an implicit recognition that the impact of the burden imposed on a regulated entity is a relevant factor in determining the reasonableness of regulations.

V. SUMMARY AND RECOMMENDATIONS

Congress was certainly aware in 1973 and 1974 of the financial problems afflicting private post-secondary educational institutions.[86] While it may be the case that H.E.W. promulgated the Subpart E regulations with the expectation that payment for auxiliary aids would come primarily from federally assisted state programs,[87] decisions such as *Barnes* are interpreting the regulations as imposing affirmative obligations on private institutions without reference to the availability of federal or state assistance to the handicapped individual. One can reasonably assume that Congress did not intentionally enact legislation which will have such a negative financial impact on already hard-pressed private educational institutions. If such is the case, the interpretation of Congressional intent as reflected in the Subpart E regulations must be erroneous.

Contrary to the assertions contained in cases like *Barnes,* the existence of a private right of action under §504 has not been established. Reliance on *Lau* for an argument by analogy to §601 is misplaced since *Lau* does not address the standing issue. *Cannon,* which addresses the standing issue directly in the Title IX context, finds no private right of action under that analogous provision. *Lloyd,* while finding a private right of action under §504, does so in part in reliance on *Lau,* and suggests that the existence of administrative remedies would limit the private right to *a posteriori* judicial review. Application of the *Cort v. Ash* tests is, at best, inconclusive since it can reasonably be argued that Congress intended no more than *a posteriori* review of administrative action.

The Subpart E regulations should be found unconstitutional as applied. They are beyond the limits of the *implied* delegated rule-making authority and they are not *reasonably* related to the purposes of §504. Additionally, redrafted regulations should impose affirmative obligations, if at all, only in the areas of admissions, evaluation adaptations and access to physical facilities. The burden of the provision of auxiliary aids should fall upon the handicapped individual, if he or she is financially able, or if not, upon federally aided state programs which Congress has provided and supported for that purpose in the Rehabilitation Act.

86. *See, e.g.,* PRIORITIES FOR ACTION: FINAL REPORT OF THE CARNEGIE COMMISSION ON HIGHER EDUCATION, 3-4 (Whitlock Press 1973).

87. Appendix A—Analysis of Final Regulations, 42 Fed. Reg. 22692-693 (1977).