

# ARTICLES

## The Higher Education Accommodation Mistake

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*A university may deny a disabled student's reasonable accommodation request if it decides that the accommodation would fundamentally alter its academic programs. In practice, the fundamental alteration defense works like a silver bullet. In evaluating the defense's application, courts defer to universities' judgments about what exactly is fundamental about their programs. This deference is a mistake, and one that has had wide-ranging consequences for generations of disabled students whose accommodation requests were denied. This Article describes how *Wynne v. Tufts University School of Medicine*, a First Circuit decision interpreting Section 504 of the Rehabilitation Act, invented a standard for reviewing how the fundamental alteration defense applies to requests for reasonable accommodation in higher education, and how that standard then became the leading approach. *Wynne* imported its problematically deferential standard from an unrelated and inapplicable body of law—qualified immunity. The result is a test that mistakenly grants super-deference to certain Section 504 and Americans with Disabilities Act (ADA) defendants in a way that the law does not permit. The Supreme Court has unequivocally held that ADA defendants do not receive special deference with respect to a court's determination of what aspects of their programs and services are fundamental. Yet for decades, *Wynne* has gone unquestioned, and its influence has only grown. It is now creeping into workplace discrimination cases, where it unjustifiably advantages employer-defendants. This Article is the first to contend that *Wynne* was wrongly decided. If courts recognize that *Wynne* is incorrect, more accommodations will be provided to the very students who need them—and as a result, those students will be more likely to stay in school, graduate, and have a chance at the self-fulfillment the ADA was intended to facilitate.*

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## INTRODUCTION

A college student who obtains a reasonable accommodation receives the tools necessary to succeed in school. Consider a deaf student who receives an accommodation that provides them with Communication Access Realtime Translation (CART) services<sup>1</sup> in an English class taught by a fast-talking, soft-spoken professor. As a result of the accommodation, which provides the student with real-time speech transcription, the student can take accurate notes and use those notes to study for and succeed on tests. Without the accommodation, the student may lose the ability to follow along in class, and may, as a result, perform poorly on tests. That student may perform so poorly that they fail the class. If it is a required course, the student may be unable to graduate. Not receiving an accommodation can alter the trajectory of a disabled student’s life.

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1. *Captioned Speech and Audio*, HEARING LOSS ASS’N OF AM., <https://www.hearingloss.org/find-help/captioning/> [<https://perma.cc/V4KB-2DWA>] (last visited Sep. 11, 2025) (explaining that CART “involves a stenographer, or steno typist, who translates speech in real-time to written words on a screen, either in person or remotely”; “tend[s] to be more accurate and understandable than automatic” captions; and is “most often used for live events like classes, presentations, conferences and theater performances”).

Nevertheless, obtaining an accommodation is a difficult task. Suspicion about whether a student with disabilities is entitled to an accommodation follows them throughout every stage of their education.<sup>2</sup> A student who convinces their academic institution that they are disabled,<sup>3</sup> and that their requested accommodation

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2. See, e.g., Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 184, 210 (1982) (holding that deaf first-grader Amy Rowley did not need the accommodation requested by her parents—a sign language interpreter—and that a less-effective FM system that amplified sound would suffice); Lauren Camera, *The Price of an Unfair Advantage*, U.S. NEWS & WORLD REP. (Mar. 15, 2019, at 06:01 ET), <https://www.usnews.com/news/the-report/articles/2019-03-15/a-victim-in-the-college-admissions-scandal-students-with-disabilities> [<https://perma.cc/U3KC-RH7D>] (describing how high school students with disabilities were impacted by the 2019 college admissions cheating scandal and faced unfounded suspicion regarding their testing accommodations); Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1083 (2019) (stating that “[s]kepticism and misconceptions” about disability can impede college students’ access to accommodations, even when they “possess[] official documentation” of disability); Christopher Toutain, *Barriers to Accommodations for Students with Disabilities in Higher Education: A Literature Review*, 32 J. POSTSECONDARY EDUC. & DISABILITY 297, 306 (2019) (describing how twenty-three empirical studies of accommodations processes highlighted recurring themes of difficulty in obtaining necessary documentation and negative reactions from peers and professors who learn of accommodation requests); Naomi Hess, *Disabled Students at Princeton and the Ongoing Fight for a More Inclusive Campus*, DAILY PRINCETONIAN (June 7, 2022, at 21:06 ET), <https://www.dailyprincetonian.com/article/2022/06/disabled-students-make-voices-heard-princeton-campus-advocacy> [<https://perma.cc/FL8U-RP9M>] (describing students’ experiences interacting with faculty and staff skeptical of their disabilities); Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 99 n.322 (2021) (describing how, until 2014, the Law School Admission Council flagged the test scores of students with disabilities who received LSAT testing accommodations to arouse suspicion about the accommodations’ necessity and to signal to law schools that the students’ test scores may not reflect their abilities); Susannah G. Price, *Invisible Victims: Combatting the Consequences of the College Admissions Scandal for Learning-Disabled Students*, 54 COLUM. J.L. & SOC. PROBS. 461, 491 (2021) (describing how post-secondary students newly-diagnosed with disabilities are denied accommodations because they cannot produce proof of past accommodations, a practice informed by the suspicion that new disabilities are faked); Kendra J. Muller, *Disability Disparities in Post-Secondary Education: Comparing Civil Rights Theories with Empirical Data on Equal Access*, 13 WAKE FOREST J.L. & POL'Y 207, 252 (2023) (describing how the bar exam requires test takers with disabilities to produce “stacks of medical records, . . . detailed information about past accommodations from childhood onward, all accommodation records from childhood, transcripts, and an essay about how their disability affects all aspects of the student’s life” including “information . . . across what can be twenty+ years of a student’s life” (internal citations omitted)). A recent high-profile essay revved concerns that college students fake Attention Deficit Hyperactivity Disorder (ADHD). See Alan Levinovitz, *Are Colleges Getting Disability Accommodations All Wrong?*, CHRONICLE OF HIGHER EDUC. (Sep. 25, 2024), <https://www.chronicle.com/article/do-colleges-provide-too-many-disability-accommodations> [<https://perma.cc/5BWQ-C4V4>] (arguing that “a significant minority of diagnoses” received by college students who request accommodations “are fraudulent or mistaken” and that accommodations are provided to “students who don’t need them”).

3. See Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U. L. REV. 1971, 1996 (2023) (describing universities’ onerous disability documentation requirements and how disability documentation that is more than three years old is often rejected); see also Mia Rasamny, “A Clear Violation of the Law”: Professors Reject Student Disability Accommodations, HOYA (Feb. 4, 2022), <https://thehoya.com/features/a-clear-violation-of-the-law-professors-reject-student-disability-accommodations/> [<https://perma.cc/CJV4-2HW7>] (describing how professors fail to provide accommodations approved by university’s Academic Resource Center); Elise Fjelstad, *Equity, Not Equality: UW Disability Community Mobilizes for More Equitable Accommodation Access, Campus Climate*, BADGER HERALD (Feb. 28, 2022), <https://badgerherald.com/news/campus/2022/02/28/equity-not-equality-uw-disability-community-mobilizes-for-more-equitable-accommodation-access-campus-climate/> [<https://perma.cc/J4KK-NQZP>] (explaining the difficulty graduate students face in obtaining accommodations); Lauren Rowlands, “Dismissive” and “Unempathetic”: Students Claim Unjust Treatment from BU Disability and Access Services Director Lorre Wolf, DAILY FREE PRESS (Jan. 28, 2022, at 06:22 ET), <https://>

is reasonable<sup>4</sup> and will not impose an undue burden,<sup>5</sup> may also need to overcome an additional obstacle: the fundamental alteration defense.

Section 504 of the Rehabilitation Act of 1973<sup>6</sup> and the Americans with Disabilities Act (ADA),<sup>7</sup> which prohibit discrimination on the basis of disability, allow covered entities to deny requests for reasonable accommodations that fundamentally alter the nature of the entity's program or services.<sup>8</sup> Neither Section 504 nor the ADA, which cover most institutions of higher education, provide that the defense applies differently in the higher education context. Yet in higher education cases, courts have bolstered the fundamental alteration defense by finding that academic institutions, and not the courts, are best suited to determining whether an accommodation would in fact fundamentally alter an academic program.<sup>9</sup> Deference to academic expertise has made the defense nearly insurmountable, even though neither Section 504 nor the ADA supports treating institutions of higher education more deferentially than other civil rights defendants who must justify their accommodation denials.<sup>10</sup>

The special deference afforded colleges and universities is the result of *Wynne v. Tufts University School of Medicine*, a 1991 First Circuit decision interpreting Section 504.<sup>11</sup> *Wynne* upheld a medical school's refusal to accommodate a student with respect to the format of the school's multiple-choice tests on fundamental alteration grounds.<sup>12</sup> It has become the lodestar in both Section 504 and ADA higher education-based accommodation analyses when a defendant raises the

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[dailyfreepress.com/2022/01/28/dismissive-and-unempathetic-students-claim-unjust-treatment-from-bu-disability-and-access-services-director-lorre-wolf/](https://www.dailymail.com/news/usa-news/article/dailyfreepress.com/2022/01/28/dismissive-and-unempathetic-students-claim-unjust-treatment-from-bu-disability-and-access-services-director-lorre-wolf/) [<https://perma.cc/DSY8-DGB2>] (explaining student concerns that university creates excessive obstacles for students seeking accommodations).

4. *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 146 (D. Mass. 1997) (stating that “[i]n the reasonable modifications context, the plaintiff has the initial burden of proving ‘that a modification was requested and that the requested modification is [generally] reasonable’” (second alteration in original) (quoting *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997))).

5. *Joseph M. v. Becker Coll.*, 531 F. Supp. 3d 383, 396 (D. Mass. 2021) (stating that accommodations may not “impose an undue burden” on an institution of higher education).

6. 29 U.S.C. § 794.

7. 42 U.S.C. § 12132.

8. *See Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979) (holding that Section 504 does not require a state nursing program to provide a modification that would fundamentally alter the course of study the program offers); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682–83 (2001) (recognizing that the ADA does not require a sponsor of professional golf tournaments to provide a reasonable modification that fundamentally alters the nature of its tournaments).

9. *Wynne v. Tufts Univ. Sch. Of Med.*, 932 F.2d 19, 25 (1st Cir. 1991) [hereinafter *Wynne I*] (reviewing a fundamental alteration-based denial of a request for reasonable accommodation under Section 504 and stating that courts are guided by “the well-established principle” that “[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty’s professional judgment” (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985))).

10. *See infra* Section II.C.

11. *See Wynne I*, 932 F.2d at 25.

12. *See id.* at 24–25; *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992) [hereinafter *Wynne II*] (affirming summary judgment after the university “considered alternative means” of accommodation and “‘came to a rationally justifiable conclusion’ regarding the adverse effects of such . . . accommodations” (quoting *Wynne I*, 932 F.2d at 26)).

fundamental alteration defense.<sup>13</sup> *Wynne* requires a university invoking the defense to submit that certain pro forma steps evaluating an accommodation were taken.<sup>14</sup> If that submission is made, a court is excused from asking questions about the underlying rationale for rejecting the accommodation as it would in other fundamental alteration cases.<sup>15</sup>

Less than ten years later, a federal district court followed *Wynne*'s holding; the resulting opinions in *Guckenberger v. Boston University* also became landmark decisions.<sup>16</sup> In addition to establishing stringent disability documentation standards for undergraduate and law students with ADHD, *Guckenberger* upheld Boston University's refusal to modify its foreign language requirement for undergraduate students with learning disabilities on the grounds that doing so would fundamentally alter the nature of its liberal arts degree.<sup>17</sup> *Guckenberger* held that Boston University met its burden under *Wynne* by simply convening a committee of faculty members who met to discuss the foreign language accommodation.<sup>18</sup> As a result of *Wynne*, the decision to deny the accommodation was unreviewable even though most other colleges and universities would have provided the accommodation and not treated it as a fundamental alteration.<sup>19</sup> This hands-off approach is also inconsistent with the review courts engage in when Section 504 claims are brought against defendants who are not institutions of higher education.<sup>20</sup>

Due to *Wynne*'s influence, judicial review of academic institutions' accommodation denials is as deferential as judicial review of law enforcement civil rights violations. That similarity is no accident—*Wynne* expressly borrowed the

13. See Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 184–88 (2003) (describing the impact of the 1991 *Wynne* case on subsequent courts' evaluation of the "reasonableness" of a requested accommodation").

14. See *Wynne I*, 932 F.2d at 26.

15. Compare *Wynne II*, 976 F.2d at 795 (stating that a medical school's "program-related decisions" are not reviewed to determine if they are "right" or "wrong" but rather to determine whether the school has undertaken a diligent assessment of available options and made "a professional, academic judgment that [a] reasonable accommodation [was] simply not available" (alterations in original) (quoting *Wynne I*, 932 F.2d at 27–28)), with A.L. by & through D.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1315 (M.D. Fla. 2020) (weighing expert testimony, including engineering studies, to consider whether modifications to amusement park passes would "fundamentally alter Disney's business model" and therefore provide a defense to an ADA Title III discrimination claim).

16. See *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 147 (D. Mass. 1997); *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 85, 87 (D. Mass. 1998).

17. See *Guckenberger*, 8 F. Supp. 2d at 87; Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J. COLL. & U.L. 843, 858 (2010).

18. *Guckenberger*, 8 F. Supp. 2d at 87, 89 (stating that Boston University's refusal to modify its foreign language requirement deserves "great deference" so long as it occurred "after reasoned deliberations as to whether modifications would change the essential academic standards of its liberal arts curriculum" (quoting *Guckenberger*, 974 F. Supp. at 149)).

19. *Id.* at 90 (stating that "so long as an academic institution rationally, without pretext, exercises its deliberate professional judgment not to permit course substitutions for an academic requirement in a liberal arts curriculum, the ADA does not authorize the courts to intervene even if a majority of other comparable academic institutions disagree").

20. See *infra* notes 325–58 and accompanying text.

deference afforded government officials who invoke qualified immunity.<sup>21</sup> *Wynne*'s version of deference is oft-cited but never questioned. Yet *Wynne* conflicts with the Supreme Court's decision in *PGA Tour v. Martin*, which interpreted a golf tournament's modification requirements under Title III of the ADA and resisted calls for complete deference to a defendant's characterization of what aspects of its programs and services are fundamental.<sup>22</sup> *Martin* rejected self-serving institutional claims. That approach stands in stark contrast to *Wynne*, which effectively insulates academic institutions from scrutiny by adopting a posture of near total deference, even when the right to be free from disability discrimination is at stake.<sup>23</sup>

This Article is the first to highlight *Wynne*'s logical missteps. It challenges the transposition of qualified immunity deference into the fundamental alteration framework. It also draws attention to *Wynne*'s mischaracterization of the cases it relied upon to support broad academic deference. Armed with a clean slate, it reimagines what fundamental alteration could look like if fundamental alteration-based accommodation denials were subject to meaningful scrutiny. There is an urgent need for courts to meaningfully review defendants' invocation of the defense because, as this Article explains, the higher education-specific version of fundamental alteration has begun to creep into primary and secondary education cases and workplace litigation.

Following this Introduction, Part I tracks the origins of the fundamental alteration defense to the Supreme Court's earliest cases interpreting Section 504 and the unique way in which the defense then evolved and broadened in the context of higher education. Part II contends that the two justifications for higher education-specific deference—a qualified immunity-inspired limit on fact-finding and respect for broad academic freedom—should be reexamined. It also argues that higher education accommodation claims should follow the Supreme Court's decision in *PGA Tour v. Martin*, which, unlike *Wynne*, resisted calls for categorical deference to entities that invoke the fundamental alteration defense.

Part III reimagines fundamental alteration as a doctrine that critically examines academic justifications for accommodation denials, taking into account not only academic expertise but also the lived experience of students with disabilities to determine whether an accommodation should be provided. It applies its new understanding of fundamental alteration to the landmark *Guckenberger v. Boston University* case's facts, demonstrating how a less deferential standard could still

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21. See *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991) (stating that “the case before us, where the adversaries are an individual and an academic institution, involves a set of conflicting concerns suggestive of those in cases where an individual seeks damages from a government official for allegedly abusing his office”).

22. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (rejecting the PGA's argument that “all the substantive rules for its ‘highest-level’ competitions are sacrosanct and cannot be modified under any circumstances” because doing so would create an exemption to Title III's reasonable modification requirement).

23. Under federal disability law, the denial of a reasonable accommodation is a form of disability discrimination. See 42 U.S.C. § 12182(b)(2)(A)(ii).

reach the right result. Part III also explains how letting go of *Wynne* will have a consequential impact: without the benefit of super-deference, fewer accommodations denials will stand, and more students with disabilities will receive the accommodations they need to remain and succeed in school. Take the student who needs CART, for example. When a CART accommodation is provided, the student who receives the accommodation will be able to take accurate notes and prepare for exams, which they will be more likely to pass. When the class is a required course, a passing grade carries the student one step closer to graduation and the financial independence and self-fulfillment the ADA envisioned for people with disabilities.

The Article concludes with a warning about *Wynne*'s expansion into other areas of civil rights law where deference to institutional defendants is equally concerning and misplaced. Civil rights law should disrupt, not reinforce, the power dynamics of the status quo.

### I. FUNDAMENTAL ALTERATION'S ORIGIN STORY

Fundamental alteration originated as a judicially created limit on a federal funding recipient's obligation to reasonably modify its program or services pursuant to Section 504. As this Part describes, early applications of the fundamental alteration defense highlighted courts' reluctance to interfere with state decisions about, for example, state educational programs and state Medicaid funding decisions, areas in which courts afforded states significant discretion. In 1991, *Wynne v. Tufts University School of Medicine*, a First Circuit decision addressing Section 504, broadened the defense even further in the context of higher education accommodations, holding that academic deference and a standard of review borrowed from qualified immunity mandate a hands-off approach to academic decisions regarding what is and is not fundamental. As this Part next describes, *Wynne*'s description of the deference owed to academic institutions has had a significant impact on federal and state court decisions reviewing reasonable accommodation denials. After *Wynne*, fundamental alteration is the easiest way to justify an accommodations denial in higher education. And even though *Wynne* is a Section 504 case, it is also applied to accommodation claims under the Americans with Disabilities Act (ADA).

#### A. FUNDAMENTAL ALTERATION AS A DEFENSE TO SECTION 504 CLAIMS

The concept of "fundamental alteration" first appears in *Southeastern Community College v. Davis*, a 1979 Supreme Court decision addressing a nursing program's obligation to accommodate a student with disabilities under Section 504,<sup>24</sup> which prohibits disability discrimination by recipients of federal funding.<sup>25</sup> Frances Davis, a deaf Southeastern Community College student,

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24. 442 U.S. 397, 409–10 (1979) (interpreting 29 U.S.C. § 794); see Kerri Lynn Stone, *The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of "Fundamental Alteration" Under the ADA*, 58 HASTINGS L.J. 1241, 1281 n.221 (2007).

25. § 794(a).

applied to Southeastern's nursing program and requested an accommodation through which Southeastern would provide her with faculty supervision during her interactions with patients in the clinical phase of the program.<sup>26</sup> She also requested an accommodation that would excuse her from taking certain required courses, given that not all nursing positions required the ability to perform every task covered in each Southeastern course.<sup>27</sup> Southeastern's nursing staff voted to deny Davis admission to the program.<sup>28</sup>

In rejecting Davis's proposals, the Court first held that applicable regulations did not require that Southeastern provide Davis with "close, individual attention" from a nursing instructor, even though such a modification would be necessary for patient safety during Davis's participation in the nursing program's clinical phase.<sup>29</sup> The Court accepted Southeastern's position that it was not required to provide Davis with close faculty supervision during the clinical phase to facilitate communication with patients; rather, the ability to hear speech on one's own "was both necessary to ensure patient safety and 'indispensable for many of the functions that a registered nurse performs.'"<sup>30</sup>

As for the second accommodation, Southeastern could have, in theory, changed a student's course of study and trained her for some but not all of a nurse's duties and some but not all potential nursing positions. However, if it were to do so, the Court held, Davis would not receive "even a rough equivalent of the training a nursing program normally gives."<sup>31</sup> Applicable regulations required only modifications; Davis was instead asking for a "fundamental alteration" to "the nature of a program," "far more" than the regulation required.<sup>32</sup> The Court further characterized Davis's proposed accommodations as "extensive modifications" which would create a substantial adjustment to existing nursing program curricula.<sup>33</sup> If the regulations were interpreted to require such modifications, "they would constitute an unauthorized extension" of Section 504 obligations.<sup>34</sup>

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26. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 400, 407 (1979).

27. *Id.* at 407-08.

28. *Id.* at 402.

29. *Id.* at 409 (citing 45 C.F.R. § 84.44).

30. Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 408 (1998) (quoting *Davis*, 442 U.S. at 407).

31. *Davis*, 442 U.S. at 410.

32. *Id.* When *Davis* was decided, the regulations in question provided that "[a] recipient [of federal funding] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." *Id.* at 408 n.9 (second alteration in original) (quoting 45 C.F.R. § 84.44 (1978)).

33. *Id.* at 410.

34. *Id.* The Court conceded, however, that a refusal to accommodate could constitute discrimination if it was based on "an insistence on continuing past requirements and practices" despite advances in technology that would "enhance opportunities to rehabilitate the [disabled] or otherwise to qualify them for some useful employment . . . without imposing undue financial and administrative burdens upon a State." *Id.* at 412-13.

Anne Dupre has noted that in *Davis*, the Court was swayed by “the power of the institution of learning . . . to determine academic standards without interference by the courts or Congress.”<sup>35</sup> The Court did not expressly state it was deferring to Southeastern’s position about what is and is not fundamental to a nursing program’s curriculum. However, it did so implicitly. The Court accepted the testimony of members of Southeastern’s staff and faculty regarding the purpose of the program, which they described as “to train persons who could serve the nursing profession in all customary ways.”<sup>36</sup> That purpose, the Court held, “is shared by many if not most of the institutions that train persons to render professional service.”<sup>37</sup> The Court also disregarded Davis’s evidence that “there were ‘a number of settings in which [she] could perform satisfactorily as an RN, such as in industry or perhaps a physician’s office’” without having taken each course required by Southeastern.<sup>38</sup>

The Supreme Court decided another landmark Section 504 case six years after *Davis*. *Alexander v. Choate* addressed whether Tennessee’s proposed reduction of the number of annual days of inpatient hospital care covered by its state Medicaid program violated Section 504.<sup>39</sup> The *Choate* plaintiffs presented evidence that the reduction would disproportionately impact disabled Medicaid beneficiaries, who required more inpatient hospital care days than nondisabled beneficiaries.<sup>40</sup>

The *Choate* Court repeatedly noted that it was following *Davis*, a case it described as striking a balance between “the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs.”<sup>41</sup> According to *Choate*, in light of *Davis*’s purported balancing test, “a grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, [but] it may be required to make ‘reasonable’ ones.”<sup>42</sup> *Choate* also added a “meaningful access” analysis to Section 504, stating that “[t]he balance struck in *Davis*

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35. Dupre, *supra* note 30, at 409. *Davis* also controversially noted that “neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.” 442 U.S. at 411. In *Alexander v. Choate*, the Court explained that *Davis*’s use of the term “affirmative action” was a reference to “‘changes,’ ‘adjustments,’ or ‘modifications’ to existing programs that would be ‘substantial,’ or that would constitute ‘fundamental alteration[s] in the nature of a program . . . ,’ rather than to those changes that would be reasonable accommodations.” 469 U.S. 287, 300 n.20 (1985) (citations omitted) (quoting *Davis*, 442 U.S. at 410–11, 411 n.10). Leslie Francis has more convincingly argued that the Court went along with a characterization suggested at oral argument by Southeastern’s counsel—that Davis’s request for an auxiliary aid was in fact a request for impermissible affirmation action. Leslie Francis, *Debilitating Southeastern Community College v. Davis: Achieving the Promise of Disability Civil Rights*, 23 U.D.C. L. REV. 183, 189 (2020) (noting that Southeastern’s counsel “used the phrase ‘affirmative accommodation,’ a phrase in the language of affirmative action, rather than auxiliary aids and services” required in § 504). Davis’s own briefs referred to the “affirmative relief” she was entitled to, including an auxiliary aid. *See id.* at 191.

36. *Davis*, 442 U.S. at 413.

37. *Id.*

38. Dupre, *supra* note 30, at 408 (quoting *Davis*, 442 U.S. at 408 n.8).

39. *See* 469 U.S. at 289.

40. *See id.*; Mary Crossley, *Giving Meaning to “Meaningful Access” in Medicaid Managed Care*, 102 KY. L.J. 255, 270 (2013–2014).

41. *Choate*, 469 U.S. at 300. *Davis* does not refer to its analysis as one that relies on a balancing test.

42. *Id.*

requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.<sup>43</sup> Leslie Francis has described *Choate*'s "meaningful access" standard as drawing a line between reasonable modifications that must be provided and fundamental alterations that need not be made.<sup>44</sup>

*Choate* held that Section 504 did not prohibit all instances of disparate impact.<sup>45</sup> Though it did not invoke the fundamental alteration concept expressly, the Court noted that "[i]t should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*."<sup>46</sup> Tennessee could maintain durational limitations on inpatient stays covered by Medicaid even if it could "achieve its immediate fiscal objectives" in a way that was less harmful to people with disabilities.<sup>47</sup> According to Mary Crossley, *Choate* can be read to hold that Section 504 "does not require a federal grantee to fundamentally alter a program in order to avoid all differential effects on people with disabilities."<sup>48</sup> Other commentators have described *Choate* as a decision that applies a "newly formulated fundamental alteration defense" that was not undermined by the state policy's disproportionate impact on disabled individuals.<sup>49</sup>

The Court's holding in *Choate* was reinforced by its conclusion that Section 504's legislative record did not show that Congress desired to limit the states' "longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid."<sup>50</sup> As a result, after *Davis* and *Choate*, the Court had deferred to a federally-funded program's position in two contexts: determining which aspects of a state institution's nurse training program are fundamental and determining what services a state's Medicaid program will cover. In fact, though not germane to its holding, the *Davis* Court repeatedly referenced the fact that Southeastern was a state agency.<sup>51</sup> It also noted that completion of Southeastern's nursing program "would make [Davis] eligible for state certification as a registered nurse."<sup>52</sup> Though perhaps not essential to its holdings in *Davis* and *Choate*, respect for a state's decisions was at least relevant to the Court's rationale in both cases.

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43. *Id.* at 301.

44. Francis, *supra* note 35, at 192.

45. *Choate*, 469 U.S. at 308.

46. *Id.*

47. *Id.* at 308–09.

48. Crossley, *supra* note 40, at 271 (emphasis omitted). Though current Section 504 interpretations allow for disparate impact theories of relief, the validity of Section 504 disparate impact claims has "faced continued challenge in federal courts," and remains vulnerable. Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709, 1733 (2023).

49. Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL'Y 695, 725 (2001).

50. *Choate*, 469 U.S. at 307.

51. *See* *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 400, 410 (1979).

52. *Id.* at 400.

The fundamental alteration defense developed in *Davis* and *Choate* was incorporated into regulations implementing the ADA.<sup>53</sup> Title II regulations provide that “[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities” but does not require any action that would result in a fundamental alteration “in the nature of a service, program, or activity or in undue financial and administrative burdens.”<sup>54</sup> As Mark Weber has explained, the fundamental alteration and undue burden excuses are “hedged significantly by the requirement that the public entity demonstrate the fundamental alteration or undue burden,” which obligates “[t]he head of the entity or that person’s designee . . . to make such a decision after considering all resources available and . . . make a written statement of reasons.”<sup>55</sup>

The Supreme Court addressed the fundamental alteration defense in the ADA Title II context in *Olmstead v. L.C.*, in which plaintiffs alleged that a state’s institutionalization of people with intellectual disabilities who could have been placed in community settings violated the ADA.<sup>56</sup> As a district court case interpreting *Olmstead* has explained, though the Court ultimately ruled for the plaintiffs, the plurality opinion noted that assessing a fundamental alteration defense “would necessarily involve a complex analysis, beyond simply comparing a plaintiff’s request for community-based services against the State’s budget as a whole, or weighing the cost of community care for one individual against the cost of institutionalized care for that same individual.”<sup>57</sup> Rather, fundamental alteration “requires the defendant state to show that, in the allocation of available resources, providing immediate relief for the plaintiff would be inequitable given the State’s overall obligation to a large and diverse population of mentally disabled individuals.”<sup>58</sup> Justice Kennedy’s concurrence noted that “appropriate deference” should be given to the “program funding decisions of state policymakers.”<sup>59</sup> “Throughout *Olmstead*, the Justices’ cautious reluctance to question State funding decisions is apparent.”<sup>60</sup> In that sense, *Olmstead* follows *Davis*’s and *Choate*’s deference to state decisions.

Title III itself provides that “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to

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53. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1103, 1120 (1995).

54. 28 C.F.R. § 35.150(a).

55. Weber, *supra* note 53, at 1103 n.78 (citing 28 C.F.R. § 35.150(a)(3)).

56. 527 U.S. 581, 587 (1999).

57. *Ligas v. Maram*, No. 05C4331, 2010 WL 1418583, at \*2 n.5 (N.D. Ill. Apr. 7, 2010) (citing *Olmstead*, 527 U.S. at 603–04).

58. Smith & Calandrillo, *supra* note 49, at 702; see also *Olmstead*, 527 U.S. at 604.

59. *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring).

60. *Ligas*, 2010 WL 1418583, at \*2 n.5; see also Smith & Calandrillo, *supra* note 49, at 702 (stating that “[t]he Court added that the ADA was not meant to compel states to phase out institutions and that states must have more leeway than the [district and circuit courts in *Olmstead*] understood the fundamental alteration defense to allow”).

individuals with disabilities” constitutes discrimination “unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”<sup>61</sup> With respect to fundamental alteration, Title III regulations track the statutory requirements.<sup>62</sup>

Title III applies to private entities, and as a result, unlike *Davis*, *Choate*, and *Olmstead*, the leading Title III fundamental alteration case is divorced from concerns related to a state’s funding and educational prerogatives. In *PGA Tour, Inc. v. Martin*, the Supreme Court addressed whether a disabled golfer’s use of a golf cart during a professional tournament would fundamentally alter the tournament.<sup>63</sup> A modification could fundamentally alter the nature of the tournament in two ways: “either by altering an essential aspect of the game such that it would be unacceptable even if it affected all competitors equally (such as changing the diameter of the hole from three inches to six inches), or by giving an unfair competitive advantage to an individual with a disability.”<sup>64</sup> Waiving the walking rule by permitting Martin to use a golf cart was not a fundamental alteration under either definition.<sup>65</sup>

The Court declined the PGA’s request that it be given absolute deference with respect to its interpretation of what constituted the substantive rules of play in its highest level competitions.<sup>66</sup> The Court treated the argument as one that would exempt the PGA from Title III’s modification provision.<sup>67</sup> Granting “wholesale deference to sports organizations . . . would render the word “‘fundamentally’” largely superfluous,” because such an approach “treats the alteration of any rule governing an event at a public accommodation to be a fundamental alteration.”<sup>68</sup>

*Martin* does not defer to an ADA defendant’s own account of the essential aspects of its services. As a result, *Martin* marks a departure from the deference

61. 42 U.S.C. § 12182(b)(2)(A)(ii).

62. 28 C.F.R. § 36.302(a).

63. 532 U.S. 661, 665 (2001).

64. Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 560 (2013); see also *Martin*, 532 U.S. at 682–83.

65. *Martin*, 532 U.S. at 685, 689.

66. See *id.* at 689–90, 689 n.51 (“Congress made no [Title III] exception for athletic competitions, much less did it give sports organizations *carte blanche* authority to exempt themselves from the fundamental alteration inquiry by deeming any rule . . . to be essential.”).

67. *Id.* at 689; Stone, *supra* note 24, at 1255.

68. Stone, *supra* note 24, at 1255 (quoting *Martin*, 532 U.S. at 689 n.51). In a corollary area of disability law, in which courts determine whether employees with disabilities are qualified based on whether they can perform a position’s essential job functions with or without reasonable accommodation, the issue of what is and is not essential is a question of fact. See, e.g., *Keith v. Cnty. of Oakland*, 703 F.3d 918, 926 (6th Cir. 2013). The analysis of this issue considers multiple factors, including “the employer’s judgment as to what functions of a job are essential.” *Id.* at 925. However, despite the deference provided to the employer’s understanding of which job functions are essential, the ultimate task of determining essentiality is left to the trier of fact—an employer is not permitted to assert that a job function is essential and rest its case. See *id.* at 925–26 (describing factors courts consider when determining whether a job function is essential under 29 C.F.R. § 1630.2(n)(2)–(3)). Indeed, “[w]hether a job function is essential is a question of fact that is typically not suitable for resolution on a motion for summary judgment.” *Id.* at 926.

given to a state's funding decisions in *Choate* and *Olmstead* and the deference given to a state's nursing program faculty in *Davis*.<sup>69</sup>

#### B. SUPER-DEFERENCE IN HIGHER EDUCATION

The ADA and its regulations do not single out higher education defendants for special treatment with respect to the fundamental alteration defense. Though *Davis* implicitly deferred to a state nursing program in evaluating the program's fundamental alteration defense, the Supreme Court has never expressly held that a special form of deference applies to determining whether higher education reasonable accommodation requests were properly denied. Yet *Wynne v. Tufts University School of Medicine*, a First Circuit case that has become controlling with respect to both ADA and Section 504 claims, does just that. The super-deference it applies to institutions of higher education is the result of a messy borrowing from disparate areas of the law that either do not implicate antidiscrimination law or simply do not stand for what *Wynne* claims they do.

This Section unearths the shaky origins of the idiosyncratic fundamental alteration standards applicable to higher education accommodations. It explores how, as a result of *Wynne*, institutions of higher education receive a form of super-deference with respect to determinations regarding which aspects of their academic programs are fundamental. Next, it offers an original analysis of how *Wynne* misrepresented the precedent it relied on in inventing its new, super-deferential standard. It then demonstrates how consequential *Wynne*'s errors are in light of the case's influence and reach.

Most colleges and universities are governed by both Section 504 and the ADA. Section 504 applies to all institutions that receive federal funding, whereas Title II of the ADA reaches public state institutions, and Title III reaches all private institutions that are not religious schools.<sup>70</sup> There are no ADA regulations that expressly address higher education. However, education-specific Section 504 regulations, promulgated by the Department of Health, Education, and Welfare in 1977 and enforced by the Department of Education since its inception in 1979, remain influential in both Section 504 and ADA litigation.<sup>71</sup> Section 504, Title II, and Title III regulations use different terms to refer to what are commonly known as reasonable accommodations. Section 504 uses the term "academic adjustments,"<sup>72</sup> whereas Title II regulations and Title III reference "reasonable modifications."<sup>73</sup>

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69. Katie Eyer and Karen Tani have described how *Choate* may reflect Reagan-era resistance to regulation and disability civil rights. See Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 883–85 (2024).

70. Macfarlane, *supra* note 3, at 1992–93 (first citing 29 U.S.C. § 794; then citing 42 U.S.C. § 12132; and then citing 42 U.S.C. § 12181(7)(J)).

71. See Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 417 (1984).

72. 34 C.F.R. § 104.44.

73. 28 C.F.R. § 35.130(b)(7)(i); Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 368 (2008) (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii)).

The leading case addressing the application of the fundamental alteration defense to higher education accommodation denials is *Wynne*, in which the First Circuit considered whether Tufts's refusal to accommodate Steven Wynne, a student with a learning disability, violated Section 504.<sup>74</sup> Wynne alleged that Tufts's failure to modify its multiple-choice testing violated Section 504 and a Massachusetts civil rights law.<sup>75</sup> The district court granted summary judgment as to both claims.<sup>76</sup> A three-judge panel of the First Circuit reversed.<sup>77</sup> A rehearing en banc followed.

The en banc opinion carefully detailed Wynne's medical school challenges. Wynne struggled throughout his first year of medical school, failing eight of fifteen courses.<sup>78</sup> In December of Wynne's first semester, he realized that he was struggling with multiple-choice examinations in particular and alerted Tufts to this fact during the following semester.<sup>79</sup> At the conclusion of his first year, the Student Evaluations and Promotions Committee and the Student Appeals Committee voted to dismiss Wynne, but the school's dean allowed Wynne to repeat his first year.<sup>80</sup> That summer, Wynne was diagnosed with a learning disability that affected his ability to answer multiple-choice questions.<sup>81</sup>

During his second attempt at completing his first year of medical school, Wynne retook courses he had previously failed.<sup>82</sup> On his second try, he passed all but two and was again permitted to retake the ones he failed.<sup>83</sup> After his third attempt at the remaining courses, he passed one but failed the second.<sup>84</sup> The same committees recommended dismissal and this time the dean agreed.<sup>85</sup> Wynne was dismissed in September 1985.<sup>86</sup>

On rehearing, the First Circuit addressed Wynne's argument that Tufts had an obligation to modify its multiple-choice question format pursuant to Section 504.<sup>87</sup> In considering this argument, the court reviewed previous Section 504 precedent inside and outside the higher education context. First, it turned to *School Board of Nassau County v. Arline*,<sup>88</sup> in which the Supreme Court addressed whether an elementary school teacher with long-dormant tuberculosis that had reoccurred was

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74. 932 F.2d 19, 20 (1st Cir. 1991).

75. *Id.* at 20–22.

76. *Id.* at 20.

77. *Id.* at 20–21.

78. *Id.* at 21. The en banc opinion also notes that, “although possessing lower MCAT . . . scores and undergraduate grades than most Tufts students, [Wynne] was admitted under the school's affirmative action program for minority applicants in 1983.” *Id.* This gratuitous detail appears intended to suggest that Wynne was unqualified on several grounds.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 21–22.

86. *Id.* at 22.

87. *See id.*

88. *Id.* at 24 (discussing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987)).

qualified to teach elementary school pursuant to Section 504.<sup>89</sup> The Supreme Court reversed the district court's finding that Arline was unqualified, remanding with an instruction that the district court "conduct an individualized inquiry and make appropriate findings of fact," which it had failed to do originally.<sup>90</sup>

According to *Wynne*, *Arline* did more: it also provided "guidance on an issue of great importance in the instant case—the deference to be given the institutional decisionmaker."<sup>91</sup> *Arline* is described as an opinion in which the Court acknowledged that it was addressing "the grave and delicate issue of the employability of a teacher with a contagious disease in an elementary school."<sup>92</sup> Therefore, according to *Wynne*, *Arline* determined that "the risks involved should be 'based on reasonable medical judgments given the state of medical knowledge.'"<sup>93</sup> *Wynne* emphasized *Arline*'s holding that "trial judges normally should defer to the reasonable medical judgments of public health officials."<sup>94</sup> Deference was appropriate unless the underlying medical judgments were "medically unsupported."<sup>95</sup> However, the defendants in *Arline* were not public health officials themselves.<sup>96</sup> Though *Arline* requires deference to medical experts with respect to issues of medical safety, it does not per se require deference to the very defendant that is alleged to have violated Section 504. This is a gloss that *Wynne* added to the more general *Arline* conclusion that public health officials should receive deference regarding their medical judgments.

*Wynne* next described the "insight" it gleaned from *Strathie v. Department of Transportation*,<sup>97</sup> a Third Circuit decision involving a bus driver who wore a hearing aid and was suspended on the grounds that he was unqualified pursuant to Pennsylvania regulations governing school bus driver licenses.<sup>98</sup> Written in the wake of *Davis*, *Strathie* noted that *Davis* did not establish any useful standard of review applicable to the claim it was faced with: failure to accommodate.<sup>99</sup> *Strathie* then described the standard it would apply: a person with disabilities need not be accommodated "if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds."<sup>100</sup>

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89. See *Arline*, 480 U.S. at 287 n.16. Section 504 applies to "otherwise qualified individual[s] with a disability." 29 U.S.C. § 794(a).

90. *Arline*, 480 U.S. at 287.

91. *Wynne I*, 932 F.2d at 25.

92. *Id.*

93. *Id.* (quoting *Arline*, 480 U.S. at 288).

94. *Id.*

95. *Id.* (internal quotation marks omitted) (quoting *Arline*, 480 U.S. at 286 n.15).

96. *Arline*, 480 U.S. at 276.

97. *Wynne I*, 932 F.2d at 25.

98. See *Strathie v. Dep't of Transp.*, 716 F.2d 227, 228–29 (3d Cir. 1983).

99. *Id.* at 231 ("Notably absent from the Supreme Court's opinion in *Davis* . . . is any discussion of the scope of judicial review with regard to the reasonableness of a refusal to accommodate a handicapped individual.")

100. *Id.*

In reviewing the state's school bus driver licensing program, *Strathie* afforded the state no special deference.<sup>101</sup> However, *Wynne* emphasizes *Strathie*'s position on deference:

The Third Circuit in *Strathie*, noting that *Davis* lacked any discussion on the scope of judicial review, acknowledged the need to accord some measure of judicial deference to program administrators, but rejected a "broad judicial deference resembling that associated with the 'rational basis' test [which] would substantially undermine Congress' intent . . . that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs."<sup>102</sup>

*Strathie* did cite *Davis*, along with a Columbia Law Review note, in rejecting a rational basis test.<sup>103</sup> However, *Strathie*'s statement about judicial deference ("[p]rogram administrators surely are entitled to some measure of judicial deference . . . by reason of their experience with and knowledge of the program in question"), is supported by a citation to the Second Circuit's decision in *Doe v. New York University*, not *Davis*.<sup>104</sup>

*Doe* is even less useful than *Strathie* with respect to *Wynne*'s ultimate conclusion about deference. *Doe* is not a case about reasonable accommodations or fundamental alterations. It focused on whether a person with disabilities "is 'otherwise qualified' for admission to an institution of higher education."<sup>105</sup> *Doe* warned courts that they should recognize their own "limited ability, as contrasted to that of experienced educational administrators and professionals, to determine an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university or a non-legal profession."<sup>106</sup> *Doe* further explained that:

"Courts are particularly ill-equipped to evaluate academic performance." For this reason, although the [Rehabilitation] Act requires us rather than the institution to make the final determination of whether a handicapped individual is "otherwise qualified," considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons.<sup>107</sup>

101. *Id.* at 232.

102. *Wynne I*, 932 F.2d at 25 (alterations in original) (quoting *Strathie*, 716 F.2d at 231).

103. *Strathie*, 716 F.2d at 231 (citing *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979); Donald J. Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 175 (1980)).

104. *Id.* (citing *Doe v. N.Y.U.*, 666 F.2d 761, 775-76 (2d Cir. 1981), *superseded by statute on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001)).

105. *Doe*, 666 F.2d at 775.

106. *Id.* at 775-76.

107. *Id.* at 776 (citations omitted) (first quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978); and then quoting *N.Y. State Ass'n for Retarded Child. v. Carey*, 612 F.2d 644 (2d Cir. 1979)).

In stating that “[c]ourts are particularly ill-equipped to evaluate academic performance,” *Doe* quoted *University of Missouri v. Horowitz*.<sup>108</sup> *Horowitz* takes *Wynne* even farther afield from a useful point. *Horowitz* concluded that courts were ill-equipped to review a very specific type of academic decision with regards to academic performance: whether a state university’s reasons for academically dismissing a student were “arbitrary or capricious” in light of the student’s claim that the dismissal decision violated substantive due process.<sup>109</sup> *Horowitz* also urged caution with respect to finding that procedural due process required a state medical school to hold a hearing before academically dismissing a student.<sup>110</sup> Doing so would, *inter alia*, “ignore the historic judgment of educators and thereby formalize the academic dismissal process.”<sup>111</sup> Read in context, *Horowitz*’s concerns about second-guessing academic decisions apply specifically to courts reviewing a state university’s academic dismissal practices on procedural and substantive due process grounds.

By contrast, Section 504 cases like *Wynne* and *Doe* address a funding recipient’s adherence to Congress’s broad powers to set the terms on which it disburses federal funds.<sup>112</sup> And unlike *Horowitz*, *Wynne* and *Doe* involved private institutions against which Fourteenth Amendment-based claims cannot be brought. Despite these differences, *Doe* used *Horowitz*’s statement that “[c]ourts are particularly ill-equipped to evaluate academic performance,” as the “reason” for its own conclusion that “considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons.”<sup>113</sup>

*Wynne*’s statement that *Strathie* “acknowledged the need to accord some measure of judicial deference to program administrators”<sup>114</sup> is true. But *Strathie* borrowed its logic from *Doe*, which in turn borrowed from *Horowitz*. These cases do not establish that the deference to academic decisionmakers present in *Horowitz*’s assessment of due process claims belongs in a Section 504 analysis; rather, they reflect a tenuous chain of reasoning that imports deference across doctrinal boundaries without justification.

*Wynne* wrapped up its discussion of relevant case law by stating that “[w]hat we have distilled from *Arline* and *Strathie* is consistent with [a] well-established principle” derived from *Regents of University of Michigan v. Ewing*: “[w]hen

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108. *Horowitz*, 435 U.S. at 92.

109. *Id.* at 91–92 (internal quotation marks omitted) (quoting *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1976)).

110. *Id.* at 90 (explaining that “[t]he educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students”).

111. *Id.*

112. *See, e.g., Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022) (stating that federal funding recipients who fail to meet the conditions set by Congress for receipt of those funds may face liability through private rights of action).

113. *Doe v. N.Y.U.*, 666 F.2d 761, 776 (2d Cir. 1981).

114. *Wynne I*, 932 F.2d 19, 25 (1st Cir. 1991).

judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."<sup>115</sup> *Wynne* described *Ewing* as a case about whether a university violated a student's substantive due process rights when it dismissed her after she "failed several subjects and received the lowest score so far recorded in [her] program."<sup>116</sup> Like *Horowitz*, *Ewing* is not well-suited to extrapolation into Section 504 cases. In justifying its decision to defer to academic judgments rather than question their substance, the *Ewing* Court explained that it was reluctant to find that the Due Process Clause "has more than a procedural dimension."<sup>117</sup> *Ewing* was also reluctant "to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'"<sup>118</sup> *Ewing* therefore declined to review the substance of academic decisions because (1) to do so would constitute an improper reliance on substantive due process, and (2) public educational institutions have a right to academic freedom derived from the First Amendment.

*Wynne* concluded that for "an 'otherwise qualified-reasonable accommodations' inquiry under the Rehabilitation Act," the *Ewing* principle of respect for academic decisionmaking would apply "with two qualifications."<sup>119</sup> The first qualification was the "real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation," and the second was an acknowledgment that *Ewing*'s "substantial departure from accepted academic norms" test is not helpful "in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person."<sup>120</sup> As significant as these qualifications might appear, *Wynne*'s next logical step ensured that *Ewing*'s academic deference standard would be expanded rather than cabined.

*Wynne* next explained what area of the law it would pull the necessary test—or standard of review—from, and it chose qualified immunity. It decided that the case before it, "where the adversaries are an individual and an academic institution, involve[d] a set of conflicting concerns suggestive of those in cases where an individual seeks damages from a government official for allegedly abusing his office."<sup>121</sup> In a Section 504 case, "concern for the statutory rights of a handicapped individual is in tension with concern for the autonomy of an academic institution," and in an official conduct case, "concern for protecting individual constitutional rights [is] in tension with concern for insulating officials from personal monetary liability and harassing litigation that would unduly inhibit

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115. *Id.* (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

116. *Id.*

117. *Ewing*, 474 U.S. at 225–26 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 543–44 (1977)).

118. *Id.* at 226 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

119. *Wynne I*, 932 F.2d at 25.

120. *Id.* at 25–26.

121. *Id.* at 26 (first citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); and then citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

discharge of their duties.”<sup>122</sup> As examples of two such “government official” cases, *Wynne* cited *Anderson v. Creighton*<sup>123</sup> and *Harlow v. Fitzgerald*.<sup>124</sup>

In *Harlow*, a federal whistleblower sued White House aides and other “high ranking government officials” for First Amendment violations.<sup>125</sup> In considering the proper defense that should apply to such claims, *Harlow* described the “social costs” of litigation against government officials, including “the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”<sup>126</sup> *Harlow* “struck down the subjective element of the good faith immunity doctrine in favor of an ‘objective’ standard” because of the disruptive discovery involved in determining a government official’s subjective state of mind.<sup>127</sup> It replaced the good faith standard with the modern qualified immunity defense which assigns liability only to violations of “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>128</sup>

According to *Wynne*, because qualified immunity turns on whether the government action in question “did not violate clearly established rights,” in many such cases, there are no disputes of material fact and courts can rule on qualified immunity “as a matter of law without extensive proceedings.”<sup>129</sup> *Wynne* held that “a similar though not identical approach is appropriate to assess whether an academic institution adequately has explored the availability of reasonable accommodations for a handicapped individual.”<sup>130</sup> In most accommodation cases, as in qualified immunity, “the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a ‘purely legal one.’”<sup>131</sup> As a result, *Wynne* proposed a standard that would accept an institution’s version of facts rather than determine their accuracy.

Inspired by the streamlined nature of qualified immunity decisions, *Wynne* held that an academic institution’s decision to deny an accommodation request on fundamental alteration grounds should be similarly reviewed. If there is no evidence of bad faith or pretext, a court can rule as a matter of law that the institution met its reasonable accommodation duty so long as “the institution submits undisputed facts demonstrating that the relevant officials within the institution

122. *Id.*

123. 483 U.S. 635, 638 (1987).

124. 457 U.S. 800, 814 (1982).

125. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 42 (1989). In *Anderson*, the FBI conducted a warrantless search of the Creighton home in search of a suspect who was not there and used excessive force in doing so. *Id.* at 47.

126. *Harlow*, 457 U.S. at 814 (alteration in original).

127. Rudovsky, *supra* note 125, at 43.

128. *Id.* (quoting *Harlow*, 457 U.S. at 818).

129. *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991).

130. *Id.*

131. *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985)).

considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration.”<sup>132</sup>

*Wynne*'s journey from academic deference to qualified immunity is difficult to follow. Nevertheless, armed with a newly invented standard, the en banc court in *Wynne* remanded the Section 504 claim, ordering Tufts to demonstrate that its determination that *Wynne* could not be accommodated was the result of a “reasoned, professional academic judgment, not a mere ipse dixit.”<sup>133</sup> Tufts's original submission justifying its decision was conclusory and consisted of only a three-paragraph affidavit from the School of Medicine's dean.<sup>134</sup> The court explained that its duty was “first to find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available.”<sup>135</sup> The Tufts affidavit was so sparse that the court could not find basic facts regarding the school's decision to adhere to multiple-choice testing.<sup>136</sup>

On remand, the district court granted summary judgment for Tufts, finding that in the amplified record, Tufts had met its burden.<sup>137</sup> Applying the new standard, the court noted that undisputed facts demonstrated that Tufts had considered alternatives to multiple-choice testing and came to a rationally justifiable conclusion about why there were none.<sup>138</sup> Tufts also provided additional information about why it had historically relied upon multiple-choice testing to assess students like *Wynne*.<sup>139</sup> Forcing it to test in another format “would require substantial program alterations, result in lowering academic standards, and devalue Tufts' end product—highly trained physicians carrying the prized credential of a Tufts degree.”<sup>140</sup> According to the court, no such accommodation was required.

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132. *Id.* Neither Tufts nor *Wynne* introduced the idea of borrowing from qualified immunity. Tufts's deference argument was relegated to three paragraphs, where it cited *Ewing* and *Horowitz* in arguing generally that “[c]ourts recognize the integral role of course examinations in the academic curriculum and regularly defer to the judgment of professional educators on matters of academic substance.” Brief of the Appellee Tufts University School of Medicine at 5–7, *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. Dec. 22, 1989) (No. 89-1670), 1989 WL 1635732 (stating that “Tufts does not seek immunity from review of its academic decisions” and that “[j]udicial deference to academic decisionmaking, however, must limit the inquiry to whether the decision meets the Supreme Court's *Ewing* standards”).

133. *Wynne I*, 932 F.2d at 27.

134. *Id.* at 27–28.

135. *Id.*

136. *Id.* at 28 (stating that the submission included “no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations” and “no indication of who took part in the decision or when it was made”).

137. *Wynne II*, 976 F.2d 791, 794 (1st Cir. 1992).

138. *Id.*

139. *Id.* at 794–95.

140. *Id.* at 795.

## C. THE IMPACT OF SUPER-DEFERENCE

*Wynne* is “[t]he key case establishing the standard for determining whether something is a fundamental alteration.”<sup>141</sup> As Laura Rothstein has noted, even though *Wynne* is not a Supreme Court decision, its reasoning “has been adopted by numerous courts in subsequent decisions.”<sup>142</sup> And despite its reliance on cases implicating academic deference to state institutions and the First Amendment, the en banc decision in *Wynne* (*Wynne I*) is followed in cases addressing ADA claims brought against private colleges and universities, inside and outside of the First Circuit.<sup>143</sup>

*Wynne I* has also influenced disability law outside of the higher education context. Its academic deference standard has been applied to determine whether a private secondary school failed to accommodate a student with disabilities in violation of the ADA<sup>144</sup> and to assess whether a student with disabilities was otherwise qualified for admission to a vocational high school in violation of Title II of the ADA and Section 504.<sup>145</sup> *Wynne I* has also been followed in cases

141. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J. COLL. & U.L. 691, 699 (2009).

142. *Id.*

143. *See, e.g.*, *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 463 (4th Cir. 2012) (“[O]ur sister circuits have overwhelmingly extended some level of deference to schools’ professional judgments regarding students’ qualifications when addressing disability discrimination claims.” (citing *Wynne I*, 932 F.2d 19, 25 (1st Cir. 1991))); *Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1291 n.20 (S.D. Fla. 2016) (“*Wynne* was unanimous on the issue of *Ewing*’s applicability to judicial review of academic judgments in the disability discrimination context.” (citing *Wynne I*, 932 F.2d at 29–30 (Breyer, C.J., dissenting))); *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1233 (S.D. Fla. 2010) (stating that *Wynne I* dictates that “judicial deference to the academic decisions is not absolute, as deference only attaches to decisions evincing some amount of reasoned consideration or professional judgment”); *Shulse v. W. New Eng. Univ.*, No. 19-CV-30146, 2020 WL 4474274, at \*6 (D. Mass. Aug. 4, 2020) (“A university is entitled wide discretion in making judgments as to the academic performance of its students, so long as its behavior is not so arbitrary or irrational as to not constitute an exercise of professional judgment.” (quoting *el Kouni v. Trs. of Bos. Univ.*, 169 F. Supp 2d 1, 4 (D. Mass. 2001)) (citing *Wynne I*, 932 F.2d at 25–26)); *Carlin v. Trs. of Bos. Univ.*, 907 F. Supp. 509, 510 (D. Mass. 1995) (in a case regarding whether a pastoral psychology program could accommodate a student’s disability, stating that “the Court defers to the institution’s decision if there is evidence that the University made a ‘professional, academic judgment that [a] reasonable accommodation [was] simply not available’” (alterations in original) (quoting *Wynne I*, 932 F.2d at 26, 27–28)).

144. *See, e.g.*, *Doe v. Haverford Sch.*, No. CIV.A.03-3989, 2003 WL 22097782, at \*8 (E.D. Pa. Aug. 5, 2003) (“Academic judgments about what modifications fundamentally alter the nature of an educational institution’s services are accorded a similar level of deference as academic judgments about whether a modification is reasonable.” (citing *Wynne I*, 932 F.2d at 25–26)). The fundamental alteration defense does not apply to claims brought pursuant to the Individuals with Disabilities Education Act (IDEA), which guarantees a free appropriate public education to students with disabilities. *See* ABIGAIL A. GRABER & KYRIE E. DRAGOO, CONG. RSCH. SERV., R48068, THE RIGHTS OF STUDENTS WITH DISABILITIES UNDER THE IDEA, SECTION 504, AND THE ADA 30–31 (2024).

145. *Cordeiro v. Driscoll*, No. CIV.A06-10854-DPW, 2007 WL 763907, at \*5 (D. Mass. Mar. 8, 2007) (stating that “[w]hen reviewing a genuinely academic decision, a court should respect faculty’s professional judgments as to potential accommodations” in deciding whether a student is otherwise qualified for purposes of Title II of the ADA and Section 504 (citing *Wynne I*, 932 F.2d at 25)).

evaluating state law disability discrimination claims.<sup>146</sup> The First Circuit's subsequent decision, in which it reviewed Tufts' revised explanation,<sup>147</sup> known as "*Wynne II*," has also been cited extensively.<sup>148</sup> Its easy-to-meet standard is understandably attractive to defendants who do not want to provide requested accommodations, and its holding provides robust support to courts wishing to uphold accommodation denials.

Finally, *Wynne* has seeped into two additional areas. First, the Department of Education has cited *Wynne I* in its discussion of proposed regulations and stated that it applies to reasonable accommodation claims.<sup>149</sup> Second, *Wynne I* appears

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146. See, e.g., *State v. G.S. Blodgett Co.*, 656 A.2d 984, 991 (Vt. 1995) (evaluating a state law disability discrimination in employment claim and stating that "where facts are undisputed, deference to [an] institutional decision that plaintiff was unable to participate effectively in [a] program is appropriate" (citing *Wynne I*, 932 F.2d at 26)); *Robinson v. Hamline Univ.*, No. C4-93-2074, 1994 WL 175019, at \*4 (Minn. Ct. App. May 10, 1994) (following *Wynne*'s deferential standard in determining whether a law student was reasonably accommodated under state disability discrimination law (citing *Wynne I*, 932 F.2d at 26)).

147. *Wynne II*, 976 F.2d 791, 794–95 (1st Cir. 1992).

148. See, e.g., *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998) ("Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement." (citing *Wynne II*, 976 F.2d at 795)); *Garcia v. S.U.N.Y. Health Scis. Ctr.*, No. CV 97-4189, 2000 WL 1469551, at \*9 (E.D.N.Y. Aug. 21, 2000) ("[C]ourts regularly apply the academic deference rule to challenges arising under the ADA and Rehabilitation Act." (citing *Wynne II*, 976 F.2d at 792)), *aff'd sub nom. Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001); *Brown v. Univ. of Cincinnati*, No. C-1-04-164, 2005 WL 1324885, at \*10 (S.D. Ohio June 3, 2005) (stating that "[c]ourts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement" (internal quotation marks omitted) (citing *Wynne II*, 976 F.2d at 795)); *Manickavasagar v. Va. Commonwealth Univ. Sch. of Med.*, 667 F. Supp. 2d 635, 646 (E.D. Va. 2009) ("[C]onsistent with the mandate that governs the judicial review of academic decisions generally, it is established that '[c]ourts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement.'" (citing *Wynne II*, 976 F.2d at 795)); see also *Rawdin v. Am. Bd. of Pediatrics*, 985 F. Supp. 2d 636, 654–55 (E.D. Pa. 2013) (finding that the American Board of Pediatrics (ABP), though not an educational institution, "is an academic institution in that it awards a credential based on testing and evaluation of candidates, and just as educational institutions are granted deference regarding accommodations that would devalue an academic degree, so too should ABP be granted deference regarding accommodations that would devalue certification" (citing *Wynne II*, 976 F.2d at 795)); *Forbes v. St. Thomas Univ., Inc.*, No. 07-22502-CIV, 2011 WL 2118737, at \*2 (S.D. Fla. May 27, 2011) (holding that the school "presented un rebutted evidence that [it] was justified in denying her request for readmission and/or for other relief, based on the school's 'rationally justifiable conclusion that accommodating [her] would lower academic standards or otherwise unduly affect its program'" (quoting *Wynne II*, 976 F.2d at 793)); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 153 (1st Cir. 1998) (holding that the district court "erred in not appropriately crediting the judgment of the educational officials" in determining whether a private secondary school engaged in disability discrimination that warranted preliminary injunctive relief (citing *Wynne II*, 976 F.2d at 795)), *abrogated on other grounds by Smith v. Spizzirri*, 601 U.S. 472 (2024); *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 811 (Iowa 2019) (evaluating a state law failure to accommodate claim and stating that courts "have given due deference to the faculty's academic judgment when affirming summary judgments dismissing a medical student's failure-to-accommodate disability claim" (citing *Wynne II*, 976 F.2d at 795–96)).

149. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33776 (Apr. 29, 2024) (stating that "in the context of Federal disability law, courts have afforded recipients some deference in 'genuine academic decisions,' such as those involving a request to waive a particular academic program requirement" (citation omitted) (quoting *Wynne I*, 932 F.2d at 25)).

in university guidance documents concerning how to manage a faculty member's assertion that an accommodation would constitute a fundamental alteration. A University of California compliance document regarding its reasonable accommodation duties cites *Wynne I* in support of its discussion of what faculty and the disability services office must do "together" with respect to determining whether an accommodation actually presents a fundamental alteration.<sup>150</sup> Florida State University's Department of Student Support and Transitions describes *Wynne* as providing "good guidance on a process for evaluating fundamental alteration."<sup>151</sup>

Both *Wynne I* and *II* were most notably followed by the influential case *Guckenberger v. Boston University* which evaluated a university's accommodation obligations with respect to undergraduate and law students with learning disabilities.<sup>152</sup> *Guckenberger* received significant media attention and addressed two key disability discrimination issues relevant to higher education.<sup>153</sup> First, *Guckenberger* reviewed Boston University's (BU) disability documentation standards, which required that documentation be no more than three years old and that certain disability diagnoses be made by individuals with advanced

150. See UNIV. OF CAL., ETHICS, COMPLIANCE, & AUDIT SERVS., ACADEMIC ACCOMMODATIONS (2023), [https://www.ucop.edu/ethics-compliance-audit-services/\\_files/compliance/ada/fundamental\\_alterations\\_guidance.pdf](https://www.ucop.edu/ethics-compliance-audit-services/_files/compliance/ada/fundamental_alterations_guidance.pdf) [<https://perma.cc/FHL9-KHW5>] (stating that a faculty member and a disability services office representative must "[e]ngage in 'reasoned deliberation' as to whether modification of the specific requirements would lower academic standards, fundamentally alter learning outcomes, or require substantial (unreasonable) program alteration"; "[d]ocument how and why a proposed accommodation would lower the academic standards or require substantial program alteration"; and, *inter alia*, "[d]etermine whether there are available alternative[s]" (citing *Wynne I*, 932 F.2d at 25–28)); see also *University's Commitment to Ensuring Equal Access*, UNIV. OF CAL., SANTA BARBARA: DISABLED STUDENTS PROGRAM, <https://dsp.sa.ucsb.edu/faculty-resources/accommodation-concerns> [<https://perma.cc/3DA4-Y364>] (last visited Sep. 11, 2025) ("U. S. courts have declared that Universities have 'a real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation . . . not mere ipse dixit.'" (citing *Wynne I*, 932 F.2d at 27)).

151. *Academic Conflict Resolution*, FLA. STATE UNIV.: DEP'T OF STUDENT SUPPORT & TRANSITIONS, <https://dsst.fsu.edu/oas/services/if-your-accommodations-are-not-being-provided> [<https://perma.cc/Q44E-AG8F>] (select "Faculty: Accommodation Concerns/Fundamental Alteration) (last visited Sep. 11, 2025) (describing how a group of "objective persons" will meet to explore a faculty member's fundamental alteration objection to a student's reasonable accommodation request "in a well-reasoned manner, without resort to a pretext for discrimination," and that if the group "believes the accommodation would fundamentally alter the essential elements of the course or program and no reasonable alternative accommodations exist," then it may deny the underlying accommodation request).

152. *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 114, 124 (D. Mass. 1997).

153. Rothstein, *supra* note 17, at 858; see also Bonnie Poitras Tucker, *Disability Discrimination in Higher Education: 1996 Case Law in Review*, 24 J. COLL. & U.L. 243, 258 n.69 (1997) (stating that "[t]he *Guckenberger* cases are significant" due to their recognition that students may bring hostile educational environment claims and their documentation and course substitution findings); Peter Blanck, *Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Colleges and Universities to Establish and Enforce Academic Standards: Guckenberger v. Boston University*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 679, 683 (1997) (describing the media attention *Guckenberger* attracted and how it brought "to the fore the underlying, often insidious, and always pervasive attitudinal biases toward many qualified persons with learning disabilities").

degrees.<sup>154</sup> Second, *Guckenberger* considered whether accommodating students with disabilities by waiving BU's foreign language requirement would fundamentally alter the university's academic program.<sup>155</sup> This second aspect of the *Guckenberger* case faithfully followed *Wynne*'s fundamental alteration standard, cementing *Wynne*'s influence in cases involving private institutions governed by Title III of the ADA.<sup>156</sup>

Two orders in *Guckenberger* address *Wynne* and the fundamental alteration defense. In its 1997 order, the court announced that it would follow *Wynne*'s deferential fundamental alteration standard, but, on the record before it, BU had not met its burden.<sup>157</sup> As explained below, as in *Wynne*, the institution's originally thin factual justification was overlooked once more extensive facts were provided. After giving BU an opportunity to amplify the record, in its 1998 order, the court again applied *Wynne*, but this time held that BU had demonstrated that the requested course waiver would create a fundamental alteration to its academic program.<sup>158</sup> Once again, as in *Wynne*, the supplemented factual record received no meaningful scrutiny. Both *Guckenberger* orders are reviewed in turn below, as are the facts underlying this consequential case.<sup>159</sup>

At the time of the *Guckenberger* lawsuit, BU was one of the country's largest private universities, and its College of Arts and Sciences, whose foreign language requirement was at issue in the case, was the university's largest college.<sup>160</sup> Before 1995, BU was known for the helpful services it provided to students with learning disabilities, which included access to the Learning Disabilities Support Services (LDSS) program, a unit within the BU Disability Services Office.<sup>161</sup> LDSS was staffed with individuals who had relevant training in educating people

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154. *Guckenberger*, 974 F. Supp. at 114 (stating that “[i]n the fall of 1995, BU imposed new documentation requirements” that required students “to be retested every three years” and that the evaluations were done by “physicians, clinical psychologists, or licensed psychologists”); see also Rothstein, *supra* note 17, at 858.

155. *Id.* The documentation aspect of the *Guckenberger* decision is beyond the scope of this Article. However, documentation standards like *Guckenberger*'s improperly medicalize disability determinations. I have previously addressed how neither the ADA nor Section 504 require that reasonable accommodation requests be supported by documentation of any kind. See generally Macfarlane, *supra* note 2 (addressing the extra-statutory origins of disability documentation standards).

156. *Guckenberger*, 974 F. Supp. at 147 (stating that *Wynne I* and *II* “provide invaluable assistance in evaluating a university's burden of supporting its conclusion that a requested modification by a learning disabled student of an academic requirement would fundamentally alter the nature of the program”).

157. *Id.* at 144–49.

158. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 87 (D. Mass. 1998).

159. This Part brings Westling's discriminatory comments to the forefront. Part III, *infra*, considers how a less deferential standard of review would have treated the comments' impact on the committee that ultimately endorsed a fundamental alteration-based denial of course waivers.

160. *Guckenberger*, 974 F. Supp. at 115–16.

161. *Id.* at 116.

with disabilities as well as disability accommodations.<sup>162</sup> According to the court, “[p]rior to 1995, the process of applying for accommodations, including course substitutions, from BU was relatively straightforward.”<sup>163</sup> As a result of BU marketing itself to students with learning disabilities, the number of such students increased significantly from 1990 to 1995, reaching 480 by the 1995–1996 academic year.<sup>164</sup> Guidance counselors recommended BU as a “desirable academic setting” for students with learning disabilities.<sup>165</sup>

During this time, BU occasionally allowed students with disabilities to substitute the College of Arts and Sciences’ required math and foreign language courses with other courses identified by LDSS in collaboration with the College of Arts and Sciences.<sup>166</sup> Between 1991 and 1994, eighty-eight students received a foreign language requirement waiver, and approximately ten to fifteen were granted each year.<sup>167</sup> No one from BU’s central administration was involved in approving the course substitutions.<sup>168</sup>

In 1995, accommodations became significantly more difficult for BU students with learning disabilities to obtain due to changes implemented by BU’s then-Provost Jon Westling. Westling was “[c]hagrined” to learn that students with disabilities were permitted to substitute courses to meet their math and foreign language requirements.<sup>169</sup> As a result, he assigned his assistant Craig Klafter to investigate the matter.<sup>170</sup> Klafter concluded “there was no scientific proof of the existence of a learning disability that prevents the successful study of math or foreign language.”<sup>171</sup> In June 1995, Westling announced that BU would no longer grant course substitutions.<sup>172</sup> He did so “without convening any committees or panels, and without speaking to any experts on learning disabilities or to any faculty members on the importance of math and foreign language to the liberal arts curriculum.”<sup>173</sup> Westling, who had no expertise in learning disabilities, also decided to personally involve himself in evaluating BU students’ accommodations requests.<sup>174</sup>

Around the same time, Westling began to give speeches criticizing what he labelled the “learning disabilities movement.”<sup>175</sup> Westling “questioned the rapidly increasing number of children being diagnosed with learning disorders, and accused learning-disabilities advocates of fashioning ‘fugitive’ impairments that

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162. *Id.* at 117.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 116.

167. *Id.* at 116–17.

168. *Id.* at 116.

169. *Id.* at 117.

170. *Id.*

171. *Id.*

172. *Id.* at 117–18.

173. *Id.* at 118.

174. *Id.*

175. *Id.*

are not supported in the scientific and medical literature.”<sup>176</sup> In one such speech, he described a BU freshman he called “Somnolent Samantha,”<sup>177</sup> recounting that Samantha approached him in class with a letter from the Disability Services Office that announced that she had a learning disability and required accommodations.<sup>178</sup> Westling characterized Samantha as a “culture wars victim” who was “placated by the promise of accommodation rather than encouraged to work to achieve their fullest potential.”<sup>179</sup> Using ableist language, Westling argued that the “learning disabilities movement” conjured up disabilities and affixed them to students who could otherwise overcome academic difficulties “with concentrated effort.”<sup>180</sup> Westling also referred to students with disabilities as “draft dodgers” and expressed his concern that “students without established learning disorders might be faking a disability to gain an educational advantage.”<sup>181</sup>

At trial, Westling admitted that Samantha did not exist and also did not represent the typical student with learning disabilities that he met at BU; instead, she “represented [his] belief—fueled mostly by popular press and anecdotal accounts—that students with learning disabilities were often fakers who undercut academic rigor.”<sup>182</sup> At the time of the *Guckenberger* case, “there ha[d] not been a single documented instance at BU in which a student ha[d] been found to have fabricated a learning disorder in order to claim eligibility for accommodations.”<sup>183</sup> Westling perpetuated the moral panic Doron Dorfman describes as “fear of the disability con.”<sup>184</sup>

As a result of Westling’s interference, BU’s accommodation policies were in flux during the first semester of the 1995–1996 academic year.<sup>185</sup> The court’s findings of fact include an account of how BU treated students with learning disabilities who sought a foreign language waiver. One such student, Avery LaBrecque, was diagnosed with a learning disability by a school psychologist in first grade.<sup>186</sup> After taking her first foreign language course in ninth grade, LaBrecque’s teacher recommended that she be formally tested for disabilities, and “a neuropsychologist’s evaluation revealed that LaBrecque had a language-based learning disorder as well as [ADHD].”<sup>187</sup> LaBrecque was exempted from her high school’s foreign language requirement.<sup>188</sup>

LaBrecque attended a BU “Taste of College” summer program for high school students with learning disorders and discussed the BU course substitution option

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (internal quotation marks omitted).

181. *Id.* at 119.

182. *Id.* at 118–19.

183. *Id.* at 119.

184. *See generally*, Dorfman, *supra* note 2, at 1051.

185. *See Guckenberger*, 974 F. Supp. at 120–21.

186. *Id.* at 125.

187. *Id.*

188. *Id.*

with BU staff.<sup>189</sup> During her third year at BU, LaBrecque transferred to the College of Arts and Sciences and sought a foreign language requirement waiver.<sup>190</sup> In October 1995, after her accommodation request was sent to Westling's office, it was denied.<sup>191</sup> Following an appeal, Westling approved an accommodation that would excuse LaBrecque from any written portion of a foreign language course,<sup>192</sup> stating that, "although 'Avery is at risk for foreign language learning,' '[i]f it is possible for her to deal with foreign language learning only [on] an oral level, that may be tried.'"<sup>193</sup> LaBrecque was initially instructed to take a Swahili course because "it had no written component," but a Swahili professor later clarified that Swahili (of course) "was indeed a written language," and that a Swahili course would test her written foreign language abilities as well as her oral language skills.<sup>194</sup> "Devastated" by BU's decision to deny her requested accommodation, LaBrecque transferred to Florida State University at the end of her junior year but withdrew soon after.<sup>195</sup>

The court described plaintiffs' course substitution claims as alleging a failure to provide a reasonable modification.<sup>196</sup> BU in turn justified its modification denial on the grounds that (1) the course substitutions "would amount to a fundamental alteration of its academic liberal arts program, a course of study that has been in place for over a century," and (2) BU already provided "special programs for students with foreign language and math difficulties (like an oral enhancement program and one-on-one tutoring) in addition to the classroom accommodations that are available in any other course."<sup>197</sup>

The court explained that a plaintiff alleging an improper failure to modify must show that the requested modification was "generally" reasonable.<sup>198</sup> The plaintiffs met that burden, demonstrating that "students with learning disorders such as dyslexia have a significantly more difficult challenge in becoming proficient in a foreign language than students without such an impairment" and that "requesting a course substitution in foreign language for students with demonstrated language disabilities is a reasonable modification."<sup>199</sup> The burden then shifted to BU to show that the requested modification would "fundamentally alter the nature of its liberal arts degree program."<sup>200</sup>

Here, the court described the *Wynne* opinions as providing "invaluable assistance in evaluating a university's burden of supporting its conclusion that a

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 125–26.

193. *Id.* at 126.

194. *Id.*

195. *Id.*

196. *Id.* at 146.

197. *Id.* at 144.

198. *Id.* at 146.

199. *Id.* at 147. The plaintiffs did not meet their burden with respect to modifying the math course requirement. *Id.*

200. *Id.*

requested modification by a learning disabled student of an academic requirement would fundamentally alter the nature of the program.”<sup>201</sup> The court, however, stated that degree requirements “go to the heart of academic freedom” even more than the multiple-choice question format at issue in *Wynne I* and *II*.<sup>202</sup> A university could refuse to make a course requirement modification “as long it ‘undertake[s] a diligent assessment of the available options’” and “makes ‘a professional, academic judgment that reasonable accommodation is simply not available.’”<sup>203</sup>

The court agreed with the plaintiffs that the modification denial was discriminatory.<sup>204</sup> The denial was based on Westling’s animus and decided without any “diligent, reasoned, academic judgment.”<sup>205</sup> As to the first point, “[a] substantial motivating factor in Westling’s decision not to consider degree modifications was his unfounded belief that learning disabled students who could not meet degree requirements were unmotivated . . . or disingenuous,” conclusions founded in part on “on uninformed stereotypes.”<sup>206</sup> As to the second point, Westling refused to make course substitutions for students with disabilities “without consulting any experts on learning disabilities,” and without “discuss[ing] the importance of foreign language to BU’s liberal arts curriculum with any of the relevant BU department heads, professors or officials.”<sup>207</sup> Instead, Westling deferred to his assistant’s conclusion that there was no scientific evidence showing that a learning disability impacts foreign language learning.<sup>208</sup> BU did not make a rational judgment regarding whether the course substitutions at issue would constitute a fundamental alteration—under *Wynne*, it was required to do so “after reasoned deliberations as to whether modifications would change the essential academic standards of its liberal arts curriculum.”<sup>209</sup>

Plaintiff’s victory was short-lived as the court gave BU a second chance, spelling out exactly how it could meet its burden. BU had thirty days to propose “a deliberative procedure for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of its liberal arts program.”<sup>210</sup> The proposal had to include “a faculty committee set up by the College of Arts and Sciences to examine its degree requirements and to determine whether a course substitution in foreign languages would fundamentally alter the nature of the liberal arts program.”<sup>211</sup> Again noting that it was following

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201. *Id.*

202. *Id.* at 148.

203. *Id.* at 148–49 (first quoting *Wynne II*, 976 F.2d 791, 795 (1st Cir. 1992); and then quoting *Wynne I*, 932 F.2d 19, 27–28 (1st Cir. 1991)).

204. *Id.* at 149.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 154.

211. *Id.*

*Wynne*, the court ordered BU to report back by the end of the semester with its decision and reasons.<sup>212</sup>

Nine months later, the court held that BU had met its burden.<sup>213</sup> The deliberative process BU designed to explore whether the requested course substitution would fundamentally alter BU's academic program involved the College of Arts and Sciences' Dean's Advisory Committee (the Committee), already in existence at the time of the lawsuit.<sup>214</sup> The Committee was typically charged with "advising the Dean on issues involving academic standards."<sup>215</sup> Eleven College of Arts and Sciences faculty members served on the Committee, though its usual chair, Dennis Berkey, who was serving as both Dean of the College and BU Provost, removed himself due to his involvement in BU's "central administration."<sup>216</sup> An associate professor of mathematics took over as acting chair.<sup>217</sup>

The Committee met to discuss course substitutions seven times.<sup>218</sup> Five of the seven meetings were attended only by committee members, as was customary.<sup>219</sup> On one occasion, two BU lawyers attended to inform the Committee of its duties, and on a separate occasion, five college students addressed the Committee.<sup>220</sup> The student involvement followed a hearing at which the court ordered that students be permitted to participate.<sup>221</sup> Only current students could address the Committee.<sup>222</sup> Westling and his staff were excluded from committee proceedings.<sup>223</sup>

After the Committee failed to take minutes at its first two relevant meetings, the court ordered that minutes be kept going forward; they were kept for four subsequent meetings but not for the final meeting.<sup>224</sup> The minutes summarized the topics discussed but did not identify speakers.<sup>225</sup> The Committee completed an eight-page report that it submitted to then-President Westling in accordance with BU by-laws.<sup>226</sup> The Committee concluded that "the foreign language requirement is fundamental to the nature of the liberal arts degree at [BU]" and therefore recommended against course substitutions for any student.<sup>227</sup>

In reviewing BU's decision, *Guckenberger* followed each step outlined by *Wynne*. The first step required it to "find the basic facts, giving due deference to

212. *Id.* at 154–55.

213. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 87–89 (D. Mass. 1998).

214. *Id.* at 86.

215. *Id.*

216. *Id.* By this time, Westling had become BU's president. *Guckenberger*, 974 F. Supp. at 117 n.6.

217. *Guckenberger*, 8 F. Supp. at 86.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* The court did not note whether any of the students were students with disabilities. Elizabeth Guckenberger was excluded because "she was not enrolled in the College, which was the only faculty at BU affected by [the course waiver] decision." *Id.* at 88 n.4.

223. *Id.* at 86.

224. *Id.*

225. *Id.*

226. *Id.* at 87.

227. *Id.*

the school,” considering whether there was “(1) an ‘indication of who took part in the decision [and] when it was made;’ (2) a ‘discussion of the unique qualities’ of the foreign language requirement as it now stands; and (3) ‘a consideration of possible alternatives’ to the requirement.”<sup>228</sup>

As to the first type of relevant fact, “an indication of who took part in the decision and when it was made,” the court found that the Committee was “made up of eminent members of the College faculty” who “deliberated this issue over the course of two months.”<sup>229</sup> Though having minutes from each meeting would have been better, the court found that the four sets of meeting minutes provided enough detail.<sup>230</sup> The court also noted that “BU took pains to insulate President Westling from the process” and “gave adequate notice to College students, both with and without learning disabilities, of the opportunity to provide input into the Committee’s decision.”<sup>231</sup> It was reasonable for the Committee to rely solely on “its own academic judgment and the input of College students.”<sup>232</sup>

As to the second point, a “discussion of the unique qualities of the foreign language requirement,” the Committee members “rallied around an articulated defense, highlighted throughout the Report, of the rigorous foreign language requirement of the College,” referencing “technical educational gains from the learning of foreign languages, such as enhancing an ability to read foreign literature in its original form and laying a ‘foundation’ for other areas of academic concentration.”<sup>233</sup> One committee member noted that “someone who can read in French would realize that Madame Bovary dies in the imperfect tense, something we don’t have in the English language, and it makes for a very different understanding of the novel.”<sup>234</sup> The Committee also noted that learning a foreign language was consistent with multiculturalism and a traditional liberal arts education, which “contemplates ‘some competence in thinking in diverse areas of knowledge.’”<sup>235</sup>

With respect to its consideration of “possible alternatives to the requirement,” at least four meetings addressed alternatives.<sup>236</sup> One committee member set forth an alternative “whereby a ‘student would select courses from a faculty approved list that focus on the language, culture, history, literature, and art of countries where the language is spoken,’” which no other member agreed with.<sup>237</sup> Student objections “were noted at length.”<sup>238</sup>

The court also held that “the Committee discussed the College’s existing accommodations of learning disabled students attempting to fulfill the foreign language

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228. *Id.* (quoting *Wynne I*, 932 F.2d 19, 28 (1st Cir. 1991)).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 87–88.

233. *Id.* at 88.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

requirement,” which “weighs in BU’s favor in this analysis.”<sup>239</sup> For example, “[l]earning disabled students are allowed spelling accommodations in language classes, and student tutoring is provided by the foreign language department at no cost to students,” and “BU provides for additional time on tests, a reading track for French and Spanish, distraction-free testing, distribution of lecture notes in advance, and replacement of written with oral exams.”<sup>240</sup>

Once satisfied that it had found “undisputed facts of a reasoned deliberation,” the court then considered “whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available.”<sup>241</sup> Quoting *Wynne*, the court noted that “[i]n the unique context of academic curricular decision-making, the courts may not override a faculty’s professional judgment ‘unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.’”<sup>242</sup> The court further explained that the standard was consistent with the “policy of judicial deference to academic decision making.”<sup>243</sup> It would give BU’s decision “great deference” so long as it followed “reasoned deliberations as to whether modifications would change the essential academic standards of its liberal arts curriculum.”<sup>244</sup>

The court next rejected three arguments that attacked the Committee’s academic judgment. First, it considered plaintiffs’ contention that BU’s decision represented a “‘a substantial departure from accepted academic norms’ because a majority of other colleges and universities . . . either do not have a general foreign language requirement or permit course substitutions for foreign languages” and that “the academic program would not be substantially affected” because, at BU, “only 15 students (out of 26,000) a semester” would need to be accommodated with a course substitution.<sup>245</sup> At other universities, the small number of students who requested course substitutions informed those universities’ decisions to allow substitutions.<sup>246</sup> The court characterized plaintiffs’ argument as an attempt to conduct a “head-count of other universities,” an approach “particularly inappropriate in the protean area of a liberal arts education” that “cannot be fit into a cookie cutter mold.”<sup>247</sup>

Relying on *Wynne*, the court noted that it only had to find that BU had reached a “rationally justifiable” conclusion rather than “the only possible conclusion it could have reached or other universities have reached.”<sup>248</sup> So long as an

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239. *Id.*

240. *Id.* at 89.

241. *Id.* (quoting *Wynne I*, 932 F.2d 19, 27–28 (1st Cir. 1991)).

242. *Id.* (quoting *Wynne I*, 932 F.2d at 25).

243. *Id.* at 89.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* (quoting *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991)). To the extent the court conducted a rational basis review, its analysis is arguably at odds with *Wynne I*, which criticized Section 504

institution “rationally, without pretext, exercises its deliberate professional judgment not to permit course substitutions for an academic requirement in a liberal arts curriculum,” then courts may not intervene “even if a majority of other comparable academic institutions disagree.”<sup>249</sup>

Second, the court addressed plaintiffs’ contention that BU had exaggerated the utility of foreign language courses. The court held that, even if BU’s foreign language requirement did not provide the sort of fluency necessary to read *Madame Bovary* in its original language, plaintiffs had simply pointed out countervailing positions, demonstrating that the issue “raise[s] the kinds of academic decisions that universities—not courts—are entrusted with making.”<sup>250</sup>

Third, the court considered plaintiffs’ argument that “BU’s report does not meet the minimum accepted standards of academic study and inquiry, especially in the Committee’s not having referred to outside experts.”<sup>251</sup> The court held that though Westling made his original decisions without consulting disability experts, the Committee had access to testimony from the underlying trial, “in which experts in the field of learning disabilities testified about the difficulty which students with learning disabilities experience in their efforts to gain proficiency in a foreign language.”<sup>252</sup> The court was “unpersuaded” that “further academic study (like a ‘longitudinal’ study) would have refined or altered the decision-making process.”<sup>253</sup>

Key to the court’s rejection of the plaintiffs’ argument was its holding that the plaintiffs had “generally overstate[d] the Court’s level of scrutiny at this stage of litigation.”<sup>254</sup> It characterized the essential facts as “actually undisputed” in light of its holding that “BU implemented a deliberative procedure by which it considered in a timely manner both the importance of the foreign language requirement to this College and the feasibility of alternatives.”<sup>255</sup> Plaintiffs’ argument that “the procedure should have been more extensive and inclusive—effectively, more like a legal proceeding,” found no support in *Wynne I* or *II*.<sup>256</sup> Because the Committee’s judgment that “a person holding a liberal arts degree from Boston University ought to have some experience studying a foreign language” was a rationally justifiable professional judgment “with which the Court should not

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decisions in which lower courts sought only a rational basis for an institution’s decision to deny an accommodation even if the institution did not seek “feasible alternative methods of accommodating the essential features of a program to a given disability.” *Wynne I*, 932 F.2d at 23. Anne Dupre has characterized *Wynne* as a case that mandates “some kind of intermediate scrutiny” because it “essentially addressed whether the university’s decision to require multiple choice examinations was based on a ‘legitimate pedagogical concern.’” Dupre, *supra* note 30, at 469.

249. *Guckenberger*, 8 F. Supp. at 90.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See id.* at 91

255. *Id.*

256. *Id.*

interfere,” as a matter of law, BU did not violate its duty to provide reasonable accommodations pursuant to the ADA.<sup>257</sup>

## II. THE HIGHER EDUCATION MISTAKE

*Wynne*'s impact reaches beyond *Guckenberger* and has not gone unnoticed by scholars. Writing just a few years after the *Wynne* decisions, Laura Rothstein recognized that courts would likely continue to defer to educational institutions regarding their chosen testing methods.<sup>258</sup> In 2004, Rothstein noted that, “in the higher education context,” courts and the Office for Civil Rights, the Department of Education’s enforcement arm, “have not required a waiver of courses” and “generally are quite deferential to institutions of higher education in setting their standards and requirements, and are particularly deferential to health care professional programs.”<sup>259</sup> Barbara Lee and Gail Abbey have explained that “[t]he standards articulated in *Wynne* and the ‘deliberative process’ used in *Guckenberger* provide important guidance to institutions.”<sup>260</sup> Their 2008 review of relevant case law demonstrated that “courts generally validate the judgments of faculty and academic administrators when students challenge academic decisions.”<sup>261</sup> Kerri Lynn Stone has described the *sui generis* form of deference that *Wynne* created.<sup>262</sup> However, *Wynne*'s rationale for that deference and its accompanying standard of review have generally gone unquestioned.<sup>263</sup>

This Part expressly criticizes *Wynne*'s reliance on qualified immunity and academic deference. After exploring how modern assessments of the qualified immunity doctrine and a reconsideration of academic deference undermine *Wynne*'s core holdings, this Part then demonstrates that the Supreme Court's fundamental alteration decision in *PGA Tour v. Martin* should control all fundamental alteration analyses, including those involving college and university academic programs. *Wynne* created an extratextual, and unjustifiable, standard. This defense,

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257. *Id.*

258. Laura F. Rothstein, *College Students with Disabilities: Litigation Trends*, 13 REV. LITIG. 425, 431–32 (1994) (stating that *Wynne* “reveals judicial attitudes towards standards and requirements set by academic institutions and the deference to be paid to them”); see also Laura F. Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 256 (2000) (explaining that, as a result of *Wynne*, there is now “a substantial degree of deference given to higher education institutions with respect to their programmatic academic requirements”).

259. Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122, 143 (2004) (footnotes omitted).

260. Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J. COLL. & U.L. 349, 371 (2008).

261. *Id.*

262. See Stone, *supra* note 24, at 1245, 1282–83 (recognizing the diverging deference standards at play in disability law cases in which defendants invoke fundamental alteration, including *Wynne*, and arguing for a unified deference standard applicable to all ADA fundamental alteration decisions, rather than standards that are too context-specific).

263. See, e.g., Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & U.L. 258, 290 (2021) (describing *Wynne* as offering “a sound and well-reasoned framework for evaluating the issue of accommodations in higher education settings” and stating that “*Wynne* provides an ‘eloquent’ analysis that the medical school did an appropriately careful evaluation of why the multiple-choice test was necessary for at least the particular course in question”).

which defeats otherwise meritorious claims, also undermines the Americans with Disabilities Act's (ADA) intent to be broadly applied and reach all aspects of U.S. society that previously excluded people with disabilities.<sup>264</sup>

#### A. THE UNDERMINING OF QUALIFIED IMMUNITY

*Wynne* sees similarities in cases in which qualified immunity and fundamental alteration apply. Therefore, it is important to describe those actions and the contexts in which they arise in accurate terms. Qualified immunity protects a government official, such as a police officer, from personal liability for civil damages when the constitutional right the officer has violated, such as the right to be free from unreasonable searches and seizures, is not clearly established. Qualified immunity is a defense carried over from the common law and is not present in the 1871 Civil Rights Act, the statute that establishes the claims to which it applies. Section 504 and the ADA, by contrast, are modern anti-discrimination laws that apply to a wide array of private and public defendants and protect long-stigmatized individual members of a minority group from disability discrimination. No common law defense like qualified immunity has been imputed into this area of civil rights law. Under Section 504 and the ADA, once a right is violated, there is liability.

*Wynne's* decision to invent a standard of review inspired by qualified immunity was based on two erroneous conclusions, as detailed in the following sections: first, that Section 504 claims against educational institutions are analogous to civil rights claims against individual government officials; and second, that the procedural approach of qualified immunity should be imported to assess fundamental alteration defenses.

#### 1. Erroneous Equivalence Between Section 504 Actions Against Institutions and Civil Rights Actions Against Individuals

*Wynne* determined that suits in which individuals bring Section 504 claims against institutions of higher education and suits in which individuals bring civil rights claims (Section 1983 claims against state officials<sup>265</sup> and *Bivens* claims against federal officials<sup>266</sup>) against individual government officials involve similar adversaries.<sup>267</sup> As explained below, they do not. *Wynne* drew a thin connection, positing that in Section 504 cases, individual rights are “in tension with

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264. See 42 U.S.C. § 12101(a)(3), (b)(1) (describing the ADA's purpose as to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” which persists in critical areas such as education). In 1992, Congress amended the Rehabilitation Act, adding findings and purposes to echo those of the ADA. See *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 116 (3d Cir. 2018).

265. 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (holding that Section 1983 provides a remedy “to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position”).

266. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that a federal agent's violation of an individual's Fourth Amendment rights gives rise to a cause of action for damages).

267. *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991) (stating that cases “where the adversaries are an individual and an academic institution” involve conflicts similar to those in cases “where an individual seeks damages from a government official for allegedly abusing his office”).

concern for the autonomy of an academic institution,” whereas in civil rights actions, individual rights are in tension with the need to insulate government officials “from personal monetary liability and harassing litigation that would unduly inhibit discharge of their duties.”<sup>268</sup>

*Wynne*’s uncritical adoption of a qualified immunity-specific standard is doctrinally unsound, and its attempt at comparison is similarly unavailing. *Wynne* expresses strong support for qualified immunity and describes it without the benefit of recent developments that have undermined its legitimacy, including the now rejected conclusion that personal monetary liability is really a concern for government officials such as police officers.<sup>269</sup> But *Wynne*’s analogy still fails even if we accept its version of qualified immunity. The stakes in the two actions are not similar. Most obviously, while qualified immunity applies to government actors, Section 504 and the ADA also reach private institutions where the decisionmakers are not employed by state or federal governments. In suits arising under modern civil rights laws like the ADA and Section 504, there is no analogous concern for inhibiting the discharge of private actors’ duties—especially when those private actors have engaged in civil rights violations.

Even when a reasonable accommodation dispute arises at a public institution, the stakes in a disability accommodation action differ from those in a Section 1983 or *Bivens* action in a significant way. In Section 504 and ADA cases, the defendants are institutions themselves.<sup>270</sup> In Section 1983 and *Bivens* actions, the defendants are individuals who, at least in theory, are vulnerable to awards for compensatory damages, including those for emotional distress, and punitive damages.<sup>271</sup> In Section 504 and ADA Title II cases, punitive damages are not available.<sup>272</sup> In

268. *Id.*

269. See *infra* notes 283–90 and accompanying text.

270. See Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New “Federalism” Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 126 (2001) (“When suing under Section 504, employees should name the entity that receives the federal financial assistance as the defendant.”); *Coddington v. Adelphi Univ.*, 45 F. Supp. 2d 211, 217 (E.D.N.Y. 1999) (dismissing individual defendants sued under Section 504 and Title III because when a plaintiff “seeks relief based upon discrimination allegedly practiced by an educational institution, it is the institution that has the power to make any accommodations required by law” and the institution is “the proper defendant”).

271. 42 U.S.C. § 1983 (establishing liability against “[e]very person who, under color of [law] subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”); see also Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1551 n.43 (2020) (describing Section 1983 remedies (citing *Smith v. Wade*, 461 U.S. 30 (1983))); Helen Norton, *Remedies and the Government’s Constitutionally Harmful Speech*, 9 CONLAWNOW 49, 61–62 n.56 (2017–2018) (“*Bivens* claims are implied private rights of actions for compensatory and punitive damages for ‘a compensable injury to a legally protected interest by a deprivation of a right secured by the Constitution and the laws of the United States at the hands of a federal official acting under color of federal law.’” (quoting HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* 243 (2001))). Though “municipalities” are “persons” who can be sued under Section 1983, see *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978), the comparison *Wynne* makes is to suits against individuals, not against municipalities.

272. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

Section 504 litigation, plaintiffs may not recover emotional distress damages.<sup>273</sup> In ADA Title III actions, there are no damages available at all.<sup>274</sup> Qualified immunity guards against damages that would be paid by individual government officials,<sup>275</sup> but in the context of higher-education accommodation-based claims, fundamental alteration does not play a similar role. The defendants in Section 504 and ADA suits are not the individual employees who deny accommodations, but rather colleges and universities themselves.

*Anderson v. Creighton*,<sup>276</sup> one of the qualified immunity cases cited by *Wynne*,<sup>277</sup> confirms this difference. *Anderson* explains that qualified immunity balances two concerns: that “action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees” and how, “[o]n the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”<sup>278</sup> In Section 504 and ADA higher education cases, there is no fear of *personal* monetary liability—and with respect to Title III claims, there is no risk of monetary liability at all.

Another distinction also undermines the *Wynne* analogy. *Anderson* provided qualified immunity to those “performing discretionary functions.”<sup>279</sup> Unlike decisions about ministerial tasks, “the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions,” and without qualified immunity, discretionary action might be inhibited.<sup>280</sup> The Supreme Court has further explained that by protecting discretionary actions, qualified immunity “protect[s] the public from unwarranted timidity on the part of public officials by . . . ‘encouraging the vigorous exercise of official authority’” and “principled and fearless decision-making.”<sup>281</sup> At least in theory, without qualified immunity, competent people will be deterred from public service.<sup>282</sup> There is no similar ministerial versus discretionary distinction at play in higher education accommodation suits, or a related concern that doing away with a deferential fundamental alteration defense would discourage individuals from working in higher education due to the threat of vexatious

273. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022).

274. James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 452 (2000).

275. *See, e.g., Fleming v. Livingston Cnty., Ill.*, 674 F.3d 874, 879 (7th Cir. 2012) (holding that qualified immunity, which “protects public officials from liability for damages if their actions did not violate clearly established rights of which a reasonable person would have known,” barred plaintiff’s claim that the defendant sheriff’s deputy falsely arrested them (internal quotation marks omitted)).

276. 483 U.S. 635, 638 (1987).

277. *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991) (citing *Anderson*, 483 U.S. at 638).

278. *Anderson*, 483 U.S. at 638 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

279. *Id.*; cf. Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 782–83 (2006) (explaining that in practice, “the ‘discretionary function’ element has almost never restricted the scope of qualified immunity”).

280. *Harlow*, 457 U.S. 800, 816 (1982).

281. *Richardson v. McKnight*, 521 U.S. 399, 407–08 (1997) (first quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978); and then quoting *Wood v. Strickland*, 420 U.S. 308, 319 (1975)).

282. *Harlow*, 457 U.S. at 816.

litigation. Fundamental alteration would simply apply to higher education institutions the same way it does to other defendants.

Wynne's use of a qualified immunity-inspired standard of review is further weakened when considering recent scholarship and case law. For example, William Baude has shown that the legal justification for applying qualified immunity to Section 1983 claims fails on three grounds: there in fact was no similar common law rule in place at the time Section 1983 was adopted; qualified immunity is not a legitimate counterbalance to the Court's decision to broaden Section 1983's reach; and qualified immunity does not derive "from principles of fair notice analogous to the criminal law rule of lenity."<sup>283</sup> Baude has also shown that qualified immunity unfairly receives "special status" for purposes of civil procedure because it is decided before discovery begins and a denial of a motion for qualified immunity-based dismissal is immediately appealable.<sup>284</sup>

Alexander Reinert has further contended that in light of Section 1983's legislative history, "no qualified immunity doctrine at all should apply in Section 1983 actions."<sup>285</sup> And Joanna Schwartz has explained that despite the fact that qualified immunity is designed to protect individuals from the burden of damages awards, most officers are indemnified by their employers.<sup>286</sup> "[T]he cost of police indemnification, at least indirectly, largely falls on municipal taxpayers and those living in the municipality and using its public services."<sup>287</sup>

In two powerful orders deciding motions to dismiss on qualified immunity grounds, Judge Carlton Reeves has highlighted the doctrine's foundational mistakes and the devastating impact of its persistence.<sup>288</sup> Even Justice Thomas seems ready to take up the issue, "criticiz[ing] the doctrine for bearing little resemblance to the common law at the time the Civil Rights Act of 1871 became law," and recommending that, "[i]n an appropriate case," the Court should reconsider its qualified immunity jurisprudence.<sup>289</sup> And yet, despite everything we now know about

283. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 51–55 (2018).

284. *Id.* at 84.

285. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 207–08 (2023) ("[T]ext and legislative history show that Congress did not intend for common law immunities to bar actions brought under Section 1983.").

286. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

287. Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 880 (2017) (citing Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1161 (2016)); see also Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) ("Near certain and universal indemnification drastically reduces the value of qualified immunity as a protection against the burden of financial liability.").

288. See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020) (stating that "thousands have died at the hands of law enforcement over the years, and the death toll continues to rise"; "[c]ountless more have suffered from other forms of abuse and misconduct by police" while "[q]ualified immunity has served as a shield for these officers, protecting them from accountability"); *Green v. Thomas*, 734 F. Supp. 3d 532, 540 (S.D. Miss. 2024) (denying motion for qualified immunity and agreeing with the "lawyers, professors, judges, and even Supreme Court Justices who have called for the doctrine's re-evaluation, if not its abolition").

289. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) (citing *Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring)).

qualified immunity, a qualified immunity-inspired standard nevertheless survives and thrives in reasonable accommodation law.

Some may argue that there are similarities between lawsuits brought against a government official, who in some ways stands in for government and institutional policy, and those brought against institutions of higher education on the basis of their policy. However, most civil rights actions implicate an individual challenge to the status quo, which is often upheld by an institution.<sup>290</sup> Qualified immunity, however, is a doctrine that reacts to concerns about how individual defendants will navigate the burdens of litigation and liability. Even if accommodation denials are originally made by individual employees, they will never face the same litigation and liability concerns that Section 1983 defendants face, either in theory or in practice. A qualified immunity-inspired form of deference should play no role in shaping Section 504 and ADA reasonable accommodation defenses.

## 2. Misapplication of Qualified Immunity Procedures to Fundamental Alteration Analysis

*Wynne* erred by borrowing the manner in which the actions of government officials are reviewed in qualified immunity analyses, creating a similar standard for assessing fundamental alteration decisions.<sup>291</sup> *Wynne* praised the way qualified immunity allows courts to resolve cases against government officials “without extensive proceedings.”<sup>292</sup> *Wynne* described qualified immunity as permitting courts, “[i]n many cases, where the material facts have not been disputed,” to “determine whether qualified immunity is applicable as a matter of law without extensive proceedings.”<sup>293</sup> Joanna Schwartz has demonstrated that the very “balance” *Wynne* believed qualified immunity achieved—protecting government officials “from harassment, distraction, and liability when they perform their duties reasonably”—has never been realized because qualified immunity “does not appear to be necessary or well suited” to the protection it was intended to provide.<sup>294</sup> As a result, *Wynne*’s second justification for borrowing from qualified

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290. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 15 (2006) (noting that antidiscrimination actions often involve individuals challenging institutional policies or practices, with courts requiring employers to maintain effective structures to prevent and remedy workplace discrimination and harassment); Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1446–47 (1989) (explaining how Section 1983 enables individuals to challenge entrenched institutional policies and customs that infringe upon constitutional rights by holding individual government officials accountable for their unconstitutional conduct).

291. *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991) (discussing fact-finding procedures in qualified immunity cases and stating that “[w]e believe a similar though not identical approach is appropriate to assess whether an academic institution adequately has explored the availability of reasonable accommodations for a handicapped individual”).

292. *Id.*

293. *Id.*

294. Schwartz, *How Qualified Immunity Fails*, *supra* note 287, at 58–59 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); see also Taylor Kordsiemon, *Challenging the Constitutionality of Qualified Immunity*, 25 U. PA. J. CONST. L. 576, 591–92 (2023) (describing how both normative and positive criticisms of qualified immunity, including those made by Schwartz and Baude, “represent a powerful theoretical challenge to the doctrine’s validity”).

immunity—the streamlining function of a standard that focuses on questions of law—is incorrect.

In her groundbreaking article *How Qualified Immunity Fails*, Schwartz examined the Supreme Court’s increased focus on justifying qualified immunity due to “the need to protect government officials from nonfinancial burdens associated with discovery and trial.”<sup>295</sup> Her research examined whether the defense actually achieved that goal.<sup>296</sup> She found that “qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end.”<sup>297</sup> Instead, Schwartz’s research demonstrated that:

Qualified immunity is raised infrequently before discovery begins: across the districts [studied], defendants raised qualified immunity in motions to dismiss in 13.9% of the cases in which they could raise the defense. These motions were less frequently granted than one might expect: courts granted motions to dismiss in whole or part on qualified immunity grounds 13.6% of the time. . . . [E]ven when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants did not always result in the dismissal of the cases—additional claims or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial.<sup>298</sup>

These findings are significant in that they show that in litigated cases, qualified immunity is not serving its trial- and discovery-protective function.<sup>299</sup> Schwartz also found that, though qualified immunity motions were more successful at summary judgment, that type of motion practice “rarely shield[s] government officials from discovery because most summary judgment motions require at least some depositions or document exchange.”<sup>300</sup> Even if qualified immunity motions succeeded at summary judgment, they only kept defendants from trial in “2.6% of the 1,183 cases” in Schwartz’s dataset.<sup>301</sup> Schwartz observed that qualified immunity is likely not serving its intended function in part because qualified immunity motions often do require engagement with facts, which are only available after discovery.<sup>302</sup>

The foundational errors that led *Wynne* to borrow from qualified immunity further highlight the harm created by *Wynne*’s chosen standard of review. *Wynne*

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295. Schwartz, *How Qualified Immunity Fails*, *supra* note 287, at 9 (describing her review of “1,183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts” that tracked “the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, the courts’ assessments of defendants’ qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases’ dispositions”).

296. *Id.*

297. *Id.*

298. *Id.* at 9–10 (footnotes omitted).

299. *Id.* at 48.

300. *Id.* at 49.

301. *Id.*

302. *Id.* at 53.

describes an institution's initial fundamental alteration burden as being satisfied by the submission of "undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program."<sup>303</sup> Here, *Wynne* attempts to craft a factual record similar to what a court would be presented with in deciding whether a right is clearly established for purposes of a qualified immunity motion.

But the facts that *Wynne* requires an institution to submit do not carry the same legal significance as facts related to "clearly established rights" in a civil rights action. For example, the undisputed facts of an allegedly unconstitutional police shooting might include the undisputed allegation that the plaintiff was carrying a silver cell phone that looked like a handgun. A district court can look to the law of the circuit to determine whether that fact would justify an officer's decision to use lethal force. Mimicking the clearly established rights step of a qualified immunity analysis, *Wynne* instructs courts to consider the facts *Wynne* deemed relevant in order to determine if the institution reached a justifiable conclusion.<sup>304</sup> Then, with respect to an ADA or Section 504 reasonable accommodation claim, courts can rule as a matter of law as to whether the reasonable accommodation duty was met.<sup>305</sup> But rather than relying on a body of law that instructs as to what is and is not a fundamental alteration, at this step, *Wynne* instead defers to an academic institution's judgment about the essential nature of its programs.

The deference is so extreme that not even a standard of review remains. For example, in *Wynne* itself, the plaintiff presented evidence that "at least one other medical school and a national testing service occasionally allow oral renderings of multiple-choice examinations in respect to dyslexic students," the very accommodation he sought and that Tufts deemed too substantial an alteration to provide.<sup>306</sup> In other words, the plaintiff in *Wynne* attempted to show that Tufts's rationale was unjustified. In response, the *Wynne* court emphasized that its standard of review was not intended to determine "whether a medical school is 'right' or 'wrong' in making program-related decisions" because such decisions are not appropriate in "the context of subjective decisionmaking, particularly in a scholastic setting."<sup>307</sup>

This hands-off approach to reviewing facts goes even further than what qualified immunity purports to accomplish in deciding questions of law—in qualified immunity cases, there *is* a right or wrong answer as to whether a right is clearly established.<sup>308</sup> An officer defending their use of allegedly excessive force is not entitled to submit an affidavit stating that they are not subject to liability because,

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303. *Wynne I*, 932 F.2d 19, 26 (1st Cir. 1991).

304. *Id.*

305. *Id.*

306. *Wynne II*, 976 F.2d 791, 795 (1st Cir. 1992).

307. *Id.*

308. *See, e.g., Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015) (per curiam) (stating that "[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right'" and for purposes of an established right, there need not be "a case directly on point, but existing precedent must have placed the statutory or constitutional question

based on their own self-informed belief, the right was not clearly established. A set of legal rules determines whether a right was violated, and a court decides whether an officer had sufficient notice of that right, that is, whether it was clearly established.<sup>309</sup> By contrast, as a result of *Wynne*, an institution that invokes the fundamental alteration defense need only adequately document its own self-determined judgment.<sup>310</sup>

In sum, *Wynne*'s use of a qualified immunity-inspired standard of review is unjustified on several grounds. First, actions against institutions that have allegedly violated disability law do not create the same potential for damages awards against individuals that Section 1983 and *Bivens* actions do. Second, scholars like William Baude and Joanna Schwartz have demonstrated that qualified immunity itself is a doctrine that deserves to be abandoned, not followed. Schwartz's research in particular demonstrates that despite *Wynne*'s desire to borrow a standard that streamlines cases and creates easy-to-resolve questions of law, qualified immunity does not do so. A qualified immunity-inspired standard has no place in cases involving institutions of higher education that invoke the fundamental alteration defense.

#### B. THE LIMITS OF ACADEMIC DEFERENCE

This Section considers whether academic deference has any place in fundamental alteration decisions that result in the denial of requests for reasonable accommodation in higher education settings. As explained above, *Wynne* arguably misrepresented the authority it relied upon to establish that institutions of higher education are entitled to academic deference.

Key to *Wynne*'s decision to apply academic deference was its reliance on the *Regents of the University of Michigan v. Ewing* instruction that: “[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty’s professional judgment.”<sup>311</sup> *Wynne* was also persuaded by *Ewing*'s position that judges “may not override” a faculty’s professional judgment “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”<sup>312</sup>

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beyond debate” (first quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012); and then quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

309. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (stating that qualified immunity turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken” and whether “officers are on notice their conduct is unlawful” (first quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999); and then quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002))).

310. *Wynne II*, 976 F.2d at 795 (stating that Tufts met its burden by “rationally if not inevitably” deciding that “no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program” as demonstrated by “the diligence of its assessment and the justification for its judgment clearly shown in the augmented record”).

311. *Wynne I*, 932 F.2d 19, 25 (1st Cir. 1991) (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

312. *Id.* (internal quotation marks omitted) (quoting *Ewing*, 474 U.S. at 225).

Perhaps the most obvious reasons to keep *Ewing* out of the accommodation context are the factual and legal differences between the claims in *Ewing* and those at issue in accommodation cases. With respect to the facts, in *Ewing*, the plaintiff claimed that “the University misjudged his fitness to remain a student.”<sup>313</sup> Deference was due to the university’s decision to dismiss Ewing because the record “unmistakably demonstrate[d] . . . that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.”<sup>314</sup> Deference may not be due outside of the context of dismissal when, for example, an entire academic record is not subject to faculty review. In *Guckenberger*, students sought an accommodation that would waive one particular course requirement.<sup>315</sup> Their academic careers as a whole were not subject to full review by the Committee members who considered the nature of the course requirement itself.<sup>316</sup> Legally, *Ewing* tied its concerns about respect for academic freedom to the First Amendment, a salient issue with respect to public educational institutions, but not necessarily so in all cases that Section 504 and the ADA reach.<sup>317</sup>

The Seventh Circuit has recognized a different reason to resist *Ewing*’s deferential standard of review.<sup>318</sup> In *Novak v. Board of Trustees of Southern Illinois University*, the Seventh Circuit held that *Ewing*’s deference was “inappropriate in cases based on the Nation’s discrimination statutes.”<sup>319</sup> The power of this pronouncement is tempered by other portions of the *Novak* decision. *Novak* noted that *Ewing*’s “formulation” “applies only to ‘legitimate academic decision[s]’ and that academic decisions that are discriminatory are not legitimate.”<sup>320</sup> In fact, *Novak* cites *Wynne* favorably, presumably cataloguing the case as one involving legitimate academic decisions.<sup>321</sup> *Novak* also stated that courts “have recognized,

313. *Ewing*, 474 U.S. at 225.

314. *Id.*

315. See *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 114 (D. Mass. 1997) (describing plaintiffs’ claims that BU failed to reasonably accommodate their request to substitute foreign language and mathematics courses for other courses).

316. Instead, BU, and then the court, focused on the purpose of the course requirements themselves, avoiding any individualized assessment of the impact on particular students or their academic careers. See *Guckenberger*, 8 F. Supp. 2d at 87–89.

317. *Ewing*, 474 U.S. at 226 (“Added to our concern for lack of standards [applicable to reviewing the substance of academic decisions] is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’” (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))); Joseph M. Flanders, *Academic Student Dismissals at Public Institutions of Higher Education: When Is Academic Deference Not an Issue?*, 34 J. COLL. & U.L. 21, 35 (2007); see also Adam M. Samaha, *Fundamental Alteration Limits on Disability Rights: Spread, Specifications, and the Quality of Education* 24 (N.Y.U. L. Working Paper, Paper No. 24-48, 2024) (arguing that there are legitimate reasons why institutions desire to or need to maintain the fundamental aspects of their program, including its nature, details, purpose, and/or quality).

318. *Novak v. Bd. of Trs. of S. Ill. Univ.*, 777 F.3d 966, 975–76 (7th Cir. 2015).

319. *Id.* at 976.

320. *Id.* at 975–76 (emphasis and alterations in original).

321. *Id.* at 976 (first citing *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1181 (10th Cir. 2001); then citing *Wynne I*, 932 F.2d 19, 25 (1st Cir. 1991); and then citing *Palmer Coll.*

continually, the significant costs associated with ‘heavy-handed’ judicial intrusion into internal academic decisions.”<sup>322</sup> Therefore, as adamant as *Novak* might have appeared in stating that “[a]cademic institutions are in no way exempt from our discrimination laws . . . [n]or are there separate and more lenient standards for them,” it hedged its caution.<sup>323</sup> According to *Novak*, when reviewing evidence in academic cases, “courts must understand the nature and mission of the institutions and evaluate the evidence accordingly.”<sup>324</sup>

On the other hand, the Second Circuit has persuasively explained why a deferential standard of review like the one adopted by *Wynne* is problematic in the context of disability discrimination claims as a whole. In *New York State Association for Retarded Children v. Carey*, the Second Circuit refused to defer to the New York City Board of Education’s (the Board) fact-finding regarding its decision to exclude certain children with intellectual disabilities from mainstream classes.<sup>325</sup> Most of the affected children had previously been institutionalized at Willowbrook Developmental Center, a state facility subject to a consent judgment due to unconstitutional and inhumane living conditions.<sup>326</sup> That consent judgment required that Willowbrook residents be provided a “‘full and suitable educational program’ in the New York City public schools,” and as a result, some children who were previously institutionalized at Willowbrook were enrolled in New York City public schools.<sup>327</sup>

Many of the Willowbrook children were also known hepatitis B carriers.<sup>328</sup> In September 1977, a hepatitis B infection was falsely reported to have originated at a New York City elementary school, leading the New York City Department of Health to study the impact of having known hepatitis B carriers in classrooms.<sup>329</sup> A group of hepatitis B experts issued tentative guidelines in February 1978 which recommended that “mentally retarded children identified as carriers of hepatitis B

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of *Chiropractic v. Davenport* C.R. Comm’n, 850 N.W.2d 326, 338–39 (Iowa 2014)). At least one court has categorized *Wynne* as a case that does not provide absolute deference because of its fact-finding and reasoned-judgment requirements. See *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 817–18 (9th Cir. 1999) (citing *Wynne I*, 932 F.2d at 25–26), *as amended* (Nov. 19, 1999).

322. *Novak*, 777 F.3d at 976.

323. *Id.*

324. *Id.*; see also *Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1291–92 n.21 (S.D. Fla. 2016) (describing the *Wynne* standard as proposing a “modified adaptation of *Ewing* in the disability discrimination context,” and reading *Novak* to “approv[e] the grant of some level of deference to subjective academic evaluations without, of course, cloaking academic institutions with immunity from antidiscrimination laws” (emphasis in original)).

325. 612 F.2d 644, 648 (2d Cir. 1979).

326. *Id.* at 646.

327. *Id.*

328. *Id.* at 647. In connection with a study that ran from 1955 until the early 1970s, children with intellectual disabilities at Willowbrook were intentionally exposed to hepatitis. See Laura I. Appleman, *The Captive Lab Rat: Human Medical Experimentation in the Carceral State*, 61 B.C. L. REV. 1, 7 (2020) (describing how the research “involved purposefully infecting sixty healthy children with hepatitis to aid in vaccine development” and that “[m]ost developed hepatitis and suffered from symptoms including ‘fever, nausea, vomiting, intolerance to food, jaundice (a yellowing of the skin and eyes), and liver damage’”).

329. *N.Y. State Ass’n for Retarded Child. v. Carey*, 612 F.2d 644, 647 (2d Cir. 1979).

should be isolated in special classrooms within each school they attended.”<sup>330</sup> The Board informed the parents and caretakers of “carrier children” that “the children were to be excluded from public school until appropriate arrangements could be made.”<sup>331</sup>

Soon thereafter, the Eastern District of New York enjoined the order on the grounds that the exclusion violated, *inter alia*, the Willowbrook consent judgment and Section 504.<sup>332</sup> The Board then devised a plan which would place the forty-eight children “in nine separate classes” all over New York City, and in which each of the forty-eight children “was to be individually evaluated, and placed in an educational setting based on the results of that evaluation.”<sup>333</sup> This plan was also found to violate the consent judgment and Section 504.<sup>334</sup>

On appeal, the Board argued that a court was limited to reviewing its actions for reasonableness.<sup>335</sup> Judicial review would only determine whether “there is a substantial basis in the administrative record for concluding that a problem exists, and that the proposed plan is rationally related to this problem.”<sup>336</sup> The Board described this as the same standard of review applicable to “state economic legislation . . . in the post-1937 era.”<sup>337</sup> The children’s representatives argued that the validity of the Board’s actions had to be established by evidence that was “presented in court and found persuasive by the trier of fact.”<sup>338</sup>

The court conceded that the Board was exercising its quintessential police power through its plan to isolate children to “guard against the spread of a serious disease.”<sup>339</sup> Moreover, the “decision was reached after an investigation by Department of Health staff members, and after serious consideration by professional educators from the Board.”<sup>340</sup> However, though “the reasoned decision-making of administrators bearing sensitive responsibilities is entitled to judicial deference,” the court explained that it too was assigned an important task.<sup>341</sup> The court was tasked with ensuring that “the established legal standards—constitutional and statutory—are followed by government agencies.”<sup>342</sup> The court refused to allow factual determinations “to go unchallenged,” as “the facts will often be dispositive, and the question of compliance with prevailing legal standards will

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330. *Id.* This language is clearly offensive today and should never be used to refer to children with disabilities. It is included here to capture the dehumanizing way in which the children in question were both spoken of and treated.

331. *Id.*

332. *Id.*

333. *Id.* at 648.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

often be determined by the manner in which the agency has found these facts.<sup>343</sup> If the Board's fact-finding was deferred to, the court would run the risk of missing violations of the various laws at issue.<sup>344</sup>

Rather than developing "some set of general rules to govern federal review of state administrative fact-finding," the court instead looked to "the constitutional or statutory provision" that it was enforcing for the appropriate standard of review.<sup>345</sup> Here, the applicable standard was Section 504 as the Board, a recipient of federal funding, excluded the children from "regular" classes as a result of their disability, while other nondisabled potential hepatitis B carrier children were neither identified nor similarly excluded.<sup>346</sup>

That Section 504 is an anti-discrimination statute was relevant to the court's standard of review:

Section 504 is intended to be part of the general corpus of discrimination law. It is a general principal [sic] of discrimination law that once the plaintiff has established a prima facie case that he has been discriminated against, the defendant must present evidence to rebut the inference of illegality . . . . The agency is required to come forward in the district court with sufficient evidence to rebut the plaintiff's prima facie case.<sup>347</sup>

With respect to deference, the court was clear that "deference to a state agency's fact-finding is inappropriate once that agency is the defendant in a discrimination suit."<sup>348</sup> It upheld the district court's finding that the Board was "obliged to make at least some substantial showing in court that its plan [was] justified" and that it "completely failed" to do so.<sup>349</sup> For example, the Board could not show that the hepatitis B carrier children posed anything but a remote possibility of a health hazard.<sup>350</sup>

The plaintiffs, by contrast, demonstrated "the detrimental effects of isolating the carrier children," including evidence that the plan would require "over half the children to be assigned to an entirely different school," resulting in "serious disorientation" and "possibly vitiating any educational progress that they have achieved" as well as "a decrease in the curricular options that are available for each child."<sup>351</sup> Separating the children in question would exclude them from

343. *Id.*

344. *Id.* at 648–49.

345. *Id.* at 649.

346. *Id.*

347. *Id.* (emphasis omitted) (citations omitted).

348. *Id.*

349. *Id.* at 650.

350. *Id.* (stating that though "the Department of Health investigators had advised the Board that they had observed drooling, kissing, and mouthing of mutually used equipment by the [children with disabilities], no such evidence was presented in court," and "[t]here was testimony by several educators who found no evidence of un-hygienic conditions in any of the classrooms they inspected").

351. *Id.* at 650–51.

school-wide activities “such as meals, recesses, and assemblies,” reenforcing the stigma “to which these children have already been subjected.”<sup>352</sup>

The *Carey* court’s instruction that an entity’s fact-finding is not entitled to wholesale judicial deference when a court is charged with enforcing Section 504 is instructive. The first step of the *Wynne* standard takes a hands-off approach to certain foundational facts submitted by academic institutions that purportedly demonstrate that they considered a student’s proposed accommodation; *Carey* instead urges courts to engage in their own fact-finding at every stage. *Carey* insisted upon such a review even though the defendant was a state actor purporting to use the very powers assigned to it by the state. If those defendants must justify their factual conclusions, so should institutions of higher education—both public and private.

*Carey*’s cautious approach to deference is not undermined by the Supreme Court’s decision in *Arline*. *Arline* reaffirms that courts must exercise their own judgment through individualized inquiry—a requirement that also undermines any presumption of institutional infallibility.<sup>353</sup> In *Arline*, the Court remanded the issue of whether the disabled plaintiff was “otherwise qualified” to be an elementary schoolteacher, instructing the district court to “conduct an individualized inquiry and make appropriate findings of fact.”<sup>354</sup> In determining what factors should determine “the employment of a person handicapped with a contagious disease,” the Court agreed with the American Medical Association, an amicus in the case, which proposed that the inquiry include:

“[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.”<sup>355</sup>

Further, the Court stated, “In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.”<sup>356</sup> In a footnote, the Court added that it was not addressing “the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.”<sup>357</sup>

Though *Arline* requires deference to medical experts in the context of determining issues of medical safety, it does not per se require deference to the very defendant that is alleged to have violated Section 504. In *Arline*, the defendant was a local school board, not a public health official.<sup>358</sup> *Carey*’s rule that once an

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352. *Id.* at 651.

353. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287 (1987).

354. *Id.*

355. *Id.* at 287–88.

356. *Id.* at 288.

357. *Id.* at 288 n.18.

358. *Cf.* Knapp v. Nw. Univ., 101 F.3d 473, 485 (7th Cir. 1996) (describing how, pursuant to Section 504, the decision as to whether a student with disabilities is physically qualified to play for the

agency becomes a civil rights defendant, the deference due to that agency is less, remains sound guidance—whether the defendant is a local health board or a university.

Some may nevertheless argue that a faculty’s reasoned judgment should receive deference when it engages in fact-finding. Many faculty committees deliberate through processes that encourage debate and look to subject matter experts for guidance. Of course, some faculty committees might have the capacity to engage in the sort of review that would rise to the level of scrutiny a court like *Carey* would otherwise provide. But an adversarial litigation system does not permit deference to one party’s version of events. Most disturbingly, when *Carey*-like fact-finding is abandoned, the bar is so lowered that pro forma faculty meetings and justifications, like those in *Guckenberger*, become the norm. An institution of higher education has no incentive to do more when courts require next to nothing. And a thorough faculty committee investigation would provide at most a guarantee of formal equality rather than the substantive equality antidiscrimination law intends to bring about.

C. THE REJECTION OF CATEGORICAL DEFERENCE TO FUNDAMENTAL ALTERATION DEFENDANTS

*Wynne*’s formulation of the fundamental alteration defense conflicts with the Supreme Court’s position regarding the deference owed to defendants that assert it. In *PGA Tour v. Martin*, the Court addressed whether allowing Casey Martin to use a golf cart, despite a walking requirement applicable to the PGA’s highest-level tournaments, was “a modification that would ‘fundamentally alter the nature’ of those events.”<sup>359</sup> The Court reviewed the evidence it considered relevant and determined that “the walking rule is at best peripheral to the nature of [the PGA’s] athletic events.”<sup>360</sup> The Court rejected the PGA’s argument that “all the substantive rules for its ‘highest-level’ competitions are sacrosanct and cannot be modified under any circumstances.”<sup>361</sup> That is, it refused to defer to the defendant’s framing of what is and is not fundamental. The Court construed the PGA’s request for deference as an attempt to secure exemption from Title III’s modification requirement.<sup>362</sup>

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men’s basketball team should not be left to the courts; “[i]nstead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court’s place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence” and that, “[s]o long as these factors exist, it will be the rare case regarding participation in athletics where a court may substitute its judgment for that of the school’s team physicians”).

359. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682 (2001).

360. *Id.* at 689.

361. *Id.*

362. *Id.* The Court’s analysis also emphasized the ADA’s basic individualized assessment requirement. *Id.* at 690. “[T]he purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments,” and with respect to Martin, he “easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.” *Id.* As a result, in Martin’s case, “[a] modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to ‘fundamentally alter’ the tournament.” *Id.*

*Martin*'s resistance to total deference has been followed in the Title II context. In *Mary Jo C. v. New York State and Local Retirement Systems*, the Second Circuit considered the argument that a three-month filing deadline for state disability retirement benefits could not be altered through reasonable modification as such a modification would constitute a fundamental alteration of the state retirement benefits system.<sup>363</sup> The district court had held that "so long as a mandatory eligibility requirement is set by a state statute," it [is] an 'essential eligibility requirement,' and any modification of it will work a 'fundamental alteration' of the program."<sup>364</sup> The statutory deadline was an essential legal requirement that accordingly could not be waived.<sup>365</sup>

The Second Circuit reversed. It explained that applicable regulations require an analysis of what is and is not essential.<sup>366</sup> "[E]ssential eligibility requirements' are those requirements without which the 'nature' of the program would be 'fundamentally alter[ed]'.<sup>367</sup> The court described *Martin* as having undertaken "an independent analysis of the importance of a rule for the service in light of the service's purpose to determine whether a requested modification would fundamentally alter its nature."<sup>368</sup> *Martin* declined to "simply defer[] to the entity providing the service in question" regarding what constituted a fundamental alteration in the nature of its services.<sup>369</sup>

Following this aspect of *Martin*, the Second Circuit refused to read all "essential eligibility requirements" to mean "all formal legal eligibility requirements."<sup>370</sup> Doing so would "run counter to the ADA's broad remedial purpose by allowing states to insist that whatever legal requirements they may set are never subject to reasonable modification under Title II of the ADA."<sup>371</sup> Such a reading would cause "the class of 'rules, policies, or practices' subject to reasonable modification under Title II [to] be vanishingly small, and nearly all eligibility requirements for the receipt of public services would be non-waivable 'essential' eligibility requirements."<sup>372</sup> The state's construction would "render Title II effectively impotent."<sup>373</sup> *Wynne*'s deference to institutions of higher education creates the same risk—that a college or university could label most or even all accommodations as fundamental

363. 707 F.3d 144, 150 (2d Cir. 2013).

364. *Id.* at 154.

365. *See id.* at 156 ("[E]ssential eligibility requirements, unlike 'rules, policies, [and] practices,' are not subject to reasonable modifications or waiver." (quoting 42 U.S.C. § 12131(2)).

366. *See id.* at 156–58

367. *Id.* at 158 (quoting 28 C.F.R. § 35.130(b)(7)).

368. *Id.* at 159.

369. *See id.*

370. *Id.* at 160 (internal quotation marks omitted).

371. *Id.*

372. *Id.*

373. *Id.* Nicole Buonocore Porter has argued that *Martin*'s fundamental alteration holding would also be useful for purposes of determining Title I claims. *See* Porter, *supra* note 64, at 533 ("[B]orrowing the 'fundamental alteration' inquiry under Title III can help to make sense of the vague and confusing body of case law under Title I, the employment discrimination title.").

alterations and render the category of available accommodations “vanishingly small.”<sup>374</sup>

Then why does the *Wynne* standard survive in light of clear instruction from the Supreme Court that wholesale deference is inappropriate in the fundamental alteration context? One explanation is that higher education is still treated as a sacrosanct, romanticized space. Anne Dupre has explored the related issue of why courts “accord greater deference” to “educators in institutions of higher education than to educators in elementary and high schools” even though “neither statutory language nor compliance with Supreme Court precedent” suggest that the standards should differ.<sup>375</sup> She reasoned that “[t]he answer may be found by examining the degree of respect society holds for the academic enterprise in which each institution is involved,” and that courts “simply do not question the importance of the academic enterprise in higher education.”<sup>376</sup> Dupre explained that judges may defer to college and university educators because they see them as peers who have similar educations and achieved similar social status and respect.<sup>377</sup> In legal academia, federal and state judges alike often serve as adjunct professors or even leave the bench to serve as law school deans.

But *Martin* arguably requires that no entity be granted categorical deference with respect to how it defines what is and is not fundamental to its program.<sup>378</sup>

374. See *Mary Jo C.*, 707 F.3d at 160. This Article contends that the *Martin* Court’s interpretation of the fundamental alteration defense controls, and therefore does not implicate, the concerns at play in *Loper Bright Enterprises v. Raimondo*. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (holding that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority” and “may not defer to an agency interpretation of the law simply because a statute is ambiguous”). However, to the extent that *Loper Bright* represents a more general concern about courts delegating their constitutional responsibility to interpret laws, *Wynne*’s decision to delegate the authority to determine whether an element of a defense is met—whether something a student wants to alter is or is not fundamental—to an academic institution, is at least arguably at odds with *Loper Bright*’s judicial over-delegation concerns.

375. Dupre, *supra* note 30, at 452.

376. *Id.* at 452–53.

377. *Id.* at 453. Mary-Rose Papandrea has described the Supreme Court’s “refusal to defer to universities’ asserted educational needs outside of the core curricular context,” such as in affirmative action-influenced admissions decisions. Mary-Rose Papandrea, *Law Schools, Professionalism, and the First Amendment*, 76 STAN. L. REV. 1609, 1620–22 (2024). Of course, a discussion of deference to academic decisions must be considered alongside the disappearance of tenure and assaults on university-led diversity, equity, and inclusion initiatives. See, e.g., Jerry C. Edwards, *Safeguarding the Search for Truth: Carving Out Academic Freedom’s Place in a Domain Dominated by Government Speech*, 19 HARV. L. & POL’Y REV. 93, 94 (2024) (describing how American society faces “the most significant assaults on academic freedom since the Red Scare”). Still, attacks on academic freedom have not also resulted in an increase in civil rights protection or concern for minoritized students. Rather, as academic freedom suffers, so do individual, civil rights, such as those embodied in Section 504 and the ADA. See Athena Mutua, Jonathan Feingold, Angela Harris, Emily Houh, Matthew Patrick Shaw & Frank Valdes, *The War on Higher Education*, 72 UCLA L. REV. DISCOURSE 2, 4 (2024) (describing how “[a]cademic freedom is under assault in the United States” and that “[t]he individuals and entities driving this antidemocratic movement have also targeted the electoral process; public education; the right to bodily autonomy; the civil rights and liberties of minoritized and marginalized communities; and freedom of speech and expression (increasingly marshaled against pro-Palestinian advocacy)”).

378. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). *But see* Stone, *supra* note 24, at 1256 (criticizing *Martin*’s approach because “allowing a court to simply roll up its sleeves and undertake a

For purposes of the ADA, an institute of higher education is simply another entity covered by Title II or Title III. Congress has demonstrated that it knows how to exempt academic institutions from the ADA's reach when it wants to—as it did with respect to religious schools.<sup>379</sup> *Wynne* should not be followed to the extent it creates an impermissible statutory exception.

The Supreme Court's recent decision in *A.J.T. v. Osseo Area Schools* lends further support to the argument that the ADA and Section 504 should be applied consistently no matter the context a plaintiff's claims arise out of.<sup>380</sup> A.J.T.'s Section 504 and ADA Title II claims challenged her middle school's failure to provide her with evening instruction to accommodate her epilepsy and ensure she received the same amount of instructional time as her nondisabled peers.<sup>381</sup> She sought injunctive relief and damages.<sup>382</sup> The *A.J.T.* Court addressed whether Title II and Section 504 claims brought by schoolchildren like A.J.T. who seek educational services must show that defendants acted with "bad faith or gross misjudgment," even though outside of the elementary and secondary context, no proof of intent is required to obtain an injunction, and to obtain damages, a plaintiff need only demonstrate deliberate indifference.<sup>383</sup>

The Court held that nothing in the text of Title II and Section 504 "suggests that such claims should be subject to a distinct, more demanding analysis."<sup>384</sup> Rather, both statutes apply to all qualified individuals with disabilities, and provide no support for the conclusion that either law "appl[ies] with lesser force to *certain* qualified individuals bringing *certain* kinds of claims."<sup>385</sup> The remedial provisions of both statutes also apply without qualification to "any person."<sup>386</sup> As a result, "ADA and Rehabilitation Act claims based on educational services should be subject to the same standards that apply in other disability discrimination contexts."<sup>387</sup> In its moving closing paragraph, the Court acknowledged that though its holding was narrow, its import was not: "A.J.T. and 'a great many children with disabilities and their parents' . . . face daunting challenges on a daily basis," which no longer include "having to satisfy a more stringent standard of proof than other plaintiffs to establish discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act."<sup>388</sup>

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wholly unstructured analysis of what *it* deemed to be an organization's essential goals or functioning, unaided by any guideposts or strictures, could create results that are dissonant and divergent, if not chaotic").

379. See 42 U.S.C. § 12187 (exempting "religious organizations or entities controlled by religious organizations, including places of worship" from Title III of the ADA).

380. *A.J.T. v. Osseo Area Schs.*, 605 U.S. 335, 342–344 (2025) (holding that Section 504 and ADA Title II plaintiffs need not show that school officials "acted with bad faith or gross misjudgment" when their claims are based on the provision of educational services).

381. *Id.* at 340–41.

382. *Id.* at 342.

383. *Id.* at 344–45.

384. *Id.* at 345.

385. *Id.*

386. *Id.* (first citing 29 U.S.C. § 794a(a)(2); and then citing 42 U.S.C. § 12133).

387. *Id.*

388. *Id.* at 351 (quoting *Luna Perez v. Sturgis Pub. Schs.* 598 U.S. 142, 146 (2023)).

Though fundamental alteration is invoked by defendants as an affirmative defense, the logic in *A.J.T.* is instructive. As in *A.J.T.*, there is no statutory support for applying a different standard based on what kind of setting reasonable accommodation claims arise out of.<sup>389</sup> The text of Section 504 applies to recipients of federal funding, with no special exception made for institutions of higher education.<sup>390</sup> Title III's fundamental alteration provision also does not carve out institutions of higher education for special treatment.<sup>391</sup> Title II's fundamental alteration regulation does not create a special rule for institutions of higher education.<sup>392</sup> As a result, an affirmative defense available under Section 504 and the ADA should apply equally to all defendants. To hold otherwise would endorse an outcome *A.J.T.* warns against: Section 504 and the ADA cannot apply with lesser force to *certain* qualified individuals with *certain* kinds of claims.<sup>393</sup> Students who bring failure to accommodate claims against their colleges and universities should not be less likely to succeed than other plaintiffs. Yet the extratextual deference created by *Wynne* changes the way the defense is applied when institutions of higher education invoke it, making *certain* plaintiffs' claims more likely to fail.

### III. FIXING HIGHER EDUCATION'S ACCOMMODATIONS MISTAKE

In Parts I and II, this Article demonstrated *Wynne*'s impact, the logical fallacies underpinning its key holdings, and the *Martin* Court's rejection of the categorical deference *Wynne* perpetuates. It is time to retire *Wynne*.

If the *Wynne* standard no longer controls, determinations regarding reasonable accommodation denials justified by a fundamental alteration defense will likely be overturned more often and eventually become less common. As illustrated by the experience of *Guckenberger* student Avery LaBrecque, a reasonable accommodation can determine whether a student with disabilities stays in school.<sup>394</sup> Returning the fundamental alteration standard to its rightful framing would provide students like LaBrecque with the full equality the ADA envisioned.

This Part uses the *Guckenberger* case to illustrate how a fundamental alteration determination would approach a college or university's accommodation denial without the super-deference *Wynne* demands. *Wynne* was applied in *Guckenberger* and resulted in the holding that Boston University (BU) need not waive its foreign language requirement because the waiver would fundamentally alter the College of Arts and Sciences' academic program.<sup>395</sup> In following *Wynne*'s first step, *Guckenberger* held that it was required to find "basic facts," including whether there was "(1) an 'indication of who took

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389. *See id.* at 345.

390. 29 U.S.C. § 794(a).

391. 42 U.S.C. § 12182(b)(2)(A)(ii).

392. 28 C.F.R. § 35.150(a)(3).

393. *See A.J.T.*, 605 U.S. at 345.

394. *See Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 126 (D. Mass. 1997).

395. *Id.* at 144–49; *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 85 (D. Mass. 1998).

part in the decision [and] when it was made;’ (2) a ‘discussion of the unique qualities’ of the foreign language requirement as it now stands; and (3) ‘a consideration of possible alternatives’ to the requirement.”<sup>396</sup> The fact-finding step required BU to show a “reasoned deliberation” but gave “due deference” to BU regarding the same.<sup>397</sup> Without the deference afforded by *Wynne*, the fact-finding stage of a fundamental alteration review changes; rather than looking solely at form, *Guckenberger* would have instead been required to examine the function of the decisionmaking process, and its fairness.

Abandoning *Wynne*’s super-deference would have changed the court’s analysis of BU’s actions in two key respects. First, without *Wynne*’s super-deference, the court might have criticized the makeup of the Committee that BU formed to evaluate whether a course waiver would create a fundamental alteration. The *Guckenberger* court reflected positively on the fact that the BU committee that ultimately found that the waiver would create a fundamental alteration was comprised of eleven “eminent members” of the College of Arts and Sciences faculty.<sup>398</sup> However, the committee membership lacked relevant expertise. No committee member had a background in learning disabilities or education.<sup>399</sup> No recent alumni served on the Committee—neither alumni who had taken foreign languages at BU nor alumni who had been exempted from taking them as a result of a disability. Had it not been so deferential, the court might have questioned the decision to exclude experts in education and disability. It might also have criticized the exclusion of those who could measure the professional benefit of the foreign language requirement or the course waiver.

The court also did not criticize the fact that no students served on the Committee—including students with disabilities.<sup>400</sup> Five students spoke at one meeting, but their involvement was the result of a court order.<sup>401</sup> Of the five student speakers, one of them, Catherine Hays Miller, also testified at trial.<sup>402</sup> The Committee’s report is available online and provides additional detail about the students’ involvement. Two of the student speakers, including Miller, self-

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396. *Guckenberger*, 8 F. Supp. 2d at 87 (alteration in original) (quoting *Wynne I*, 932 F.2d 19, 28 (1st Cir. 1991)).

397. *Id.*

398. *Id.*

399. *Id.* at 86 n.2 (identifying the Committee members). The Committee included Susan K. Jackson, Associate Dean of the College of Arts and Sciences, who, the court noted, was the “1993 winner of [the] ‘Outstanding Professor’ [award]” given by the Learning Disabilities Support Service office. *Id.* It is unclear as to whether the award was the result of student nominations or was endorsed by student consensus. It might, for example, simply reflect that Jackson followed the office’s instructions as to what the law required her to do with respect to students with learning disabilities. Jackson received the award before her committee voted against waiving the foreign language requirement for students with disabilities.

400. *See id.* at 87 (“The Committee gave adequate notice to College students, both with and without learning disabilities, of the opportunity to provide input into the Committee’s decision.”).

401. *Id.* at 86.

402. *Id.*

identified as having learning disabilities.<sup>403</sup> The second disabled student explained how his learning disability prevented him from adequately learning French.<sup>404</sup>

Miller herself endorsed the provision of course substitutions.<sup>405</sup> A third student who was not disabled explained that “on hearing about the issue[s] before the Committee” and “discuss[ing] the matter with other students,” she concluded that students with “appropriate learning disabilities[] could be exempted from the requirement without significant compromise to th[e] degree.”<sup>406</sup> Two remaining students who were not disabled spoke to the benefits of their foreign language study.<sup>407</sup> As a result, the majority of the student input favored granting the accommodation. The court did not criticize the Committee for disregarding the students’ position.

The report also noted that plaintiff Elizabeth Guckenberger requested to speak to the Committee but was not permitted to do so:

Because she is not a student in the College of Arts and Sciences, and because the question pertains exclusively to the foreign language requirement of the College of Arts and Sciences, the Committee asked counsel whether to grant her an appearance, and on advice of counsel she was not allowed to speak.<sup>408</sup>

Excluding Guckenberger was perhaps savvy legal strategy, but not a sound decision for purposes of informing the Committee’s deliberations. Guckenberger helped form a student group, “the Law Disability Caucus,” that served as a co-plaintiff in the case, in order to address the university’s treatment of students with learning disabilities and their accommodation needs.<sup>409</sup> Guckenberger and other students met with Westling’s assistant, Craig Klafter, whom Westling originally assigned to conduct research about learning disabilities and LDSS’s accommodations process.<sup>410</sup> After Klafter determined that there was no proof that a learning disability prevented a student from successfully studying math or a foreign language, Westling instructed the College of Arts and Sciences to cease granting course substitutions for courses in those subject areas.<sup>411</sup>

During Guckenberger’s meetings with Klafter, he:

[E]xpressed the concern about students who might be “faking” a learning disorder to procure special accommodations. At some point, he referred to non-licensed, learning-disabilities specialists as “snake oil salesmen.” Klafter told

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403. REPORT OF THE DEAN’S ADVISORY COMMITTEE, COLL. OF ARTS & SCIS., BOS. UNIV. 6 (1997), <https://www.bu.edu/cas/files/2017/12/Guckenberger.pdf>.

404. *Id.*

405. *Id.*

406. *Id.* at 7.

407. *Id.* at 6–7.

408. *Id.* at 6.

409. *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 125 (D. Mass. 1997).

410. *Id.* at 117, 124.

411. *Id.* at 117–18.

[Guckenberger] that it was significant that mostly “rich kids” had diagnoses of learning disorders and expressed concern that the diagnoses were not genuine.<sup>412</sup>

Guckenberger’s firsthand experience with BU accommodations and related ableism, and her perspective as a student who succeeded academically without having satisfied a foreign language requirement, was the very expertise the Committee was missing. They might have countered the Committee’s generalized assumptions about the same.

Guckenberger’s interactions with Klafter could have inspired the Committee to consider whether animus and ableism continued to infect BU’s accommodation decisions. Guckenberger’s lived experience as a successful graduate student who had herself received accommodations would also have been enlightening. Guckenberger was diagnosed with dyslexia as a college freshman, and as an undergraduate, her accommodations included “exemptions from her language requirements,” the very sort of accommodation at issue in the Committee’s deliberations.<sup>413</sup> No member of the Committee possessed Guckenberger’s very relevant expertise. Guckenberger was perhaps the person best-suited to describing the value of the accommodation in question, and what disabled students lose when their course waiver accommodations are denied.

Instead, the court concluded that “[t]he Committee’s reliance on only its own academic judgment and the input of College students was reasonable and in keeping with the nature of the decision.”<sup>414</sup> Without *Wynne* deference, the court might have scrutinized the failure to permit more meaningful student involvement. It might have questioned the Committee’s uneven composition and its ability to engage in reasoned decisionmaking.

Abandoning *Wynne*’s super-deference would have changed the court’s analysis of BU’s actions in a second manner. Without *Wynne*’s super-deference, the court might have more closely examined the role Westling continued to play at BU and his potential impact on the Committee’s deliberations. The court favorably noted that BU excluded Westling from the committee’s work.<sup>415</sup> However, Westling still loomed large over the process. For example, the Committee that made the ultimate fundamental alteration decision—the College of Arts and Sciences Dean’s Advisory Committee—pre-dated the *Guckenberger* lawsuit and would continue to meet after the lawsuit’s conclusion.<sup>416</sup> For purposes of deliberating over the course waiver, the ordinary chair—Dennis Berkey, dean of the College of Arts and Sciences and BU Provost—“removed himself as chairman of proceedings relating to course substitutions because of his role in the ‘central administration’ of BU” and an associate professor of mathematics took over as acting chair.<sup>417</sup> At the conclusion of the lawsuit,

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412. *Id.* at 124.

413. *Id.* at 123.

414. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 87–88 (D. Mass. 1998).

415. *Id.* at 86.

416. *Id.*

417. *Id.*

however, the members of the Committee would still report to Dean Berkey, both in their role as committee members and as members of the College of Arts and Sciences faculty. Berkey's replacement, associate professor of mathematics Paul Blanchard, would still be subject to Berkey's review during the time in which he prepared for a subsequent promotion to full professor.<sup>418</sup> And Berkey, as BU provost, would continue to report to Westling. The Committee members were therefore arguably not free of outside influence from either Berkey or Westling. In fact, BU's bylaws required that Westling, as president of BU, receive a copy of the Committee's report.<sup>419</sup>

Westling's leadership role at BU subjected the Committee members to the potential of future retaliation. Without any insulation from that retaliation, the Committee members might have hesitated to overrule Westling's original decision to forbid course waivers. The court originally rejected BU's decision to forbid course waivers because it found that the decision was unreasoned and also the result of Westling's animus.<sup>420</sup> Had it not given so much deference to the committee process, the court might have taken into consideration the animus that informed Westling's original decision to forbid course waivers, and found that his influence, and his animus, still played a role in the Committee's deliberations.

Third, without *Wynne's* super-deference, the court might have criticized the Committee's consideration of other accommodations BU did provide to students with disabilities. The court noted that the Committee's consideration of possible alternatives to the foreign language requirement led to a discussion of the existing accommodations BU provides to "learning disabled students attempting to fulfill the foreign language requirement," which "weigh[ed] in BU's favor in this analysis."<sup>421</sup> Those accommodations included "distraction-free testing, distribution of lecture notes in advance, and replacement of written with oral exams."<sup>422</sup> However, given the individualized nature of accommodations, that some accommodations are already provided does not conclusively establish that others are not needed.<sup>423</sup> Indeed, the law requires an individualized assessment of each reasonable accommodation request.<sup>424</sup> Disability experts might have made that

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418. *Id.* During the tenure and promotion process, senior members of a department's or college's faculty, like Berkey, are typically able to offer formal feedback about a junior colleague's tenure or promotion application. Informal pushback can also derail tenure or promotion. Moreover, a perception that a faculty member is a team player who does not challenge institutional norms weighs in favor of a faculty member's tenure or promotion chances. Blanchard was promoted to full professor in 2010. *Tribute to Paul Blanchard, Professor of Mathematics*, BOS. UNIV. ARTS & SCIS. (May 2, 2023), <https://www.bu.edu/cas/retiringfacultytributes/> [<https://perma.cc/B8GU-22KPJ>].

419. *Guckenberger*, 8 F. Supp. 2d at 87.

420. *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997).

421. *Guckenberger*, 8 F. Supp. 2d at 88.

422. *Id.* at 89.

423. For example, imagine a student whose learning disability necessitates both distraction-free testing and a foreign language course waiver. Providing distraction-free testing does not alleviate the need for the waiver.

424. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (holding that "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability

point. The court itself should have rejected findings that looked beyond the appropriateness of the accommodation in question. The law does not award brownie points when civil rights defendants properly provide some accommodations but improperly deny others.

The *Guckenberger* court was satisfied that the Committee's key factual findings, limited to considerations of who was on the Committee and what they considered, were undisputed and demonstrated that BU had engaged in a reasoned deliberation.<sup>425</sup> A more meaningful review of the facts could have resulted in a finding that the Committee report was insufficient.

*Guckenberger* also applied the second step of the *Wynne* analysis to determine if the court had made a "professional, academic judgment that reasonable accommodation is simply not available."<sup>426</sup> Without that precedent, the court would not need to follow *Wynne*'s instruction that, "[i]n the unique context of academic curricular decision-making, the courts may not override a faculty's professional judgment 'unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'"<sup>427</sup>

Setting aside *Wynne*'s "great deference" would lead to a different outcome. *Guckenberger* rejected the plaintiffs' suggestion that it look for "a broad-ranging consensus of expert or university opinion on the value of foreign languages to a liberal arts curriculum," noting that all that BU had to show was that the accommodation had been considered.<sup>428</sup> Absent *Wynne*'s influence, the *Guckenberger* court might have been persuaded by the fact that BU's refusal to provide a foreign language waiver represented "'a substantial departure from accepted academic norms' because a majority of other colleges and universities . . . either do not have a general foreign language requirement or permit course substitutions for foreign languages."<sup>429</sup> It might also have given further weight to the evidence that the small number of BU students who requested course substitutions at BU should have been considered, as that factor led other universities to permit substitutions.<sup>430</sup> It could have also considered that BU was withdrawing an accommodation that it had previously provided, a fact that some courts have found supports providing the accommodation going forward.<sup>431</sup> Instead, the court

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would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration").

425. *Guckenberger*, 8 F. Supp. 2d at 898.

426. *Id.* at 89 (quoting *Wynne I*, 932 F.2d 19, 27–28 (1st Cir. 1991)).

427. *Id.* (quoting *Wynne I*, 932 F.2d at 25).

428. *Id.* at 87.

429. *Id.* at 89.

430. *Id.*

431. *See, e.g.*, *Spears v. Okmulgee Cnty. Crim. Just. Tr. Auth.*, No. 23-CV-65, 2023 WL 11809978, at \*4 (E.D. Okla. Sep. 20, 2023) (holding that in the employment context, "a policy change, even if facially neutral, that has the effect of withdrawing a previously granted accommodation may be the basis for an ADA failure to accommodate claim"); *cf.* Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 *DRAKE L. REV.* 885, 915 (2015) (stating that although a previously-provided accommodation that is later withdrawn should not receive "a legal presumption or inference" of reasonableness, "the prior

rejected the plaintiffs' attempt to establish the majority approach, characterizing it as a "head-count of other universities" that was "particularly inappropriate in the protean area of a liberal arts education."<sup>432</sup>

Finally, without *Wynne*, the court might have considered the plaintiffs' suggestion that the Committee's conclusion was faulty because it did not incorporate the opinions of outside experts. The court found it sufficient that the Committee could refer to the testimony provided by the many experts who had testified at trial.<sup>433</sup> There is no evidence in the Committee's report that it did so.

Of course, *Wynne* is more than just an abstract standard undermined by its reliance on qualified immunity and an overstated understanding of academic deference. It is an outcome-determinative rule that makes it nearly impossible for students with disabilities to challenge accommodation denials. For some students, an accommodation denial means that they will fail the class in which they sought the accommodation. For students like Avery LaBrecque, failure to obtain an accommodation requires dropping out of college all together.<sup>434</sup>

Students with disabilities are 15% less likely to complete an undergraduate degree in six years than their nondisabled peers.<sup>435</sup> At least one reason for that difference is inadequate accommodations.<sup>436</sup> As Kendra J. Muller has highlighted, "disabled students drop out at much higher rates than their non-disabled colleagues."<sup>437</sup> The difference in degree completion has a direct impact on annual earnings: those without a bachelor's degree "have median annual earnings of just \$39,362, over \$20,000 less than those who receive a bachelor's degree."<sup>438</sup> National education data reflect a persistent gap in higher education attainment for disabled Americans:

Only 10.9% of disabled Americans have a four-year degree, compared to 22% of the non-disabled population. Disabled students are even less represented in post-baccalaureate programs. The largest percentage estimate found only

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accommodation *is* relevant" in withdrawn accommodation cases, and "[o]ne logical solution is to include this information as one of the factors listed in the Equal Employment Opportunity Commission's (EEOC) regulations defining 'qualified individual'").

432. *Guckenberger*, 8 F. Supp. 2d at 89.

433. *Id.* at 90.

434. *Guckenberger*, 974 F. Supp. at 126.

435. POSTSECONDARY NAT'L POL'Y INST., STUDENTS WITH DISABILITIES IN HIGHER EDUCATION 2 (2023), <https://pnpi.org/wp-content/uploads/2023/11/StudentswithDisabilities-Nov-2023.pdf> [https://perma.cc/3NMF-GMTG] (stating that, "[a]ccording to the Beginning Postsecondary Students Longitudinal Study, 23% of undergraduates who reported a disability in 2012 graduated with a bachelor's degree by 2017," but "38% of undergraduates who did not report a disability in 2012 graduated with a bachelor's degree by 2017"); DUDLEY ET AL., INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., 2012 BEGINNING POSTSECONDARY STUDENTS LONGITUDINAL STUDY (BPS:12) STUDENT RECORDS COLLECTION at iii (2020) (explaining that, "[c]onducted by the U.S. Department of Education's National Center for Education Statistics (NCES), the 2012 Beginning Postsecondary Students Longitudinal Study (BPS:12) is a longitudinal study of students who first began their postsecondary education in the 2011–12 academic year").

436. POSTSECONDARY NAT'L POL'Y INST., *supra* note 435, at 2.

437. Kendra J. Muller, *supra* note 2, at 227.

438. *Id.*

11.9% of post-grad students are disabled. Graduate degree attainment of disabled students is much lower than non-disabled students in every U.S. state.<sup>439</sup>

As Muller explains, “the gap between disabled and non-disabled students has increased,” and dramatically so: “In 2010, 33% of non-disabled students received four-year degrees compared to 15% of disabled students,” but “in 2020, 41% of non-disabled adults received a four-year degree compared to only 18% of disabled adults.”<sup>440</sup> Muller describes how “23% of disabled students report witnessing disability discrimination,” and that “few disabled students seek accommodations” due in part to their awareness of the potential for denial.<sup>441</sup>

The cost of failing to obtain a college degree accumulates over time. Some research suggests that “finishing a post-secondary degree does lead to greater likelihood of homeownership,” and disabled students with post-secondary education “have overall better health outcomes.”<sup>442</sup>

*Wynne* facilitates accommodation denials. Failure to provide necessary, reasonable accommodations can have a lifelong impact on a person with disabilities.

#### CONCLUSION

This Article revealed how a special class of civil rights defendants—institutions of higher education accused of disability discrimination—receive a special form of deference that neither applicable statutes nor Supreme Court precedent support. As a result, generations of students with disabilities have been forced to contend with an extratextual defense that has undermined the purpose and reach of federal disability law, and their own potential for academic and professional success. The case that created this form of deference, *Wynne v. Tufts University School of Medicine*, should no longer be followed. This Article calls upon the courts to disavow *Wynne* once and for all.<sup>443</sup>

This Article began by tracing the origin of the fundamental alteration defense to Section 504 case law, where the fact that the defendants were state entities was relevant to the deference their decisions regarding state programs and services received. It next demonstrated how *Wynne*, a landmark case followed by federal and state courts around the country, repackaged and misrepresented the deference present in those early Section 504 cases to justify the invention of a form of super-deference to public and private post-secondary academic institutions that deny accommodations on fundamental alteration grounds. It also highlighted

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439. *Id.* at 227–28 (footnotes omitted).

440. *Id.* at 228.

441. *Id.*

442. *Id.* at 228–29 (stating that “an analysis of the health factors indicates that education level may be an even stronger predictor of health than income level”).

443. Of course, colleges and universities could also stop denying reasonable accommodations on *Wynne*-inspired grounds. However, it is difficult to imagine a school’s general counsel instructing its staff to grant accommodations that it has no desire to impose before a court holds that *Wynne* is bad law. The *Wynne*-created standard is a litigation gift to defendants and justifies a decision to swiftly deny accommodations without providing any real justification for doing so.

how *Wynne* relied on a standard of review inexplicably drawn from qualified immunity cases. Just as qualified immunity has been reexamined, so should *Wynne*.

The Article also illustrated how academic deference is not essential to a fundamental alteration analysis in higher education accommodation cases. Instead, the Supreme Court's *PGA Tour v. Martin* decision should be followed in all ADA fundamental alteration cases. That case supports this Article's conclusion that no defendant claiming fundamental alteration should receive super-deference. The Article finally considered how a more meaningful review of academic decisions regarding fundamental alteration might result in accommodating a greater number of students with disabilities—thereby helping them stay in school, graduate, and succeed both personally and professionally.

This Article has argued for a reexamination of *Wynne* in student accommodation cases. However, *Wynne* is also being applied in other contexts. Some cases have already relied on *Wynne* in assessing accommodation denials in employment cases.<sup>444</sup> At least one commentator has endorsed its expansion into employment law when academic institutions deny faculty accommodations on fundamental alteration grounds.<sup>445</sup>

*Wynne* should not be permitted to creep any further into areas of law in which it does not belong. Employment accommodations in higher education that implicate academics themselves, for example, do not involve a conflict between institutional knowledge and a student's individual needs, the dispute that *Wynne* recognized. Imagine a case in which a long-tenured professor requests an accommodation that would permit them to teach two classes online for one semester following a major surgery. There, the professor also has relevant knowledge about pedagogy and whether a class can succeed online just as it would in-person. The professor is arguably entitled to more deference than the institution with respect to how their class should be conducted. Why favor the institutional defendant in such a matter?<sup>446</sup>

*Wynne* held that a case in which the needs of individuals are balanced against those of an institution requires deference to the institution. Therefore, extending

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444. See *supra* note 146.

445. See Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J. COLL. & U.L. 531, 583 (2015) (recommending that institutions "should also take guidance" from *Wynne* with respect to "faculty and other employment decisions"); Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?*, 22 AM. U.J. GENDER SOC. POL'Y & L. 519, 635 (2014) (stating that *Wynne* "provides guidance about judicial deference" and is relevant to both student and faculty accommodations).

446. This was the case in *Oross v. Kutztown University*, where a tenured psychology professor's request to teach remotely following his heart transplant was denied due to "a recently formulated general policy that any request to change the course modality from in-person to remote would be considered a substantial alteration" to the university's course offerings and constitute a prohibited fundamental alteration. No. CV 21-5032, 2023 WL 4748186, at \*1, \*6 (E.D. Pa. July 25, 2023), *reconsidered in part on other grounds as stated in*, No. CV 21-5032, 2024 WL 83506 (E.D. Pa. Jan. 8, 2024). Rather than deferring to the university, the court relied upon evidence in the record, including Oross's past experience teaching online, to conclude that teaching in-person was never "an essential function of [Oross's] job." *Id.*, at \*19.

*Wynne* into any context in which individual rights run into institutional goals seems appropriate.<sup>447</sup> But what makes *Wynne* seemingly versatile is also what makes it dangerous. *Wynne* made a normative choice to tip the scales in favor of institutional civil rights defendants at odds with an individual's disability concerns. That decision runs counter to the purpose of civil rights actions, where individual rights will often, if not always, conflict with institutional prerogatives. Civil rights law offers a means of recalibrating the power dynamic that always favors institutions. Institutional defendants do not need any additional advantage.

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447. See, e.g., Rothstein, *supra* note 17, at 856 (“The *Wynne* decision has come to be relied on by numerous other courts, which have praised its sound reasoning and utilized its rule as the standard for determining the reasonableness of accommodations.”); Rothstein, *supra* note 263, at 290 (describing *Wynne* as providing “a sound and well-reasoned framework for evaluating the issue of accommodations in higher education settings”).