Equal Access to Mass Transportation for the Handicapped

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I. Introduction

The need for mass transit increasingly has been recognized from the urban planning viewpoint in order to ease the pressures of congested highways, to facilitate movement of passengers throughout metropolitan areas, to limit vehicular air pollution, and to conserve fuel. However, the need for public transportation must also be regarded from the individual's viewpoint. Mass transit agencies must identify and respond to the requirements of particular segments of the population, and in doing so they should consider transportation for minorities more desperately in need of transportation assistance than the general public—the handicapped and elderly. The transit needs of these groups are unique because the physical obstacles commonly encountered in transportation can serve as complete barriers to travel, to education, to employment, and to social contact. This article examines the special transportation needs of the physically handicapped, the alternative ways of meeting these needs, and the legal rights to service of these needs by mass transit entities.

The manner in which transit systems must be modified to meet the requirements of those with special problems depends in large part upon the type of system involved. Although mass transit today is provided through a variety of modes, the mode most embroiled in the accessibility controversy is the passenger bus.[1] Buses present a more difficult technological problem

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1. Regulations have recently been promulgated by the Urban Mass Transportation Administration specifying accessibility standards for fixed facilities, light rail, and rapid rail vehicles. 49 C.F.R. §§ 609.13, .17, .19 (1976).

than other types of mass transit vehicles because the passenger area floor is generally about thirty-five inches above the ground,[2] whereas other transit vehicles are usually boarded at fixed terminals where level entry is provided.[3] Thus buses are more difficult to modify to allow easy entry by the handicapped.

Present regulations of the Urban Mass Transportation Administration (UMTA) do not require that buses be accessible to the wheelchair handicapped,[4] although these regulations were promulgated pursuant to a statute requiring "special efforts" to make transportation facilities accesssible.[5] Another relevant statute generally prohibits discrimination against the handicapped in federally funded programs.[6] These laws do not clearly define what is necessary to meet legal requirements; *e.g.*, is it necessary to make transportation facilities fully accessible to individuals in wheelchairs when this would require substantial expenditures and might decrease the efficiency of the transit system? Several suits have been filed by handicapped individuals and organizations seeking definition of the requirements.[7]

There are two primary issues in the equal access controversy. The threshold question is whether or not public transportation systems must provide transportation for mobility-disabled individuals. The second question is whether this transportation must be provided by making main-line transit buses fully accessible or whether requirements can be satisfied by a separate system for use specifically by the elderly and handicapped.

II. IDENTIFYING THE HANDICAPPED

Although equal accessibility lawsuits deal primarily with the interests of the severely and permanently handicapped, especially those confined to wheelchairs, these are not the only people whose physical conditions prevent full access to mass transportation facilities. There is an entire mobility-disadvantaged group that may be divided into two categories: those whose handicaps are "acute" and those whose handicaps are "chronic." The latter includes the type of disabilities most readily brought to mind by the term "handicapped"—the blind; the deaf; persons using braces, wheelchairs and prosthetic limbs; and those with cardiac and vascular conditions.[8]

2. Urban Mass Transportation Administration Policy Statement on Transbus, 41 Fed. Reg. 32287 (1976).

3. The UMTA regulations as originally proposed distinguished between "level entry" and "step entry" vehicles. 40 Fed. Reg. 8314 (1975).

4. 49 C.F.R. § 609.15 (1976).

5. Urban Mass Transportation Act, 49 U.S.C. § 1612 (1970).

6. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1970).

7. *E.g.*, Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975); United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1976); Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975).

8. L. HOEL, E. PERLE, K. KANSKY, A. KUEHN, E. ROSZNER, H. NESBITT, LATENT DEMAND FOR URBAN TRANSPORTATION (n.d.) (prepared for the Transportation Research Institute, Carnegie-Mellon University) [hereinafter cited as L. HOEL.]

Acute handicaps include temporary disabilities like fractures and sprains.[9] The handicaps caused by advanced age must also be taken into account in transit planning.[10]

A great deal of disparity exists in estimates of the number of handicapped persons who would be benefited by more accessible transportation. One study places the number of those with mobility-limiting handicaps living in urban areas (excluding those so severely handicapped that they are confined to bed) at about 6.1 million.[11] The Department of Transportation made the highest estimate of the number of persons who would benefit from removal of transportation obstacles—nearly forty-four million people.[12]

Most of this disparity is due to differing definitions of the term "handicap." The latter estimate included people "with limited social and economic opportunities who would benefit significantly in time savings, comfort and convenience for the duration of their handicap if transportation were improved."[13] The same report also stated, "For a traveler, then, a handicap is an inability to perform one or more of the actions required by existing transportation systems at a comfortable level of proficiency."[14] In contrast, the six million figure concentrated only on those whose mobility was actually restricted by transportation barriers.[15]

The Department of Transportation has taken into account both acute and chronic conditions in defining the group to be served by its latest regulations on transportation for the handicapped and elderly.

> "Elderly and handicapped persons" means those individuals who, by reason of illness, injury, age, congential malfunction, or other permanent or temporary incapacity or disability, including those who are non-ambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation and services as effectively as persons who are not so affected.[16]

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9. *Id.*

10. For an in-depth examination of the special transportation problems of the elderly, *see* INTERDISCIPLINARY WORKSHOP ON TRANSPORTATION AND AGING, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, TRANSPORTATION AND AGING—SELECTED ISSUES (1970).

11. L. HOEL, *supra* note 8, at 50. This estimate was based on statistics from the National Center for Health Statistics.

12. OFFICE OF THE SECRETARY, U.S. DEP'T OF TRANSPORTATION, TRAVEL BARRIERS 3 (1970) [hereinafter cited as TRAVEL BARRIERS]

13. *Id.*

14. *Id.* at 4-5.

15. "Estimates derived indicate that there are, in American SMSA's [standard metropolitan statistical areas], 3,203,000 chronically handicapped persons, 1,580,000 persons with acute handicaps resulting from injuries, and 1,355,000 elderly persons with other types of acute conditions, yielding a total population estimate of 6,138,166 persons with handicaps resulting in mobility limitations." L. HOEL, *supra* note 8, at 50.

The Department of Health, Education, and Welfare, using a broad definition of disability, estimated that over 29 million Americans suffer from conditions that would be less handicapping without transportation and architectural barriers. R. LAUDER, SOCIAL AND REHABILITATION SERVICE, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, THE GOAL IS: MOBILITY! 4 (1969).

16. 49 C.F.R. § 609.3 (1976) (similar to definition in 49 U.S.C. § 1612(d) (1970)).

Using a similar functional definition, the Urban Mass Transportation Administration estimated that 13.3 million people cannot use current bus stairways or entrance-ways, or experience substantial difficulty in doing so.[17] This final estimate appears most realistic for the purpose of this article. No matter which estimate is relied upon, it is apparent that a large number of people would be allowed access to mass transportation for the first time if physical barriers were removed. Countless others would find mass transit more convenient and would consequently increase ridership.

With the present transportation system, the chronically handicapped travel only about half as much as the rest of the population.[18] The largest difference in numbers of trips between the disabled and other mass transit passengers is in social/recreational, work, and shopping trips. The handicapped take only about one-third as many trips for these purposes as the able-bodied.[19] In fact, almost a third of the severely disabled are homebound, meaning that they travel only once a week or less.[20] If an accessible transportation system were available the number of trips made by these people would increase significantly.[21]

The major impact that inaccessible transportation has on the handicapped is reflected in employment statistics. Of disabled peopled aged seventeen to sixty-five, about eighty-six percent have the ability to work, but only thirty-six to forty-four percent are employed. Lack of transportation is the single most important factor preventing thirteen percent of the disabled from working, and removal of travel barriers should allow 200,000 handicapped people to enter the work force.[22]

The cost of providing accessible transit will undoubtedly be high. However, the benefits to society from the utilization of the handicapped population's talents help counterbalance the cost:

> [S]ociety has a distinct interest in utilizing every possible source of human skill and ingenuity, including the skills and talents of mobility-handicapped individuals. When effectively confined to a single floor, building, or city block, not only are the handicapped deprived of the myriad benefits of society, but society is deprived of the valuable contributions of these otherwise normal human beings. And this deprivation is compounded by

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17. TRANSPORTATION SYSTEMS CENTER, URBAN MASS TRANSPORTATION ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, THE HANDICAPPED AND ELDERLY MARKET FOR URBAN MASS TRANSIT 9, 14 (1973), *cited in* 40 Fed. Reg. 8314 (1975).

18. TRAVEL BARRIERS, *supra* note 12, at 7.

19. *Id.*

20. ATLANTIS COMMUNITY, INDEPENDENT LIVING FOR THE PHYSICALLY DISABLED 92 (1976), *citing* Urban Institute, Comprehensive Service Needs Study.

21. "If an accessible transportation system were available at 'no cost' these persons would make 50 percent more medical trips, 82% more shopping trips, 85% more church trips and 111% more social and recreational trips." *Id.* at 93 (*citing* ABT ASSOCIATES, INC., TRAVEL BARRIERS—TRANSPORTATION NEEDS OF THE HANDICAPPED (1969) (prepared for the Office of Economics and Systems Analysis, U.S. Dep't of Transportation)).

22. TRAVEL BARRIERS, *supra* note 12, at 19; TRANSPORTATION SYSTEMS CENTER, U.S. DEP'T OF TRANSPORTATION, AN INFLATIONARY IMPACT STATEMENT OF THE URBAN MASS TRANSPORTATION ADMINISTRATION'S PROPOSED ELDERLY AND HANDICAPPED REGULATION 40-43 (March 4, 1976).

> the fact that, when unable to fend for themselves, the handicapped must depend upon the public purse for their sustenance. This is a burden that should be inflicted upon neither the mobility handicapped nor society in general.[23]

The Department of Transportation found that a net economic benefit of approximately $800 million would result from elimination of transportation barriers.[24]

III. Equal Access vs. Separate Systems

The optimum means for fulfilling the needs of the mobility-disabled while maximizing the efficiency of the overall transportation system is subject to debate. It must be determined whether the handicapped should be afforded access to transit facilities used by the general public or whether a separate system designed to fit the unique needs of the disabled would be desirable and legally sufficient.

Presently the severely handicapped rely a great deal on private transportation in the form of taxicabs and specially equipped van services. Fares for the latter mode in particular have been termed "outrageous,"[25] particularly in light of the fact that the average income for the mobility-disabled is poverty-level.[26]

There are few transportation alternatives available for mobility-disabled. "[I]n a society where mobility is a prerequisite of living, the handicapped are forced to travel very little and either depend upon their friends and family for transportation or pay the high cost of special transportation."[27] Thus a handicapped person generally has a greater need for public transportation than an able-bodied person.

A. *The Rationale for Separate Systems*

Modes of transportation that provide service to the handicapped as an alternative to full accessibility of the general public transit system may be referred to as "paratransit."[28] The alternatives include subsidizing private handicapped transportation services, sharing of specially modified automobiles driven by the handicapped, and private taxi service.

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23. Bartels v. Biernat, 405 F. Supp. 1012, 1017-18 (E.D. Wis. 1975).

24. Transportation Systems Center, U.S. Dep't of Transportation, An Inflationary Impact Statement of a Program of Transportation Services to Elderly and Handicapped Persons 82-83 (1976) estimates that a benefit of $300 million to $500 million would result from each 100,000 handicapped people returned to the work force. Abt Associates estimated the benefit of eliminating barriers at $824 million, an average of $3,887,000 per major metropolitan area. Travel Barriers, *supra* note 12, at 19.

25. Atlantis Community, *supra* note 20, at 100. A round trip within a metropolitan area via specially equipped van costs $15.00 to $20.00. *Id*. at 99.

26. L. Hoel, R. Lauder, *supra* note 8, at 51; R. Lauder, *supra* note 15, at 5.

27. K. Dallmeyer, quoted in Atlantis Community, *supra* note 20, at 92.

28. Paratransit means "those types of public transportation in-between the private automobile and conventional transit." R. Kirby, K. Bhatt, M. Kemp, R. McGillivray, & M. Wohl, Para-Transit: Neglected Options for Urban Mobility (n.d.) [hereinafter cited as R. Kirby].

The most commonly advocated alternative is the small wheelchair-accessible transit bus operated by the transportation authority on a demand-responsive basis (either through subscription, dial-a-ride, or a combination of the two). Advantages of this type of system may be measured both in terms of service to the disabled and of increased efficiency for the main-line system. For the disabled, a demand-responsive public system provides door-to-door service, avoiding other physical barriers faced by the handicapped in traveling to bus stops and reaching their ultimate destinations after departing from the bus. One of the most common complaints expressed by the handicapped about mass transit is crowded conditions of vehicles and stations.[29] Overcoming this problem might best be accomplished by use of paratransit facilities because there would be less waiting, less jostling, and fewer people.

Demand-responsive transportation and modes that provide door-to-door service for the severely disabled fulfill a definite need, and would continue to have a function even if the public transportation system became fully accessible. For example, a small wheelchair-accessible bus could serve as a feeder for an accessible main-line system. Private vans could transport the disabled to destinations not serviced by public transportation and could aid those who, because of severe multiple disabilities or psychological problems, could not use mass transit.

Also, a separate system for the handicapped may maintain the efficiency of the overall transit system.

> Most rapid transit systems depend upon quick loading and unloading at stations, in order to maximize the overall running speed of the system. The ambulatory problem person is often not able to operate within the loading and unloading system at a speed commensurate with the system design, especially under crowded or rush hour conditions.[30]

Loading a wheelchair on a main-line bus may cause a slowdown in service of two to four minutes,[31] although this figure is apparently decreasing as technology is improved.[32] Buses equipped for handicapped accessibility may be inherently inefficient for transporting the able-bodied because of seldom-used features like wheelchair tie-downs, lifts, or ramps. These features add to the cost of purchasing a bus, and the space in the passenger area necessary for a wheelchair tie-down may elminate seats that could carry four to six other passengers.

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29. The irregular, dense and usually hurried pedestrian traffic in most travel situations is a physical menace to many disabled travelers as well as a source of apprehension. About one-third of the handicapped are frightened or upset by crowds of strangers . . . . The social pressure implicit in a situation in which the slower moving handicapped person may feel that he is impeding others can also be upsetting.

TRAVEL BARRIERS, *supra*, note 12, at 14. *See also* L. HOEL, *supra* note 8, at 58.

30. L. HOEL, *supra* note 8, at 42.

31. Statement of Barbara Williamson, Denver Regional Transportation District, in *Is urban transit being handicapped?*, 91 AM. CITY & COUNTY, No. 6 at 6 (1976).

32. *See* notes 116-118 *infra*.

Serving travel demand for the handicapped by means of specially-equipped and subsidized para-transit modes would be clearly a great deal cheaper than equipping all the vehicles and stations of an urban transit system to serve them, and indeed would almost certainly result in a higher level of service.[33]

B. The Rationale for a Fully Accessible System

The primary reason that a fully accessible system would be a desirable goal is intangible and unquantifiable: the psychological and social benefit to the handicapped and elderly of being more fully integrated into society. While a separate bus system could ideally provide adequate transportation, it would nevertheless create another circumstance wherein the handicapped are segregated from the rest of the population.

In practical terms, a fully accessible main-line system may be more effective in providing transportation for the disabled than a demand-responsive system alone, based on actual experience with the latter. The Denver Regional Transportation District, for example, created an innovative "HandiRide" system consisting of twelve small buses equipped with wheelchair lifts. The buses offer door-to-door service on a subscription basis to elderly and handicapped passengers. Although the HandiRide provides a necessary and valuable service, many of the disabled hold a negative view of the service.[34] The limited capacity of the system, which makes it difficult for the handicapped or elderly to get service, and the inflexibility of scheduling have been pinpointed as the major problems. Only 185 individuals are presently served by HandiRide and these people must schedule trips about a month in advance.[35]

Problems like this are by no means unique to Denver. Criteria for comparing the quality of service provided by separate systems and by fully accessible systems were identified by Dennis Cannon in a study for the Southern California Regional Transportation District.[36] To act as an acceptable substitute for an accessible main-line system, a transit system for the handicapped should display equivalence in geographic service area, choice of origin and destination points, transfer frequency, travel time, and trip-decision time.[37]

Trip-decision time reflects how far in advance a user must decide to travel. As indicated above, this element is particularly weak in some existing transit systems for the handicapped and elderly. A fully accessible system

33. R. Kirby, *supra* note 28, at 42.

34. Interviews conducted in Denver found that 47% of the disabled have a negative view of HandiRide and 63% of those served by HandiRide felt negatively about it. Atlantis Community, *supra* note 20, at 105.

35. Consequently the purposes of trips are almost exclusively for employment, education, or medical care. *Id.* at 111.

36. D. Cannon, Design Criteria for Transportation for the Disabled: A Test of Equivalence 5-6 (1976) (prepared for the Southern California Rapid Transit District Board of Directors).

37. *Id.*

would give the disabled person the same freedom to come and go at any time as the non-handicapped person.

The range of fares charged to handicapped riders was listed by Cannon as an evaluative criterion, but this point has been made obsolete by recent UMTA regulations specifying that rates for handicapped and elderly passengers during non-peak hours may not exceed one-half the peak-hour fares applicable to other passengers.[38]

Although special systems for the handicapped and elderly like Denver's HandiRide have helped fill a definite need, they are sometimes opposed as stopgap measures that slow progress toward full accessibility. Because it is more expensive to retrofit buses currently in use to make them wheelchair accessible than to add this option to new buses, and because UMTA's other accessibility regulations deal only with new transit buses, most cities will probably acquire accessible buses only through the process of gradually replacing older buses with new accessible buses. Thus, accessible buses will be added only when other considerations dictate that new buses are necessary to expand the system or replace worn-out vehicles. Obviously, each purchase of non-accessible main-line buses slows the accessibility process by several years.

The cost/benefit analysis of either type of system is, of course, an important analytical tool, but the present estimates of cost vary so widely that their value is questionable.[39]

IV. Legal Aspects of Equal Access

Legal requirements for accessible transportation have changed dramatically in the last few years as part of a movement toward equalizing the rights of handicapped citizens. Congressional mandates have begun to define the standards, and these statutes are being further sketched in by administrative and judicial interpretation. Pending legislation may also serve to alter and clarify the rights of the mobility-disabled.

It is first necessary to review the various legal foundations for the rights of the mobility-disabled population. Most of the cases filed to date by the handicapped demanding equal access have relied on a combination of these foundations. The primary constitutional source is the Equal Protection Clause,[40] supplemented by the judicially recognized constitutional right to travel. Statutory causes of action have been based on the Rehabilitation Act,[41] the Urban Mass Transportation Act,[42] the Federal-Aid Highway Act,[43]

38. 49 C.F.R. § 609.23 (1976).
39. Cannon, *supra* note 36, at 7-8, 19-20; Atlantis Community, *supra* note 20, at 126-27.
40. U.S. Const. amend. XIV, § 1.
41. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1970).
42. Urban Mass Transportation Act, 49 U.S.C. § 1612(a) (1970).
43. Federal-Aid Highway Act of 1973, § 165(b), 23 U.S.C. § 142 note (Supp. 1974), *as amended by* Federal-Aid Highway Act Amendments of 1974, § 105(b), Pub. L. No. 93-643, 88 Stat. 2281.

and various state statutes.[44] Regulations implementing the federal statutes further amplify the basis for mobility rights of the disabled, particularly the 1976 UMTA regulations entitled *Transportation for Elderly and Handicapped Persons*.[45]

A. THE URBAN MASS TRANSPORTATION ACT

Powerful language in the Urban Mass Transportation Act of 1964[46] creates a right to public transportation for the handicapped and elderly, leaving no doubt that the disabled must be provided access to at least some form of mass transit. Section 16 of the Act provides: "It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services . . . ."[47]

It is unusual in the face of such strong statutory assertion of a right that this passage is not relied on a great deal in accessibility suits. Actually, section 504 of the Rehabilitation Act[48] preventing discrimination in federal funding is cited much more frequently.[49] The statement of rights of the disabled in the Urban Mass Transportation Act is weak in that it is merely a statement of "national policy." A right is created, but without the underlying foundation necessary to render it enforceable.

Another portion of this same statutory section contains the most controversial term in the accessibility issue: "special efforts." The Act requires that "special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured . . . ."[50]

This portion of the Act may weaken the statement of rights of the handicapped and elderly because the only implementation required is special effort in planning and design. It does not set a physical standard for compliance; it does not clarify whether the right conferred is actually exercisable.

Judicial interpretations of this Act have found thus far that this section creates no requirement for a fully accessible system.[51] The rationale in these decisions has been that the "special efforts" requirement cannot demand accessibility when accessible buses are not yet in commercial production. The limiting factor has been feasibility.[52]

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44. *E.g.*, Bohlke v. Golden Gate Bridge, Highway & Transp. Dist., No. 73362 (Cal. Super. Ct., filed Nov. 18, 1974) (based on CAL. GOV'T CODE § 4500 (West Supp. 1977)).
45. 49 C.F.R. § 613.204 (1976).
46. 49 U.S.C. § 1612(a) (1970).
47. *Id.*
48. 29 U.S.C. § 794 (1970).
49. *See* Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir.1977).
50. 49 U.S.C. § 1612(a) (1970).
51. Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975); United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1976).
52. 409 F. Supp. at 1300.

The legislative history of the Act, on the other hand, tends to support the idea that the aim of section 16 is to create full accessibility.[53] While exercise of the right may be limited on an interim basis by technological factors, the ultimate goal may not stop short of complete accessibility. The chief sponsor of the amendment creating the present section 16 stated:

> Heretofore handicapped Americans were relegated to separate and unequal transit systems—systems that were very costly not only to the Government, but also to the individual user. My 1970 amendment sought to require that design and construction of all new mass transit systems, equipment, and facilities be totally accessible to the elderly and handicapped.[54]

Regulations recently promulagted by the Urban Mass Transportation Administration make it clear that UMTA does not interpret the special efforts requirement as necessitating full accessibility—a separate system for the handicapped is sufficient. The UMTA regulations specifying criteria for project approvals reiterate the special efforts criterion for receipt of federal funding but do not fully define special efforts.[55]

The initial determination of what the standard encompasses is left to local planners. Although the appendix to these UMTA regulations states, "UMTA will not specify a program design to meet the 'special efforts' requirement,"[56] some guidance is provided through a list of examples of actions that would meet the special efforts standard. Among these examples of sufficient programs is provision of a *separate* substitute service for non-ambulatory individuals.[57]

A later notice issued by UMTA gave further insight into the agency's interpretation of the statutory language:

> UMTA has taken a strong position in these regulations [49 C.F.R. part 609] and in testimony, however, that the Federal Government should leave

53. For a more thorough discussion of the legislative history of section 16, *see* Comment, *Mass Transportation for the Handicapped and the Elderly*, 1976 DET. C.L. REV. 277.

54. 120 CONG. REC. 5309 (1974) (remarks of Rep. Biaggi). The Biaggi Amendment was introduced on the floor of the House of Representatives during debate and so was never considered by committee. Bohlke v. Golden Gate Bridge, Highway, & Trans. Dist., No. 73362 (Cal. Super. Ct., filed Nov. 18, 1974) (citing 116 CONG. REC. 34180-81 (1970)).

55. 49 C.F.R. § 613.204 (1976). *See also* 23 C.F.R. § 450.120(5) (1976).

56. 49 C.F.R. § 613 Appendix (1976).

57. Other examples listed by UMTA as "illustrative of a level of effort that will satisfy the 'special efforts' requirement" are

> 1. A program for wheelchair users and semi-ambulatory handicapped persons that will involve expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 [49 U.S.C. § 1604 (Supp. 1974)] apportionment to the urban area . . . .
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> 2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible . . . .
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> 3. A system of any design that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available if requested for 10 round trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length within the service area of the public transportation authority.

49 C.F.R. § 613 Appendix (1976).

to local jurisdictions the choice of whether to use such wheelchair accessible transit buses or separate specialized services, or some combination, to meet the transit needs of wheelchair users and semi-ambulatory persons.[58]

Along with regulations requiring that the needs of the handicapped and elderly be considered in the planning process, UMTA also published more specific criteria for vehicular and fixed facility features to aid the disabled.[59] Again, there was no clear requirement for full accessibility for buses.[60]

These regulations will, of course, be given a great deal of weight in any judicial interpretation of the Urban Mass Transportation Act. Thus any argument that the Act requires full accessibility of main-line buses must come from the Act itself and must be strong enough to overcome the deference given to agency interpretation. Since the statute, as discussed *supra*, is somewhat ambiguous, it is very probable that UMTA's interpretation would be adopted.

Legislation is pending in Congress that would clarify the language of section 16 of the Urban Mass Transportation Act, making equal access mandatory.[61] Although its passage would resolve the conflict in favor of full accessibility, during its pendency the fact of its existence adds to the arguments against full accessibility. It serves as yet another statement that the present section 16 does not require complete accessibility.

B. The Federal-Aid Highway Act

Section 165 of the Federal-Aid Highway Act of 1973[62] is usually regarded as demanding stronger action to achieve accessibility than the Urban Mass Transportation Act.[63] Each act applies to the portion of mass transit funding distributed under its aegis.[64] In addition to a declaration of national policy establishing the handicapped's right to use mass transportation (very similar to that expressed in the Urban Mass Transportation Act),[65] the Federal-Aid Highway Act provides:

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58. UMTA Policy Statement on Transbus, 41 Fed. Reg. 32,286 (1976).

59. 49 C.F.R. § 609.1-.19 (1976).

60. 49 C.F.R. § 609.15 (1976).

61. H.R. 199, 95th Cong., 1st Sess. (1977). This bill, introduced by Rep. Bingham, would amend the Urban Mass Transportation Act, § 16, 49 U.S.C. § 1612 (1970), by addition of the following section:

> The Secretary shall require that any bus or other rolling stock used for mass transportation purposes and any station, terminal, or other passenger loading area, improved or constructed in whole or in part with Federal funds or under authority of Federal law after June 30, 1975, be designed with features to allow utilization by elderly and handicapped persons.

62. Federal-Aid Highway Act of 1973, § 165, 23 U.S.C. § 142 note (Supp. 1974), *as amended by* Federal-Aid Highway Act Amendments of 1974, § 105 (b), Pub. L. No. 93-643, 88 Stat. 2281.

63. S. Rep. No. 93-1111, 93d Cong., 2d Sess. 7-8 (1974).

64. 49 U.S.C. § 1612 (1970).

65. Federal-Aid Highway Act of 1973, § 165, 23 U.S.C. § 142 note (Supp. 1974), *as amended by* Federal-Aid Highway Act Amendments of 1974, § 105(b), Pub. L. No. 93-643, 88 Stat. 2283 (emphasis added).

> The Secretary *shall not approve* any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons.[66]

The strong language quoted above was added to the Act in 1974.[67] Legislative history of this amendment reveals that Congress' intent was to force creation of a transportation system that is accessible "to the maximum extent feasible."[68] Although the requirement falls short of complete accessibility at this time, it would become a requirement when technically and economically feasible. Congress was clear in its assertion that accessibility must include wheelchair accessibility:

> The [Senate Public Works] Committee has found that while funds have been spent on such worthwhile projects as overhead grip rails, non-skid flooring material, improved lighting and public address systems, and additional vertical handrails at side doors, there has been a lack of facilities such as turnstile alternatives or elevators which would make a system accessible to persons in wheelchairs.
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> The Committee proposes to amend Section 165(b) to insure that any project receiving Federal financial assistance under the urban mass transit, Interstate transfer, or rural bus demonstration sections of the Federal-Aid Highway Act of 1973 shall be "planned, designed, constructed and operated so as to allow effective utilization by elderly or handicapped persons," *including those in wheelchairs*.[69]

As with the Urban Mass Transportation Act, judicial interpretation has found that the Federal-Aid Highway Act "does not require every standard-size transit bus to be totally accessible to every mobility handicapped person."[70]

UMTA's regulations discussed in the preceding section were promulgated partially under the authority of the Federal-Aid Highway Act, so they serve as administrative interpretations of this Act as well as the Urban Mass Transportation Act. The Federal Highway Administration has also created rules regarding planning for the handicapped.[71] Perhaps the clearest statement of the administrative view of statutory requirements is found in an internal UMTA document:

> [W]e interpret Section 165(b) as requiring that mass transit facilities and services funded under the affected provisions must incorporate features which will facilitate the use of those facilities and services by a particular

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66. Substantially more funds are distributed under the Urban Mass Transportation Act. S. REP. No. 93-1111, 93d Cong., 2d Sess. 8 (1974).

67. Federal-Aid Highway Act Amendments of 1974, § 105(a), Pub. L. No. 93-643, 88 Stat. 2283, 23 U.S.C. § 142 Note (Supp. 1974).

68. "It is . . . the [Senate Public Works] Committee's intent that any project receiving funds after the date of enactment, under any of the programs referred to in this subsection, to the maximum extent feasible, be planned, designed, constructed and operated to provide for effective use by the elderly or handicapped." S. REP. No. 93-1111, 93d Cong., 2d Sess. 8 (1974).

69. *Id*. (emphasis added).

70. United Handicapped Federation v. Andre, 409 F. Supp. 1297, 1300 (1976).

71. 23 C.F.R. pt. 450 (1976).

group of the elderly and handicapped. The group which is of concern is those persons who normally utilize and can be expected to utilize mass transit facilities and services but, due to age or physical disability, cannot do so "as effectively as" persons without those characteristics . . . . Such persons include, for example, those with poor eyesight, but not the blind; those who are lame, but not those confined to wheelchairs.[72]

C. *The Rehabilitation Act of 1973*

The Rehabilitation Act, section 504,[73] has served as a stronger base for lawsuits seeking accessible transportation systems than have either of the transportation-related acts.[74] This Act prohibits discrimination against handicapped persons in any federally funded project.[75]

The Rehabilitation Act closely parallels civil rights legislation; in fact, it was originally introduced as legislation to include the handicapped within the list of groups protected under Title VI of the Civil Rights Act.[76] It has been interpreted as not only expressing substantive rights of the disabled, but also as conferring a private right of action to enforce the statute.[77]

Lloyd v. Regional Transportation Authority,[78] the foremost decision on the handicapped accessibility issue, relied heavily on section 504. Plaintiffs in this case were two handicapped individuals suing on behalf of the class of mobility-disabled people in the northeastern Illinois region served by defendants, the Chicago Transit Authority and Regional Transportation Authority. Defendants were planning to purchase new vehicles that would not be wheelchair-accessible. Plaintiffs asked for a preliminary injunction to prevent use of new facilities that were not fully accessible and also for a mandatory injunction requiring defendants to make the existing transportation facilities accessible. Defendants' motion to dismiss was granted by the district court on the basis that the statutes relied upon by plaintiffs[79] did not create a private cause of action and no valid equal protection argument existed. The Court of Appeals vacated and remanded.

The Seventh Circuit opinion contains a detailed analysis of section 504 of the Rehabilitation Act of 1973. The court relied heavily on *Lau v. Nichols*,[80]

72. Opinion of UMTA's Chief Counsel to UMTA's Director, Program Development (April 18, 1974), *quoted in* Complaint at 57, Disabled in Action of Pennsylvania, Inc. v. Coleman, No. 76-1913 (E.D. Pa., filed June 17, 1976).

73. Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794 (Supp. 1974)).

74. Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

75. Section 504 provides:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (Supp. 1974).

76. 548 F.2d at 1280 n.9.

77. *Id.* at 18.

78. 548 F.2d 1277 (7th Cir. 1977).

79. 49 U.S.C. § 1612(a) (1970); 29 U.S.C. § 794 (Supp. 1974); 42 U.S.C. §§ 4151, 4152 (1970).

80. 414 U.S. 563 (1973).

a Supreme Court case interpreting the Civil Rights Act, in determining that a right to file a private action to enforce statutes aiding the handicapped exists under section 504.

Lloyd left unanswered the question of whether separate facilities for the handicapped can adequately substitute for a fully accessible system; there was no decision on the merits of plaintiffs' claim. However, the court presented a strong case for the existence of an affirmative duty to provide accessible facilities. The court paraphrased Justice Douglas in *Lau*: "Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons] . . . for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation]."[81]

Two decisions prior to *Lloyd*, *Snowden v. Birmingham-Jefferson County Transit Authority*[82] and *United Handicapped Federation v. Andre*,[83] took a view of the impact of section 504 that rendered it virtually meaningless in the transportation accessibility context. These cases found that section 504 prohibits only affirmative discrimination without requiring action to aid the handicapped. "The defendant transit authority does not exclude the wheelchair handicapped from riding the transit buses if they can arrange for someone to assist them in boarding and exiting the bus. The defendants are not in violation of the Rehabilitation Act of 1973."[84]

Thus the only possible violation under *Snowden* and *Handicapped Federation* would be a rule prohibiting all handicapped persons from riding buses. A physical barrier producing the same result would not be violative.[85]

The Department of Health, Education, and Welfare did not interpret section 504 as prohibiting only active discrimination in recently proposed regulations. On July 16, 1976, HEW published proposed rules[86] for implementing the provisions of the Rehabilitation Act. Although these rules have no direct applicability to mass transportation because they apply only to funds administered by HEW,[87] they are significant because HEW has been assigned the task of overseeing implementation of the Rehabilitation Act by other federal agencies,[88] and will issue separate regulations in its supervisory role. The current proposed regulations provide some insight into HEW's interpretation of the statute, both to predict the content of its supervisory regulations and to serve as persuasive authority in judicial interpretation.[89]

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81. 548 F.2d at 1284 (quoting 414 U.S. at 566) (bracketed words in original).
82. 407 F. Supp. 394 (N.D. Ala. 1975).
83. 409 F. Supp. 1297 (D. Minn. 1976).
84. 409 F. Supp. at 1301; *accord*, 407 F. Supp. at 397.
85. Compare this with the concepts of *de facto* and *de jure* segregation in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
86. 41 Fed. Reg. 29548 (1976) (to be codified in 45 C.F.R. pt. 84); Notice of Proposed Rulemaking, 41 Fed. Reg. 20296 (1976).
87. 41 Fed. Reg. 19548 (1976).
88. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).
89. The proposed regulations were cited at length by Circuit Judge Cummings in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

Proposed 45 C.F.R. Section 84.4(b)(2) provides that a recipient of federal financial assistance "may not provide different or separate aid, benefits, or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others."[90] Advisory material accompanying this regulation made even more explicit its intention that services should be provided in a manner that will meet the needs of the handicapped with a minimum of separation from the able-bodied public:

> [I]n order to meet the individual needs of handicapped persons to the same extent that corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary . . . . [A]lthough separate services may be required in some instances, the *provision of unnecessarily separate or different services is discriminatory.*[91]

The reasoning of *Snowden* and *Handicapped Federation* is also contradicted by looking at other portions of the Rehabilitation Act. The creation of the Architectural and Transportation Barriers Compliance Board contemplates affirmative action to eliminate physical barriers, particularly in federal facilities.[92] In this regard, the House Committee on Education and Labor stated, "[I]t is imperative that handicapped individuals be given the opportunity to move freely in the society into which they must integrate themselves."[93]

D. Equal Protection

Equal protection is the primary constitutional basis for assertion of rights to equal access by the mobility disabled, and has been pleaded in almost every accessibility suit to date,[94] often under 42 U.S.C. § 1983.[95] The only published handicapped accessibility decisions addressing the equal protection argument. *Snowden*[96] and *Handicapped Federation*[97] found it unpersuasive. However, neither case discussed the equal protection issue in depth.

The analysis employed thus far in evaluating equal protection claims may be criticized as being outmoded; the courts utilized a rigid test that has been abandoned by the Supreme Court in recent years.[98] Commentators have recognized three formulations used to determine equal protection

90. 41 Fed. Reg. 29561 (1976) (to be codified as 45 C.F.R. § 84.4(b)(2)).
91. 41 Fed. Reg. 29551 (1976) (emphasis added).
92. 29 U.S.C. § 792 (Supp. 1974).
93. H.R. Rep. No. 93-244, 93d Cong., 1st Sess. 23 (1973).
94. *See, e.g.*, cases cited note 7 *supra*.
95. 42 U.S.C. § 1983 (1970). This statute, prohibiting denial of Constitutional rights under color of law, may serve as the basis for federal court jurisdiction over state officials. Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975). Section 1983 may also be used to enforce statutory rights. Blue v. Craig, 505 F.2d 830 (4th Cir.1974).
96. Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975).
97. United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1976).
98. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

questions. These formulations are denominated as the "old," the "new," and the "newer" equal protection tests.[99] In addition, the most recent Supreme Court decisions indicate that the Court may be moving into yet another phase in equal protection analysis. The latest standard that has been employed may be entitled "discriminatory intent."

The primary point of divergence for these tests is the standard of review to be applied in determining the validity of discriminatory state action. The old equal protection test requires only that state action demonstrate a "rational basis" for its classification scheme,[100] while under the new equal protection test the involvement of a fundamental right or suspect class triggers the necessity for a "strict scrutiny" test of the state's basis for discrimination.[101] The new test clearly eases the way for invalidation of state action in cases where the necessary prerequisite of a fundamental right or suspect class exists,[102] but makes acceptance of the state action virtually automatic if the absence of these prerequisites causes the court to revert to the rational basis test.[103] This latter reversion is illustrated by *Snowden* and *Handicapped Federation*.

1. The Strict Scrutiny Test

The analyses used in *Snowden*[104] and *Handicapped Federation*[105] followed new equal protection reasoning by examining whether a fundamental interest or suspect category were involved that would necessitate employment of the strict scrutiny standard. The disabled plaintiffs in these cases argued that the defendant mass transportation systems interfered with the exercise of the fundamental right to travel and that the mobility-disabled constituted a suspect class. Consequently, state action discriminating against the handicapped by purchasing inaccessible buses had to be evaluated using a strict scrutiny test. The contentions of the plaintiffs were based in part on the right to travel, which has been recognized by the Supreme Court as a fundamental right.[106] When the right to travel is charac-

99. Note, *Exclusionary Zoning: A Question of Balancing Due Process, Equal Protection and Environmental Concerns*, 8 SUFFOLK U.L. REV. 1190, 1192 (1974) [hereinafter cited as Exclusionary Zoning];Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

100. Railway Express Agency v. New York, 336 U.S. 106 (1949); McGowan v. Maryland, 366 U.S. 420 (1961).

101. Frontiero v. Richardson, 411 U.S. 677 (1973).

102. *Id.*; Shapiro v. Thompson, 394 U.S. 618 (1969).

103. Dandridge v. Williams, 397 U.S. 471 (1970).

104. 407 F. Supp. at 397-98.

105. 409 F. Supp. at 1301-02.

106. Shapiro v. Thompson, 394 U.S. 618, 629 (1969) stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty untie to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Shapiro's holding is limited to interstate travel, but other cases have held that the right exists for intrastate travel as well. "It would be meaningless to describe the right to travel between states

terized as broad enough to encompass local public transportation, state action discriminatorily interfering with exercise of that right must be justified by a "compelling state interest." If the courts in *Snowden* and *Handicapped Federation* had recognized this fundamental right as being abridged, the next step in the analysis would have been evaluation of the state's interests to determine their "compelling" nature. The primary state interest appears to be maximizing the efficiency of the transportation system while saving tax money. It is doubtful that efficiency alone could be considered compelling, and cutting expenditures has been expressly rejected as a compelling interest in failure to provide special services for the handicapped.[107] Thus the plaintiffs contended that the government had to act affirmatively to provide equal access.[108]

The courts in *Snowden* and *Handicapped Federation* rejected new equal protection arguments, holding that no fundamental right was involved, and the only constitutional requirement was the presence of a rational basis for discrimination. This basis was found in the technological and economic infeasibility of providing wheelchair-accessible facilities.

> The facts of this case do not appear to involve any invidious discrimination against similarly situated persons. Such discrimination as may in fact exist results from technological and operational difficulties in designing, producing and operating the kind of special vehicles needed to allow plaintiff and the class she represents to utilize BJCTA's [Birmingham-Jefferson County Transit Authority's] bus system with safety and convenience for themselves and other passengers.[109]

Another statement of this rationale was presented in an amicus brief prepared by UMTA in another accessibility case.

> Perhaps the essence of the weakness of plaintiff's constitutional claim is the fact that their Complaint shows on its face that they are not "situated similarly" to the non-handicapped passenger because of their physical

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as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

107. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the . . . [s]ystem whether occasioned by insufficient funding or administrative inefficiency certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child. Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

108. Government agencies have been required to act affirmatively to provide certain classes of persons with equal rights. Points and authorities in Opposition to Demurrer at 9, Bohlke v. Golden Gate Bridge, Highway & Transp. Dist., No. 73362 (Cal. Super. Ct. May 9, 1975). For example, indigents must be provided with free counsel, Douglas v. California, 372 U.S. 353 (1963), and transcripts on appeal, Griffin v. Illinois, 351 U.S. 12 (1956); special education programs must be offered for retarded children, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); and language instruction must be provided for bilingual children, Lau v. Nichols, 414 U.S. 563 (1964).

109. 407 F. Supp. at 398.

impairments and hence require special and costly modifications to transit buses before they can safely board, ride and alight.[110]

2. The Newer Equal Protection

The strict scrutiny test described above proved overly rigid in some instances. Rights considered "fundamental" were given a great deal of protection; rights only slightly less important that had not been recognized as "fundamental" were only marginally protected. Gradually it has been realized that a test lying between these extremes may be necessary. This newer equal protection test determines the strictness with which state action will be examined on the basis of the degree of harm to the affected class. The more serious the infringement of rights, the stricter will be the examination of the state's justification for its actions.[111] Although the language employed in Supreme Court cases utilizing this test has been similar to the old rational basis equal protection standard, the results have been different, *i.e.*, the Court has invalidated legislation for failure to meet the rational basis requirement. While the standard has been merely a rational basis, there has been a requirement of showing that the basis is indeed rational, thus eliminating the perfunctory approval of state action that formerly followed designation of a case for rational basis analysis.[112]

Application of newer equal protection to equal access suits would have the effect of raising the standards for showing of a rational basis. Defendant transit entities would need to affirmatively prove the rationality for the existence of travel barriers. The harm to individuals from denial of access to mass transportation is great, and the right to public transportation for the handicapped has been affirmed by statute. Thus, the balancing of interests might show that equal protection demands accessibility.

3. Discriminatory Intent

A discussion of equal protection must conclude with mention of the Supreme Court's most recent direction in discrimination cases, set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[113] This case represents the strongest example to date of the degree to which the current Court's thinking has diverged from past civil rights cases. The plaintiffs in *Arlington Heights* attacked an exclusionary zoning ordinance as a violation of the Fair Housing Act[114] and the fourteenth amendment. The Supreme Court refused to invalidate the ordinance, requiring that there be a showing of actual intent to discriminate.[115] This case possibly may be

110. Amicus Curiae Brief in Support of Defendant's Demurrer to Complaint, at 17-18, Bohlke v. Golden Gate Bridge, Highway & Transp. Dist., No. 73362 (Cal. Super. Ct. May 9, 1975).

111. *See* Exclusionary Zoning, *supra* note 99; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

112. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

113. 97 S. Ct. 555 (1977).

114. 42 U.S.C. § 3601 (1970).

115. The Supreme Court stated:

confined within its narrow factual situation, but its impact appears to extend much further. If its requirement of showing actual intent is applied to the handicapped accessibility area, for example, it will mean that mobility-disabled plaintiffs must prove that transit entities purchased inaccessible buses with the intent of barring access to those in wheelchairs. If other justifications for the action can be pinpointed, *e.g.*, system efficiency or financial factors, then the agency's action will be upheld. This extreme judicial deference would virtually destroy any hope of achieving accessible transit through litigation.

V. TECHNOLOGY

The "state of the art" in providing transportation for the handicapped is an important factor to be considered. When a balancing test is employed by public decisionmakers to weigh the costs of providing accessible transportation against the benefits, factors like system efficiency and feasibility can tip the scales.

One major problem with accessibility has been the additional time per stop it would take to load passengers if a wheelchair lift is deployed. If a device were used that took three or four minutes to operate, loading two wheelchairs per trip would cause a bus to fall behind schedule. On the other hand, if a lift or ramp could load a wheelchair in twenty seconds, then picking up disabled passengers would take little more time than other riders.[116]

The possibility of redesigning buses entirely to create maximum accessibility for all passengers by lowering bus floors and eliminating steps has been controversial. UMTA began a project working with bus manufacturers to develop Transbus, a low-floor accessible bus incorporating advanced design techniques. Transbus did not prove to be a popular project among transit planners due to disadvantages like higher cost, increased fuel consumption, and reduced seating capacity.[117] Some of the original criteria for this project, most notably the low floor height, had to be compromised in order to met demands for advanced transit buses more quickly.[118]

Our decision last Term in Washington v. Davis, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. 97 S. Ct. at 563.

116. Several devices have been developed that allow for rapid loading and unloading of wheelchairs. ATLANTIS COMMUNITY, *supra* note 12, at 124.

117. Young, The Battle of the Buses, 3 Mass Transit No.5, at 6 (1976); Is urban transit being handicapped?, 91 AM. CITY & COUNTY No.6, at 6 (1976).

118. The original plans for Transbus involved a major redesign of existing transit buses that included lowering of bus floors to 22 inches or less. Due to time and cost factors, UMTA determined that the needs of the transit public would be better served by "interim buses" incorporating some of the advanced aspects of Transbus but without the complete redesign of

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The Transbus project is an example of the necessity for planning on a federal level to bring accessible transit buses into production. Since cities usually purchase a maximum of 200 to 300 buses at a time, it is not economically feasible for manufacturers to make major modifications in the standard bus design for an individual city. A manufacturer would be unwilling to incur the massive expenses of retooling without assurance that such features would be purchased by local governments.[119]

Current regulations require all new full-size buses purchased with UMTA grants to be equipped with several features to make them more accessible and more convenient. Among these features are handrails usable when boarding, overhead handrails, a rail located near the fare-collection box for passengers to lean against, and other handrails and stanchions "sufficient to permit safe on-board circulation, seating and standing assistance and unboarding by elderly and handicapped persons."[120] Visual factors should also make bus transit easier for some of the elderly and handicapped: illuminated destination and route signs on the front and side of the vehicle, stepwell lighting, outside lighting, priority seating signs, and a band of bright contrasting color on each step. Under these regulations, the height from a standard six-inch curb to the first step cannot exceed eight inches, and each step inside the bus may also not exceed eight inches (the height of an average household step).[121]

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existing buses. A low floor height (of 29 inches or less) would be achieved by a combination of lowering the floor height somewhat and utilizing "kneeling devices," which are "[d]eflatable airbag devices which permit the front-end or front right corner of a bus to 'kneel' down by four or five inches." UMTA Policy Statement on Transbus, 41 Fed. Reg. 32286, 32287 (1976). These devices are now offered by all three major bus manufacturers for $300-$400, and will result in an effective floor height of 24 inches or less. *Id.* Although these features are less advanced than UMTA's original goal, they may still be helpful in providing accessibility:

> [A] net 24-inch floor height, when combined with the further offset of a typical six-inch curb, may permit use of a ramp instead of a more expensive lift for wheelchair access (although assistance to the wheelchair user may be necessary, depending on the length of the ramp). Thus, for an increase in price of less than one percent per bus, features which substantially improve the accessibility of the vehicle for all riders, and especially for elderly and handicapped person[s], can be added. *Id.*

119. William M. Spreitzer, Head of the Transportation Research Department of General Motors, commented about the acceptance of a prototype incorporating a low floor, a kneeling device, and a new braking system for smoother stopping: "[F]ollow-up market studies within the transit industry indicated that, desirable as some of these features were from the standpoint of the elderly and the handicapped, there was not sufficient interest to justify including them on future production models." *A Barrier-Free Environment for the Elderly and the Handicapped: Hearings before the Senate Special Comm. on Aging*, 92d Cong., 1st Sess., pt. 3, at 165 (1971).

A Department of Transportation publication stated:

> Major changes in vehicle design require a large investment which the manufacturers are not eager to make without guarantees of increased revenues . . . . The structure is another deterrent to action. While a larger share of the market might ordinarily be a strong incentive for any manufacturer to invest in product improvements, the largest bus manufacturers are already able to influence the market in such a way that it is not advantageous for them to initiate the changes. TRAVEL BARRIERS, *supra* note 12, at 39.

120. 49 C.F.R. § 609.15(e)(3) (1976).

121. 49 C.F.R. § 609.15 (1976).

The primary choice left open for local transit planners is whether or not to purchase wheelchair loading devices. The regulations do not require purchase of the wheelchair option, but only that the bus be capable of being equipped with the option.[122] Any transit bus may be retrofit for wheelchair accessibility, but it requires alterations in the structure of the bus like widening doorways and aisles that make retrofitting costly. Buses can be constructed with the necessary structural alterations so that retrofitting requires only attachment of the wheelchair loading device. Thus, what the present regulations require is not wheelchair accessibility, but only construction of buses so that they may, at some future time, be made accessible at minimum cost.[123]

The regulations also contain a requirement directed toward bus manufacturers, although enforced only through indirect pressure. UMTA will approve funds for acquisition of transit buses only if the local transit entity's bid requires an assurance from each vehicle manufacturer that wheelchair options are available. Thus before a manufacturer can participate in bidding for federally funded transit bus contracts it must offer a wheelchair option.

VI. Conclusion

The need for accessible transportation is apparent. There are millions of Americans who are constantly restricted from leading fuller lives by mere physical barriers; barriers that could and should be removed. Unfortunately, there is not yet a firm legal foundation for requiring accessible transit facilities. Thus the action that must be taken is primarily for the legislatures, not the courts.

Action should be taken in the near future while transit systems are expanding so that expensive retrofitting will not be necessary. Until accessible full-size buses are developed for practical use in mass transportation, planners should examine the possibilities for operating paratransit modes that could later be used as supplemental systems.

The justifications for discriminatory separate systems or failure to provide any facilities for the handicapped become weaker as technological developments make a fully accessible system more feasible. Legal precedents are quickly being established in this area. To prevent the law from being frozen at a stage far behind the state of the art, the precedents must be regarded in the perspective of their factual context.[124]

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122. "The term 'wheelchair accessibility option' means a level change mechanism (e.g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device." 49 C.F.R. § 609.15(b) (1976).

123. The regulation provides that "procurement solicitations shall provide for a bus design which permits the addition of a wheelchair accessibility option and shall require an assurance from each bidder that it offers a wheel chair accessibility option for its buses." *Id.*

124. For recent developments in this field subsequent to preparation of this article, *see* final Health, Education, and Welfare Department regulations entitled Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. 22,675 (1977) (to be codified in 45 C.F.R. §§ 84.1-.61); Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus, 123 Cong. Rec. S10,562 (daily ed. June 23, 1977).