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THE STRUGGLE FOR EQUAL ACCESS INCLUDES COMMERCIAL AIR TRANSPORTATION: THE NEED FOR A PRIVATE RIGHT OF ACTION FOR DISABLED PERSONS TO ENFORCE THE AIR CARRIER ACCESS ACT OF 1986

I. INTRODUCTION

Persons with disabilities have faced a long tradition of discrimination in areas such as employment, program services, and transportation. “Handicapped persons have been characterized by many observers as the ‘newest’ minority, because over the last several decades the demands of handicapped individuals and groups representing them have resulted in the development of significant protections and remedies for the handicapped by Congress and the courts.” In 1973, Congress enacted the Rehabilitation Act which was intended to be a major piece of civil rights legislation on behalf of disabled individuals. Section 504 of the Rehabilitation Act absolutely prohibits discrimination against disabled persons by recipients of federal financial assistance. It

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3. Comment, supra note 1, at 578. For an analysis of barriers faced by persons with disabilities and the legal issues involved, see United States Commission on Civil Rights, Accommodating the Spectrum of Individual Disabilities, 81 CLEARINGHOUSE PUBLICATION (Sept. 1983).

4. 29 U.S.C. § 794 (1982 & Supp. IV 1987). Section 504 of the Rehabilitation Act of 1973, is generally referred to as Section 504 and will be referred to as such in this comment. Section 504 provides that:

[N]o otherwise qualified individual with handicaps in the United States, as defined [by this title], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


5. Section 504 regulations define an “individual with handicaps” to be “[A]ny
provides that no disabled person who is qualified for participation in a federally funded program or activity shall be denied access to that program or activity merely because of his or her disability.

Congress has not acted as quickly, however, to prevent discrimination against disabled persons in the area of transportation. Consider the following situation: A disabled woman, who uses a collapsible, manual, wheelchair, purchases a round-trip ticket on a major commercial airline. She is on
her way to a business meeting. She tells the ticketing agent at the time she purchases her ticket that she is disabled and uses a wheelchair. On three subsequent occasions prior to her initial flight, she informs an airline representative that she is disabled and will be travelling with a collapsible wheelchair. Each time the passenger is told that her disability and use of a wheelchair will in no way interfere with the airline's ability to transport her. When the passenger arrives at the airport to depart on her initial flight, she finds that the plane will be boarded from the field level instead of through a jetway. Because the airline has not provided for appropriate boarding procedures, the passenger must be carried up the stairs into the airplane. Upon arriving at the flight's destination airport, the passenger inquires about her return flight at the end of the week. She is informed by an airline representative that she will not be allowed to travel on that flight without an attendant. The passenger is stranded. In this situation what recourse is available for the passenger?  

In 1986, Congress recognized the inequity and unpredictability confronting disabled travellers by amending section 404 of the Federal Aviation Act of 1958 to include the Air Carrier Access Act of 1986. The Air Carrier Access Act of 1986 reads:

(c) Prohibition on discrimination against qualified handicapped individuals

(1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.

(2) For the purposes of paragraph (1) of this subsection the term “handicapped individual” means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Id. § 1374(c) (Supp. IV 1987). This amendment is known as the Air Carrier Access Act of 1986 and will be referred to as such in this comment. Air Carrier
cess Act prohibits discrimination by air carriers against passengers on the basis of disability. The amendment further provides that within one hundred and twenty days of its enactment, the Secretary of Transportation will promulgate regulations to “ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers.” The Department of Transportation issued final regulations pursuant to this amendment on March 6, 1990.

However, the Air Carrier Access Act does not expressly create a private right of action for damages for persons injured by a violation of the Act. Without a private right of action, the individual is unable to challenge the exact type of discrimination which the Act was designed to prohibit.

This comment will focus on the need for an express or implied private right of action that would allow individuals to redress acts of discrimination under the Air Carrier Access Act of 1986. The first section will address the background of the implied right of action doctrine. This will include a discussion of the current test applied by the United States Supreme Court when determining whether or not an implied right of action should be found. The next section will present a discussion of the problem created by the fact that there is no private right of action available under the Act. An analysis of the problem in the context of the four factor test applied by the Supreme Court will follow. Finally, a sample statute which creates an express right of action under the Air Carrier Access Act will be presented.


16. Id.


18. The United States Supreme Court is currently using a four factor test set forth in Cort v. Ash, 422 U.S. 66 (1975) to determine whether to imply a private right of action when none is provided by a statute. For a discussion of the development of the Cort test and its application, see infra notes 45-57 and accompanying text.
II. BACKGROUND

A. History of the Implication Doctrine

In 1916, the United States Supreme Court first recognized a private individual's right to obtain a remedy in federal court for injuries caused by a violation of a federal statute not expressly providing for a private right of action. In *Texas & Pacific Railway v. Rigsby*, the Court held that an implied remedy would be found if a statute expressly protects a specific class of persons and if the plaintiff is a member of that benefitted class. In 1964, the Supreme Court addressed the issue of an implied private right of action in the area of securities regulation. The Court's decisions in this area led to great expansion in the implication doctrine.

1. Implied Private Right of Action Under the Securities Act of 1934

In *J.J. Case Co. v. Borak*, the Court unanimously held that a corporate shareholder could sue for damages which resulted from the circulation of a false and misleading proxy statement in violation of section 14(a) of the Securities Exchange Act of 1934. The Securities Exchange Act of 1934 contains no language expressly creating such a right of action. However, it does prohibit the circulation of false and-

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20. 241 U.S. at 39. Rigsby was a switchman working in the Texas and Pacific Railroad's yard crew. While performing his duties, he fell from one of the cars due to a defect in one of the hand holds that formed the rungs of a ladder. He sued for damages based on the Federal Safety Appliance Act. 44 U.S.C. §§ 1-16 (1982). In this case, the United States Supreme Court implied a private right of action under the Act. Id. at 36.

21. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In Borak, the Supreme Court held that a private right of action is available to redress violations of section 14(a) of the Securities Exchange Act of 1934 in both direct and derivative cases. Id. at 430-31.

misleading proxy statements.\(^2\) In Borak, the Supreme Court recognized the shareholder’s right to bring the action, and for the first time stated that it was proper to imply a private right of action from a provision of a federal statute at least when the provision prohibited the particular conduct involved.\(^2\)

In developing a rationale for allowing a private right of action to be implied from section 14(a), the Court in Borak first examined the legislative intent behind section 14(a).\(^2\)

The Court found that the purpose of section 14(a) “is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.”\(^2\)

Second, the Court looked to the language in section 14(a) which allows the Commission to use its rules and regulations as necessary for the public interest or the protection of investors. According to the Court, this language “implies the availability of judicial relief where necessary to achieve that result.”\(^2\)

Third, the Court

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\(^{23}\) Section 14(a) of the Securities Exchange Act of 1934 provides that

\[\text{[i]t shall be unlawful for any person, by the use of the mails or any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78f of this title.}\]


\(^{24}\) Borak, 377 U.S. at 426. See generally Schneider, supra note 19, at 863.

\(^{25}\) Id. at 431.

\(^{26}\) Id. The Court found that section 14(a) stemmed from “the Congressional belief that ‘[F]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.’” Id. (citing H.R. REP. No. 1383, 73d Cong., 2d Sess. 14 (1984)). “It was intended to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of the stockholders.” Id. at 431 (citing H.R. REP. NO. 1385, 73d Cong., 2nd Sess., 14). “Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.” Id. at 431 (citing S. REP. NO. 792, 73 Cong., 2nd Sess., 12). See generally Schneider, supra note 19, at 865.

\(^{27}\) Borak, 377 U.S. at 432. The Court considered language in section 14(a) making it,

unlawful for any person . . . to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may pro-
believed that private enforcement of the proxy rules complemented action taken by the Securities Exchange Commission because the Commission was, in all likelihood, unable to examine the factual accuracy of proxy statements filed.\textsuperscript{28} The Court concluded that these three factors indicated that Congress intended to create a private right of action and remedy when it enacted section 14(a).\textsuperscript{29}

In later decisions, the Supreme Court continued to imply a private right of action under the federal securities laws.\textsuperscript{30} Subsequently, the Court began to imply a private right of action under legislation involving civil rights, including the Rehabilitation Act of 1973.

2. **Implied Private Right of Action Under Section 504 of the Rehabilitation Act of 1973**

Section 504 of the Rehabilitation Act of 1973 was enacted to bring disabled persons into the mainstream of society.\textsuperscript{31} The goals of the Rehabilitation Act were to (1) guarantee equal rights for handicapped persons in federal programs;\textsuperscript{32} (2) “encourage the development and implementation of rehabilitation services for all handicapped persons, particularly extending services to severely disabled persons who had not been served in the past”;\textsuperscript{33} (3) “encourage rehabilitation agencies to serve disabled persons who might not have vocational goals in the traditional sense, but who would nonetheless benefit from appropriate rehabilitation services”;\textsuperscript{34} and (4) “provide a means for coordination of scientific and technical research in areas which would be of direct benefit to disabled persons.”\textsuperscript{35} “In short, this Act was de-
signed to guarantee the civil rights of handicapped persons."

The Rehabilitation Act of 1973 prohibits discrimination against qualified handicapped persons by any program or activity which is a recipient of federal financial assistance. The Act was amended in 1978 to provide that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" were available to disabled persons who were aggrieved under section 504.

The Civil Rights Act of 1964 was itself amended to apply only to programs created by Congress for the primary purpose of providing employment. However, in Consolidated Rail Corp. v. Darrone, the Supreme Court rejected the "primary objective" test as applied to section 504. In doing so, the Court held that section 504 prohibits discrimination by any program or activity receiving any federal financial assistance and that the rights and remedies of Title VI are available to any recipient of such aid. In so holding, the Court implicitly recognized the right of a private individual to bring a cause of action under section 504, even though the statute itself does not expressly provide for it.

In 1975, the Supreme Court limited the implied private right of action in Cort v. Ash. The four factor test developed in Cort has been accepted as the Court's standard when implying a private right of action.

36. Comment, supra note 1, at 581.
41. Id. at 632-33 (emphasis added). The Supreme Court analyzed the language of section 504, as well as the legislative history, executive interpretation, and the purpose of Congress when enacting the Rehabilitation Act of 1973, in concluding that section 504 was not limited to programs where a primary objective of the financial assistance was to provide employment. Id. at 630-33 (citing Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982)).
42. Id. For a general discussion of the United States Supreme Court's interpretation of section 504, see Summary, Analysis & Commentary, 8 MENTAL AND PHYSICAL DISABILITY L. REP. 262 (1984).
43. 422 U.S. 66 (1975).
44. For a detailed discussion of the development of the implication doctrine.
3. Cort v. Ash and Its Progeny

Prior to Cort v. Ash, the United States Supreme Court did not employ any particular standard to determine whether or not a private right of action should be implied when a statute does not expressly provide for such a right.\textsuperscript{45} However, as subsequent cases established, the single most important factor in determining whether a private right of action should be implied when a statute is silent is whether Congress intended to create such a right.\textsuperscript{46} The Supreme Court set forth the four factors to be used in determining the existence of such Congressional intent in the landmark decision of Cort v. Ash.\textsuperscript{47}

The first Cort factor is whether or not the plaintiff is a member of a class for whose special benefit the statute was enacted.\textsuperscript{48} In other words, does the statute create a federal right in favor of the plaintiff? Did Congress intend to protect the plaintiff? The Court examined the legislative history and language of the statute in question to determine whether this requirement was met.\textsuperscript{49}

and the Cort factors, see infra notes 45-57 and the accompanying text.


\textsuperscript{46.} Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (“[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted . . . .”); Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 13 (1981) (“The key to the inquiry is intent of the Legislature.”); Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 91 (1980) (“The ultimate question . . . is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke.”).

\textsuperscript{47.} 422 U.S. 66 (1975). In Cort, a stockholder brought suit against Bethlehem Steel Corporation for damages and injunctive relief because of allegations in connection with the 1972 Presidential election that the corporation’s directors had authorized campaign contributions from corporate funds. Jurisdiction was alleged under 28 U.S.C. § 1331, 18 U.S.C. § 610, as well as a pendant claim under Delaware law. Id. at 70-71. The principal question addressed by the Court was whether a private right of action for damages against corporate directors is to be implied in favor of a corporate stockholder under 18 U.S.C. § 610. Section 610 criminalizes the corporation when the corporation makes contributions in connection with presidential and vice-presidential elections. Id. at 68. The United States Supreme Court, in stating its four factor test, held that there was no private right of action under 18 U.S.C. § 610. Id. at 85.

\textsuperscript{48.} Cort, 422 U.S. at 78 (citing Texas & Pacific Ry. Co. v. Rigsby, 241 U.S, 39 (1916)).

\textsuperscript{49.} Id. at 80. The Court stated that 18 U.S.C. § 610 was concerned not with
The second *Cort* factor is whether there is any indication of implicit or explicit legislative intent to create or deny a private right of action.\(^{50}\) After examining the legislative history of the statute, the Court found that although in certain situations it is not necessary to show an intent to create a private right of action, in certain situations it is clear that a federal law has granted a class of persons certain rights. However, an explicit purpose to deny a private right of action would be controlling.\(^{51}\)

The third *Cort* factor is whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."\(^{52}\) In analyzing this factor the Court looked to whether the remedy sought would aid the primary goal of Congress when enacting the law in question.\(^{55}\)

The fourth *Cort* factor is whether the cause of action is one that is traditionally relegated to state law.\(^{54}\) The Court considers whether the area in question is so basically one of the States' concern that it would be inappropriate to imply a cause of action based solely on federal law.\(^{55}\)

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the internal relations between corporations and stockholders, but with corporations as a source of aggregated wealth with the potential for being a corrupting influence. Therefore, the Court found that section 610 differs from other criminal statutes in which private causes of action have been implied because there was a clearly articulated federal right in the plaintiff.\(^{50}\) Id. at 82.

\(^{50}\) Id. at 78. (citing National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974)).

\(^{51}\) Id. at 82. The Court found that there was no indication in the legislative history to suggest a Congressional intent to allow stockholders a federal right to damages for a violation of section 610.\(^{50}\) Id. The Court stated that if it was dubious as to whether Congress intended to allow the plaintiffs to have greater rights than those provided by state regulation of corporations, the fact that there is no indication of Congressional intent to allow a private right of action indicates that the relationship between corporations and stockholders was intended to be enforced by state law.\(^{50}\) Id. at 83-84.


\(^{53}\) Id. at 84. The Court found that in this instance the remedy of a private cause of action would not aid the primary goal of Congress, which was to curb the influence which corporate funds may have in an election. The Court stated that such a remedy would only allow corporate directors to "borrow" corporate funds for a time; the later repayment of such funds might not be a deterrent to such action and would not decrease the impact their use would have.\(^{50}\) Id.

\(^{54}\) Id. at 78.

\(^{55}\) Id. The Court found that corporations are creatures of state laws. Inves-
The Supreme Court currently relies upon the four Cort factors to determine whether Congressional intent to imply a private right of action exists.\textsuperscript{56} In the years since Cort, the Court has decided several cases in which it has attempted to clarify and solidify the relationship between the four factors.

\textbf{a. Implied Private Right of Action After Cort v. Ash}

Since the Supreme Court's decision in Cort, various interpretations of these four factors have been used to imply rights of action in many statutes.\textsuperscript{57} The Court has continued to apply these factors emphasizing the need to determine Congressional intent.\textsuperscript{58} According to the Supreme Court, "what ultimately must be determined is whether Congress intended to create the private remedy asserted."\textsuperscript{59}

In the first case decided after Cort, Cannon v. University of Chicago,\textsuperscript{60} the Supreme Court authorized a private right of action under Title IX of the Education Amendments of 1972. Title IX prohibits discrimination on the basis of sex in educational programs or activities receiving federal financial assistance.\textsuperscript{61} The Supreme Court held that the mere fact that a federal statute has been violated and a person been harmed does not automatically give rise to a private right of action in favor of that person.\textsuperscript{62} Additionally, the Court stated that before a court could find Congressional intent to

\textsuperscript{56} Thompson v. Thompson, 108 S. Ct. 513, 516 (1988). Although a private right of action was not implied in this case, the Court's reasoning and application of the Cort analysis indicate that this test will continue to be used to determine whether to imply a private right of action where a statute does not expressly provide for one. See Bryson, \textit{Implied Private Rights of Action: Progress on the Road Back From Chaos}, 22 CLEARINGHOUSE REV. 143 (1988).

\textsuperscript{57} See infra notes 61-90 and accompanying text.

\textsuperscript{58} Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1980); Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1978).

\textsuperscript{59} Transamerica Mortgage Advisors (TAMA) v. Lewis, 444 U.S. 11, 15-16 (1979).

\textsuperscript{60} 441 U.S. 677 (1978).

\textsuperscript{61} 20 U.S.C. §§ 1681-1686 (1982 & Supp. 1986); section 1681 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." \textit{Id.}

make a remedy available to a litigant, it must carefully analyze the four Cort factors. In so stating, the Court reaffirmed the Cort factors as a framework for implying a private right of action when a statute does not expressly provide for one.

In Cannon, the Court specifically mentioned the application of the implication doctrine in civil rights statutes. It stated that a private right of action should always be implied where the statute creates a right in a class of persons and the plaintiff is a member of that class. The Court reasoned that a statute which is "declarative of a civil right will almost have to be stated in terms of a benefitted class. Put somewhat differently, because the right to be free of discrimination is a personal one . . . a statute conferring such a right will almost have to be phrased in terms of the person benefitted." Based on this language, some commentators have noted that "[c]ivil rights statutes will therefore always pass the Cort threshold test." After Cannon, the Court attempted to clarify the Cort factors in three additional decisions. In Touche Ross & Co. v. Redington, the Court indicated its reluctance to imply a private right of action. The Court stated that although the central inquiry in determining the availability of an implied private right of action is Congress' intent, the Cort factors are not entitled to equal weight. In this case, an analysis of the first three factors was sufficient to show that there was no indication of Congressional intent to create the remedy requested by the plaintiff because the statute itself did not
grant private rights to any individual class, nor did it pro-
scribe any conduct as unlawful.\textsuperscript{70} Therefore, the Court held
that the inquiry can be restricted to a determination of Con-
gressional intent, and no separate consideration of the final
factor was necessary.\textsuperscript{71}

In \textit{Transamerica Mortgage Advisors (TAMA) v. Lewis,}\textsuperscript{72} the
Court continued to struggle with its interpretation of the
\textit{Cort} factors. In this case, the Court did find an implied right
of action to exist in a shareholders' derivative action.\textsuperscript{73} The
Court relegated the first \textit{Cort} factor to a mere threshold test
when it stated that "the mere fact that the statute was de-
dsigned to protect . . . clients does not require the implication
of a private cause of action for damages on their behalf."\textsuperscript{74} However, the Court stated that the "dispositive question re-
mains whether Congress intended to create any such reme-
dy."\textsuperscript{75} This indicates that the first factor is necessary as a
threshold test, but is not sufficient on its own to meet the
standard in order for a court to imply a private right of ac-
tion.

The Court continued its discussion of the implication
document and the \textit{Cort} factors in \textit{California v. Sierra Club.}\textsuperscript{76} In

\textsuperscript{70} \textit{Id.} at 576.
\textsuperscript{71} \textit{Id.} The Court stated that the legislative history of the Securities Exchange
Act of 1934 does not address the issue of private remedies under section 17(a).
"At least in cases such as this, the inquiry ends there; the question whether
Congress, either expressly or by implication, intended to create a private right of
action, has been definitely answered in the negative." \textit{Id.}

\textsuperscript{72} 444 U.S. 11 (1979).

\textsuperscript{73} \textit{Id.} at 24. In TAMA, a stockholder of the petitioner brought suit in
federal district court as a derivative action on behalf of the petitioner and as a
class action on behalf of its stockholders alleging a violation of the Investment
Advisors Act of 1940. \textit{Id.} at 13.

\textsuperscript{74} \textit{Id.} at 24.

\textsuperscript{75} \textit{Id.} The Court found that section 215 of the Investment Advisors Act of
1940 contains language that implies a right to limited and specific relief in Fed-
eral court. It states that contracts whose formulation or performance would violate
the Act "shall be void . . . as regards the rights of" the violator. \textit{Id.} at 16-17. The
Court found that when Congress declared that certain contracts would be void, it
intended for the usual legal incidents of voidness to occur, including the avail-
ability of a suit for rescission or for an injunction against the continued operation
of the contract, and for restitution. \textit{Id.} at 19. Therefore, the Court held that a
limited private remedy exists under the Investment Advisors Act of 1940 to void
an investment advisors contract. \textit{Id.} at 16-17.

\textsuperscript{76} 451 U.S. 287 (1980). In this case, section 10 of the Rivers and Harbors
Appropriation Act of 1879 prohibits "[t]he creation of any obstruction not affirma-
tively authorized by Congress, to the navigable capacity of any of the waters of
this case, the Court, after analyzing the first two Cort factors, found nothing in the language or legislative history of the statute in question indicating that Congress intended to provide a private right of action in favor of the plaintiff. Therefore, the Court concluded that there was no need to examine the remaining two Cort factors. The Court found that the final two factors are only relevant if the first two factors show Congressional intent to create a remedy in the plaintiff. In Sierra Club, the Court interpreted Congressional silence as a negative inference of a private right of action by finding that the statute in question did not confer rights upon a particular plaintiff.

In the most recent case interpreting the implication doctrine, Thompson v. Thompson, the Supreme Court moved away from its recent restrictive position as exemplified in the above cases, and toward a more moderate position concerning the requirements for an implied private right of action when a statute does not expressly provide for such action. The Court stated that in determining whether to infer a private right of action from a federal statute the focal point is congressional intent.

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the United States." Id. at 289. An environmental organization and two private citizens filed suit to enjoin the construction and operation of water diversion facilities which are part of the California Water Project as a violation of section 10. Id.

77. Id. at 297-98. The Court found that the language of the statute states only a general proscription against certain activities. Id. at 294. It does not focus on any particular class of beneficiaries. Id. Furthermore, the Court found that the legislative history supports the view that the Act was designed to benefit the public at large because it empowered the federal government to exercise its authority over interstate commerce with regards to obstructions on navigable rivers caused by bridges and other similar structures. Id. at 294-95.

78. Id. at 298.

79. Id. The Court stated that the final two factors are only of relevance if the first two factors give an indication of Congressional intent to create the remedy. Id. (citing Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)).

80. Mezey, supra note 64, at 75.

81. 108 S. Ct. 513 (1988). In this case, a father filed suit seeking declaratory and injunctive relief under the Parental Kidnapping Prevention Act because of conflicting state child custody decrees. Id. at 515.


83. Thompson, 108 S. Ct. at 516.
the requirements that all four Court factors be examined when determining Congressional intent.84

Significantly, the Thompson Court did not require specific evidence that Congress intended to create a private right of action in order to make this determination.85 As the Court stated, the “implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action.”86 The Court recognized that “the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.”87 Therefore, Congressional intent may appear “implicitly in the language or structure of the statute or in the circumstances of its enactment.”88 This is significant in that it is more expansive than the court’s view in the past and may encourage lower courts to infer private rights of action in appropriate cases.89

B. History of Lack of Access to Air Transportation

1. Department of Transportation v. Paralyzed Veterans of America90

In 1973, Congress passed the Rehabilitation Act requiring recipients of federal financial assistance to make their programs, services, and employment opportunities accessible to qualified disabled persons.91 In April, 1976, Executive Order 11914 was issued ordering the United States Department of Health, Education, and Welfare (HEW), to develop general guidelines for all funding agencies of the federal government to develop their own regulations for compliance with section 504.92 In 1978, final guidelines were issued for

84. Id.
85. Id.
86. Id.
87. Id. (citing Cannon v. University of Chicago, 441 U.S. 667 (1978)).
88. Id. (citing Transamerica Mortgage Advisors (TAMA) v. Lewis, 444 U.S. 11 (1979)).
89. Bryson, supra note 82, at 145.
90. 477 U.S. 597 (1986) [hereinafter DOT v. PVA].
all federal executive agencies. Each governmental agency was then authorized to draft and pass its own regulations, following the HEW's guidelines, to ensure compliance with Section 504.

In 1979, the Civil Aeronautics Board (CAB), began to develop regulations in order to ensure compliance with section 504. In order to do so, it relied on § 404 of the Federal Aviation Act of 1958, and extended beyond its specific section 504 authority in an attempt to apply its proposed regulations for implementing non-discriminatory policies to all commercial airlines, whether or not they were recipients of direct financial assistance. The CAB's rationale for doing so was based upon general statements in section 404 requiring the provision of adequate service to and non-discrimination against disabled air travellers which are applicable to all air carriers regardless of federal financial

93. Id. The guidelines were issued to all federal agencies to be used as "minimum requirements" with regard to recipients of funds from each agency. The recipients included "private contractors, colleges, schools, transit authorities, state/county/municipal governments." Id.

94. Id. HEW's regulations were directed to federal agencies dispensing funds, but not to the recipient of the funds. Each federal agency was left to draft and pass its own regulations and then to implement and enforce those regulations upon the recipients of each agency's funds. Id. at 48.

95. The Civil Aeronautics Board was later disbanded and the majority of its functions were transferred to the Department of Transportation under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, 98 Stat. 1703. DOT v. PVA, 477 U.S. 597, 599 n.3 (1986).


97. DOT, 477 U.S. at 600. The CAB had concluded that its authority under section 504 was applicable only to those few airlines that received a federal subsidy under section 406(b) or section 419 of the Federal Aviation Act of 1958. However it relied on section 404 in an attempt to circumvent this. Id. at 600 and n.6. Section 404 has two sections which the CAB considered relevant in making this decision. Id. at 601. Section 404(a)(1) provides:

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation . . . upon reasonable request therefor; . . . to provide safe and adequate service, equipment, and facilities in connection with such transportation . . . ; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation . . . .

49 U.S.C.A. § 1374(a)(1) (West 1976). Section 404(b) provided that "No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference or advantage to any particular person . . . or subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Id. §1374 (b). See also infra note 99.
assistance. The CAB relied upon both of these general statements to support its conclusion that it had regulatory authority over the activities of all air carriers.

Following consultation with the Attorney General of the United States and the solicitation and receipt of public comments, the CAB concluded that its authority was limited by section 504 of the Rehabilitation Act. Therefore, it concluded that any specific regulations it promulgated would be applicable only to air carriers who received federal financial assistance. The CAB’s proposed regulations were revised and issued in three subparts.

The first of those subparts, section A, prohibited discrimination against qualified handicapped persons in air transportation. The second subpart, section B, contained specific requirements which must be followed by air carriers providing service to disabled persons and refers to specific procedures for assuring the accessibility of aircraft and reservation services, availability of information to deaf passengers, procedures for blind persons travelling with guide dogs, and guidelines for transporting wheelchairs. The third subpart, section C, contained specific compliance and administrative enforcement procedures. In issuing its final

98. DOT, 477 U.S. at 601.
99. Id. CAB relied upon these general statements even though it was aware that the antidiscrimination provision of section 404(b) would lapse as of January 1983 under the Airline Deregulation Act of 1978. Id.
100. Id. at 602.
101. Id.
102. 14 C.F.R. § 382.3 (1982).
103. Id. § 382.1-382.5. These proposed regulations defined a qualified handicapped person with respect to air transportation to be a “handicapped person:

   (1) Who tenders payment for air transportation;
(2) Whose carriage will not violate the requirements of the Federal Aviation Regulations . . . or in the reasonable expectations of carrier personnel . . . jeopardize the safe completion of the flight or the health or safety of other persons; and
(3) Who is willing and able to comply with reasonable requests of airline personnel or, if not, is accompanied by a responsible adult passenger who can ensure that the requests are complied with. A request will not be considered reasonable if:

   (i) It is inconsistent with this part or
   (ii) It is neither safety-related nor necessary for the provision of air transportation.

Id.
104. Id. §§ 382.10-382.15.
105. Id. §§ 382.20-382.25.
regulations, the CAB concluded that only section A would be applied to all air carriers. Sections B and C, the specific requirements for providing service to handicapped passengers, would only be applicable to the extent authorized by section 504, or to those air carriers who received federal subsidies.\textsuperscript{106}

In response to these regulations, the Paralyzed Veterans of America and two other organizations representing disabled persons brought suit challenging the CAB's decision that its rulemaking authority was limited by section 504.\textsuperscript{107} The court ruled in favor of PVA, vacated the existing regulations, and instructed the Department of Transportation, successor of the Civil Aeronautics Board, to issue new regulations that would apply to all air carriers, commercial as well as non-commercial.\textsuperscript{108} In reaching its decision, the court found that air carriers received federal financial assistance from two sources. The first source of assistance was that provided to airports through the Airport and Development Act of 1970.\textsuperscript{109} Second, the court found that the air traffic control system in place at all major airports was another source of federal financial assistance provided to airlines.\textsuperscript{110} Therefore, the court of appeals found that the CAB had authority over all air carriers under section 504.\textsuperscript{111}

After this ruling, the Department of Transportation appealed the court's decision.\textsuperscript{112} In 1986, the United States Supreme Court granted certiorari and addressed the issue of whether the non-discrimination provisions of section 504 are applicable to commercial airlines in \textit{Department of Transportation v. Paralyzed Veterans of America}.\textsuperscript{113} The Supreme Court held that the requirements of section 504 are not applicable to commercial airliners which are not direct recipients of federal financial assistance.\textsuperscript{114}

\textsuperscript{106} \textit{Id.} § 382.2.
\textsuperscript{107} \textit{Paralyzed Veterans of Am. v. Civil Aeronautics Bd.}, 752 F.2d 694 (D.C. Cir. 1985). The plaintiffs in this case will hereinafter be referred to as PVA.
\textsuperscript{108} \textit{Id.} at 724-25.
\textsuperscript{109} \textit{Id.} at 712.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{DOT}, 477 U.S. 597 (1986).
\textsuperscript{113} \textit{Id.} The Supreme Court decided this case 6-3.
\textsuperscript{114} \textit{Id.} at 612-13.
In reversing the lower court's decision, the United States Supreme Court focused on the issue of whether or not commercial airlines are recipients of federal financial assistance as mandated in order to be bound by the requirements of section 504.\textsuperscript{115} The financial funds in question are those given to airport operators through the Airport Airway Improvement Act of 1982 and through a Trust Fund created by the Airport and Airway Development Act of 1970.\textsuperscript{116} These funds were intended to be used for airport facilities' improvements such as construction of runways and terminals and are not given directly to any specific airlines. Therefore, the Supreme Court concluded that the airport operators were the recipients of the financial assistance.\textsuperscript{117} Thus, the Court determined that the airport users, commercial airlines, were \textit{not} recipients of federal financial assistance as required by section 504.\textsuperscript{118}

Second, the Supreme Court analyzed Congress' intent behind section 504. The Court concluded that Congress had used language limiting section 504's requirements to recipients of federal financial assistance as a means of indicating its intent to "impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds."\textsuperscript{119} The Supreme Court found that Congress intended compliance with regulations under section 504 as consideration for the receipt of federal financial assistance. Therefore, the Supreme Court concluded that Congress imposed section 504 obligations upon those in a position to accept or reject those obligations as part of their decision to receive federal funds.\textsuperscript{120} The only parties in the position to

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 604.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 605.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} The Court stated that "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment as a quid pro quo for the receipt of Federal funds." \textit{Id.} "Under the program specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds; the recipient's acceptance of the funds triggers coverage under the nondiscrimination provisions." \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 606. The Court felt that Congress limited coverage of section 504 to "recipients" of federal financial assistance in order to impose the obligations of section 504 upon those in a position to accept or receive those obligations as part of their decision to receive the funds. \textit{Id.}
\end{itemize}
make that decision in this case, according to the Court, were the airport operators, not commercial airlines.\textsuperscript{121}

Third, the Supreme Court found that commercial airlines were merely beneficiaries of federal financial assistance, and not "indirect recipients" of federal aid as contended by PVA.\textsuperscript{122} PVA contended that because airport operators were "direct recipients" of financial assistance to build runways and terminals under the above two mentioned improvement acts, all airlines should be considered "indirect recipients" of that aid because they actually used the runways and terminals. However, the Supreme Court held that section 504 requirements were applicable only to "direct recipients" of federal financial assistance.\textsuperscript{123} Therefore, the requirements were found to be inapplicable to commercial airlines.\textsuperscript{124}

Finally, the Supreme Court found that air traffic controllers are federal employees and that the operation of their facilities is financed by the federal government.\textsuperscript{125} The lower court had found that this federally funded system of air traffic controllers constituted a form of federal financial assistance to commercial airlines.\textsuperscript{126} However, according to the Supreme Court, the national system of air traffic controllers is "owned and operated" by the United States and, as such, is a federally conducted program.\textsuperscript{127} It is not a recipient of federal financial assistance.\textsuperscript{128} Therefore, the Supreme

\textsuperscript{121} Id. at 607. The language of section 504 limits its coverage to programs or activities that receive federal financial assistance. The Court felt that the airport operators were the actual recipients of federal funds under the Airport and Airway Improvement Act of 1982 and under a Trust Fund established by the Airport and Airway Development Act of 1970. According to the Court, the recipient airport operators' acceptance of the federal funds triggered the nondiscrimination provisions of section 504. In other words, because the air carriers did not receive federal funds, there was no requirement to comply with the nondiscrimination provisions of section 504. The Court relied on this same rationale in Grove City College v. Bell, 465 U.S. 555 (1984) in which it stated that the recipient of the federal financial assistance was free at any time to terminate its participation in a federal grant program and avoid the requirements of Title IX. Id. at 605.

\textsuperscript{122} Id. at 606.

\textsuperscript{123} Id. at 607.

\textsuperscript{124} Id.

\textsuperscript{125} Id. at 611.

\textsuperscript{126} Paralyzed Veterans of Am. v. Civil Aeronautics Bd., 752 F.2d 694, 712 (D.C. Cir.).

\textsuperscript{127} DOT, 477 U.S. at 612.

\textsuperscript{128} Id. at 611. According to the Supreme Court, the federally provided air
Court concluded that commercial airlines were not recipients of federal financial assistance as mandated by section 504 and not subject to its non-discriminatory provisions.129

2. The Air Carrier Access Act of 1986

Several months later, in response to the Supreme Court's decision in DOT v. PVA, Congress amended section 404 of the Federal Aviation Act of 1958.130 The Air Carrier Access Act of 1986 provides for a general prohibition of discrimination against qualified131 disabled persons in the provision of air transportation.132 The key to this Act is that all air carriers are covered by its provisions, regardless of their status as recipients of federal financial assistance.

The legislative history of the Act, specifically Senate Report 99-404, indicates that although the Act does not prohib-
it specific practices by air carriers, its intent is that airlines will not impose any restrictions on disabled air travellers which are unrelated to safety or the individual's disability. Furthermore, the Senate Report indicates that Congress intended to eliminate any inconsistency in services presently being offered by different air carriers, or by the same air carrier on different flights.

The Air Carrier Access Act of 1986 provides that within one hundred and twenty days after its enactment the Secretary of Transportation would promulgate regulations to ensure non-discriminatory treatment of qualified disabled persons. Proposed regulations were published in June, 1988; final regulations were published on March 6, 1990.

The Air Carrier Access Act of 1986 was enacted to fulfill several specific purposes. First, the statutory amendment was enacted in response to the Supreme Court's decision in DOT v. PVA. Senator Robert Dole stated that the "purpose of the legislation... is quite simple. It overturns the recent Supreme Court decision in the case of Paralyzed Veterans Association v. Department of Transportation." Second, it responded to the practical effect of that decision, which was to "render inoperative and inapplicable Department of Transportation regulations which had attempted to set forth imple-


136. 55 Fed. Reg. 8008. The final regulations which became effective on April 5, 1990, contain general and administrative provisions concerning physical facilities and services to be provided to passengers with disabilities. The regulations apply to all carriers who provide transportation. Id.


menting regulations for air carriers." Without any regulations in place at all, disabled air travellers had no protections against discriminatory acts by air carriers. Third, the Act sought to eliminate the lack of uniformity in airline policies regarding service to disabled persons. Fourth, as Senator Dole stated, it sought to accomplish all of this in a manner that is consistent with the safe carriage of all passengers.

However, neither the statute nor the proposed regulations address the availability of a private right of action to disabled persons in order to redress acts of alleged discrimination under the Act. The Act does provide for administrative enforcement procedures. Without access to the courts, however, disabled persons are left without an effective method to protect themselves against potential acts of discrimination.

140. Id. at 11787 (daily ed. August 15, 1986) (statement of Sen. Cranston: "Complaints of inadequate training of airlines personnel and lack of uniformity in policies relating to transportation of disabled persons and in the implementation of such policies clearly indicates that there is considerable progress to be made in the air transportation industry before it can be concluded that air travel in this nation is appropriately accessible to all of our citizens.")
142. The regulations provide that each air carrier shall establish a complaint resolution mechanism. The procedure must include several elements. First, each airline shall designate a complaints resolution official (the "CRO") for each airport at which it provides service. The CRO must be available either in person at the airport or by telephone and has authority to resolve complaints of alleged violation of the regulations on behalf of the air carrier. If the complaint is made to a CRO prior to the carrier's action, the CRO directs carrier personnel to take action in compliance with the regulations. However, CRO's are not authorized to override the decision of a pilot-in-command who has excluded a passenger from flight based upon safety reasons. If a violation of these regulations has already occurred, the CRO must provide a written summary of the action and any corrective steps that the carrier must take. If the CRO determines that no violation occurred, he or she must provide the complainant with a written statement and explanation to that effect.
Second, each carrier must establish a procedure for resolving written complaints and must respond to such complaints in writing within 30 days. Complainants may appeal the decision of the complaints resolution official to the Office of the Secretary of Transportation whose determination is final. 55 Fed. Reg. 8008, 8054 (to be codified at 14 C.F.R. §382 and 49 C.F.R. §27).
III. ANALYSIS

The state of the law governing the rights of disabled air travellers is unclear. The 1970's marked the beginning of a specific civil rights movement on behalf of individuals with disabilities. The Rehabilitation Act of 1973 in general and section 504 of the Act in particular provided disabled individuals with access to federally funded programs, activities, and employment opportunities. The United States Supreme Court recognized a private right of action under section 504, thereby giving disabled individuals access to the federal courts to redress acts of discrimination. By so doing, the Court affirmed the idea that a violation of section 504 constitutes a violation of the civil rights of disabled individuals.

In 1986, however, a stunning blow was dealt to the disabled community when the United States announced its decision in DOT v. PVA. The Court retreated from its earlier decisions by holding that the non-discrimination provisions of section 504 of the Rehabilitation Act did not apply to commercial airlines which were not direct recipients of federal financial assistance. This decision eliminated the requirement of nondiscrimination for airlines. Although section 404(a) of the Federal Aviation Act of 1958 imposes a duty on air carriers to provide safe and adequate service, "it is unclear whether that language itself is enough to support

146. Id.
147. The lack of such a requirement not to discriminate against persons with disabilities in the provision of air transportation has restricted the ability of disabled persons to travel freely by air in a time when air travel is a necessity not only for pleasure, but for business. As Representative Howard stated: "The nation's economy, as well as its political, social, and cultural life is very closely tied to the air transportation system. Equal and nondiscriminatory access to the air transportation system is vital to economic opportunity for all citizens and to participation in the political, social and cultural life of our country." 132 CONG. REC. 7194 (daily ed. Sept. 18, 1986) (statement of Rep. Howard). Furthermore, Representative Snyder stated that: "travel by air is a means of transportation which should be made available to all Americans without discrimination. Air travel is not a luxury but a necessity in today's world." 132 CONG. REC. 7194 (daily ed. Sept. 18, 1986) (statement of Rep. Snyder).
specific and detailed anti-discrimination rules."\textsuperscript{148} As a result, after \textit{DOT v. PVA}, disabled air travellers were faced with the possibility of discriminatory, unpredictable, and inconsistent treatment by air carriers.

Disabled rights advocates believe that disabled travellers are subjected to requirements neither related to safety nor imposed upon other air travellers.\textsuperscript{149} Additionally, policies for accommodating disabled travellers can vary from one airline to another or even within any one airline.\textsuperscript{150} Disabled air travellers are often faced with inadequately trained airline representatives, inequity among airline services, flat refusals of service, and arbitrary policies and procedures. Therefore, the disabled have no way of predicting in advance what conditions may be imposed upon them when travelling by air.\textsuperscript{151}

Congress recognized the inequity of the Supreme Court's decision in \textit{DOT v. PVA} and moved swiftly to correct the injustice which had occurred.\textsuperscript{152} Within four months of the Supreme Court's decision, it enacted the Air Carrier Access Act of 1986. In doing so, Congress recognized that "everyone must be served in air transportation in a manner appropriate to their abilities."\textsuperscript{153}

The Air Carrier Access Act of 1986 was enacted with the specific purpose of overturning the Court's decision in \textit{DOT v. PVA}\.\textsuperscript{154} Furthermore, the effect of the decision was to

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 2330.
\item Id. at 2330.
\item 132 Cong. Rec. 7194 (daily ed. Sept. 18, 1986) (statement of Rep. Ackerman that the Department of Transportation v. Paralyzed Veterans of America ruling was a "major setback for all people with disabilities and a shameful retreat from our national effort to combat discrimination in this country . . . . The unfortunate Supreme Court decision left Congress with no choice but to change the law and undo the damage that the Court has done.").
\item Id. at 11784 (statement of Sen. Dole: "the purpose of the legislation is quite simple. It overturns the recent Supreme Court decision in the case of Paralyzed Veterans of America versus the Department of Transportation); Id. at 11786 (statement of Sen. Cranston: "[i]n passing this measure . . . the United States Senate would be rejecting in a remarkably swift and decisive fashion the Supreme
\end{enumerate}
\end{footnotesize}
"render inoperable the Department of Transportation regulations which had attempted to set forth implementing FAA regulations for air carriers." Since regulations were applicable only to airlines receiving direct federal financial assistance, most of the airline industry was left without coverage.

Following the elimination of these regulations, the industry was left with no guidelines for assuring the provision of air transportation to disabled air travellers. Although the Act provided that within one hundred and twenty days the Department of Transportation would promulgate regulations to assure such compliance with the Act, nearly four years passed prior to the passage of such regulations. Proposed regulations were issued on June 22, 1988; final regulations were issued on March 6, 1990.

Neither the Act nor the implementing regulations provide disabled individuals with a private right of action to redress alleged acts of discrimination. The regulations provide for administrative procedures for enforcement only.

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Court's decision in the case of Paralyzed Veterans of America versus the Department of Transportation."); 132 CONG. REC. 7194 (daily ed. Sept. 18, 1986) (statement of Rep. Edgar: "This legislation is in response to the recent Supreme Court decision in the case of U.S. Department of Transportation v. Paralyzed Veterans of America, which held that nonfederally subsidized commercial air carriers are not required to adhere to antidiscriminatory statutes under current law.").


156. Id. Since very few commercial airlines, if any, receive a federal subsidy, most airlines lie beyond the reach of section 504 in the wake of DOT v. PVA. However section 406(b) of the Federal Aviation Act created a program which provided air service to transport mail to small communities. That program ended in 1982. The CAB began another program under section 419 of the Federal Aviation Act which was to subsidize small community air service. This program was to end in 1988. These were the two major sources of federal financial assistance to airlines and they reached only a very small percentage of the airline industry. See DOT v. PVA, 477 U.S. 597, 601 n.6 (1986).


158. Id. at 8049. The provision of administrative enforcement procedures under the proposed regulations may suggest that Congress did not intend to provide for an implied private right of action. Several courts have stated in interpreting section 404(a) of the Federal Aviation Act that "[b]ecause of the Act's emphasis on administrative regulation, . . . it is highly improbable that 'Congress absentmindedly forgot to mention an intended private right of action.'" Anderson v. US Air, Inc., 818 F.2d 49, 55 (D.C. Cir. 1987) (quoting In Re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 407 (9th Cir. 1983) (quoting Transamerica Mortgage Advisors, Luc. v. Lewis, 444 U.S. 11, 20 (1979)). However,
The statute itself is silent on the issue of enforcement. Administrative enforcement procedures have not proven effective in conjunction with section 504, and will likely not be effective in enforcing violations of the Air Carrier Access Act of 1986. Under section 504, responsibility for enforcement is given to agencies which fund the particular program suspected of discrimination. A particular compliance agency is responsible for both enforcing section 504, as well as implementing the programs a section 504 complaint will attack. Therefore, there is an unavoidable conflict of interest which prevents stringent enforcement of section 504. Furthermore, since close relationships develop between agencies and the programs which they fund, it is unlikely that the agencies will act impartially when enforcing section 504. These same problems will likely surface when the Department of Transportation attempts to administratively enforce the Air Carrier Access Act of 1986.

Until now, the civil rights of disabled individuals have been gained through battles in this nation’s courts. Without a mechanism for accessing the courts to redress grievances suffered under the Air Carrier Access Act of 1986, disabled persons are powerless to achieve equality of access in air transportation. Disabled individuals must be able to access the court system if this Act is to be interpreted and protection is to be provided in the manner intended by Congress.

IV. PROPOSAL

Neither the Air Carrier Access Act of 1986, nor the regulations providing for its implementation, establish a private right of action for disabled individuals to obtain com-
pensation for alleged violations under the Act. Without this access to the courts disabled individuals are left with no effective means of securing compliance with its requirements. Therefore, the Air Carrier Access Act of 1986 should be amended to expressly provide disabled individuals with a private cause of action to redress alleged violations of the Act. In the alternative, the United States Supreme Court, when faced with the issue, as it most certainly will be, should imply a private right of action for disabled individuals by using the four factor standard established in *Cort v. Ash*.165

A. An Express Cause of Action

An amendment to the Act should retain the existing language of the statute with some crucial exceptions. It must specifically provide that disabled individuals who have faced discrimination by air carriers in the provision of air transportation shall have access to the courts to redress such grievances. Furthermore, it should allow for the possibility of actual or punitive damages to redress violations of the statute. If a private right of action in federal court is expressly provided in the Act, its requirements will be more readily enforced by commercial airlines. Commercial airlines will be more likely to comply with the requirements if there is the possibility of a lawsuit and damages to redress non-compliance than they will be with the threat of administrative enforcement. The mere fact that damages may be assessed for violations of the Act should lead to compliance with its requirements.

Therefore, to ensure that disabled individuals have a statutory express right to action for violation under the Air Carrier Access Act of 1986, the Act should be amended to provide:

(c)(1) It shall be unlawful for any carrier to discriminate against any otherwise qualified handicapped individual by reason of such handicap, in the provision of air transportation.

(2) Jurisdiction for alleged violations of this Act shall be found in the federal courts of the United States.

(3) Both actual and punitive damages shall be available to the qualified handicapped individual to redress violations of this section.

(4) For the purposes of paragraph (1), (2), and (3) of this subsection the term "handicapped individual" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.\(^\text{166}\)

Enactment of this amendment would further Congress' goal of providing equal access to commercial air transportation in several ways. First, it would ensure that commercial airliners view their non-discriminatory obligations more seriously. It would further enhance the importance of these requirements. Second, more importantly, it would provide disabled individuals with access to the court system to redress violations of yet another civil right. This method has proven most effective for disabled persons in achieving equality and access thus far. To deny them such access would in itself be a denial of their rights.\(^\text{167}\)

B. An Implied Right of Action

If Congress does not choose to amend the Air Carrier Access Act of 1986, the United States Supreme Court will most certainly be faced with deciding whether or not an implied right of action exists under the Act. To eliminate the possibility of inconsistent interpretations under the Act, the Supreme Court must address this issue.\(^\text{168}\)

In making its decision, the Court will most likely analyze the issue using the four factor test established in \textit{Cort v.}\n
\(^{166}\) This is the definition of "handicapped individual" contained in section 504 of the Rehabilitation Act as well as in the final regulations issued by the Department of Transportation to implement the Air Carrier Act of 1986. 29 U.S.C. § 706(8)(B) & (Supp. V 1987); 55 Fed. Reg. 8008 (1990) (to be codified at 14 C.F.R. § 382 and 49 C.F.R. § 27).

\(^{167}\) For a discussion of an implied private right of action under section 504, see supra notes 31-44 and accompanying text.

\(^{168}\) As of the date of this writing, one court has found an implied private right of action to exist to redress violations of the Air Carrier Access Act of 1986. Tallarico v. Trans World Airlines, 881 F.2d 566 (8th Cir. 1989). In Tallarico, the plaintiff was a minor with cerebral palsy who was not allowed to fly unaccompanied on a flight for which she had already purchased a ticket. The court used the four factor \textit{Cort} analysis to find a private right of action to exist. \textit{Id.}
Ash.169 Although this test has been somewhat diluted in the years since Cort was decided, it is still relied upon by the Court to determine whether a cause of action should be implied when a statute does not expressly so provide.

In determining whether to imply a private cause of action under a statute, the Supreme Court looks primarily to the intent of Congress when enacting that statute.170 The four factor Cort test is the method by which the Court determines such intent.171 By analyzing the Air Carrier Access Act of 1986 in the context of these four Cort factors, the Supreme Court would most likely find that a private right of action should be implied in favor of disabled individuals facing discrimination by air carriers.

The first Cort factor, whether the plaintiff is one of the class for whose benefit the statute was enacted, certainly favors the implication of a private right of action in favor of disabled individuals facing discrimination by air carriers.172 In analyzing this factor, the Court will look to the language and legislative history of the statute.173

In this instance, the plaintiffs to be protected are disabled individuals. The language of the statute expressly provides that the Act is for the benefit of “qualified handicapped individuals.”174 When a statute expressly names the individuals to be protected from discrimination, it suggests an intent to provide for a private right of action.175 Furthermore, in its legislative history, Congress clearly stated its

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169. 422 U.S. 66 (1975). For a detailed discussion of the development of the Cort four factor standard and its subsequent refinement, see supra notes 45-57 and accompanying text.

170. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("The key to the inquiry is whether Congress intended to create a private right of action under a federal statute without saying so explicitly."); Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77, 91 (1980) ("The ultimate question . . . is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke."); Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted . . . .").

171. For a statement of the four factors determined in Cort to be controlling when deciding whether a private right of action should be implied if a statute does not expressly provide for one, see supra notes 45-57 and accompanying text.

172. Cort, 422 U.S. at 78.

173. Id. at 88.


intent to prohibit discrimination against disabled individuals in the provision of air transportation.\textsuperscript{176} Senator Alan Cranston expressed this purpose in his remarks to the United States Senate when he stated that the Air Carrier Access Act of 1986 ensured that disabled individuals are not discriminated against by airlines.\textsuperscript{177} Therefore, it is clear that Congress intended the class of disabled individuals to benefit from the enactment of the Act.

The second \textit{Cort} factor, whether there is any indication of legislative intent to create or deny a remedy to the plaintiff, also favors the implication of a private right of action in favor of disabled individuals.\textsuperscript{178} In \textit{Cort}, the Court suggested that an analysis of the legislative history of the statute would be the proper method for determining whether this factor is met.\textsuperscript{179}

First, an examination of the legislative history of the Air Carrier Access Act of 1986 indicates Congress' express intention to repeal the Supreme Court's decision in \textit{DOT v. PVA}.\textsuperscript{180} Senator Robert Dole, in his Floor Speech to the


\textsuperscript{177} 132 \textit{Cong. Rec.} S11,784, 11,786 (daily ed. Aug. 15, 1986) (statement of Sen. Cranston) (He is delighted to support this legislation "to ensure that individuals with disabilities are not discriminated against by airlines.").

\textsuperscript{178} \textit{Cort}, 422 U.S. at 78.


Although I believe additional reforms may be needed to ensure that disabled individuals are able to use an airline's services, equipment and facilities, and obtain equitable relief from an airline which violates the law and unjustly discriminates, I believe that the legislation before us is a good basis from which to begin our efforts to eliminate inconsistent and unfair airline procedures. This statement certainly indicates a recognition by Congress that persons with disabilities require further rights under the Air Carrier Access Act of 1986 to enforce its nondiscriminatory policies. A private right of action would be such an additional right.

United States Senate stated that the purpose of the Act was to overturn the Supreme Court's decision in *DOT v. PVA.* Furthermore, Senator Cranston, in his remarks to the Senate, characterized the passage of the Act as a rejection in a "remarkably swift and decisive fashion" of the Court's decision in *DOT v. PVA.*

The ruling in *DOT v. PVA* left disabled air travellers without the protections against discrimination provided by section 504 of the Rehabilitation Act of 1973. Congress' swift and intentional overturning of the Court's ruling in *DOT v. PVA* indicates that it intended to provide disabled air travellers with the remedies provided under section 504 prior to the *DOT v. PVA* ruling. A private right of action has already been implied under section 504. Therefore, the legislative history indicates that Congress intended to create such a remedy for disabled individuals.

Second, the Air Carrier Access Act of 1986 is modeled after section 504 of the Rehabilitation Act. As Senator Dole stated, it relies heavily upon language and precedents from the Rehabilitation Act. The Supreme Court has already recognized an implied private right of action under Section 504. "The courts which have considered the issue have uniformly held that section 504 creates a private cause of action for those who are its intended beneficiaries." Therefore, it would be consistent for the Court to imply a right of action under the Air Carrier Access Act of 1986.

Third, the swift manner in which Congress addressed the issue of the Act is a further indication of its intent to create a remedy in disabled individuals. The Supreme Court decided *DOT v. PVA* on June 27, 1986, and the Air Carrier Access

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Cranston).


182. Id. at 11,786 (statement of Sen. Cranston).


184. See supra note 42 and accompanying text.


188. See supra note 42 and accompanying text.

Act was enacted on October 2, 1986. Congress had recognized that "Air transportation obviously is a most important component of our society and full access to it is vital to millions of individuals' pursuit of business and personal matters."\textsuperscript{190} The third Cort factor, whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff, also strongly favors the implication of a private right of action in favor of disabled individuals.\textsuperscript{191} Congress' primary purpose in enacting the Air Carrier Access Act of 1986 was to eliminate acts of discrimination against disabled air travellers.\textsuperscript{192} Furthermore, section 1304 of the Federal Aviation Act, provides that "there is a recognized and declared to exist on behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."\textsuperscript{193} A private right of action would allow disabled individuals access to ensure fulfillment of the rights guaranteed by that statute. Furthermore, at least four United States courts of appeals have implied a private right of action under various other sections of the Federal Aviation Act.\textsuperscript{194} Therefore, the implication of a private right of action would be consistent with the underlying purposes and actions of Congress and the courts.

The fourth Cort factor, whether the cause of action is one traditionally relegated to state control, also supports the implication of a private right of action in favor of disabled individuals under the Air Carrier Access Act of 1986.\textsuperscript{195} The Department of Transportation has been given authority to promulgate regulations under the Act. An airline's duty to comply with these regulations and provide air transportation in a non-discriminatory fashion is derived from this federal statute. Furthermore, the federal government has taken a

\textsuperscript{191} Cort, 422 U.S. at 78.
\textsuperscript{194} For a discussion of courts which have implied a private right of action under other sections of the Federal Aviation Act of 1958, see supra note 158.
\textsuperscript{195} Cort, 422 U.S. at 78.
role of leadership in the enforcement of civil rights legislation. Section 504 has established the protection of disabled individuals as an area of federal concern. Therefore, the regulation of non-discrimination against disabled persons in air transportation should be an area of concern of the federal government.

By analyzing the above four factors, the Court would undoubtedly determine that a private right of action should be implied under the Air Carrier Access Act of 1986.

C. Damages

If the Court implies a private right of action under the Air Carrier Access Act of 1986, actual compensatory and punitive damages should be available for travellers with disabilities who prove violations of the Act have occurred. Both types of damages have already been granted to redress violations of section 404(b) of the Federal Aviation Act. In such an instance, punitive damages are available if the defendant airline has acted “wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.”

Finally, disabled travellers should be able to establish a cause of action in state court for damages for the tort of intentional infliction of emotional distress, or in the alternative, for negligence or negligent infliction of emotional distress. At least one United States court of appeals has held that a state claim for intentional infliction of emotional distress is not preempted by a federal claim under the Fed-


197. Hingson v. Pacific Southwest Airlines, Inc., 743 F.2d 1408, 1412 (9th Cir. 1984); Karp v. North Central Airlines, Inc., 437 F. Supp. 87, 90 (E.D. Wis. 1977), aff'd, 583 F.2d 364 (7th Cir. 1978). In deciding to allow an award of punitive damages, the court made reference to civil rights legislation which grants a private right of action, but which makes no express provision for damages. The implication of damages was allowed on the premise that in tort actions punitive damages have been allowed where circumstances warrant, irrespective of enabling legislation. Wills, 200 F. Supp. at 367.

198. Id. at 367.

199. This cause of action would be in addition to alleging a violation of the Air Carrier Access Act of 1986.
eral Aviation Act. In addition, one court has allowed damages for emotional distress for an airline’s violation of the Air Carrier Access Act.

V. CONCLUSION

This comment has presented a history of the implication doctrine, which allows a court to imply a private right of action when a statute does not expressly provide for one. The Air Carrier Access Act of 1986, which prohibits discrimination by air carriers against disabled persons in the provision of air transportation services, does not expressly provide for a private right of action. Without such access to the court system, disabled individuals are virtually powerless to redress grievances which have occurred under the Act. Therefore: (1) the Air Carrier Access Act of 1986 should be amended to expressly provide for a private right of action; or in the alternative, (2) the United States Supreme Court should imply a private right of action using the four factor test it established in Cort v. Ash. Furthermore, the Act should provide for compensatory and punitive damages including damages for plaintiffs who sue in state courts based upon the theories of intentional infliction or negligent infliction of emotional distress. “Without judicial intervention to redress . . . violations of the statute, the rights of air passengers as declared in the Act, to travel without . . . unjust dis-

200. Hingon, 743 F.2d at 1416. To establish a cause of action for intentional infliction of emotional distress a plaintiff must establish: (1) severe emotional distress; (2) intentional or reckless extreme and outrageous conduct; and (3) causation. Fletcher v. Western National Life Insurance Co., 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88 (1970). In the case of air travellers with disabilities, conduct which arbitrarily deprives them of their right to travel by air is “outrageous”. It would certainly be considered outrageous to deny a non-disabled traveller access to air travel for no apparent reason. By establishing the existence of such elements due to a violation of the Air Carrier Access Act of 1986, disabled travellers would have an additional avenue by which to redress alleged acts of discrimination by air carriers. If the infliction of emotional distress is not intentional, disabled travellers may be able to recover damages for the negligent infliction of emotional distress by establishing the following elements: (1) that the defendant air carrier had a duty of care to the plaintiff; (2) that the defendant airline breached that duty of care; (2) that the breach of that duty actually and proximately caused the plaintiff’s damage; (4) damages.

crimination would be robbed of vitality and the purposes of the Act substantially thwarted.\textsuperscript{202}

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