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## PRIVATE RIGHTS OF ACTION

Michael P. Seng\*

*In order for Sections 503 and 504 of the Rehabilitation Act of 1973 to practically prohibit employment discrimination against handicapped persons, a broad array of effective and prompt remedies is needed. In this Article, the author examines judicial findings of legislative intent to create private causes of action in the enactment of various civil rights legislation and concludes that a private cause of action is an available mechanism to enforce the federal statutory scheme prohibiting discrimination in the employment of handicapped individuals. While Sections 503 and 504 are silent as to whether a private cause of action exists, Professor Seng clearly shows that the same reasons that permit private causes of action under other civil rights legislation holds true for Sections 503 and 504, thus realizing Congress' intent to fully protect handicapped individuals.*

If equal employment opportunities for handicapped persons are to be more than empty promises, a prompt judicial remedy is required. Experience in the civil rights area indicates that administrative remedies are no substitute for the relief which can be provided by courts. While many states now provide means for the protection of handicapped persons, this Article will focus on the relief available through the federal judicial system. The Federal Rehabilitation Act of 1973<sup>1</sup> is often referred to as the Bill of Rights for Handicapped Persons. Sections 503 and 504 of the Act are modeled on some of the earlier federal declarations designed to eliminate racial discrimination.<sup>2</sup>

Section 503 requires federal contractors to establish affirmative action programs to employ and advance in employment qualified handicapped individuals.<sup>3</sup> The President is directed to promulgate rules

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1. 29 U.S.C. §§ 701-794 (Supp. V 1975). A "handicapped individual," for purposes of Sections 503 and 504 of the Act, 29 U.S.C. §§ 793 and 794 (Supp. V 1975), is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. § 706(6) (Supp. V 1975).

2. In addition to Sections 503 and 504, a separate section of the Act requires that each department and agency in the Executive Branch have an affirmative action program for the hiring, placement and advancement of handicapped persons in that agency or department. 29 U.S.C. § 791(b) (Supp. V 1975).

3. 29 U.S.C. § 793 (Supp. V 1975). Section 503 imposes this requirement on federal contractors where the contract exceeds \$2500.

to implement this section and the Department of Labor is directed to investigate complaints and take appropriate action against noncomplying contractors. The provisions of Section 503 are similar to Executive Order 11246, which requires affirmative action programs to eliminate racial discrimination by federal contractors.<sup>4</sup>

Section 504 of the Rehabilitation Act provides that no handicapped person "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."<sup>5</sup> The terminology of Section 504 is similar to both Title VI of the Civil Rights Act of 1964,<sup>6</sup> which prohibits racial discrimination by recipients of federal funds, and Title IX of the 1972 Education Amendments,<sup>7</sup> which prohibits sex discrimination under any educational program or activity receiving federal funds. However, contrary to Section 503, Title VI and Title IX, Section 504 does not expressly require the President or other executive official to promulgate rules to implement the Section; nor does Section 504 provide any particular mode of administrative enforcement.<sup>8</sup>

Both Sections 503 and 504 are silent as to whether an aggrieved individual can go to court and seek either legal or equitable relief to force compliance by a recipient of federal funds. Whether a private cause of action is available under a federal statute is determined by

4. Section 503 does differ from Executive Order No. 11246, 30 Fed. Reg. 12,319 (1965), in important respects. Executive Order 11246 has generally been held not to create a private cause of action. *See, e.g.*, *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied* 425 U.S. 943 (1976); *Weise v. Syracuse U.*, 522 F.2d 397 (2d Cir. 1975); *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871 (N.D. Cal. 1975); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied* 389 U.S. 977 (1967). *But see* *Lewis v. Western Airlines*, 379 F. Supp. 684 (N.D. Cal. 1974). Although no private cause of action exists against an employer, a mandamus action has been upheld against federal officials who failed to enforce the Executive Order. *Legal Air Society v. Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974). However, such precedents are of limited authority as to whether a private cause of action exists under Section 503. A serious constitutional argument can be raised concerning the ability of the President, without delegation from Congress, to create a private cause of action. *See* *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. at 877 n. 12 (N.D. Cal. 1975). No such impediment exists when construing an Act of Congress.

5. 29 U.S.C. § 794 (Supp. V 1975).

6. 42 U.S.C. § 2000d (Supp. V 1975).

7. 20 U.S.C. § 1681 (Supp. V 1975).

8. Section 400 of the Rehabilitation Act authorizes the Secretary of Labor to promulgate rules and regulations to implement Subchapters I, III and IV of the Act. 29 U.S.C. § 780(b) (Supp. V 1975). Sections 503 and 504 are not included in this provision.

On April 28, 1976, the President issued Executive Order 11914. This Order authorizes HEW and other concerned agencies to issue rules and regulations to implement Section 504 and requires federal agencies to suspend or terminate federal assistance if the recipient of federal funds is not in compliance. Regulations have since been issued by HEW. *See* 42 Fed. Reg. 22676-22685 (1977). 45 C.F.R. § 84-84.99 (1977). The legislative history of the 1974 Amend-

the intent of the legislature. The legislative intent regarding Sections 503 and 504 is not clear. Except for the administrative procedures specified in Section 503, no remedies are defined. Nonetheless, it is known that Congress does not create mere hypothetical rights.<sup>9</sup> Congress intends that its legislation be effective and its pronouncements enforced.<sup>10</sup> Especially where Congress has not mandated the promulgation and implementation of administrative rules or provided for a specific enforcement mechanism, the courts will presume that Congress intended they exercise all appropriate enforcement powers, both legal and equitable.<sup>11</sup>

In this respect, Section 504 is similar to Sections 1981 and 1982,<sup>12</sup>

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ments to Section 504 shows that Congress did contemplate delegation of responsibility to HEW to set up an effective Federal approach to the problems of handicapped persons. See [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391. This legislative history not only strongly supports the power of HEW and other federal agencies to issue regulations, but, as some courts have noted, may actually *require* HEW to promulgate regulations to effectuate Section 504. See *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1281 (7th Cir. 1977). However, legislative history does not support an argument that Congress intended to preclude a private cause of action under Section 504. Indeed, all it establishes is that Congress in 1974 intended HEW and other federal agencies to take an active part in implementing Section 504 objectives. As more fully developed hereafter, the statute itself is designed to be a powerful and comprehensive tool to break down barriers against the handicapped.

9. See, e.g., *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977). In addition to the issue of the availability of a private right of action pursuant to Sections 503 and 504 of the Rehabilitation Act of 1973, there is the problem of the applicability of the doctrine of primary jurisdiction to such actions. See *Lloyd v. Regional Transp. Auth.*, *id.* at 1287. The issue of primary jurisdiction is beyond the scope of this article.

10. *Richards v. United States*, 369 U.S. 1, 11 (1961); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

11. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Texas & N.O.R. Co. v. Brotherhood of Ry. and Steamship Clerks*, 281 U.S. 548, 569 (1930); *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916).

12. 42 U.S.C. Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

42 U.S.C. Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

Sections 1981 and 1982 have been held to prohibit discrimination by private individuals and companies, as well as that which results from governmental action. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976). By finding support for these Amendments in the 13th Amendment, the Supreme Court has been able to avoid the "state action" problems implicit in the 14th Amendment.

legislation enacted to protect civil rights after the Civil War.<sup>13</sup> Both Sections 1981 and 1982 are declaratory and are silent as to their enforcement mechanisms, but the Supreme Court has sustained the use of both equitable and legal remedies to implement the protections

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The Supreme Court has broadly construed Section 1981 to prohibit all forms of racial discrimination and to protect white persons as well as non-white persons from discriminatory employment practices based on race. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The lower courts have been reluctant to extend the protections of Section 1981 to discriminatory employment practices of a non-racial character. While Section 1981 has been held to prohibit employment discrimination based on alienage because of its broadened statutory language protecting "all persons" and not just citizens, as is the case of Section 1982, *e.g.*, *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54, (5th Cir. 1974), lower courts have held that the Section does not prohibit discrimination based solely on national origin (*see, e.g.*, *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135 (N.D. Ill. 1977) (finding Hispanics to be covered as a "race")), or on sex (*see, e.g.*, *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 522 F.2d 1235, 1240 n.9 (7th Cir. 1975); *League of Academic Women v. Regents*, 343 F. Supp. 636 (N.D. Cal. 1972)). Attempts by handicapped persons to sue for employment discrimination under Section 1981 are therefore likely to be unsuccessful. Justice Marshall, speaking for a unanimous court in *McDonald*, implicitly recognized the limited scope of Section 1981. His examination of the drafting of 1981 and especially the House Amendment by Representative Wilson, which added the qualifying words "as is enjoyed by white citizens", lead him to conclude that these words were added due to Congress' concern that, quoting Wilson, the rights protected by the Act "might be extended to all citizens, whether male or female, majors or minors." 427 U.S. at 293. The purpose of the amendment, Justice Marshall found, was "to emphasize the racial character of the rights being protected", 427 U.S. at 293, quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (emphasis added).

13. Section 504 does not expressly provide judicial relief as does 42 U.S.C. § 1983, which expressly provides that an injured party may sue state officials for civil rights violations in an action at law, suit in equity, or other proper proceeding for redress, and 42 U.S.C. § 1985(3), which expressly provides an action for the recovery of damages against conspirators who deprive persons of their right to equal protection of the laws.

Although 42 U.S.C. § 1983 is to be read against the background of common law tort liability, the Supreme Court has held that Congress intended to create a federal remedy for violations of civil rights which cannot be defeated either by state judicial or administrative remedies. *Damico v. California*, 389 U.S. 416 (1967); *Pierson v. Ray*, 386 U.S. 547 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). It can be argued that if Section 504 gives handicapped individuals a right to be free from employment discrimination and a person acting under color of law so discriminates, he can be sued for damages and an injunction under Section 1983. The Supreme Court has not had occasion to construe the Section 1983 phrase "rights secured by the . . . laws," but lower courts have held that Section 1983 actions can be used to safeguard civil rights created not only by the Constitution but also by federal statutes. *See* citations in *ANTIEAU, FEDERAL CIVIL RIGHTS ACTS* (1971) § 73. The only exception enunciated by the Courts is when the statute creating the right provides an exclusive remedy. *Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U.S. and Can.*, 182 F.2d 158 (9th Cir. 1950), *cert. den.*, 340 U.S. 827 (1951). This exception would not be an impediment to a Section 1983 action predicated on a Section 504 violation. *See* discussion in text *infra*.

Although Section 1985(3) provides expressly only for an action for damages, lower courts have afforded injured parties equitable and declaratory relief in appropriate cases brought under that section. *See* *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Mizell v. North Broward Hosp.*

afforded by these Sections. In *Jones v. Alfred H. Mayer Co.*,<sup>14</sup> the Court sustained equitable relief in a Section 1982 action against a private individual who practiced racial discrimination against a black home buyer.<sup>15</sup> Also, in *Sullivan v. Little Hunting Park, Inc.*,<sup>16</sup> the Court sustained the use of both compensatory and punitive damage awards to the injured party in a housing discrimination suit under Section 1982. The Court noted that "the existence of a statutory right implies the existence of all necessary and appropriate remedies."<sup>17</sup> Furthermore, the Court stated that where the disregard of the statute resulted "in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."<sup>18</sup>

In *Bivens v. Six Unknown Named Agents*,<sup>19</sup> the Court sustained the inherent power of courts to shape relief against constitutional deprivations, even without statutory authorization.<sup>20</sup> The *Bivens* Court also rejected the narrow argument that damages should be made

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Dist., 427 F.2d 468 (5th Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). If racial bias, which Congress can prevent under the 13th Amendment, or "perhaps otherwise class-based, invidiously discriminatory animus" is present, or if one of the narrow privileges and immunities of United States citizenship, i.e., the right to interstate travel, is implicated, the Supreme Court has held that Section 1985(3) will reach private conspiracies as well as conspiracies involving state officers. *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). The lower courts are not in agreement as to whether a conspiracy motivated by invidiously discriminatory intent other than racial bias is actionable under Section 1985(3). See, e.g., *Murphy v. Mount Carmel High Sch.*, 543 F.2d 1189 (7th Cir. 1976); *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Marlow v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Abbot v. Moore Business Forms, Inc.*, 439 F. Supp. 643 (D.N.H. 1977); *Curran v. Portland Super. Sch. Comm.*, 435 F. Supp. 1063 (D. Me. 1977). No cases have been reported on whether private conspirators who refuse to hire handicapped persons can be sued under 1985(3).

14. 392 U.S. 409 (1968).

15. *Id.* at 420-22. J. Harlan, joined by J. White, dissented on the ground that in enacting Title VIII of the Fair Housing Law of 1968, 42 U.S.C. §§ 3601-3619 & 3631, Congress had provided a comprehensive scheme for dealing with this kind of discrimination and that the Court, as a matter of policy, should not develop a common law of forbidden racial discrimination under Section 1982. 392 U.S. at 450. Congressional concern about the interpretation and coverage of Section 1982 was one of the motivating factors behind the adoption of Title VIII. The majority, however, broadly construed Section 1982. Similar coverage and enforcement was afforded to Section 1981. 392 U.S. at 422-36. See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The majority position in these cases supports the strong presumption in favor of full judicial enforcement of civil rights absent a showing of clear Congressional intent to the contrary.

16. 396 U.S. 229 (1969).

17. *Id.* at 239.

18. *Id.* quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916).

19. 403 U.S. 388 (1971).

20. 403 U.S. at 397. The Court relied on *Marbury v. Madison*, 1 Cranch 137, 163 (1803), reaffirming that "[t]he very essence of civil liberty certainly consists in the right of every indi-

available only when the Court deemed them to be *necessary* to enforce constitutional rights. The Court held that an injured party is entitled to redress for his injuries through the remedial mechanism normally available in the federal courts, absent an "explicit congressional declaration that persons injured . . . may not recover money damages. . ." but "must instead be remitted to another remedy, *equally effective* in the view of Congress."<sup>21</sup>

In *Bivens*, the Court created a presumption in favor of full remedial enforcement by the judiciary. This presumption was consistent with the Supreme Court's leading decision finding a private cause of action under Section 14(a) of the Securities Exchange Act of 1934,<sup>22</sup> *J.I. Case Co. v. Borak*.<sup>23</sup> In *Borak*, the Court acknowledged that Section 14(a) made no reference to a private cause of action. Nevertheless, the Court found that among the Section's chief purposes was the protection of investors, "which certainly implies the availability of judicial relief when necessary to achieve that result."<sup>24</sup> In finding that the courts have power to grant all necessary remedial relief, the Court analogized to the antitrust laws where the threat of civil treble damages or injunctive relief served as a "most effective weapon" to enforce the law.<sup>25</sup>

Finally, in *Cort v. Ash*,<sup>26</sup> the Supreme Court articulated a set of factors to be considered in determining whether a private cause of action may be used to enforce a federal statutory scheme. The *Cort*

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vidual to claim the protection of the laws when he receives an injury." Congress had not enacted a federal statute allowing private persons to sue federal officers for constitutional violations as it had against state officers in 42 U.S.C. § 1983. The plaintiffs in *Bivens* thus premised their action on 28 U.S.C. § 1331(a) and the inherent power of federal courts to afford relief against unconstitutional deprivations. In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court had held that the lower courts should not have summarily dismissed a similar claim for lack of jurisdiction. 327 U.S. at 684. The Court stated that "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." *Id.* The Court in *Bivens* reaffirmed this language and noted that damages have been historically regarded as the ordinary remedy for an invasion of personal interest. 403 U.S. at 392. *Bivens* involved a claim against federal agents under the Fourth Amendment. The Supreme Court has not decided whether the courts will award damages for other constitutional violations. *See, e.g., Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977).

21. 403 U.S. at 397 (emphasis added).

22. 15 U.S.C. § 78n(a).

23. 377 U.S. 426, 433 (1964).

24. 377 U.S. at 432. While the Court used the term "necessary" in *Borak*, it did not use it in the strict sense that the government later urged and the Court rejected in *Bivens*, but rather in the sense of what relief is appropriate. It reaffirmed the principle enunciated in *Bell v. Hood*, note 20 *supra*, that "federal courts may use any available remedy to make good the wrong done." 377 U.S. at 433, *quoting* *Bell v. Hood*, 327 U.S. at 684. But *note* the more restricting use of the word "necessary" in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 25 (1977).

25. 377 U.S. at 432.

26. 422 U.S. 66 (1975).

“tests” have become the starting point and have provided the framework for the analysis of subsequent private cause of action cases. In *Cort*, a private cause of action for damages and injunctive relief was instituted by a stockholder against his corporation for alleged violations of title 18 Section 610, of the United States Code which prohibited corporations from making contributions or expenditures in connection with specified federal elections. Section 610 provided only for criminal penalties against the corporation; it did not provide for civil enforcement.<sup>27</sup> The Court articulated four factors relevant to whether Congress intended to create a private cause of action in favor of corporate shareholders.<sup>28</sup> First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted?” Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? Fourth, 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?<sup>29</sup>

The first factor, whether plaintiff belongs to “one of the class for whose *especial* benefit the statute was enacted,” seems clearly to have been the most important consideration in *Cort*,<sup>30</sup> the four fac-

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27. 422 U.S. at 78. The statute was amended to provide for administrative enforcement through a federal election commission after suit was filed but before the Supreme Court decision. These amendments were not directly before the Court.

28. The Court acknowledged that this suit was filed by the plaintiff only derivatively as a stockholder and hence the Court would not address his standing as a citizen or voter. 422 U.S. at 77. Absent a finding that Congress had conferred standing on citizens and voters, there is no reason to suppose that the suit would have fared any differently if plaintiff had redefined his status. Compare, *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

29. 422 U.S. at 78.

30. Indeed, in nearly every Supreme Court case since *Cort*, although the Court goes through the four tests seriatim, the resolution of the first *Cort* factor seems to be the deciding issue. For instance, in *Piper v. Chris-Craft Industries, Inc.*, the Court refused to allow a private cause of action under Section 14(e) of the Securities Exchange Act by an unsuccessful contender for control of a target corporation against a successful contender. 430 U.S. at 41. The majority concluded that Congress enacted 14(e) because it was concerned with protecting the shareholders of target companies and did not intend that the statute be used as a club by one contender against another in a take-over fight. The Court expressly reserved the question whether shareholder-offerees of the target corporation might have standing in another case to sue for violations of Section 14(e). 430 U.S. at 42, n.28. Having decided that 14(e) was not enacted for the *especial* benefit of takeover bidders, the majority used this conclusion to answer the other *Cort* inquiries that Congress did not intend to create a private remedy in favor of the plaintiffs, that a private action would be inconsistent with the careful legislative scheme, which was one of complete neutrality between competitive bidders, and that the parties were relegated to whatever remedy they would have under state law.



tors seeming to have been articulated in a descending order of importance. The first test poses policy considerations, and, in a broader context, has certain constitutional underpinnings based on the requirement that a proper "case or controversy" be before the Court. Whether a plaintiff has standing to sue under a federal statute is determined by whether he is in the "zone of interest" Congress intended to be protected by the enactment.<sup>31</sup>

In *Cort*, the Supreme Court found that Congress, in enacting the Campaign Contributions Act, regarded the protection of corporate stockholders as, "at best a secondary concern" and not within the "zone of interest" protected by the Act.<sup>32</sup> The primary focus of the legislation, the Court stated, was against the aggregate wealth and possible corrupting influence of corporations on federal elections. Thus, the Court concluded that Congress did not intend to create a private cause of action in favor of corporate shareholders. The Court contrasted this conclusion with *Bivens*, where it had found a clearly articulated federal right in the plaintiff, and to *Borak*, where it had found the presence of a pervasive legislative scheme governing the relationship between the plaintiff and defendant classes.<sup>33</sup>

There can be no dispute that handicapped persons are within the "zone of interest" to be protected by Section 504 and that the statute was enacted for their *especial* benefit. Section 504 was intended to prevent employers from discriminating against the handicapped. The statute necessarily creates rights in the plaintiffs and governs future relations between handicapped persons and employers.

The second factor articulated in *Cort* was whether there is any intent, explicit or implicit, either to create or deny a privately enforceable remedy. The Court acknowledged that it is not necessary to show an intention to *create* a private cause of action where it is clear that federal law has granted a class of persons certain rights. However, an explicit intention to *deny* a private cause of action is controlling.<sup>34</sup> Section 610 did not explicitly foreclose a private remedy, but because the Court found that Congress was, at most, only secondarily

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The *Cort* factors are not absolute requirements but are guides for the courts. If there is a statutory basis for inferring a private cause of action, even the first *Cort* factor, as well as any of the others, may be dispensed with as non-essential. See dissenting opinion of Justice Stevens in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 66-67. Justice Stevens was joined by Justice Brennan, the author of the *Cort* "tests." Justice Stevens notes that even *Borak* itself does not meet the majority's "especial class" test as narrowly applied in *Piper*.

31. *Data Processing v. Camp*, 397 U.S. 150 (1970).

32. 422 U.S. at 81.

33. *Id.* at 82.

34. *Id.*

concerned with the rights of stockholders, it decided that no private cause of action existed under the Campaign Contributions Act.<sup>35</sup> In reaching this conclusion, the Court relied primarily on the resolution of the first *Cort* factor—that plaintiffs were not the *especial* beneficiaries of the law. On the other hand, the same inference cannot be drawn from Congress' silence to Section 504. Because handicapped persons are the *especial* beneficiaries of Section 504, and because Congress did not *expressly* deny a private cause of action, create an exclusive administrative remedy, or impose criminal sanctions, a private cause of action must be inferred.

The third *Cort* factor—whether a private cause of action is consistent with the underlying purposes of the legislative scheme—also favors the creation of a private cause of action under Section 504. Section 504 provides no criminal sanctions and does not on its face mandate a particular administrative procedure. Thus a judicial interpretation of Section 504 which foreclosed a private civil remedy, would render Section 504 a nullity. It would be a mere declaration dependent upon the whim of executive officials for its enforcement.<sup>36</sup> Certainly, a court order requiring an employer to cease discriminating against the handicapped, coupled with the threat of damages, furthers the primary Congressional purpose of Section 504.

The fourth *Cort* factor—the appropriateness of relegating plaintiffs to their state remedies—has never, standing alone, been the determining factor in any Supreme Court case.<sup>37</sup> Indeed, Congress is free to create a remedial scheme in favor of plaintiffs, despite the existence of remedies created by state law.<sup>38</sup> In *Borak*, the Court noted

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35. *Id.* at 83-84.

36. *Id.* at 84. Because the Campaign Contributions Act provided penalties against violators, and because a derivative suit would only permit directors to "in effect" borrow corporate funds for awhile, the Supreme Court found in *Cort*, that an action for damages really would not further the legislative goal and would not decrease the impact of the use of illegal funds upon an election already past. *Id.*

37. In formulating its fourth factor in *Cort*, the Court cited *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963), which held that an investigator for the House Unamerican Activities Committee could not be sued for abuse of the subpoena power. The federal statute governing the issuance of subpoenas had not been complied with, but no violation of the 4th Amendment had occurred, and the subpoena had never been given coercive effect. The majority in *Wheeldin* noted that in cases for damages for abuse of power, federal officials had traditionally been governed by state law. *Id.* at 649-50. Subsequently, in *Bivens*, on a damage claim arising out of a violation of the 4th Amendment, the Supreme Court refused to accept the federal officers' contentions that state laws regulating trespass and the invasion of privacy provide sufficient protection to citizens against invasions by federal officers and that the scope of a federal officer's authority, or lack of it, depends upon the state in which the act occurred. 403 U.S. at 394-395. See also *Santa Fe Industries v. Green*, 403 U.S. 462, 478-479 (1977).

38. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. at 41.

that federal law could be compromised to the extent that state laws differ or might impede a suit.<sup>39</sup> However, in *Cort* the Court distinguished this problem on the ground that Congress was concerned not with regulating corporations but with dulling their impact in federal elections. Whether or not state law allowed a derivative cause of action for damages would neither aid nor hinder the primary goal of the Election Contributions Act.<sup>40</sup> Logic dictates that Congress would not pass a statute prohibiting discrimination against the handicapped by recipients of federal funds and then relegate aggrieved persons to whatever remedy, if any, the states might provide. Thus, even strictly applying the four criteria enunciated in *Cort*, Section 504 must be construed to create a private cause of action.

The language of Section 504 is closely patterned after Title VI of the Civil Rights Act of 1964. In *Lau v. Nichols*,<sup>41</sup> the Supreme Court upheld a private cause of action under Title VI. In *Lau*, Chinese students sued the San Francisco school system alleging racial discrimination because the school system failed to provide specialized instruction for non-English speaking Chinese students. The Court held that the plaintiffs had stated a cause of action under Section 601 of the Civil Rights Act and remanded the matter to the District Court for the fashioning of appropriate relief.<sup>42</sup>

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39. 377 U.S. at 434.

40. 422 U.S. at 85.

41. 414 U.S. 563, 568-69. (1974).

42. *Id.* at 569. The Supreme Court held in *Lau* that, under Title VI, discrimination was barred which had that effect even though no purposeful design was present. *Id.* at 568. The Court thus interpreted Title VI in a manner consistent with its interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which outlaws racial, ethnic, religious and sex discrimination in both public and private employment. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that Title VII prohibits the use of all job requirements or tests which have the effect of impeding the employment of any of the classes protected in the statute. The mere showing of such an effect by the plaintiff shifts the burden of proof to the employer to show that the requirement is "job-related." *Id.* at 431. Even if the employer meets this burden, it remains open to the plaintiff to show that other selection devices, without a similarly undesirable racial effect, would serve the employer's legitimate interests. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425-35 (1975). The lower courts have generally interpreted Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604, which prohibits housing discrimination, as not requiring proof of "purposeful" discrimination. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 558 F.2d 1283 (7th Cir. 1977); *Residents Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). Because the language of Section 504 is so similar to these other statutes and because all of these statutes promote equal opportunities, it is doubtful courts would require plaintiffs in a Section 504 action to assume a higher burden and prove defendants acted out of animus against handicapped persons. For this reason, there is an advantage for handicapped persons to stand on their statutory remedies rather than to premise a cause of action solely on constitutional grounds, which the courts have generally held to require proof of "purposeful" discrimination. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

*Lau*, however, must be read with caution. Justice Blackmun, in his concurring opinion, focused upon the class action aspects of the suit. For him, numbers were at the heart of the suit and he did not consider *Lau* dispositive of whether a single child who spoke a language other than English could require a school to provide him with special instruction. Justice Blackmun's concern about the affirmative obligations of schools to expend sums to support special programs applicable only to one child would not apply with equal force in an employment case, where the plaintiff is seeking the removal of all barriers which are not "job related" or justified by "business necessity."<sup>43</sup> The burdens and costs to an employer who is required to cease discriminating against qualified handicapped individuals will probably be considerably less than those to a school which is required to institute a special program of instruction.

In *Cannon v. University of Chicago*,<sup>44</sup> the Seventh Circuit Court of Appeals focused on Justice Blackmun's concurrence in a sex discrimination suit brought by a female applicant against the University of Chicago Medical School under Title IX of the Education Amendments of 1972. The court found that the plaintiff did not have an individual cause of action. The court distinguished *Lau* on the ground that it involved an attempt to deprive "large groups" of minorities their right to an equal education. The court also narrowly read the Supreme Court's private cause of action cases and stated that a private action should not "be lightly implied under a statute where Congress had not provided one—especially where Congress had provided

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Another reason why plaintiffs in a 504 action should not be required to prove "purposefulness" is because a discriminatory animus against handicapped persons may be very difficult to show. "Purposeful" discrimination is usually best shown by statistical evidence which requires defining some homogeneous class. Defining a class of handicapped individuals with common characteristics may be very difficult. Therefore, the use of statistical evidence, which is so important in any case of race discrimination, may be very difficult in a case involving discriminations against handicapped persons. Compare *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) with *Castaneda v. Partida*, 430 U.S. 482 (1977). The difficulty in identifying a "homogeneous class of handicapped persons" in an employment discriminations suit, see, *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977), is a strong counter-argument to any suggestion that Justice Blackmun's "numbers" concerns in *Lau* be extended to private actions under Section 504. See accompanying text *infra*.

43. See note 42, *supra*, for a discussion of "job-relatedness" defenses under Title VII of the 1964 Civil Rights Act. The new HEW regulations implementing Section 504 place an affirmative duty on employers to make "reasonable accommodations" to facilitate the employment of handicapped persons unless the employer can show that the accommodations will impose an "undue hardship" on his operations. *But see Trans World Airlines v. Hardison*, 432 U.S. 903 (1977), where the Supreme Court narrowly construed the affirmative duties of an employer under the religious discrimination provision of Title VII.

44. 559 F.2d 1063 (7th Cir. 1976), *cert. granted*, 98 S.Ct. 3142 (1978).

for other means of enforcement.”<sup>45</sup> The Supreme Court has agreed to review *Cannon*. Even if the Court upholds the lower court, however, Section 504 is distinguishable. Congress included enforcement mechanisms in Title IX under which a single individual can at least partially vindicate his rights administratively. On its face, Section 504 provides no similar option to negate the need for judicial enforcement through private actions.

A majority of the justices addressed the question whether Title VI affords aggrieved individuals a private cause of action for racial discrimination and answered it affirmatively in *Regents of University of California v. Bakke*.<sup>46</sup> The Title VI questions were handled somewhat obliquely, so the precedential value of the various opinions can be variously interpreted. Nonetheless, as Justice White commented in his separate opinion, four justices were of the view that such a private cause of action exists and four other justices assumed it for purposes of that case.<sup>47</sup> Only Justice White stated without qualification that no private cause of action exists under Title VI. He felt that a private cause of action would be inconsistent with the underlying legislative scheme and contrary to the legislative intent. He noted that Congress had expressly provided for private actions in other titles of the 1964 Act, and he felt “it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles of the Act, intended silently to create a private cause of action to enforce Title VI.”<sup>48</sup> He also noted that Congress intended federal agencies to adopt rules to implement Title VI and that funds could be cut off only pursuant to those rules and after a hearing and voluntary means to secure compliance had been exhausted.<sup>49</sup> He further emphasized the “clear” statements of legislators that a private cause of action under Title VI does not exist.<sup>50</sup> Whether or not Justice White’s views are accepted by the Court in future cases, and the opinions of the other Justices indicate they will not, Section 504 and its legislative history contain no comparable infirmities to mitigate against private enforcement.

Justice Powell, who announced the opinion of the Court, found it unnecessary to determine in the abstract whether a private cause of action exists under Title VI. He noted that the question had not been

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45. 559 F.2d at 1074 (emphasis added).

46. 98 S.Ct. 2733 (1978).

47. *Id.* at 2794.

48. *Id.* at 2795.

49. *Id.*

50. *Id.* at 2797.

raised below and therefore assumed that for purposes of the case the respondent had a right of action.<sup>51</sup> However, in a footnote to his opinion, Justice Powell indicated he may lean to Justice White's position when and if the issue is ever squarely presented again. He noted that "several comments in the debates cast doubt on the existence of any intent to create a private right of action."<sup>52</sup> Justices Brennan, Marshall and Blackmun stated only that they agreed with Justice Powell's conclusion that it was not necessary to resolve whether there is a private cause of action under Title VI.<sup>53</sup>

Finally, Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, several of whom have been quite reluctant to create private causes of action under other statutes, explicitly held that Title VI creates a private cause of action. Relying on *Lau* and several other lower court opinions, they stated that the courts, including the Supreme Court, have "unanimously concluded or assumed that a private cause of action may be maintained under Title VI."<sup>54</sup> They further noted that Congress had repeatedly enacted legislation predicated on the assumption that Title VI could be enforced by a private action. For our analysis here, it is important that in making this statement, these justices cited Section 504 and the legislative history discussed in *Lloyd v. Regional Transportation Authority*.<sup>55</sup> These justices also went through the four *Cort* "tests" and found them to be satisfied.<sup>56</sup>

The private cause of action aspects of Section 504 have been addressed in a number of lower court decisions.<sup>57</sup> The most important is *Lloyd v. Regional Transportation Authority*.<sup>58</sup> In *Lloyd*, mobility-disabled persons sued the Chicago and Regional Transportation Authorities alleging a violation of Section 504 of the Rehabilitation

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51. *Id.* at 2745.

52. *Id.* at 2745 n.18.

53. *Id.* at 2768.

54. *Id.* at 2814.

55. *Id.* at 2815 n.27.

56. *Id.* at 2815 n.28.

57. See, e.g., *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Doe v. New York University*, 442 F. Supp. 522 (S.D.N.Y. 1978); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.C. S.C. 1977); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd. on other grounds*, 556 F.2d 184 (3d Cir. 1977); *Hairston v. Drosich*, 423 F. Supp. 180 (S.D.W.Va. 1976).

58. 548 F.2d 1277 (7th Cir. 1977). *Lloyd* takes on special significance because of the favorable reading given it by four justices in *University of California Regents v. Bakke*, 98 S.Ct. at 2815. (emphasis added.) See also *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

Act and other statutes.<sup>59</sup> They sought a court order requiring all bus and train systems to accommodate mobility-disabled persons. The District Court granted the defendants' motion to dismiss on the ground that Section 504 was merely hortatory and did not create a private cause of action. The Seventh Circuit Court of Appeals vacated and remanded the case based on two conclusions. First, the Seventh Circuit relied upon *Lau* to hold that Section 504, at least when considered with the 1976 Urban Mass Transportation Administration's regulations implementing it, established affirmative rights.<sup>60</sup> Second, the *Lloyd* Court applied the *Cort* factors to the Rehabilitation Act and concluded that "a private cause of action must be implied from Section 504."<sup>61</sup>

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59. 548 F.2d at 1278. In addition to the Section 504 violations, plaintiffs claimed violations of the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151, 4152.

60. The Court in *Lloyd* limited its language so that it decided only, as in *Lau*, that affirmative rights existed under Section 504, when considered with the HEW rules that implement it. Experience under the various post-Civil War civil rights statutes and Title VIII indicate that, even in the absence of administrative rules and regulations, courts are competent to provide standards to prevent discrimination. The administrative regulations, as "clarifying amendments," do have cogent significance in construing Section 504. 548 F.2d at 1285. An advantage of the HEW rules is that they provide for administrative consistency within the federal government. See 4 U.S. CODE CONG. & AD. NEWS 6391 (1974). The Supreme Court has given deference to EEOC guidelines in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, c-1 to c-9 (1974). See *Albemarle Paper Co. v. Moody*, 422 U.S. at 431. *But see* *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). It can be assumed that similar deference will be accorded the rules implementing Section 504. But even without considering these rules, the court could have found a private cause of action under Section 504. There is no indication that Congress intended that the availability of judicial remedies depend on whether a federal executive agency has promulgated administrative rules and regulations, which it is not explicitly required to do under the act. Compare *Guernsey v. Rich Plan*, 751 ATRR D-1 (N.D. Ind. 1976), where the District Court distinguished prior cases which refused to find a private cause of action in the Federal Trade Commission Act. The prior cases relied on the Congressional intent to subrogate the consumer's interest to the "expert judgment" of the Federal Trade Commission. In *Guernsey*, the court held that once the commission has exercised this judgment in the form of a cease and desist order, there is no longer any need for the courts to refuse to lend their aid to the consumer. It found a legislative intent under those circumstances to afford the consuming public a private judicial remedy. No such legislative scheme is explicit or implicit in Section 504.

61. *Lloyd* has been the basis for a number of cases finding a private cause of action under Section 504. *Kampmeier v. Nyquist*, *supra*; *Leary v. Crapsey*, *supra*; *United Handicapped Fed'n. v. Andre*, *supra*; *Doe v. New York Univ.*, *supra*; *Crawford v. University of N. Carolina*, *supra*; *Barnes v. Converse College*, *supra*. In *Bartels v. Biernot*, 427 F. Supp. 226 (E.D. Wis. 1977), a case strikingly similar to *Lloyd*, 427 F. Supp. at 230 n.7, Judge Warren granted plaintiffs' motion for summary judgment and ordered that the defendants, the Milwaukee County Transit Board (MCTB) be permanently enjoined from acquiring or operating any new mass transit vehicles "which are not designed for accessibility and effective utilizations by mobility handicapped individuals, until such time as defendants can demonstrate to the satisfaction of the court that such transportation facilities have been planned, designed, and are being made available to such individuals in a non-discriminatory manner." 427 F. Supp. at 233. The court also permanently enjoined the Urban Mass Transportation Administrators (UMTA) from releasing

The Court's opinion in *Lloyd* is not without qualification. The Court referred to its earlier opinion in *Cannon* and noted that *Lloyd* involved a "huge class" of handicapped individuals.<sup>62</sup> The Court's concern with the size of the class makes some sense in the context of a public transportation suit where the problem of designing a transit system to accommodate the handicapped may require emphasis on the generalized problems of handicapped persons rather than on a particularized problem in an individual case. This concern is not present in a private action for employment discrimination. In such an action, the dispute centers on the particular requirements of the job as they relate to the particular qualifications of the individual applicant. Experience in other areas of employment discrimination demonstrates the importance of both class and individual actions to vindicate Congressional purposes.<sup>63</sup>

The same reasons that support a private cause of action under Section 504 support a private cause of action under Section 503.<sup>64</sup> Section 503 requires federal contractors, with contracts totaling more than \$2,500, to implement affirmative action programs to employ and advance in employment qualified handicapped individuals. Under a *Cort* analysis, handicapped persons are certainly the *especial* beneficiaries of Section 503.<sup>65</sup> Congress has not explicitly *denied* a private cause of action under Section 503, and, therefore, the strong presumption in favor of judicial enforcement applies. Furthermore, a private cause of action will advance the purposes of the Act, and the statutory scheme again indicates that Congress wanted to provide a federal remedy and not to relegate aggrieved parties to inconsistent state enforcement.<sup>66</sup>

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any federal funds until MCTB complied with the aforementioned order. This order was entered despite the fact that the UMTA had already approved a federal grant of \$17 million for the proposed Milwaukee Area Transit Development Program.

62. 548 F.2d at 1287.

63. For the reasons stated in note 42 *supra*, it will be difficult in some instances to establish the prerequisites under FED. R. CIV. P. 23, for maintaining a class action against an employer who is guilty of discrimination against handicapped persons.

64. The similarity in the enforcement of Section 503 and 504 was emphasized by Senator Robert Stafford of Vermont. Senator Stafford declared that "it was the Committee's intent that the enforcement under Section 503 and 504 would be similar to that carried out under Section 601 of the Civil Rights Act and 901 of the Education Amendments" (emphasis added). See also *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

65. In *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977), the court found that the plaintiff, a handicapped person, satisfied the first of the four *Cort* tests. This finding should be very persuasive in favor of a private cause of action. See note 29 *supra*; see also *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003, 1008 (D. Del. 1977).

66. In *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. at 202, the District Court held that a private cause of action would be inconsistent with Section 503. *Accord*, *Wood v. Diamond State Tel.*



Unlike Section 504, Section 503 does provide for administrative enforcement through the Department of Labor.<sup>67</sup> The presence of an administrative remedy in the statute, while perhaps making the need for a judicial remedy less compelling, will not, in itself, defeat the judicial remedy. The *Borak* statute and the majority of other statutes, under which the Supreme Court has inferred a private cause of action, have contained alternative means of enforcement.<sup>68</sup> The judicial remedy is a necessary supplement to the enforcement

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Co., 440 F. Supp. at 1008. The District Judge relied on the lack of any identifiable and homogeneous class of handicapped persons—although, as previously noted, this factor speaks eloquently in favor of a private cause of action for individual handicapped persons. See notes 42 and 63 *supra*. He also noted that handicaps often will affect job abilities and productivity. While this may be a defense available to an employer, see note 43 *supra*, it is hardly a reason to find a private cause of action inconsistent with Section 503. Indeed, the underlying presumption of the statute is that handicapped persons make good employees and any generalized presumptions against the employability of handicapped persons violates federal policy. Compare *Gurmankin v. Costanzo*, 411 F. Supp. at 992 with *City of Los Angeles v. Manhart*, 98 S.Ct. 1370 (April 25, 1978). The judge also commented that different treatment of the handicapped “normally stems from sympathetic rather than intolerant motives.” The Supreme Court has cautioned against similar “romantic paternalism” in a sex discrimination situation and noted that such treatment “more often puts them [women] in a cage rather than on a pedestal.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Unfortunately, the same has too often been true of paternalistic attitudes toward handicapped persons.

The District Judge in *Frito-Lay* also noted that Congress has repeatedly rejected attempts to amend Title VII of the Civil Rights Act 1964 to include protection to handicapped persons and found this a persuasive reason why courts should not infer a private remedy under Section 503. This conclusion does not follow. Title VII has broader coverage than Section 503 and requires an injured party to submit his claim to the Equal Employment Opportunity Commission before going to Court. The remedies afforded against racial discrimination in Title VII are separate and distinct and do not supersede the remedies afforded against racial discrimination in Title VI of the '64 Act, in Executive Order 11242 or under § 1981. Whether or not Congress gives handicapped persons a remedy under Title VII, they have a separate and distinct remedy under Section 503.

67. The Secretary of Labor has promulgated rules and regulations implementing his duties under Section 503. See 41 C.F.R. 60-741-741.54 (1977).

68. See, e.g., *J.I. Case v. Borak*, 377 U.S. 426 (1964); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). The Seventh Circuit has stated in dicta that normally a private cause of action will not be implied where Congress has provided other means of enforcement. *Goldman v. First Fed. Savings & Loan of Wilmette*, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975); *Cannon v. University of Chicago*, 559 F.2d at 1074 n.14. But the Supreme Court cases cited by the Seventh Circuit Court of Appeals do not go this far. For instance, the Supreme Court simply noted in *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 457 (1974) (*Amtrack*), that “the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.” These considerations support a private cause of action under Section 503. The Supreme Court narrowly interpreted *Amtrack* in *Cort v. Ash*, 422 U.S. at 81, 82 n.14, by finding specific support in the legislative history of the *Amtrack* Act for the proposition that the statutory remedies were to be exclusive. No such finding is evident in the legislative history of Section 503.

mechanisms specified in Section 503. The Department of Labor can require contractors to adopt affirmative action plans and refuse them access to federal funds if they fail to comply with Departmental guidelines.<sup>69</sup> The courts can go further and, in appropriate cases, grant injunctive relief or damages, including damages for mental anguish suffered by the plaintiff. A judicial remedy is fully consistent with the Congressional plan and is necessary to make whole the rights of handicapped persons protected under Section 503.<sup>70</sup>

### CONCLUSION

A private cause of action under Sections 503 and 504 will insure that handicapped persons are not relegated either to a sympathetic, or, as the case may be, an apathetic bureaucracy for the enforcement of their rights to equal employment opportunity. In keeping with the intent of Congress to provide full protection to handicapped individuals, an appropriate interpretation of Sections 503 and 504 is one consistent with other legislation in the increasingly burgeoning civil rights arena in affording litigants a private right of action. Absent an explicit congressional denial of a private right of action and given that handicapped persons are *especial* beneficiaries of Sections 503 and 504, such a conclusion guarantees that aggrieved persons will be guaranteed direct access to the courts with the full array of judicial remedies.

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69. Under the rules and regulations promulgated by the Secretary of Labor, progress payments can be withheld from an employer who violates the provisions of his affirmative action plan, and, in an extreme case, the contract can be terminated and the employer barred from receiving future government contracts. 41 C.F.R. §§ 60-741.28(c), (d), and (e). In addition to these remedies, the government can go to court for injunctive relief to require the employer to comply with his affirmative action program. 41 C.F.R. §§ 60-741.28(b). None of these remedies is specifically tailored to make whole a person who has suffered employment discrimination. Also, all too often the federal agency enforcement machinery in areas of civil rights has proved inefficacious at best. *Compare*, Doe v. New York Univ., 442 F. Supp. at 523 with Crawford v. University of N. Carolina, *supra*, so resort to the courts in the first instance is necessary to protect individual rights which can not later be made whole by agency actions. Court proceedings are also preferable because the plaintiff has control of his case and frequently court proceedings provide a speedier remedy than is available in the administrative process. By issuing temporary restraining orders and preliminary injunctions, courts can prevent irreparable injury—something the administrative process does not accomplish under Section 503.

70. Section 503 creates affirmative rights on behalf of private handicapped individuals under the same analysis that the Supreme Court used under Title VI in *Lau* on behalf of Chinese students and the Seventh Circuit Court of Appeals used under Section 504 in *Lloyd* on behalf of handicapped individuals. Under *Cort* principles, handicapped persons are certainly the *especial* beneficiaries of Section 503. *See* note 66 *supra*.

