Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973

Among the last of the minorities to be recognized as subject to discrimination and guaranteed equal opportunities are the mentally and physically disabled. Throughout the United States, qualified persons are being denied federally funded programs and services solely on the basis of a mental or physical handicap.[1] Congress responded to this injustice by enacting section 504 of the Rehabilitation Act of 1973, designed to ban discrimination on the basis of handicap.

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

Originally intended as an amendment to the Civil Rights Act of 1964, section 504 was appended to the Rehabilitation Act of 1973 as that bill moved through the 92d and 93d Congresses. Its terms purport to guarantee to handicapped individuals the same rights afforded other minority or disadvantaged peoples under similar antidiscrimination provisions.[3] But because section 504 was not enacted as a part of those provisions, a separate program was necessary for its enforcement.

This noble declaration of civil rights for the handicapped remained for three years a right without a remedy because of woefully inadequate enforcement by the executive and the judiciary. The Department of Health, Education, and Welfare (HEW), responsible for the promulgation of implementing regulations under section 504, hesitated for over three years before issuing administrative guidelines. Final regulations were issued in April 1977,[4] only after an executive order from President Ford[5] and a suit filed against the responsible officials[6] prodded the Department to act.

In the interim, private individuals injured by apparent violations

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1. 118 CONG. REC. 525-26 (1972) (remarks of Sen. Humphrey).
2. 29 U.S.C. § 794 (Supp. V 1975). The Rehabilitation Act comprises 29 U.S.C. §§ 701-794.
3. *See* § 901 of the Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. II 1972) (relating to gender); § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970) (relating to race, color, and national origin).
4. 45 C.F.R. § 84 (1977). These regulations became effective June 3, 1977.
5. Exec. Order No. 11,914, 3 C.F.R. 117 (1977).
6. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

of the provision attempted to secure performance of its promise through the federal judiciary. The threshold question presented in suits brought under section 504 was whether that section creates a private cause of action or whether relief could be had only through administrative channels. Federal district courts confronted with this question avoided deciding it out of uncertainty whether section 504 confers a private right to sue.

There are two conceivable reasons for the district courts' uncertainty. First, the courts appeared to be unfamiliar with the common-law doctrine of implication, the traditional method for determining whether a right to sue is implicit in a regulatory statute. Second, even if familiar with the doctrine, the lower federal courts may have been discouraged from applying it by recent Supreme Court decisions disallowing implied causes of action and making the standards of the implication doctrine more stringent. However, the Supreme Court's recent determination to limit the implication of private causes of action from regulatory statutes has not been absolute. The Court has indicated that the doctrine of implication may be used to find an implied cause of action to vindicate civil rights. And in the 1975 case of *Cort v. Ash*,[7] although the Court further restricted the use of implied causes of actions, it indicated that the doctrine is still viable by clarifying the implication methodology. A proper analysis of section 504 using the implication doctrine as restated in *Cort* discloses that a private cause of action may be implied under that statute.

The first decision to face the issue squarely and discuss it fully was *Lloyd v. Regional Transportation Authority*.[8] In that opinion the United States Court of Appeals for the Seventh Circuit applied the *Cort* analysis of the implication doctrine and held that a private cause of action did flow from section 504. Yet the cautiously exploratory nature of the court's reasoning, which was confined to the narrow facts presented in *Lloyd*, and the failure of the court to apply the doctrine of implication properly, necessitate a clarification of the doctrine and its application to section 504.

After an overview of district court case law involving section 504, this article will trace the development of the doctrine of implication, examine what appears to be a misapplication of the doctrine by the Seventh Circuit in *Lloyd*, and suggest an alternative application of the doctrine to section 504 in keeping with its historical understanding and recent evolution.

I. THE PROBLEM OF JUDICIAL ENFORCEMENT OF SECTION 504

The question whether there is an implied cause of action under

7. 422 U.S. 66 (1975).

8. 548 F.2d 1277 (7th Cir. 1977).

section 504 was raised in several suits brought before HEW promulgated its regulations. Most of the courts avoided an analysis of the issue, deciding the cases with scant discussion of the grounds or reasoning underlying their holdings. Only one district court examined the issue and determined on the basis of express reasoning that a cause of action was stated under section 504 by a plaintiff denied hospital employment solely by reason of her epilepsy.[9] Another district court found that the exclusion of a mentally handicapped individual from participation in a vocational rehabilitation program by the state's Department of Corrections, solely on the basis of his handicap, was forbidden by section 504 of the Rehabilitation Act. The court held that section 504 "provides a cause of action for any discrimination on the basis of such handicap."[10] Nevertheless, no reasoning was offered to support this holding.[11]

In *Hairston v. Drosick*,[12] another district court found that the exclusion of a minimally handicapped child from a regular public classroom without a bona fide educational reason was in violation of section 504. The court in *Hairston*, however, did not discuss the issue of a private cause of action under section 504 and used the alternative ground of the fourteenth amendment in addition to section 504 to justify its order that the child be readmitted to regular classes. Similarly, in *Gurmankin v. Costanzo*,[13] in which plaintiff's claim was based on both the Rehabilitation Act and provisions of the Civil Rights Act of 1871,[14] the United States District Court for the Eastern District of Pennsylvania held for the plaintiff, but relied on due process grounds for its decision. The court stated that section 504 was not dispositive and lamented the absence of guidance in interpreting that provision: "[W]hile I have been unable to find any reported decisions construing [section 504], it seems reasonably clear that a refusal to hire a blind

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9. Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 815 (E.D. Pa. 1977). District Judge Higginbotham came closest to following the method suggested below for determining whether a cause of action existed under § 504 through application of the *Cort* doctrine of implication. *See* Section V. *infra*. Yet even this analysis was confined to two paragraphs of the eight-page opinion.

In a recent case, a district court noted a "probable" right under § 504 and issued a preliminary injunction requiring a private college to furnish a deaf graduate student with an in-class interpreter in order that she could complete coursework necessary to maintain her teaching permit in deaf education. Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977).

10. Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976).

11. The court did cite to three cases that had presented similar issues: Lau v. Nichols, 414 U.S. 563 (1974); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976) *aff'd* 556 F.2d 184 (3d Cir. 1977); and Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975).

12. 423 F. Supp. 180 (S.D. W. Va. 1976).

13. 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977). The circuit court found it unnecessary to decide the § 504 issue.

14. 42 U.S.C. § 1983 (1970).

person as a teacher is the kind of discrimination which that section was meant to prohibit."[15]

Three courts in addition to the lower court in *Lloyd*[16] declined to recognize a cause of action under section 504 in cases instituted by handicapped persons against local mass transportation authorities in attempts to render public transportation accessible to persons confined to wheelchairs. In *United Handicapped Federation v. Andre*,[17] and in *Snowden v. Birmingham-Jefferson County Transit Authority*,[18] the courts held that section 504 was a statement of federal policy only and created no new right to sue. In the third case, *Bartels v. Biernat*,[19] a preliminary injunction was issued to prevent the execution of contracts for the purchase of new mass transit vehicles unequipped for handicapped passengers. The plaintiffs were permitted to proceed with a class action, but the court expressly refused to "determine whether a private right of action is created by § 504."[20] In its reversal of the district court decision in *Andre*, the Court of Appeals for the Eighth Circuit relied on *Lloyd*, disposing of the issue of plaintiffs' right to sue in one sentence: "We also agree that plaintiffs do have standing to bring a private cause of action."[21] Finally, in *Coleman v. Darden*,[22] the Colorado district court dismissed an action to compel employment by a blind person in part because it found that no private cause of action was created by section 504.[23]

This conflicting and superficial treatment demonstrates the uncertain status of section 504 in the courts. Even those courts granting the relief sought have not disclosed the reasons behind their holdings. This is not surprising, since there is little to guide courts in construing section 504. The text of the section itself is silent concerning whether section 504 confers a private right to sue for its enforcement; it merely proscribes discrimination on the basis of handicap. Nor do the regulations of the Secretary of the Department of Health, Education, and Welfare[24] address the problem of a private remedy. The Secretary's analysis accompanying the final regulations correctly recognizes that to confer a right to sue under section 504 is beyond the authority of the executive branch of government.[25] And despite a

15. 411 F. Supp. at 989.

16. Lloyd v. Illinois Regional Transp. Auth., No. 75-C1834 (N.D. Ill., Mar. 16, 1976), *vacated and remanded sub nom.* Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

17. 409 F. Supp. 1297 (D. Minn. 1976), *vacated* 558 F.2d 413 (8th Cir. 1977).

18. 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).

19. 405 F. Supp. 1012 (E.D. Wis. 1975).

20. *Id.* at 1015.

21. United Handicapped Fed. v. Andre, 558 F.2d 413, 415 (8th Cir. 1977).

22. [1977] LAB. REL. REP. (15 Fair Empl. Prac. Cas.) 272 (D. Colo.).

23. *Id.* at 273.

24. 45 C.F.R. § 84 (1977).

25. 42 Fed. Reg. 22,676, 22,687 (1977).

plethora of congressional comment on the Rehabilitation Act as a whole,[26] the legislative history regarding section 504 is so meager that one commentator has concluded that there is none.[27]

II. THE DOCTRINE OF IMPLICATION

A. *Early Development of the Doctrine*

In order to determine whether a statute not expressly establishing a private right of action nevertheless implicitly provides for one, courts have traditionally employed the doctrine of implication. This doctrine provides that a court, confronted with a statute that is ambiguous or silent concerning whether it serves as the basis for private suit, may turn to outside sources to ascertain whether a private remedy was implied in the statute by its drafters. This normally entails application of the rules of statutory construction, analysis of the legislative history, and examination of the interpretation and application of the statute after its passage.[28]

The doctrine of implication has roots in English common law as early as 1703.[29] Its rationale rests on the well-established principle of *ubi jus ibi remedium*,[30] or as stated by Blackstone: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law whenever that right is invaded."[31] The first full exposition of the doctrine of implication appears in the 1854 case of *Couch v. Steel*,[32] in which damages were awarded a seaman whose illness was aggravated by defendant's failure to comply with a statutory duty to keep medicines on board his ship. The rule stated by Lord Campbell in *Couch v. Steel* and by later cases[33] had been articulated by Justice Holt: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."[34] The application of this rule was expanded to include statutory negligence—the deriving of a civil action in tort from

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26. *See* S. REP. No. 391, 93d Cong., 2d Sess.; H.R. REP. No. 500, 93d Cong., 2d Sess.; S. REP. No. 318, 93d Cong., 1st Sess.; H.R. REP. No. 244, 93d Cong., 1st Sess.; *all reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076.

27. Comment, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. & SOC. PROB. 457, 466 (1974).

28. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

29. Anonymous, 87 Eng. Rep. 791 (Q.B. 1703); Rowning v. Goodchild, 96 Eng. Rep. 536 (C.P. 1776).

30. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40-41 (1916).

31. 3 W. BLACKSTONE, COMMENTARIES *23.

32. 118 Eng. Rep. 1193 (Q.B. 1854).

33. *E.g.*, Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916).

34. J. COMYNS, DIGEST OF THE LAWS OF ENGLAND, § F *Action Upon Statute* *442 (quoting Holt, C.J., Anon., 6 Mod. 26, 27).

a criminal statute[35]—and from there was extended to include inferences[36] of implied causes of action from regulatory statutes.

Since *Couch v. Steel*, the process of determining whether a private cause of action should be implied under a statute has entailed two basic inquiries: first, whether the particular plaintiff facing the court is the proper beneficiary of the right conferred by the legislation; and second, whether the language and purpose of the statute and the scheme of enforcement warrant an implied remedy.[37]

The seminal federal case enunciating the doctrine of implication was *Texas & Pacific Railway Co. v. Rigsby*.[38] In that case, a railroad employee was injured while riding a box car with defective handholds. His suit against the railroad was based on the Federal Safety Appliance Acts,[39] one section of which established a duty of railroads to equip all cars with secure handholds. The Supreme Court, using the implication doctrine, permitted the action. Recognizing that there was "no express language conferring a right of action for the death or injury of an employee," the Court nevertheless concluded that both requirements for the application of the implication doctrine were satisfactorily fulfilled because "the safety of employees and travelers is [the Acts'] principal object, and the right of private action by an injured employee . . . has never been doubted."[40]

After the *Rigsby* decision, the implication doctrine was utilized with increasing frequency, particularly by the Warren Court, to further the implementation of many regulatory statutes. Although the most frequent focus of implied actions has been the federal securities laws,[41] private actions have been implied under such other provisions as the antitrust laws,[42] the Food, Drug, and Cosmetic Act,[43] the Railway La-

35. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 190 (4th ed. 1971); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); RESTATEMENT (SECOND) OF TORTS §§ 285-86 (1965).

36. While the doctrine might be more appropriately labeled a process of "inference" from the text and history of a statute, the designation "implication" reveals the doctrine's rationale: a court is considered to be carrying out its recognized obligation to interpret the legislative mandate by finding a cause of action that was implied by the legislature in a statute.

37. *See, e.g.*, Guernsey v. Rich Plan, 408 F. Supp. 582, 586 (1976)

38. 241 U.S. 33 (1916).

39. The Safety Appliance Act of 1893, ch. 196, § 4, 27 Stat. 531, *as amended by* Act of April 14, 1910, ch. 160, § 2, 36 Stat. 298.

40. 241 U.S. at 39.

41. *E.g.*, 15 U.S.C. § 78 (1970). *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371 (1976). *See generally* 1 A. BROMBERG, SECURITIES LAW: FRAUD §§ 2.4(1)-(2) (1975).

42. *E.g.*, 15 U.S.C. § 26 (1970). *See, e.g.*, Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76 (1975).

43. 21 U.S.C. §§ 301-392 (1970). *See* Cole & Shapiro, *Private Litigation Under the Federal Food, Drug and Cosmetic Act: Should the Right to Sue Be Implied?*, 30 FOOD DRUG COSM.

bor Act,[44] the Air Commerce Act,[45] and the Consumer Credit Protection Act.[46]

B. *Restriction of the Doctrine*

The expansive use of the doctrine during the Warren Court years triggered apprehension about its propriety, leading to restriction of its use by the Burger Court. Criticism has focused on two perceived faults of implication: first, that it constitutes improper judicial legislation; and second, that it encourages litigation, thus aggravating the already excessive burden borne by the federal judiciary.

These criticisms were expressed by the dissenting Justices in *Bivens v. Six Unknown Federal Narcotics Agents*,[47] which implied an action for damages against unlawful conduct by federal agents. *Bivens* presented a particularly apt forum for criticism of the implication doctrine since it involved an extreme form of implication: the Court inferred a cause of action, not from a statute, but directly from the fourth amendment to the United States Constitution, and the resulting class of potential plaintiffs who could avail themselves of the cause of action encompassed every person in the United States. In his dissent, Chief Justice Burger expressed his dissatisfaction with the doctrine as follows: "I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress . . . . Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."[48] He was joined in this view by Justice Black: "[N]either Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."[49] In a separate dissent, Justice Blackmun also complained of the "judicial legislation," which he felt "opens the door for another avalanche of new federal cases."[50]

L.J. 576 (1975). Congress amended this Act in 1972 to grant the courts express jurisdiction over violations. 21 U.S.C. §§ 331-32 (Supp. V 1975).

44. 45 U.S.C. § 152 (1970). *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Burke v. Compania Mexicana De Avacion, 433 F.2d 1031 (9th Cir. 1970).

45. 49 U.S.C. §§ 173, 181 (1970). *See, e.g.*, Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761, 763 (N.D. Ohio 1929).

46. 15 U.S.C. § 1674(a) (1970). *See, e.g.*, Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974); Western v. Hodgson, 359 F. Supp. 194 (S.D. W. Va. 1973), *aff'd* 494 F.2d 379 (4th Cir. 1974); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057 (W.D. La. 1972), *vacated on other grounds*, 488 F.2d 450 (5th Cir. 1973). *See also* Note, *Implying a Civil Remedy from 15 U.S.C. § 1674(a)*, 54 NEB. L. REV. 744 (1975).

47. 403 U.S. 388 (1971).

48. *Id.* at 411-12 (Burger, C.J., dissenting).

49. *Id.* at 428 (Black, J., dissenting).

50. *Id.* at 430 (Blackmun, J., dissenting).

Dissatisfaction with the doctrine of the sort expressed in the *Bivens* dissents prevailed in later majority holdings.[51] In *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*,[52] a private cause of action was sought by train passengers under the Amtrak Act[53] to enjoin an announced discontinuance of certain routes. And in *Securities Investor Protection Corp. v. Barbour (SIPC)*,[54] broker customers attempted to compel the SIPC to provide financial relief to failing brokerages under the Securities Investor Protection Act.[55] Four justices who had permitted an implied cause of action in *Bivens* joined Justices Blackmun and Burger[56] in opinions that evidenced a decided shift away from the liberal application of the doctrine that had developed during the Warren Court years. In both cases the Court applied the doctrine of *expressio unius est exclusio alterius*[57] to find that administrative remedies provided in the Amtrak Act and the Securities Investor Protection Act precluded implied private actions under the statutes.[58]

Amtrak and *SIPC* concerned statutes regulating economic interests. The criticisms encouraging an anti-implication stance in areas of economic regulation do not necessarily apply to regulatory schemes created to protect civil rights. The argument that the implication of a private remedy from an antidiscrimination statute, such as section 504, constitutes judicial legislation is outweighed by the need and value of a private remedy to vindicate civil rights. Hence, whereas in some situations implication may constitute judicial legislation, in other cases it may more properly be viewed as the realization of the

51. *See generally* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK L. REV. 167 (1976).

52. 414 U.S. 453 (1974). For a perceptive discussion by a circuit judge of *Amtrak* as a "signal . . . to decelerate use of . . . implied civil remedies" see *Ash v. Cort*, 496 F.2d 416, 426-27 (3d Cir. 1974) (Aldisert, J., dissenting), *rev'd*, 422 U.S. 66 (1975).

53. The Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-644 (1970).

54. 421 U.S. 412 (1975).

55. 15 U.S.C. § 78a-78hh-1 (1970).

56. Justices Brennan, Marshall, Stewart and White, who together with Justice Douglas had composed the majority in *Bivens*, shifted to support the denial of private actions in *Amtrak* and *SIPC*. Justice Douglas thus emerged as the only dissenter in either of the two later opinions.

57. In defining this maxim as follows: "the specific mention of one . . . thing implies the exclusion of other . . . things," Justice Francis McCaffrey warned that it "must be applied with great caution." F. MCCAFFREY, STATUTORY CONSTRUCTION § 17 (1953). The Supreme Court had earlier stated that the maxim should be "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . ." SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943). Although the Court proceeded cautiously in both *Amtrak* and *SIPC*, recognizing that the maxim "must yield to a clear contrary evidence of legislative intent," the revival of its use for implication purposes is indicative of the stricter approach toward implied private remedies undertaken in those cases. The usefulness of the *expressio* maxim in this context is totally rejected in HART & SACKS, THE LEGAL PROCESS 1173-74 (temp. ed. 1958).

58. Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419, 425 (1975); National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 461 (1974).

judicial duty to enforce the expressed purpose of the statute. Congress is a general policy-determining body, which is not always institutionally capable of enacting exhaustive remedial provisions. A failure to include specific remedies may be read as a congressional delegation of responsibility to the federal courts to fashion remedies that will effectuate the articulated purposes of Congress. This institutional justification was explained by one commentator as follows:

> The weaknesses of the court as lawmaker—the lack of debates and hearings, the retroactive effect of its solution, the uncertainty of its public mandate—are less serious when conduct has already been proscribed by the legislature and only an additional remedy is sought. Making its own decision in relation to an existing and functioning statute, the court may be in an even better position to assess the need for supplemental civil relief than was the legislature at the time of enactment.[59]

Section 504 is exactly the type of statute that would be more effectively enforced by a private remedy. Because the term "handicap" encompasses a wide range of disabilities, from physical disorders such as blindness and paralysis to mental disorders such as mental illness and retardation,[60] discrimination on the basis of handicap takes innumerable forms. Congress could not be expected to anticipate all forms of discrimination. In enacting section 504, Congress expressed in as broad language as possible its intention that those receiving federal assistance should not subject any person to discrimination on the basis of handicap. It is for the courts, as well as the agencies, to fashion remedies on a more specific basis to insure that this congressional mandate is fulfilled.[61] The federal judiciary had already developed substantial mechanisms for the protection of civil rights generally,[62] and Congress may have expected that those same enforcement methods would be applied by the courts to protect the civil rights of handicapped individuals.[63]

As to the criticism that the creation of a private remedy will flood the federal courts with too many cases, it must be observed that the

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59. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963).

60. The Secretary of HEW has included alcoholism and drug addiction in the definition of "handicap." Analysis of Final Regulation, 42 Fed. Reg. 22,685 (1977).

61. Bell v. Hood, 327 U.S. 678, 684 (1946): "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *See* the discussions by Justice Cardozo in Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 36 (1933) and by Justice Holmes in The Western Maid, 257 U.S. 419, 433 (1922).

62. *Cf.* Comment, *A Survey of Remedies Under Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 437 (1973) (discussing discrimination in employment).

63. The Department of Health, Education, and Welfare has published a notice of intent to issue proposed rules for consolidating procedures for administration and enforcement of several civil rights laws and authorities. 41 Fed. Reg. 18,394 (1976).

protection of basic human rights against arbitrary discrimination has long been awarded a preferred position in our federal law,[64] and this protection should be deemed a sufficiently substantial interest to overcome any inconvenience caused the judicial system. When there are no other means of enforcement or when established means are inadequate, our traditional conception of justice requires that federally-created rights not be sacrificed to judicial convenience.[65] It is significant that even Justice Black, in *Bivens*, refused to apply his condemnation of implied remedies indiscriminately; although decrying the "growing number of frivolous lawsuits," he reserved approval for

> cases . . . brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers.[66]

C. Lau v. Nichols: *The Civil Rights Exception*

The Supreme Court recognized the type of case contemplated by Justice Black when it decided *Lau v. Nichols*[67] in 1974. In *Lau*, non-English-speaking Chinese students claimed that the San Francisco School District discriminated against them in violation of section 601 of the Civil Rights Act of 1964.[68] Approximately 1,800 students of Chinese ancestry in the school system spoke little or no English and received no supplemental instruction in the English language. The students complained that the language barrier effectively excluded them from education and requested that the Board of Education be ordered to provide them special services—such as English language instruction or classes taught in Chinese—so that they could receive an education equal to that provided students fluent in English.[69]

Lau was an unusual case.[70] Whether a private cause of action

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64. The preference for protecting civil rights through federal laws is evidenced not only in the Constitution itself, U.S. CONST. amends. XIII, XIV, XV, & XIX, but also by congressional activity pursuant to those amendments. *See, e.g.*, 18 U.S.C. §§ 241-42 (1970); 42 U.S.C. §§ 1981-83, 1985(3) (1970); 42 U.S.C. § 2000a (1970). *See also* Goldberg v. Kelly, 397 U.S. 254, 265 (1970) wherein the Court stated: "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."

65. Bell v. Hood, 327 U.S. 678, 684 (1946); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803).

66. 403 U.S. 388, 428 (1971).

67. 414 U.S. 563 (1974).

68. 42 U.S.C. § 2000d (1970) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

69. 414 U.S. at 564.

70. The uniqueness of the case is barely suggested by the majority opinion, but is more fully developed in Justice Stewart's concurrence. *Id.* at 569 (Stewart, J., concurring).

could be implied under section 601 depended upon a finding that "affirmative rights" were conferred by the statute. Section 601 prohibits discrimination against certain classes of persons. This prohibition is ordinarily understood to apply to the intentional deprivation of certain persons rights that are accorded others, or the unequal treatment of essentially equal classes of persons. The right conferred by the statute is the right to be treated equally, and the duty imposed is to refrain from unequal treatment. The facts in *Lau*, however, posed a situation that did not fit into this framework. There, the discrimination complained of resulted from the equal treatment of essentially unequal populations: teaching all students in English deprived those unfamiliar with the language of a meaningful education. The school board, by providing all students with equal services, was passively working a discrimination against those who were by nature incapable of making effective use of those services.

To remedy this "passive" discrimination, special services were required for the Chinese students. In *Lau*, the Court found that a higher level of duty—an "affirmative duty"—was imposed on the school officials. In order to support its holding that the statute imposed such an affirmative duty, the Court found that the statute conferred an "affirmative right" on the plaintiffs to receive special services. Observing that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education,"[71] the Court held that the school district was discriminating against these students in violation of section 601 and implied a private action in favor of the plaintiffs to enforce the affimative duties imposed by the statute.

Lau may be viewed, within the context of the development of the doctrine of implication, on two levels. It stands apart from recent Supreme Court implication cases since the Court permitted a private remedy and since nowhere in the majority opinion did its author, Justice Douglas, refer explicitly to the doctrine of implication or to its recognized components. Because of this apparent disregard for the common-law doctrine, *Lau* might be characterized, first, as the pronouncement of an entirely new method of implying a private cause of action.[72] Yet *Lau* may also be viewed as a permissible application of the traditional doctrine of implication to a complaint fitting within the exceptions delineated in Justice Black's dissent in *Bivens*. *Lau* was a case "brought by citizens with substantial complaints . . . persons

71. *Id.* at 566. The same principle was articulated by Justice Frankfurter in New York v. United States, 331 U.S. 284, 353 (1947): "The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals."

72. The ramifications of this approach are discussed in, note 101 *infra*.

who have not yet received the equal opportunity in education . . . that was the dream of our forefathers."[73] Although Justice Douglas made no reference to the common-law doctrine of implication (indeed, he never stated what analytical method he was using), he did use its methodology: he looked first to the statute and, finding it ambiguous, turned to extrinsic sources[74] for illumination of its meaning.

Approaching *Lau* as an exception to the Court's general trend away from the implication doctrine's frequent application may explain the Court's failure to refer explicitly to the doctrine in that case. *Lau* confronted the Court after it had begun to restrict the application of the doctrine in *Amtrak* and *SIPC*. To allow a cause of action using the implication doctrine might have been interpreted by lower courts as the signal of a return to the Warren Court's liberal recognition of implied private remedies. It is conceivable that the Court, recognizing that a cause of action was warranted under the facts presented by *Lau*, nevertheless chose to refrain from referring to the doctrine by name to avoid sending such a signal.

The exceptional duty inferred from section 601 may also explain the lack of reference to the implication doctrine in *Lau*. The Court might have been able to apply the more stringent standards it was developing in other implication decisions to find a duty to refrain from unequal treatment. But in order to find the higher level of duty requiring affirmative action, it was necessary for the Court to read the statutory language more liberally—perhaps too liberally to conform to the Court's conception of proper implication analysis.

While these considerations may have entered into the *Lau* analysis, the key to the *Lau* approach may well lie with its author. Justice Douglas had in an earlier implication case expressed his impatience with the labels and doctrines surrounding the issue of private remedies. In *Amtrak*, he complained:

> The court phrases the question in terms of whether "a right of action" exists, saying that no question of "standing" or "jurisdiction" is presented. Whatever the merits of the distinction between these three concepts may be in some situations, the difference here is only a matter of semantics.
>
> . . . .
>
> We deal here with a federal cause of action and it is the judicial tradition "for federal courts to fashion federal law where federal rights are concerned."[75]

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73. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 428 (1971) (Black, J., dissenting).

74. Douglas relied primarily on various HEW regulations interpreting § 601: 45 C.F.R. §§ 80.3(b)(1), 80.5(b) (1976); 35 Fed. Reg. 11,595 (1970); 33 Fed. Reg. 4,955 (1968). He also referred to state statutes, CAL. EDUC. CODE §§ 8573, 12101 (West Supp. 1973), and to the contract between the San Francisco School District and the federal government binding the district to " 'comply with title VI of the Civil Rights Act of 1964 . . .' " 414 U.S. at 566-69.

75. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 467 (1974) (Douglas, J., dissenting).

Justice Douglas criticized the Court's "dedication to legalisms,"[76] pointing out the similarities between *Amtrak* and an earlier pro-implication decision,[77] and then stripped the issues down to the equities involved:

> The Court is in the mood to close all possible doors to judicial review so as to let the existing bureaucracies roll on to their goal of administrative absolutism. When the victims of administrative venality or administrative caprice are not allowed even to be heard, the abuses of the monsters we have created will become intolerable. The separation of powers was designed to provide, not for judicial supremacy, but for checks and balances. When we turn back this respondent, we turn back passengers who are the victims of the present transportation debacle. Those who complain are not adventurers who seek personal aggrandizement as do jackals who historically have fattened on some economic debacles. The passengers are the victims of the transportation crisis out of which Amtrak seeks to make a fortune. . . . I would affirm the judgment of the Court of Appeals whether the rationalization be based on standing, cause of action, or jurisdiction.[78]

It thus appears that Justice Douglas achieved in *Lau* what he had wanted to achieve in *Amtrak*. Rather than referring to the complicated network of "legalisms" developed in the Court's implication decisions, he addressed afresh the issue whether a cause of action existed under section 601, and decided, using all means at his disposal—contract law, state statutory law, and administrative regulations—that it did. The precedential value of *Lau* and its position in the development of the doctrine of implication are uncertain. Nevertheless, it appears that within the trend away from implied causes of action, *Lau* may be viewed as an exception of the sort the dissenters in *Bivens* envisioned: a private right of action will be derived from a statute vindicating constitutionally guaranteed civil rights.

D. Cort v. Ash: *Further Restriction and Restatement*

The liberal approach taken by Justice Douglas in *Lau* did not alter the course charted by the Burger Court restricting the use of the implication doctrine. In 1975, a unanimous Court consolidated prior case law[79] to reaffirm this trend in *Cort v. Ash*.[80] Prior to the *Cort* decision, conflicting policies and standards had been applied to determine when the implication of a private action was warranted.[81]

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76. *Id.* at 471.

77. J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

78. 414 U.S. at 472.

79. *Lau* was ignored in this consolidation.

80. 422 U.S. 66 (1975).

81. Note, *Emerging Standards for Implied Actions under Federal Statutes*, 9 U. MICH. J. L. REF. 294, 295-96 (1976).

Courts had agreed on the general two-step approach to be taken, inquiring first whether the particular plaintiff was the beneficiary of the right conferred by the statute and second whether the statute itself appeared to be compatible with an implied remedy.[82] Nevertheless, the standards used to obtain answers to these inquiries had conflicted considerably.[83] *Cort* established four criteria that, taken together, were apparently intended to resolve the issue of implication in any particular case.

The Supreme Court held in *Cort* that a private cause of action for damages against corporate directors could not be implied in favor of a corporate stockholder for violation of section 610 of the Federal Election Campaign Act, a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election . . . at which Presidential and Vice Presidential electors . . . are to be voted for . . . ."[84] The Court found that the intervention of amendments to the Act in 1974,[85] establishing a Federal Election Commission with primary jurisdiction over complaints of section 610 violations, required that plaintiff Ash turn first to the newly formed Commission for relief.[86]

Although the Court apparently could have disposed of the case on the basis of the "exhaustion of remedies" doctrine, it nevertheless turned to the issue of "whether a private remedy is implicit in a statute not expressly providing for one," and refuted the holding of the court of appeals that a private cause of action was proper under section 610. It articulated a test in four parts:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[87]

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82. *See* note 37 *supra* and accompanying text.

83. Note, *supra* note 81, at 295-96.

84. 18 U.S.C. § 610 (1970) (repealed, Pub. L. No. 94-283, § 201(a), 90 Stat. 496 (1976)). This provision had formed part of Title 18, "Crimes and Criminal Procedure," and had set fines and prison sentences for its violation.

85. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 18 U.S.C. §§ 431-456 (Supp. IV 1974)).

86. 422 U.S. at 76 n.9.

87. *Id.* at 78 (emphasis in original). In support of the especial beneficiary requirement, the Court cited Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916). Regarding legislative intent, it cited National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 460 (1974). In support of the overall legislative scheme criterion, the Court cited *id.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975) and Calhoon v. Harvey, 379 U.S. 134 (1964). Finally, regarding the state concern criterion, the Court re-

These four standards clarify the issues relevant to implication analysis and represent a tightening of the applicable standards. The criteria had been applied in various combinations by the Supreme Court in earlier cases. The *Cort* opinion indicates that all four must be separately considered in future analyses. These requirements are far more stringent than any that had been previously applied, indicating an effort by the Court to make the implication of private causes of action a more difficult task than before.

Applying the four criteria to the case before it, the Supreme Court found that the plaintiff in *Cort* did not have a private cause of action. Turning to the second criterion to illuminate the first, the Court determined that the legislative history did not indicate congressional intent to make the plaintiff an "especial beneficiary" of the statute. The primary purpose of the Federal Election Campaign Act was found to be the prevention of the joinder of political power and the wealth of corporations. Protection of stockholders' investments was of secondary concern.[88] Ash therefore failed to satisfy the first two criteria since, suing in his capacity as shareholder, he qualified as a secondary rather than as an especial beneficiary of the statute. Because the remedy sought would not aid the primary congressional goal, the Court also found that the third criterion was not satisfied; the suit did not further the general purposes of the legislative scheme. Finally, since state law provided the plaintiff a remedy in the form of an ultra vires suit, the Court found the area adequately controlled by state law.[89]

Cort was expected to have established a uniform, nationwide doctrine that would put an end to the implication doctrine's history of conflicting standards and unpredictable applications.[90] It has not done so. Several lower federal courts have adopted the criteria set out in *Cort*;[91] others have ignored them;[92] and at least one has fused its own standards with those of *Cort*.[93] The lower courts' varying treatment

ferred the reader to Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394-95 (1971); and *id.* at 400 (Harlan, J., concurring in judgment).

88. 422 U.S. at 81-82.

89. *Id.* at 85.

90. Note, *supra* note 81, at 318.

91. *See, e.g.*, Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 814-15 (E.D. Pa. 1977); De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4, 6-7 (N.D. Tex. 1976); Rauch v. United Instruments, Inc., 405 F. Supp. 442, 444-46 (E.D. Pa. 1975), *rev'd*, 548 F.2d 452 (3d Cir. 1976); Moen v. Las Vegas Int. Hotel, Inc., 402 F. Supp. 157, 161-62 (D. Nev. 1975), *aff'd*, 554 F.2d 1069 (9th Cir. 1977); Jones v. United States, 401 F. Supp. 168, 171 (E.D. Ark. 1975), *aff'd* 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 735 (1977); Sierra Club v. Morton, 400 F. Supp. 610, 622-25 (N.D. Cal. 1975).

92. *See, e.g.*, Evans v. Kerbs & Co., 411 F. Supp. 616 (S.D.N.Y. 1976); Hibernia Bank v. International Bhd. of Teamsters, 411 F. Supp. 478 (N.D. Cal. 1976); Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D.N.Y. 1975); Guernsey v. Rich Plan, 408 F. Supp. 582 (N.D. Ind. 1976); Rogers v. Exxon Research, 404 F. Supp. 324 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977).

93. Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975).

of *Cort* can be traced in part to the fact that the *Cort* standards constitute dicta. Because Ash's claim was disposed of by the intervening law that relegated the complaint to the Federal Election Commission for initial review, discussion of the possibility of a private remedy was superfluous to the holding and served only to support the conclusion already drawn.

Nevertheless, the four-part *Cort* test carries great weight with lower courts presented with implication issues because it comprises the only attempt to synthesize the contradictory reasoning of prior cases and the only expression of comprehensive guidelines by the United States Supreme Court.[94] At the very least, it must be recognized as a definitive statement that the Burger Court will tolerate fewer implied actions.[95]

III. THE *Lloyd* OPINION

A. *The Seventh Circuit's Analysis*

Lloyd involved a class action suit brought by two "mobility-handicapped" citizens[96] of Illinois against the Regional Transportation Authority and the Chicago Transit Authority. The plaintiffs sought to compel local transportation authorities to take affirmative steps to provide special services to mobility-handicapped persons.[97] The cause of action asserted under section 504[98] presented the issue whether the language of section 504 conferred on the plaintiffs a right to sue the transportation authorities. The district court had determined that section 504 did not allow plaintiffs "to enforce a policy of affirmative action in favor of handicapped persons" and that this absence of an affirmative action requirement deprived them of a cause of action under the statute.[99] The court of appeals vacated the judgment and remanded the case, holding that the statute imposed a duty of affirmative action and that a private cause of action was implicit in the statute.[100]

94. Note, *supra* note 81, at 302.

95. McMahon & Rodos, *supra* note 51, at 185-87.

96. Plaintiff George A. Lloyd, a quadriplegic confined to a wheelchair, and Janet B. Wolfe, mobility-disabled because of a chronic pulmonary dysfunction, sued on behalf of all mobility-disabled persons in northeastern Illinois, alleging that their class was excluded from public transportation because of physical disabilities.

97. A preliminary injunction was requested to prohibit the defendants from designing or placing into operation any federally funded facilities not accessible to mobility-handicapped persons; a mandatory injunction was sought to compel them to make the existing system accessible.

98. Three other bases for recovery were relied upon by the plaintiffs: § 16 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612 (1976); §§ 1 and 2 of the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-52 (1973), and the equal protection clause of the fourteenth amendment to the United States Constitution. Deciding the case on the basis of § 504, the Court did not reach these other causes of action.

99. Lloyd v. Illinois Regional Transp. Auth., No. 75-C1834 (N.D. Ill., March 16, 1976).

100. Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-85 (7th Cir. 1977).

In reaching these conclusions, the circuit court undertook the difficult task of harmonizing *Lau* with *Cort*. *Lau* was relevant because it involved a statute with language similar to section 504 and implied a cause of action based on an affirmative duty to provide special services. As in *Lau*, the discrimination in *Lloyd* resulted from admittedly equal treatment of unequal populations. Thus, before a right to sue under section 504 could be found, it was necessary in *Lloyd* to determine that an affirmative duty was implicit in the statute. Just as the school board in *Lau* needed to provide special services to non-English-speaking students to rectify the inequality inherent in the provision of equal services, it was necessary for the transit authorities in *Lloyd* to provide special services for mobility-handicapped persons in order to counteract the discrimination inherent in the provision of equal transportation facilities. Because of the strong parallels between the *Lau* and *Lloyd* facts, the Seventh Circuit might have relied exclusively on *Lau* to find a private cause of action in *Lloyd*.

Yet the Seventh Circuit in examining these facts after the *Cort* decision, recognized that the *Cort* opinion also had relevance because it articulated the means for determining whether a private action could be implied from a regulatory statute. Therefore Judge Cummings divided his analysis into two parts: first, he relied on *Lau* to determine that section 504 confers affirmative rights on handicapped individuals; second, having found these rights, he applied the four-part *Cort* test to determine that a private cause of action could be implied to vindicate them.[101]

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101. *Id.* at 1285. This two-part analysis, however, is not without ambiguity. Some language in the opinion suggests that Judge Cummings may have found the implied right of action based on *Lau* alone and that the *Cort* analysis is only supportive. Although the *Lloyd* court applied the doctrine as described in *Cort*, it suggested in two places that *Cort* may not have been indispensable to its holding—a holding that appears to have been determined exclusively by reliance on *Lau*. Before making any mention of *Cort*, the Seventh Circuit pronounced its holding: "*Lau* is dispositive. Therefore, we hold that section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed." 428 F.2d at 1281. And at the conclusion of the discussion of the four *Cort* criteria, the court indicated that *Cort* was merely supportive of the holding already made under *Lau*: "Because all four *Cort* tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy." *Id.* at 1287. This language, together with the *Lau* decision, suggests that an attempt may be underway to develop a new mode of analysis to supplant the doctrine of implication or circumvent its restrictive use in civil rights cases in which affirmative rights are involved.

Assuming this is a new mode, it appears to consist of the recognition of an affirmative duty imposed on the regulated party by a statute and the inference of a right to sue to enforce that duty. The inference of a private action appears to flow automatically from the existence of the affirmative right. This method represents a return to the original common law implication rationale: a right is discovered in a statute and a remedy is recognized to vindicate that right. *See* note 34 *supra* and accompanying text. It avoids the complex standards developed in recent decisions and consolidated in *Cort*: the plaintiff's status as especial beneficiary, the applicability of the *expressio unius* maxim to other remedies expressed in the statute, the underlying purposes of the legislative scheme and the efficacy of analogous state enforcement. Some of these issues may be examined in connection with the search for an affirmative right, yet once that right is established, the remedy is a natural consequence.

Why a new approach is sought is speculative. The reasons advanced for Justice Douglas'

1. *The Affirmative Rights of Handicapped Individuals*

Judge Cummings found that *Lau* mandated the conclusion that section 504 creates affirmative rights in favor of handicapped individuals because the language of section 601 is nearly identical to the language in section 504.[102] To buttress his conclusion, Judge Cummings attempted to refute the district court reasoning with regard to the *Lau* decision and thereby deviated from his otherwise accurate implication analysis. The district court had found that *Lau* did not govern the question of affirmative rights under section 504, because in *Lau* the "obligation to provide special programs did not flow from the cited statutory language [section 601] but rather from Health, Education, and Welfare guidelines which were enacted pursuant to the additional statutory section, § 2000d-1 [section 602]."[103] Since no analogs to the HEW guidelines had been promulgated under section 504 at the time of the district court decision in *Lloyd*, the *Lau* reasoning was considered by the trial court to be inapplicable. Judge Cummings, however, explained that analogous administrative guidelines were indeed extant, having emerged in developments subsequent to the district court decision: Executive Order 11914[104] authorized HEW to adopt rules and regulations to ensure compliance with section 504, and the

failure in *Lau* to refer to the doctrine of implication by name may also explain a new method of implication permitting desired actions more readily than the increasingly restrictive implication doctrine. The Supreme Court's refusals in *Amtrak*, *SIPC*, and *Cort* to allow conventional implication in favor of plaintiffs indicate its desire to restrict the doctrine to such an extent that it has minimal application in areas of economic regulation. An undesirable by-product of a conscientious application of the restrictive *Cort* standards would be the foreclosure of private actions under civil rights statutes such as § 601 of the Civil Rights Act and § 504 of the Rehabilitation Act, areas in which a private action may be viewed as a desirable complement to administrative regulation. To insure the continued availability of private actions to enforce civil rights statutes and at the same time preserve the restriction of private remedies generally, the courts in *Lau* and *Lloyd* may have found it appropriate to fashion the new mode of analysis.

Another related reason may follow from the facts peculiar to both cases. In *Lau* the lower courts had denied relief because the students' lack of proficiency in English "was not caused directly or indirectly by any state action." Lau v. Nichols, 483 F.2d 791, 798 (1973). Similarly, in *Lloyd*, the provision of equal transportation services excluded handicapped persons from services altogether. In both cases, the respective statutes clearly imposed a duty not to discriminate, but in order to find a higher level of duty to provide special services to counteract inadvertant discrimination, it was imperative that more be read into the statutory language. Hence, the search for an "affirmative right" demanded a more liberal reading of the statute. This liberal reading would be inconsistent with the current trend in implication analysis toward a strict reading of statutory language.

If *Lau* does represent an alternative to the traditional implication methodology, *Lloyd* demonstrates how this alternative may be used in subsequent cases. A plaintiff suing under section 504 or a similar statute, who is subjected to discrimination by the failure to observe an affimative duty, would need to demonstrate only that an affirmative right is established by the statute by pointing to its history, its regulations, local state law or any other source. The conventional principle *ubi jus ibi remedium* would then apply to award a private remedy

For a recent district court analysis which appears to follow this approach, see Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977).

102. 548 F.2d at 1281.

103. No. 75-C1834, at 7 (N.D. Ill. Mar. 16, 1976).

104. 3 C.F.R. 117 (1977).

Urban Mass Transit Administration (UMTA) guidelines[105] established affirmative duties to provide special transportation services for the handicapped.

By relying on these administrative developments, the Seventh Circuit was able to imply a private right of action from the statute and regulations together, thereby avoiding a conclusion that section 504 alone provided the action:

> *Lau* is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights . . . . Even though the opinion of the Court in *Lau* can be read as authority for allowing this action to proceed under section 504 . . . alone, developments subsequent to the district court's opinion have provided a virtual one-to-one correspondence between the conceptual props supporting the concurring opinion in *Lau* and the elements of the instant case.[106]

2. *The* Cort *Implication Doctrine*

Having established that affirmative rights exist under section 504, Judge Cummings embarked upon an inquiry whether a private cause of action could be implied to vindicate those rights, using the four-part *Cort* test. The deftness with which the court appears to have handled the first *Cort* criterion—"[p]laintiffs of course are among the class specifically benefited by the enactment of the statute"[107]—is deceptive. The ten-page discussion devoted to establishing the existence of affirmative rights was indispensable to this conclusion.

Why the court in *Lloyd* devoted so much of its discussion to the first *Cort* standard can be explained by the great stringency with which this standard had been applied in *Cort* and by the higher level of duty required to establish affirmative rights under section 504. The first standard is described in *Cort* as follows: "[I]s the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . —that is, does the statute create a federal right in favor of the plaintiff?"[108] As articulated, this standard actually involves a double inquiry. In order to answer this question affirmatively, it must be determined that: 1) a federal right is created by the statute; and 2) the plaintiff is the especial beneficiary of this right.[109] In *Cort*, special emphasis was placed on the second prong of this inquiry—the plaintiff was not regarded as an "*especial* beneficiary" of the Election Campaign Act. In *Lloyd*, on the other hand, plaintiffs' status as especial beneficiaries was not in doubt. Instead, the character of the right created by the

105. 49 C.F.R. §§ 609.1-25, 613.204 (1976).

106. 548 F.2d 1277, 1281 (7th Cir. 1977).

107. *Id.* at 1285.

108. 422 U.S. 66, 78 (1975) (emphasis in original).

109. Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 376 (1975-76).

statute posed difficulties. In order to find an affirmative right under section 504 it was necessary for the court to read more into the statute than would have been necessary to find a nonaffirmative right. The circuit court devoted the bulk of its discussion in *Lloyd* to the search for affirmative rights under the statute, then incorporated that search into its analysis of the first *Cort* standard, stating simply that "[a]s demonstrated above, Section 504 establishes affirmative private rights."[110]

Once the first standard of the *Cort* test was met, the other three appeared to fall easily into place. The court found that "there is surely an indication of legislative intent to create such a remedy and none to deny it."[111] But the dearth of history surrounding the drafting of section 504 compelled the court to turn to elucidation of the section provided after its passage in the legislative discussion of the 1974 amendments to the Rehabilitation Act. As the opinion observes, these amendments "redefined the term 'handicapped individual' as used in Section 504 and, as clarifying amendments, have cogent significance in construing"[112] that section. The legislative discussion of the 1974 amendments stresses the selection of language in section 504, identical to section 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1973, and indicates Congress' intention that the enforcement of section 504 should closely parallel implementation under those other sections, including private enforcement. "This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process . . . , provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action."[113] This language, read by the Seventh Circuit to refer to post-administrative judicial review, nevertheless indicated to the court that "it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action."[114] Moreover, the court recognized that "[w]hen administrative machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts."[115] Accordingly, it was determined that the second *Cort* criterion was met.

The third criterion of the *Cort* test requires that it be consistent with the underlying purposes of the legislative scheme to imply a

110. 548 F.2d at 1285.

111. *Id.* at 1286.

112. *Id.* at 1285.

113. S. REP. No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

114. 548 F.2d at 1286.

115. *Id.*

remedy. Pointing to one of the expressed purposes of the Rehabilitation Act to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals,"[116] the Seventh Circuit in *Lloyd* found that the underlying purpose of the Rehabilitation Act would be served by allowing the implication of a private cause of action under section 504. Since an implied right of action would serve to enforce the uniform standards envisioned by Congress, "the unseemly vista of a spotty application of *ad hoc* remedies . . . would not occur."[117]

Finally, because it was conceded in argument that "it was the intent of Congress to deal with the transportation needs of the handicapped on a national basis,"[118] *Lloyd* did not present a type of injury traditionally remedied under state law. Thus, the circumstances of *Lloyd* satisfied all the standards articulated in *Cort*.

B. *Critique of the* Lloyd *Analysis*

Lloyd appears to contain a broad holding. At several points the court makes flat statements to the effect that "Section 504 implicitly provides a private remedy."[119] However, because it relied heavily on the UMTA regulations to find the implied right, rather than deriving the right of action squarely under the statute, the court's opinion is misleading and much more cautious than the holding would admit.

Concerning the first *Cort* standard, the Seventh Circuit held that "Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights . . ."[120] The UMTA regulations dealt only with the rights of handicapped individuals to have access to public transportation, and the Seventh Circuit found that the affirmative rights guaranteed by section 504 applied particularly to transportation barriers. It further found that a private action would be consistent with the purposes underlying the statutory and administrative scheme to eliminate architectural and transportation barriers and would enforce standards for public transportation systems established by UMTA and HEW regulations.[121] It held that mass transit is not an area traditionally subject to state regulation.[122] All of these findings relate only to the rights of handicapped individuals to have access to public transportation although

116. 29 U.S.C. § 701 (1975).
117. 548 F.2d at 1286.
118. *Id.* at 1286-87.
119. *Id.* at 1287. *See id.* at 1281.
120. *Id.* at 1281.
121. *Id.* at 1286.
122. *Id.* at 1286-87.

section 504 clearly confers rights upon disabled persons with respect to all types of federally funded programs. Only with regard to the legislative intent to allow private remedies is the *Lloyd* reasoning as broad as its ostensible holding that the statutory section itself provides the private cause of action.

A disturbing consequence emerges from the Seventh Circuit's heavy reliance on the regulatory language: a judicial remedy arises only after the regulations issue, when this remedy can serve in a supplementary capacity only. The implied cause of action, which is the sole channel designed to provide private redress and enforce a public duty before administrative regulations are issued, is withheld until those regulations appear.

It was improper and unnecessary to propound a rule of law with such ironic consequences. Administrative regulations may serve to set standards and guidelines delineating the scope of a statutory right and aiding in the determination of whether a violation of the statute has indeed occurred. But it is the statute, as an expression of congressional authority, which creates the right upon which a handicapped person must rely in court.[123] If a private remedy can be implied under a statute, it is important to do so directly, so that the intended beneficiaries of the legislative enactment have a remedy before the administrative agency promulgates regulations or when administrative enforcement is inadequate. The Seventh Circuit could have employed the doctrine of implication as it had developed at the time of the *Lloyd* appeal to derive the cause of action squarely under the statute.

Nevertheless, the Seventh Circuit chose to chart a new course by scouring the administrative guidelines for authority for a private remedy rather than by applying the ready and established means for making such a determination under section 504—the doctrine of implication. A closer look at the *Lloyd* analysis reveals why the Seventh Circuit took the course it did.

The Seventh Circuit's failure to apply the implication doctrine properly can be traced to the court's recognition that in order to satisfy the first inquiry of the four-part *Cort* test it was necessary to determine that affirmative rights were established by section 504. The court did so by relying on the *Lau* decision. It placed particular emphasis on the concurring opinions in *Lau*, reading them to require administrative guidelines similar to those used in *Lau* as a prerequisite to the finding of an affirmative right. In examining the executive order and

123. The only example of an administrative rule spoken of by courts as the source of an implied cause of action is rule 10b-5, 17 C.F.R. §§ 240.10b-5 (1977), promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1970). *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). Although no court has actually so held, an implied cause of action may exist under rule 10b-6, 17 C.F.R. § 240.10b-6 (1977), promulgated under the same statute. *See* Piper v. Chris-Craft Industries, 97 S. Ct. 926, 950-52 (1977).

the UMTA guidelines, for example, Judge Cummings sought a "one-to-one correspondence between the conceptual props supporting the concurring opinions in *Lau* and the elements of the instant case."[124] And again at the end of his affirmative rights discussion, he concluded that "every element of the two concurring opinions in *Lau* is also satisfied under the statutory and administrative framework of the instant case."[125]

This concern for the concurring opinions in *Lau* may at first appear curious.[126] However, the majority opinion failed to explain adequately the issue presented and the method of reasoning used to resolve that issue. Justice Stewart's concurrence clarified the problem posed by the facts in *Lau*: the necessity of establishing affirmative rights in favor of the plaintiffs before a right to sue could be implied. Perhaps the circuit court also considered Justice Stewart's opinion more reflective of the Supreme Court's restrictive attitude towards implication.[127] Nevertheless, the emphasis in *Lloyd* on Justice Stewart's concurrence in *Lau* reads too much into that opinion. This becomes clear from an examination of Justice Stewart's reasoning.

Justice Stewart questioned whether section 601, "standing alone, would render illegal the expenditure of federal funds," pointing out that rather than affirmatively or intentionally discriminating, the school district merely "failed to act in the face of changing social and linguistic patterns." He continued: "On the other hand, the interpretive guidelines published by the Office for Civil Rights . . . clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools."[128] It is most likely that this language led the court in *Lloyd* to search for administrative guidelines and to refuse to find a cause of action in section 504 alone. Nevertheless, this reading of Justice Stewart's concurrence in *Lau* is erroneous, for on closer examination it becomes evident that Justice Stewart did not read the regulations as providing the right, but only, in their interpretive capacity, as clarifying that the right exists in the statute. Indeed, his word choice carefully avoids any indication that the right derives from the regulations. He found that the text of section 601 was "not entirely clear" about the requirement of special services, and, turning to the administrative guidelines for explication of the statute, he found that they indicated that affirmative efforts were indeed "*required by Title VI.*"[129] This interpretive aspect of the guidelines

124. 548 F.2d at 1281.

125. *Id.* at 1284.

126. *Lau* was a unanimous decision. Four justices joined the majority opinion of Justice Douglas; the others concurred in the result.

127. Justice Stewart wrote the *Amtrak* opinion denying an implied cause of action.

128. Lau v. Nichols, 414 U.S. 563, 570 (1974) (Stewart, J. concurring).

129. *Id.* (emphasis added).

is underscored by Justice Stewart's view of the issue involved: "The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601."[130] He concluded that they did not, and that "[t]he Department has reasonably and consistently *interpreted § 601 to require* affirmative remedial efforts to give special attention to linguistically deprived children."[131] Indeed, Justice Stewart's approach does not conflict with the majority opinion, which stated explicitly that the decision to reverse the lower court was based "solely on § 601 of the Civil Rights Act."[132]

In *Lau*, it was necessary to examine the administrative guidelines in their explicative capacity in order to determine whether an affirmative right to sue for special treatment was required by the statute. Contrary to the district court's conclusion and the circuit court's tacit assumption in *Lloyd*, however, that right derived ultimately from the statute, not from the guidelines. Had this been recognized by the *Lloyd* court, it could have enunciated a more generous and less cautious holding that would nonetheless have been consistent with prior implication analysis.

IV. THE HEW REGULATIONS

After the circuit court decision in *Lloyd*, final regulations were issued under section 504, providing for extensive voluntary compliance on the part of recipients of federal assistance and government enforcement on the part of the Office of Civil Rights.[133] These regulations apply to each recipient of federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance. In the area of employment practices, the regulations prohibit discrimination in recruitment, hiring, compensation, job assignment and classification, and fringe benefits and require employers to make reasonable accommodation for qualified handicapped applicants and employees. All programs are to be made accessible to handicapped persons. Preschool, elementary, and secondary education is to be provided each qualified handicapped child in the most normal setting appropriate. Recruitment, admission, and treatment after admission to post-secondary educational institutions are to be conducted on a nondiscriminatory basis, and colleges and universities are required to adjust academic requirements and existing programs to insure that handicapped persons are not effectively excluded from higher education. Hospitals and other recipients providing health, welfare, and social service programs must make adjustments to abolish discrimination and af-

130. *Id.* at 571.

131. *Id.* (emphasis added).

132. *Id.* at 566.

133. 45 C.F.R. § 84 (1977).

ford access to their programs. In addition to governing Health, Education, and Welfare programs, the HEW regulations will serve as a basis for guidelines to be issued by the Department to other departments and agencies of the federal government that are affected by section 504.

The HEW regulations incorporate by reference the Department's enforcement procedures under Title VI of the Civil Rights Act of 1964.[134] These procedures encourage voluntary compliance, permit investigation by the Department, and allow for an administrative hearing and a termination of federal funding upon a finding of a refusal to comply. Judicial review of the administrative action may be had pursuant to the Administrative Procedure Act.[135] Implementation of the regulations promises finally to set in motion the overdue enforcement of the rights guaranteed to handicapped persons by Congress four years ago.

The regulations, though not specifically providing for a private cause of action, do not preclude continued private enforcement in the courts. Thus, the theoretical weakness of the *Lloyd* decision remains problematical. To be sure, courts could use the *Lloyd* decision to grant relief to plaintiffs in areas other than transportation, basing their results on the new and extensive HEW regulations.[136] However, this is inconsistent with the common law doctrine of implication, which, even after *Cort*, retains enough vitality to accommodate a cause of action under section 504 alone. The *deus ex machina* of the new regulations does not excuse the failure of the *Lloyd* court to apply the implication doctrine properly. Courts presented with the issue of whether a private cause of action is implied in section 504 should undertake an independent examination of the provision in light of the Supreme Court's restatement of the doctrine in *Cort* and other cases.

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134. 45 C.F.R. §§ 80.6-.10; 45 C.F.R. § 81.1-.131 (1976).

135. 5 U.S.C. § 706 (1970).

136. At least three cases decided since *Lloyd* have relied on its reasoning without undertaking an independent analysis of § 504 itself. In *Bartels v. Biernat*, the court had imposed a preliminary injunction against various Milwaukee and federal transit officials and permitted a class action to proceed, without discussion of whether or not a cause of action existed under § 504. 405 F. Supp. 1012 (E.D. Wisc. 1975). In subsequent proceedings, that court sustained the plaintiffs' cross motions for summary judgment, declaring the defendants to be in violation of, inter alia, § 504, and permanently enjoined operation of the system until defendants could demonstrate that special efforts were made to provide equivalent access to the system for handicapped persons. *Lloyd* was cited for the holding that "section 504 . . . does create a private cause of action," and the court found that "[t]he *Lloyd* case dictates that the federal defendants' motion to dismiss for lack of jurisdiction over the subject matter of the action and for failure of the complaint to state a claim upon which relief can be granted should be denied." Bartels v. Biernat, No. 75-C-704 (E.D. Wis. Feb. 14, 1977).

Two other cases are United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (awarding an implied cause of action); and Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977) (denying an implied cause of action). *But see* the independent analysis undertaken in Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). *Lloyd* is also cited in Gurmankin v. Costanzo, 556 F.2d 184, 188 (3d Cir. 1977).

V. Proposed Method of Implying a Cause of Action Under Section 504

A. *The Especial Beneficiary of Affirmative Rights and Legislative Intent*

The first *Cort* standard requires that the plaintiff be the especial beneficiary of the statute. In *Cort* and its predecessors, this standard was met by an examination, first of the text and then of the legislative history of the statute, in order to ascertain the primary motivation behind the law.[137] An examination of section 504 within this analytical framework reveals that it was unnecessary for the Seventh Circuit in *Lloyd*, in satisfying the first *Cort* standard, to look for administrative guidelines conferring affirmative rights. The guidelines, though of assistance under the *Lloyd* facts, were superfluous to the finding of affirmative rights under section 504. Two other paths to that end were available—through the *Lau* decision and through the conventional implication inquiry employed in *Cort*.

First, the Supreme Court in *Lau* had determined that affirmative duties which were enforceable by private suits were established by an antidiscrimination statute with the following wording: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[138] Given the *Lau* holding, the Seventh Circuit might have reasoned that the same rights and duties of an affirmative nature flowed also from the virtually identical language of section 504: "No otherwise qualified handicapped individual in the United States, . . . 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."[139]

Second, following the approach taken by the Supreme Court in *Cort*, the court in *Lloyd* might have examined the second criterion for implying a private cause of action—legislative intent—to illuminate the first. The concept embodied in section 504 was first introduced by Senators Humphrey and Percy and Representative Vanik as an amendment to section 601 of the Civil Rights Act to include handicapped individuals among those protected by that statute.[140] Senator

137. Cort v. Ash, 422 U.S. at 85. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916); Western v. Hodgson, 359 F. Supp. 194 (S.D. W. Va. 1973), *aff'd*, 494 F.2d 379 (4th Cir. 1974).

138. 42 U.S.C. § 2000d (1970).

139. 29 U.S.C. § 794 (Supp. V 1975).

140. H.R. 12154, 92 Cong., 1st Sess., 117 CONG. REC. 45945 (1972); S. 3044, 92d Cong., 2d Sess. 118 CONG. REC. 526 (1972), introduced on Jan. 20, 1972, would have inserted "physi-

Humphrey subsequently sanctioned the incorporation of this bill into legislation concerning reorganization of the rehabilitation program, noting that it preserved the intent of the original bill:

> I am deeply gratified at the inclusion of these provisions, which carry through the intent of original bills which I introduced jointly with the Senator from Illinois (Mr. Percy), earlier this year, S.3044 and S.3458, to amend, respectively, Titles VI and VII of the Civil Rights Act of 1964, to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance . . . .[141]

As the Seventh Circuit recognized, the fullest elaboration of congressional intent regarding section 504 occurred after its enactment, during consideration of amendments to the Act in 1974. Already distressed at the absence of enforcement of the antidiscrimination sections,[142] the full Committee on Labor and Public Welfare made numerous changes intended to broaden the class of persons protected and to remove any doubts about the broad implementation contemplated by Congress. Noting that section 601 of the Civil Rights Act served as a model for section 504, the Committee's report states:

> It [section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement were intended.
>
> The language of section 504, in follow 9 [*sic*] the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations . . . , attempts to bring non-complying recipients into voluntary compliance . . . , and the imposition of sanctions . . . . Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. . . . This approach to implementation of section 504 . . . would . . . *permit a judicial remedy through a private action.*[143]

Section 504, read in the light of this legislative history, indicates that Congress intended that a person injured by a violation of the provision's mandate be permitted to benefit from a private judicial remedy.

By using either or both of these methods—analogizing from *Lau* or examining the legislative history of section 504, the *Lloyd* court could have satisfied the first standard of the *Cort* test by finding a duty of an affirmative nature imposed by the statute itself. This analysis also satisfies the second *Cort* requirement since it discloses that Con-

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cal or mental handicap," immediately after "color" and "unless lack of such physical or mental handicap is a *bona fide* qualification reasonably necessary to the normal operation of such program or activity" after "Federal financial assistance," and would have added a section defining physical or mental handicap.

141. 118 CONG. REC. 32310 (1972).

142. Section 504 is one of four sections meant to alleviate discrimination of various kinds against handicapped persons. *See* 29 U.S.C. §§ 791-794 (Supp. V 1975).

143. S. REP. NO. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390 (emphasis added).

gress specifically referred to a private cause of action in its discussion of contemplated implementation mechanisms.

B. *Underlying Purposes of the Legislative Scheme*

Over the course of the development of the implication doctrine, the courts have evolved several considerations to aid in determining whether a private action harmonized with the overall legislative scheme: 1) whether a private suit would frustrate the goals of Congress in enacting the statute;[144] 2) whether the remedy would be a valuable supplement to otherwise inadequate enforcement;[145] 3) whether the threat of private suit would aid in deterring violation of the statute;[146] and 4) whether the remedy would interfere with the primary jurisdiction of the responsible agency.[147]

Applying these considerations to section 504, it appears that a private remedy would indeed fall within the legislative scheme. Under section 504, there is no frustration of goals such as was fatal in *Amtrak*, in which a private suit was expected to hamper the congressional policies of efficient elimination of unproductive routes and preservation of the passenger rail system.[148] In *SIPC*, in which a primary purpose of the statute was found to be the stabilization of the securities business by halting the domino effect that failing brokerages have on other brokerages, the Court denied a remedy against a failing brokerage because private suits against failing brokerages would further destabilize the industry. Thus, a private remedy would have worked at cross purposes with the legislative scheme.[149] No such delicate interrelations govern the policy behind section 504. The purpose, as revealed by an examination of the legislative intent, is to prevent discrimination against handicapped persons by all recipients of federal funds. A private remedy would not conflict with this goal.

Rather, a private remedy would effectively supplement inadequate administrative enforcement. Budget projections for the 1977 fiscal year demonstrate that minimal enforcement procedures are contemplated by the Office of Civil Rights.[150] While it is too soon to

144. *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

145. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Carey v. General Elec. Co., 315 F.2d 499, 509 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964); Fitzgerald v. Pan Am World Airways, Inc., 229 F.2d 499, 502 (2d Cir. 1956).

146. *See* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 41-42 (1916).

147. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464, 472-74 (1959); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

148. National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 461-64 (1974).

149. Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 415, 421-23 (1975).

150. The Office of Civil Rights (OCR) is responsible for enforcement of § 504 after the regulations issue. It is responsible also for enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, §§ 799A and 945 of the Public Health

evaluate the adequacy of the enforcement mechanisms set up under the HEW regulations for section 504, the experience of administrative enforcement procedures in other regulatory areas is instructive. Due to inadequate resources, administrative agencies have established a pattern of selective enforcement aiming only at the most flagrant violations. The Secretary of Labor, for example, was able to investigate less than 4% of the employment establishments covered by the Fair Labor Standards Act in 1973.[151] In *J.I. Case Co. v. Borak*,[152] the Supreme Court acknowledged that the Securities Exchange Commission could not adequately examine the 2000 proxy statements it received annually. The Court of Appeals for the Second Circuit has cited the notorious overcrowding of the National Labor Relations Board's docket as a reason for permitting judicial remedies in the labor relations field.[153] There is no reason to assume that the record of the Office of Civil Rights will prove to be any more illustrious than those of other agencies.

Moreover, the threat of private suit might effectively deter further violations of section 504. If potential violators are faced with only a slight chance of being penalized for their conduct owing to selective administrative enforcement, there is clearly little motivation to comply with the statutory standard. But the existence of a possible civil penalty may provide the incentive required for the "voluntary" compliance envisioned by HEW in its regulations.

It may be that HEW will be deemed to possess primary jurisdiction over complaints of section 504 violations, requiring a court to refrain from exercising its jurisdiction until after HEW has made its determination with respect to each complaint.[154] Perhaps, also, a complainant may be required to exhaust state and federal administrative remedies before a court will accept jurisdiction over the cause.[155] Yet the doctrine of primary jurisdiction has been held not to bar actions in areas normally covered by it when discrimination[156]

Service Act, and Executive Order 11246. OCR's proposed plan, devoted to the "elimination of the backlog of complaints" as well as the "conduct of an effective compliance program," projects that of 539 "professional person years" to be devoted to compliance work, 29 will be expended on the investigation of complaints under § 504 in the fiscal year 1977. 41 Fed. Reg. 41,776 (1976).

151. Employees v. Missouri Pub. Health Dep't, 411 U.S. 279, 287 (1973) (Marshall, J., concurring).

152. 377 U.S. 426, 432-33 (1964).

153. Carey v. General Elec. Co., 315 F.2d 499, 509 (2d Cir. 1963).

154. Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 817 (E.D. Pa. 1977). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958).

155. *See* Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974).

156. *Compare* Transport-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157 (1966) *and* Slocum v. Delaware, L. & W. R.R. Co., 339 U.S. 239 (1950) (noting primary jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, 45 U.S.C. § 153 (1972)) *with* Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969) (action permitted alleging discrimination against train porters under the Civil Rights Act).

or other civil rights violations[157] are at issue. In *Lau*, the Supreme Court did not find that either the doctrine of primary jurisdiction or the doctrine of exhaustion of administrative remedies posed an obstacle to its jurisdiction over a complaint based on section 601 of the Civil Rights Act;[158] other courts have rejected the two doctrines in connection with the Civil Rights Act.[159] The Supreme Court's treatment of section 601 of the Civil Rights Act of 1964 in *Lau* is indicative of the proper treatment of section 504, because the administrative enforcement procedures under the two sections are identical.

C. *Traditional State Concern*

Finally, *Cort* requires that the cause of action not be one traditionally relegated to state law. Again focusing on the narrow area covered by the UMTA guidelines rather than that covered by the statute, the court in *Lloyd* accepted that Congress intended the transportation needs of the handicapped to be handled on a national basis. Yet in determining the propriety of a cause of action under a federal statute in relation to state law, courts generally focus their attention on the *statute* in its relation to the state interest involved and on the existence of state remedies.

When a statute is intended to be an intrusion of federal law into an area of substantial federal concern, a private action will often be implied.[160] Several states have enacted laws that guarantee equal treatment for the handicapped.[161] Yet the interest of the United States in insuring uniformly equal treatment of all its citizens has clearly been a matter of federal concern since the addition of the fourteenth amendment to the Constitution.[162]

Thus, the use of the traditional implication analysis, even as limited by *Cort*, demonstrates that the *Cort* criteria are flexible enough to allow implication of a cause of action under section 504 alone,

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157. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397 (1970) (inequality in welfare distributions).

158. The Court in *Lau* did not discuss the question whether primary jurisdiction or exhaustion precluded their review. The fact that the Court did not raise either issue on its own motion suggests that these doctrines were considered too insubstantial to bar or postpone the exercise of judicial jurisdiction in that case.

159. *See* Cannon v. Green, 398 U.S. 956 (1970) (suit permitted under Title VI); Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399 (5th Cir. 1969) (suit permitted under Title VII); Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970) *appeal dismissed sub. nom.*, Coit v. Green, 400 U.S. 986 (1971); Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.) (suit permitted under Title VI), *cert. denied*, 388 U.S. 911 (1967).

160. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 409 (1971) (Harlan, J. concurring); J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964); Mortimer v. Delta Air Lines, 302 F. Supp. 276, 279 (N.D. Ill. 1969).

161. *See, e.g.*, CAL LABOR CODE §§ 1412, 1420, 1432.5 (West Supp. 1977); ILL. CONST. art. I, § 19; ILL. REV. STAT. ch. 38 §§ 65-22—65-31 (1977) (Pub. Act. 77-1211 §§ 2-11); N.J. STAT. ANN. § 4-33-7 (1974); Ohio A.S.S.B. No. 162, *reprinted in* 1976 Ohio Legislative Service.

162. *See* U.S. Const. amend. XIV *and* note 64 *supra*.

without resort to the regulations. The unusual character of section 504, as a civil rights statute, guaranteeing "the equal opportunity in education, . . . and the pursuit of happiness that was the dream of our forefathers," enables it to fit within the exceptions to the restricted implication doctrine which were recognized by Black in his *Bivens* dissent. The language of the statute, its legislative history both before and after enactment, its similarity to section 601 of the Civil Rights Act, and the value of the effective enforcement of civil rights guaranteed over four years ago, enable section 504 to satisfy the stringent *Cort* criteria for implication of a private cause of action.

VI. CONCLUSION

Early in the history of our judicial system in the case of *Marbury v. Madison*, the Supreme Court proclaimed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of our laws, whenever he receives an injury."[163] This generally recognized principle is embodied in the implication doctrine, the traditional method for vindication in the courts of rights granted by statute but not otherwise enforced. Concerns of judicial legislation and overburdened court dockets have led to the restriction of the use of that doctrine. It is nevertheless of fundamental importance that laws created by Congress to protect rights guaranteed all persons by our Constitution be enforceable. When no remedy is offered by government, or when the remedy offered is inadequate to effectively vindicate those rights, the need for private judicial enforcement overcomes institutional and pragmatic concerns.

Amtrak, *SIPC*, and *Cort* have reduced the utility of the implication doctrine in most regulatory areas, yet it still retains flexibility for implying a right to sue to enforce a civil rights statute such as section 504 of the Rehabilitation Act of 1973. *Lau* demonstrates that the Supreme Court will still allow private suit in situations in which it is deemed valuable. *Lloyd* demonstrates that the implication doctrine, even as narrowly defined by *Cort*, still may be used to permit a cause of action under section 504.

Lloyd is a valuable decision. It encourages private individuals to enforce rights created by Congress over four years ago. Yet the narrow basis which supports the holding—the heavy reliance on administrative regulations—threatens the holding's endurance as an accepted legal principle. A more proper application of the *Cort* test for implication would derive the cause of action directly from the statute. In the case of section 504, this method demonstrates that the civil rights, antidiscrimination character of section 504 and its historical

163. 5 U.S. (1 Cranch) 137, 163 (1803).

association with earlier civil rights provisions enable a private cause of action to be implied squarely under the statute.

The narrow *Lloyd* reasoning is, moreover, inapplicable to other conceivable statutes under which no administrative enforcement has been undertaken. Persons injured by violations of other statutes need not forfeit their statutory rights and courts faced with their claims need not reject a valid claim because no clarifying regulations exist from which to infer an implied cause of action. An application of the *Cort* test as proposed will determine whether a private cause of action can be inferred from the statutory section alone.

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