1992

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STATUTORY SOURCES OF PROTECTION FOR
THE HANDICAPPED TRAVELER

VICTORIA JENSEN

THE DISABLED and air carriers have battled for many years over the treatment of disabled in the airways. The duration of the struggle is not surprising given the early precedent. Rules adopted by the Civil Aeronautics Board (CAB) in 1937 governing air travel by the "ill, deformed or disabled" were very restrictive. It was not until the passage of the Air Carrier Access Act of 1986 that a law specifically prohibited air carrier discrimination based on handicap.

While the ultimate goal of the struggle has been equal treatment, the primary complaint of handicapped passengers has been inconsistent treatment by air carriers. Expiration of the early restrictive rules left air carriers to devise policies and practices regarding handicapped passengers, guided only by the vague prohibition against discrimination in both the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958. The result was inconsistent practices among air carriers and internal inconsistency in individual air carriers' operations.

This inconsistency created substantial obstacles to air

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3 Civil Aeronautics Act of 1938, Ch. 601, § 405(b), 52 Stat. 973, 1019 (current version at 49 U.S.C. § 1374(b) (1988)).
travel by the disabled. Arrival of an unannounced disabled traveler might be treated as routine on some occasions while boarding was refused on others. One airline might require an attendant while another did not. Even the same airline might require an attendant at one city and not at another. Some airlines forced handicapped persons to exchange their wheelchairs for uncomfortable airport chairs for boarding, while others allowed them to remain in their own wheelchairs. Some air carriers required disabled passengers to sign a waiver of liability before boarding a plane. Powered wheelchair batteries were either transported in baggage compartments or excluded altogether as unsafe for air transport. These inconsistent policies and others have long made it difficult for the disabled to plan uneventful air travel. Disabled passengers have objected to inconsistent conditions not only as inconvenient and unnecessary but also as discriminatory.

Exit row seating policies have been a particularly frustrating area of inconsistency, especially for the blind. In an address delivered at the Annual Convention of the National Federation of the Blind, Kenneth Jernigan cited two instances that illustrate the wide range of air carrier practices. In one case, a blind person was arrested for refusing to move to a seat near the emergency exit. Only days later a blind person was arrested for refusing to move out of an exit row. It is not hard to understand why handicapped persons subjected to such extremely
arbitrary conditions consider themselves victims of discrimination.

Passengers alleging discrimination by air carriers have resorted to several statutory schemes for protection. This comment will discuss various statutes that have been available to protect passengers from discrimination by air carriers. It will then focus on the narrow issues of discrimination in seat assignments. Statutory sources of protection from discrimination include the Federal Aviation Act of 1958, section 504 of the Rehabilitation Act of 1973, and the Air Carrier Access Act of 1986.

Discrimination in seat assignments will be examined primarily in the context of the most recently implemented sources of protection. Those are the Department of Transportation (DOT) and Federal Aviation Administration (FAA) rules on seating, particularly in exit rows.

The inquiry of this examination is whether the new rules represent a step forward in protecting airline passengers from inconsistent and arguably discriminatory seating practices, or whether they are a retreat.

I. THE FEDERAL AVIATION ACT OF 1958

Sections 404(a) and 404(b) of the Federal Aviation Act of 1958 form the basis of an air carrier's duty to provide non-preferential service to its passengers. Section 404(a) requires air carriers to provide air transportation

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15 Of the many types of discrimination which have been alleged, the most prevalent has been discriminatory bumping. See Peter B. Heister, Discriminatory Bumping, 40 J. AIR L. & COM. 533 (1974).
16 49 U.S.C. app. §§ 1301-1557 (1988) (section 1374(b) was originally enacted in the Civil Aeronautics Act as 49 U.S.C. § 484(b)); see also Jean F. Rydstrom, Annotation, Availability of Private Civil Action For Violation of § 404(b) of Federal Aviation Act of 1958 (49 USCS § 1374(b)), Prohibiting Discrimination By Airline, 41 A.L.R. FED. 532, 534 n.1 (1979).
20 49 U.S.C. § 1374(a) and (b) (1988) (corresponds to sections 404(a) and (b) of the Civil Aeronautics Act of 1938, supra note 3). Section 404(a) of the Federal Aviation Act was amended in 1972 to include paragraph (a)(2) pertaining to rates.
upon reasonable request.\textsuperscript{21} It also requires air carriers to provide safe and adequate service, equipment and facilities, and to establish just and reasonable rules, regulations and practices.\textsuperscript{22} While this mandate would appear to prohibit discriminatory treatment of passengers, courts have repeatedly held that section 404(a) does not imply a private right of action.\textsuperscript{23}

Section 404(b) prohibits air carriers from giving unreasonable preference to any person.\textsuperscript{24} It also prohibits subjecting any person to unjust discrimination or any undue or unreasonable prejudice. Courts first found an implied private right of action under section 404(b) of the Civil Aeronautics Act in Fitzgerald v. Pan American World Airways.\textsuperscript{25} This seminal 1956 case recognized a private right of action under section 404(b) for discriminatory treatment of passengers by an air carrier.\textsuperscript{26} Ella Fitzgerald, an internationally famous singer, her pianist, and her accompanist, all of whom were black, were not allowed to reboard their plane and continue on to Australia in their first class seats after a stopover in Honolulu, Hawaii. The

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\textsuperscript{22} Id.

\textsuperscript{23} See Diefenthal v. CAB, 681 F.2d 1039 (5th Cir. 1982); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984).

\textsuperscript{24} 49 U.S.C. § 1374(b) (1988).

\textsuperscript{25} 229 F.2d 499 (2d Cir. 1956), rev'd sub nom on other grounds, Prescription Plan Serv. Corp. v. Franco, 552 F.2d 493 (2d Cir. 1977).

\textsuperscript{26} Id. at 501.
court found the refusal was racially motivated conduct, which amounted to "unjust discrimination and undue and unreasonable prejudice and disadvantage, in violation of section 404, subdivision (b)."  

The court then held that a private right of action was implied in section 404(b). In so holding, the court rejected the defendant's contention that the plaintiff's only available remedy was a complaint to the Civil Aeronautics Board. At most, the board could issue an order compelling compliance in the future. The board could not order the defendants in 1956 to allow the plaintiffs to board defendant's plane in 1954. The court refused to restrict plaintiffs to a remedy that would leave them unable to vindicate a harmful violation of an actionable civil right.  

The private right of action for violation of section 404(b) first implied in Fitzgerald has since expanded, most notably as a remedy for discriminatory bumping. Despite some expansion, however, this remedy has significant limitations. Courts have not extended protection to passengers alleging discrimination based on factors other than race or improper bumping. In such cases, the courts have found the preferential treatment or discrimination justified by the air carriers' required compliance with law, rules or regulations.  

At the threshold, the court must determine whether the conduct alleged to be discriminatory and in violation of the statute falls within the scope of conduct the statute

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27 Fitzgerald, 229 F.2d at 500.  
28 Id. The court held that 49 U.S.C. § 484(b) (1952) (the previous codification of section 404(b)) "is for the benefit of persons, including passengers, using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation." Id. at 501. The court applied the analysis found later in Cort v. Ash, 422 U.S. 66 (1975). See infra note 82 for a discussion of the analysis.  
29 Fitzgerald, 229 F.2d at 502.  
30 Id.  
31 Id.  
32 Rydstrom, supra note 16, at 535.  
33 Id. at 536.  
34 Id.
seeks to prevent. The statute reaches air carriers’ discriminatory interference with the right to access air facilities. The Third Circuit stated this test especially succinctly: “it is this denial of access to air facilities, whether caused directly, by outright refusal of permission to board, or indirectly, by burdening the potential user with special requirements not applied to the general public, which is critical.” This limitation led to denial of relief in several cases.

A more formidable obstacle to the protection offered by section 404(b) lies in the discretion granted air carriers by the Federal Aviation Act and other applicable rules and regulations to ensure safety. Perhaps the broadest such discretion derives from section 1511 of the Federal Aviation Act. Section 1511 confers broad authority on air carriers to refuse boarding based on safety concerns. Nevertheless, even this expansive grant of discretion must be balanced with the protections of section 404(b).

\[\text{35} \text{ Id. at 539.} \]
\[\text{36} \text{ Id. at 540.} \]
\[\text{37} \text{ Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 336 (3d Cir. 1975).} \]
\[\text{38} \text{ E.g., id. (holding that supplying inferior ground accommodations was not conduct meant to be prevented by the statute); Mason v. Belieu, 543 F.2d 215, 221 (D.C. Cir.), cert. denied, 429 U.S. 852 (1976) (holding that failure to comfort or assist the distraught wife of a passenger denied boarding was not conduct meant to be prevented by the statute).} \]
\[\text{39} \text{ 49 U.S.C. app. § 1374(b) (1988).} \]
\[\text{40} \text{ See, e.g., 14 C.F.R. § 25.805(c) (1991) (requiring that the aircraft can be completely evacuated within 90 seconds); 14 C.F.R. § 91.3(a) (1991) (giving pilot ultimate responsibility for aircraft safety).} \]
\[\text{41} \text{ 49 U.S.C. § 1511 (1988).} \]
\[\text{42} \text{ 49 U.S.C. § 1511(a) (1988). Section 1511(a) provides that “subject to reasonable rules and regulations prescribed by the Secretary of Transportation, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.” Id.} \]
\[\text{43} \text{ O’Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir.), cert. denied, 490 U.S. 1106 (1989).} \]

The discretion conferred by the above section, [49 U.S.C. § 1511] while decidedly expansive, is not unfettered. Section 1374 [codification of section 404(b)] provides that all air carriers must “provide safe and adequate service, equipment, and facilities . . . [and] establish, observe, and enforce just and reasonable . . . rules, regulations and practices relating to [air travel] . . . or subject any particular
In *Hingson v. Pacific Southwest Airlines* full play was given to reciprocally limiting provisions of the Federal Aviation Act. While section 404(b) prohibited unjust discrimination by air carriers, other FAA provisions appeared to confer broad authority on pilots and air carriers to discriminate for proper safety-related reasons. Hingson, a blind passenger traveling with a guide dog, sued Pacific Southwest Airlines (PSA), alleging unlawful discrimination. PSA personnel insisted that Hingson sit in a bulkhead seat. The only applicable PSA policy manual restriction stated that blind passengers should not be allowed to sit by emergency exits.

Although the issues on appeal were evidentiary, they arose from Hingson’s attempt to show violation of section 404(b). The parties and the court agreed that the basic issue litigated at trial was “whether PSA acted unreasonably in demanding that Hingson take a bulkhead seat.” The appeals court noted that despite the pilot’s good faith in exercising discretion for the safe operation of the plane, a jury could find that the crew’s failure to follow PSA policies was unreasonable and in violation of Section 404(b).

The *Hingson* court did not address the interaction between sections 1511 and 404(b) of the Federal Aviation Act. In *Williams v. Trans World Airlines*, however, the Second Circuit formulated a test to determine the propriety of an air carrier’s exercise of power under section 1511. The basic inquiry is whether the conduct of the air carrier was rational and reasonable in light of the circumstances as they appeared at the time.

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person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."  

*Id.* at 12-13.

44 743 F.2d 1408 (9th Cir. 1984).

45 *Id.* at 1413 n.5.

46 *Id.* at 1413.

47 *Id.* at 1412 n.6.

48 509 F.2d 942 (2d Cir. 1975).

49 *Id.* at 948.

The test of whether or not the airline properly exercised its power
In Williams the Federal Bureau of Investigation (FBI) informed Trans World Airlines (TWA) that Williams, a known fugitive, was planning to fly on TWA and that his arrival at his destination might be accompanied by a demonstration.\textsuperscript{50} In response to TWA’s requests for more information, the FBI provided TWA with a copy of the FBI Wanted Bulletin regarding Williams.\textsuperscript{51} The Bulletin stated that Williams carried a gun, was schizophrenic, and advocated violence.\textsuperscript{52} The court held, based on this information, that TWA had reasonably and properly exercised its authority pursuant to section 1511 to refuse passage to Williams.\textsuperscript{53} In discussing the interaction between sections 404(b) and 1511 as a prologue to the formulation of its test, the court stated:

[We are] of the opinion that Congress did not intend that the provisions of section 1374 [codification of section 404(b)] would limit or render inoperative the provisions of section 1511 in the face of evidence which would cause a reasonably careful and prudent air carrier \ldots to form the opinion that the presence aboard a plane of the passenger-applicant “would or might be inimical to safety of flight.”\textsuperscript{54}

The Ninth Circuit adopted the Williams test in Cordero v. CIA Mexicana De Aviacion.\textsuperscript{55} In so doing, the court cited as a supporting factor the absence of legislative history suggesting congressional intent to limit protections of section 404(b) by enactment of section 1511.\textsuperscript{56} The court stated a

\begin{footnotes}
\item \textsuperscript{50} Id. at 944.
\item \textsuperscript{51} Id. at 945.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Williams, 509 F.2d at 948.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} 681 F.2d 669 (9th Cir. 1982).
\item \textsuperscript{56} Id. at 672.
\end{footnotes}
belief that, by judging the air carrier's exercise of section 1511 power based on the information available at the time, "the test provide[d] a reasonable balance between safety concerns and the right of a ticket-holder to be free from unwarranted discrimination."\(^{57}\)

Plainly, protections offered passengers under section 404(b) are significantly limited by other factors. Courts weigh the discriminatory conduct (provided it falls within the scope of the statute) against the airline's safety concerns based on the information available to it at the time. This standard requires only minimal investigation by the air carrier since critical decisions often must be made within minutes.\(^{58}\)

### II. SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act\(^{59}\) states that no program or activity receiving federal financial assistance may discriminate against "otherwise qualified handicapped individual[s]" solely on the basis of handicap.\(^{60}\) This act appeared to provide protection for those passengers who felt that air carriers had practiced discrimination based on a handicap. In practice, however, its application to commercial air carriers was quite limited.

In *Anderson v. USAir*\(^{61}\) a blind passenger alleged that USAir unlawfully discriminated against him by excluding him from the exit row seat to which he was assigned. Anderson alleged violation of section 504 of the Rehabilitation Act, among other statutes. The court found no violation of section 504 based on the facts of the case.\(^{62}\) The court stated that the seating requirement was based

\(^{57}\) *Id.*

\(^{58}\) *Williams*, 509 F.2d at 948.


\(^{60}\) *Id.* The Supreme Court has defined this class as "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *S.E. Community College v. Davis*, 442 U.S. 397, 406 (1979).


\(^{62}\) *Id.* at 1195.
on safety concerns relating to the ability of blind persons to perform emergency exit tasks and thus was not discriminatory. The court was, however, prepared to apply section 504 to USAir. It did so by designating "air travel" as a program receiving federal financial assistance.

Other courts, however, refused to apply section 504 to commercial air carriers. These courts looked beyond a program of "air travel" and limited application of section 504 to direct recipients of federal financial assistance. They rejected contentions that indirect subsidies such as technical assistance, airport construction funding, air traffic controllers, or government mail contracts were sufficient to trigger the Act's protections.

The courts that refused to apply section 504 to commercial air carriers proved prophetic. In 1986 the Supreme Court foreclosed this avenue of protection against commercial air carrier discrimination. In *United States Department of Transportation v. Paralyzed Veterans of America* the Court held that section 504 does not apply to commercial airlines. Thereafter, section 504's mandate not to discriminate applied only to "those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." The only parties who fit this description were the airport operators who received federal funds.

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63 Id.
64 Id. at 1194.
66 Angel, 519 F. Supp. at 1178; Hingson, 743 F.2d at 1415.
67 Angel, 519 F. Supp. at 1178.
68 Hingson, 743 F.2d at 1414.
70 Id.
71 Id. at 606.
72 Id.
Within three months of the Supreme Court’s decision in *Paralyzed Veterans of America*, Congress considered a bill designed to overturn the decision.\(^7^3\) The Air Carrier Access Act (ACAA) passed through both houses quickly and was enacted into law on October 2, 1986.\(^7^4\) On its face, the law appears to be an outright prohibition of differential treatment of handicapped or impaired passengers.\(^7^5\) In practice, however, both the legislative history and the Secretary of Transportation’s authority to implement the law through regulations limit this protection.

The legislative history of the ACAA suggests that Congress did not mean to compromise existing DOT and FAA safety regulations by enacting the law.\(^7^6\) Furthermore, the Secretary of Transportation was directed to “promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers.”\(^7^7\) These safety-related limitations became substantial barriers to protection against discrimination when the DOT and the FAA simultaneously promulgated regulations implement-

\(^7^3\) 132 CONG. REC. 21,770 (1986). Senator Robert Dole, the author of the bill stated: “[t]he purpose of the legislation is quite simple. It overturns the recent Supreme Court decision in the case of Paralyzed Veterans of America versus the Department of Transportation.” Id. Senator Alan Cranston, a principal co-sponsor of the bill, expressed his “deep disappointment at the outcome of the case and echoed Dole’s commitment to overturning the high court’s ruling.” Id. at 21,772. Senator Howard Metzenbaum supported the bill because he felt it “undoes the damage perpetuated by the Supreme Court ruling.” Id.


\(^7^5\) 49 U.S.C. § 1374(c)(1) (1988). The relevant text of the law is as follows: “[n]o air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.” Id.

\(^7^6\) 132 CONG. REC. S11784-08 (1986). Senator Robert Dole, principal author of the bill, said “[o]ur intent . . . is that so long as the procedures of each airline are safe as determined by the FAA, there should be no restrictions placed upon air travel by handicapped persons. Any restrictions that the procedures may impose must be only for safety reasons found necessary by the FAA.” Id.

The effect of safety regulations on ACAA protections was illustrated in *Tallarico v. Trans World Airlines*,[79] the principal case in which the Eighth Circuit recognized a private right of action under the ACAA.[80] The case involved Polly Tallarico, a fourteen-year-old cerebral palsy victim. TWA denied Polly the right to board the plane unaccompanied by an attendant because of physical handicaps including impaired abilities to walk and talk. The jury found, and the Eighth Circuit agreed, that TWA violated the ACAA,[81] which required a finding that Polly was an "otherwise qualified handicapped individual" within the meaning of the statute.[82]

This illustrates the operation of safety-related limitations in curtailing the protection offered by the ACAA. The statute explicitly circumscribes coverage to "otherwise qualified handicapped individuals."[83] This requires

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[78] See infra notes 100-136 and accompanying text for a discussion of DOT and FAA regulation of exit row seating.

[79] 881 F.2d 566 (8th Cir. 1989).

[80] Id. at 570.

[81] Id. at 568.

[82] 49 U.S.C. § 1374(c) (1988); *Tallarico*, 881 F.2d at 569. The district court applied the analysis of implied private rights of action adopted by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). There the Court listed four relevant factors:

First, is 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 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?

881 F.2d at 568. The appellate court applied the same analysis in affirming the district court's decision that the ACAA impliedly provides a private cause of action. *Id.* at 570.

[83] 49 U.S.C. § 1374(c) (1988). The statute, however, does not define the term. The legislative history of the ACAA indicates that the term is meant to be consistent with the definition in 14 C.F.R. § 382.3(c) (1988). S. Rep. No. 400, 99th Cong., 2d Sess. 4 (1986), reprinted in 1986 U.S.C.C.A.N. 2328, 2332. Therein a qualified handicapped person is one who tenders payment for air transportation, whose carriage will not violate Federal Aviation Administration (FAA) regulations and who is willing and able to comply with reasonable safety requests of the air-
that a passenger possess the ability and willingness to comply with reasonable safety requests of airline personnel or, alternatively, that a handicapped passenger be accompanied by a person who can ensure compliance.\textsuperscript{84} While the Eighth Circuit found that Polly Tallarico was otherwise qualified and not in need of an attendant,\textsuperscript{85} many other handicapped individuals would not meet the "otherwise qualified" standard. Those passengers cannot avail themselves of the protection offered by the ACAA unless they travel with an attendant. This requirement doubles the cost of air fare and may be prohibitively expensive for many handicapped persons.

IV. SEATING ASSIGNMENTS AND EXIT ROW SEATING

The application of the ACAA to seating assignments illustrates the ultimate effect that safety regulations may have on protection against discrimination offered by the ACAA. By enacting the ACAA Congress intended to overturn \textit{Paralyzed Veterans of America} and bind air carriers who were not recipients of federal funds to non-discrimi-

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\textsuperscript{84} 14 C.F.R. § 382.3(c) (1990).
\textsuperscript{85} Tallarico, 881 F.2d at 569.
natory policies with regard to disabled passengers. Conversely, since implementation of the ACAA, air carriers have excluded the disabled from exit rows.

A. Seating Assignments

In 1990, the DOT promulgated regulations to ensure non-discriminatory treatment of qualified handicapped individuals, as directed by the ACAA. Prior to the enactment of these regulations, air carriers were allowed a great deal of discretion in fashioning seating policies. In 1962, the Civil Aeronautics Board (CAB) approved some criteria regarding types of passengers acceptable for air transport. After 1982, seating policies were formed in part by CAB regulations issued to implement section 504 of the Rehabilitation Act of 1973. These regulations merely required airline policies to be safety-related or necessary for the provision of air transportation.

Air carriers designed policies on seating, exit row seating in particular, to comply with certain FAA safety requirements. Relevant provisions require that an air carrier be capable of evacuating a full aircraft within 90 seconds and that access to emergency exit windows be free from obstruction. Aside from the general CAB guidelines and FAA safety requirements, air carriers were free to fashion their own seating policies. These policies

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86 See Cordero v. Cia Mexicana De Aviacion, 681 F.2d 669, 669 (9th Cir. 1982).
90 47 Fed. Reg. 25,938 (1982). The Supreme Court held section 504 of the Rehabilitation Act inapplicable to commercial air carriers in United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986). See supra notes 69-72 and accompanying text for a discussion of this case. This finding of inapplicability would not alter the effect of CAB regulations implemented pursuant to the Rehabilitation Act on formation of airline policies before the case was decided. See Anderson, 619 F. Supp. at 1194.
were, as discussed earlier, subject to challenge as unlawfully discriminatory under existing statutes. Such challenges have been fairly rare and have met with varying success.

_Fitzgerald_\(^9\) may be read as a challenge to an air carrier's seating assignment policy. Pan American agents "refused to allow plaintiffs to reboard the . . . plane and to continue on the flight . . . in their assigned first-class seats" because they were black.\(^9\) The Court held that exclusion of the plaintiffs was unlawful, and the case resulted in recognition of a private right of action under section 404(b).\(^9\) Although the court's opinion also focused on the exclusion of the plaintiffs, the language quoted above suggested that unlawful discrimination in seating assignments might also evoke a private right of action against an air carrier.

_Hingson v. Pacific Southwest Airlines_\(^9\) resolved any doubt as to the existence of such an action. This case involved a direct challenge to an air carrier's seating assignment as unlawful under section 404(b).\(^9\) Hingson, a blind man, objected to being forced to sit in the front row of the airplane. The appellate court held that the air carrier acted unreasonably and in violation of the statute.\(^9\) Thus, the _Hingson_ court clearly recognized a private right of action for unlawful discrimination in seating assignments.

**B. EXIT ROW SEATING**

As with seating policies in general, air carriers have had great discretion and little governmental guidance in formulating exit row seating policies. CAB regulations implementing section 504 of the Rehabilitation Act of

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\(^9\) 229 F.2d 499 (2d Cir. 1956), rev'd sub nom. on other grounds, Prescription Plan Serv. Corp. v. Franco, 552 F.2d 493 (2d Cir. 1977); see _supra_ notes 25-31 for a relevant discussion of this case.

\(^9\) 229 F.2d at 500 (emphasis added).

\(^9\) _Id._ at 509; see _supra_ note 20 for a discussion of the enactments and codifications of sections 404(a) and 404(b).

\(^9\) 743 F.2d 1408 (9th Cir. 1984); see _supra_ notes 44-47 and accompanying text for a discussion of _Hingson_.

\(^9\) _Id._ at 1411-13.

\(^9\) _Id._ at 1411-13.
1973\textsuperscript{100} did not speak directly to the issue of exit row seating. The preamble, however, suggested that it might be reasonable practice "to ask some handicapped passengers, along with children and others who might have trouble opening an emergency exit, not to sit in exit rows, while permitting able-bodied passengers to sit there."\textsuperscript{101}

A study conducted in 1973 by the FAA's Civil Aeromedical Institute (CAMI)\textsuperscript{102} provides the primary empirical basis for the CAB's suggestions, as well as for the DOT's and the FAA's rules regarding exit row seating. The study was prompted by the CAB's request to DOT in 1972 for definitive safety standards governing carriage of the handicapped.\textsuperscript{103} The CAB requested this study because air carriers were inconsistently interpreting and applying existing rules.\textsuperscript{104} CAMI and FAA Flight Standards personnel developed a test program to obtain data on evacuation problems associated with the handicapped.\textsuperscript{105} This study compared the times required for handicapped, non-handicapped, and non-handicapped individuals feigning various handicaps to make their way unaided to an exit.\textsuperscript{106} The study concluded that people with disabilities increased the time required for total evacuation of an aircraft through floor-level exits.\textsuperscript{107}

Critics of the study have suggested that the limited measurement of time required to move to an exit may bear little relationship to a passenger's ability to open the exit and perform other functions necessary to facilitate an escape.\textsuperscript{108} The FAA defended their use of this measurement as a basis upon which to formulate seating policy in the context of a chilling scenario: "A passenger aircraft

\textsuperscript{101} Id.
\textsuperscript{102} FAA Civil Aeromedical Institute, Emergency Escape of Handicapped Air Travelers, Doc. No. FAA-AM-77-11 (July 1977).
\textsuperscript{103} Id. at 1.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 1-2.
\textsuperscript{106} Id. at 4.
\textsuperscript{107} Id. at 31, table 10.
crashes. Inside the cabin there are many survivors. A fire begins. If the passengers are to stay alive, they must get out of the aircraft as soon as they can. Seconds mean the difference between life and death." Thus, the FAA reasoned, the delays associated with handicapped passengers (from seat to exit) were relevant to evacuation in general. If they occurred at the beginning of an exit queue, traffic would back up. Very possibly, fewer passengers would escape in the critical moments before becoming overwhelmed by smoke, fire, explosion, or flooding.

Additionally, the FAA argued that "[i]n many cases, it is readily apparent that the cause of slow progress . . . also would affect the person's ability to open an emergency exit door." Study findings supported this argument. The evacuation times for handicapped passengers were slower when using a window exit. The FAA pointed out that a modest increase in complexity (from a floor level to a window exit) slowed handicapped passengers' evacuation time. This fact led to the logical conclusion that "additional complexity, such as finding and manipulating emergency exit opening mechanisms, would impose additional burdens on persons with handicaps and cause delays."

Critics of the use of the study as a basis for CAB exit row seating policy guidelines also point out that the study did not include statistically valid samples of people with the numerous impairments addressed by the guidelines and rules. While this criticism may be valid, the FAA is not without additional data supporting conclusions drawn in the CAMI study. The FAA also relied on a 1970 study

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109 Id. at 8055.
110 Id. at 8057.
111 Id.
112 Id. at 8058.
113 Id.
114 Id.
by the FAA’s Office of Aviation Medicine\textsuperscript{116} and a memorandum based on CAMI accident reports.\textsuperscript{117} These documents analyzed data from actual events.

The 1970 study concluded that “"[i]n aircraft accidents in which decelerative forces do not result in massive cabin destruction and overwhelming trauma to passengers, survival is determined largely by the ability of the uninjured passenger to make his way from a seat to an exit within time limits imposed by the thermotoxic environment."”\textsuperscript{118} The CAMI memorandum was written at a time when the CAMI Cabin Safety Data Bank contained 132 entries involving problems with handicapped or impaired people likely to affect an emergency exit.\textsuperscript{119} The memorandum analyzed 50 of these entries and generally reinforced the conclusions drawn from the CAMI study.\textsuperscript{120}

Based on information from all of these sources, the FAA “concluded that it is more probable than not that persons with handicaps that prevent them from performing certain evacuation functions would be likely to impede emergency evacuations if seated in an exit row.”\textsuperscript{121} This conclusion forms the basis of the most recent actions by the DOT concerning regulation of exit row seating\textsuperscript{122} and the FAA’s safety rule restricting exit row seating.\textsuperscript{123} These rules became effective simultaneously.\textsuperscript{124} DOT’s section 382.37 on seat assignments simply prohibits exclusion of any qualified handicapped person from any seat based on the passenger’s handicap.\textsuperscript{125} This prohibition is subject to exceptions involving involuntary behavior and

\textsuperscript{116} Id. at 8058-59 (citing Office of Aviation Medicine of the FAA, Survival in Emergency Escape from Passenger Aircraft, Doc. No. AM70-16 (1970)).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 8059.
\textsuperscript{124} See supra note 78.
accommodation of guide animals.\textsuperscript{126} Most importantly, the prohibition is subject to FAA safety regulations.\textsuperscript{127}

FAA section 121.585 contains the substance of the current restrictions on exit row seating.\textsuperscript{128} The rule basically provides that air carrier personnel must determine whether passengers seated in the exit row are suitable.\textsuperscript{129} No passengers may be seated in the exit row if they are:

- physically unable to perform each of ten enumerated functions necessary to facilitate escape;
- under 15 years of age;
- unable to read and understand the printed instructions regarding emergency evacuation provided by the carrier;
- unable to understand oral crew commands spoken in English;
- unable to see well enough to find the exit, read exit instructions, and determine if outside conditions preclude opening the exit;
- unable to hear shouted instructions;
- unable to impart information orally;
- accompanied by small children; or
- likely to be injured in performing escape functions.\textsuperscript{130}

The rule also requires dissemination of exit row seating criteria in passenger briefings and in passenger information cards.\textsuperscript{131} Air carriers must request passengers to identify themselves if they are unsuitable for exit row seating for reasons not easily discernable.\textsuperscript{132}

The stated goal of these rules is patently unobjectionable: to provide optimum conditions for escape from air-

\textsuperscript{126} Id.
\textsuperscript{127} Section 382.37(a) provides in part that "[c]arriers shall not exclude any qualified handicapped individual from any seat in an exit row or other location or require that a qualified handicapped individual sit in any particular seat, on the basis of handicap, except in order to comply with the requirements of an FAA safety regulation." 55 Fed. Reg. 8008, 8050 (1990) (to be codified at 14 C.F.R. § 382.37(a)).
\textsuperscript{129} Id. at 8072.
\textsuperscript{130} Id. at 8072-73.
\textsuperscript{131} Id. at 8073.
\textsuperscript{132} Id.
craft in emergency situations. Yet the means chosen to reach that goal - seating only those who are able-bodied near the emergency exits - have proved exceedingly controversial. While the superficial debate revolves around relative safety virtues, an apparent undercurrent of fear exists that some lives are being considered less valuable than others. This fear is inevitably aroused by seating rules which reserve seats nearest the exit to those traditionally favored members of society, the able-bodied. Certainly, this fear adds to the fervor of the debate. It is not, however, the only force driving those opposed to the exit row seating restrictions. Groups opposed to the FAA regulation raise several important issues.

V. THE DEBATE

While the debate over exit row seating long pre-dated the enactment of the ACAA, it coalesced during the regulatory negotiations preceding promulgation of the DOT ruling on permissible criteria for seat assignments under the ACAA. Pursuant to the Federal Advisory Committee Act, interest groups affected by the rulemaking formed an advisory committee to negotiate with the DOT and other representatives of the Federal Government's interests. Despite agreement on many points and sub-

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133 Id. at 8054.
134 See Christopher Fotos, Blind Passengers Protest Exit Row Seating Policy, Av. Wk. & Space Tech., Mar. 27, 1988, at 94. This article states that “[a] number of airline industry veterans have told Snider of past discrimination against blacks, who similarly were not seated in exit rows, partly because ‘the life of a black person was not considered as valuable as that of a white person.’” Id.
135 55 Fed. Reg. at 8054-55. The regulation states that “[t]he issues addressed by the rule are among the most difficult and controversial ever addressed by the FAA, for they require, in the interest of what is essential for the safety of all passengers, that some passengers be treated differently from other passengers, depending on their physical abilities.” Id.
137 55 Fed. Reg. 8008, 8009-10 (1990) (to be codified at 14 C.F.R. § 382.37). The regulation summarizes the composition of the committees: [D]isability groups represented on the committee included the Paralyzed Veterans of America (PVA), the National Council on Independent Living, the American Council of the Blind, National Federation of the Blind (NFB), National Association of Protection
substantial progress on others, the negotiations came to an
impasse on the issue of exit row seating. Due to the stale-
mate, the advisory committee issued no final recommen-
dations.\textsuperscript{138} DOT then proposed its rule on seating
assignments.\textsuperscript{139} The proposed rule prohibited exclusion
of passengers from exit rows on the basis of handicap,
subject to minor exceptions and subject to compliance
with FAA safety rules.\textsuperscript{140} Thus, the debate moved to the
comment period preceding the FAA's rulemaking.

A. CIVIL RIGHTS OR SAFETY?

At the most fundamental level, the FAA and the oppos-
ing disabled groups\textsuperscript{141} disagree over the nature of their
debate. While the FAA characterizes the debate as one
concerning safety,\textsuperscript{142} disabled groups assert that the safety
issue is spurious and that the real issue is civil rights.\textsuperscript{143}
Specifically, the disabled allege that those with easily iden-
tifiable disabilities will be excluded from exit rows while
those with equally incapacitating, but hidden, health

\begin{footnotesize}
\begin{itemize}
\item Id. at 8050. Consequently, the Office of the Secretary of Transportation
\item Id. at 8008.
\item Id. at 8050.
\item Id. at 8010. Those submitting comments to the FAA following its notice of proposed
rulemaking (NPRM) were dominated by blind individuals and by groups with
blind membership. Foremost among the groups was the National Federation of
the Blind (NFB). 55 Fed. Reg. at 8055-56. Since most of the comments came
from the NFB, its issues will be focused on in this comment.
\item 55 Reg. at 8054 (stating that "[t]his action is intended to further safety for
all passengers").
\item Fotos, \textit{supra} note 134, at 94.
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problems will be allowed to sit in those rows.\textsuperscript{144} Since the regulations result in preferential treatment of those with hidden health problems, they are contrary to the ACA because they promote unlawful discrimination against the obviously disabled.\textsuperscript{145}

The FAA provides only a brief response to these allegations. The Federal Register devotes a mere thirteen pages to a discussion of the issues involved, and only three pages address civil rights issues.\textsuperscript{146} Clearly, each side of the debate hopes to frame the issue to its own advantage. Allegations of discrimination garner close attention, particularly in the context of rules that place the disadvantaged at a further disadvantage. On the other hand, people (including lawmakers) are likely to look favorably on any rule which promotes aviation safety, especially a rule with commonsense appeal.

\section*{B. Civil Rights}

The FAA's response to charges of discrimination is brief. The response appears under the heading \textit{Whether the FAA's Exit Row Seating Proposal Discriminates Against Persons With Disabilities, Especially the Blind}.\textsuperscript{147} It is so weak as to be humorous. Therein, the FAA points out that the aviation community considers exit row seating to be a safety issue and that two editorials, one appearing in the \textit{New York Times} and one appearing in \textit{Aviation Week and Space Technology}, agreed that no discrimination was involved.\textsuperscript{148} The FAA also cites as support the fact that representatives of disabled groups were included in the Secretary of Transportation's advisory committee. Finally, the FAA flatly asserts that the final rules base seating decisions on "neutral nondiscriminatory criteria applicable to all passengers."\textsuperscript{149}

\begin{thebibliography}{99}
\bibitem{146} Id. at 8056-71.
\bibitem{147} Id. at 8060.
\bibitem{148} Id.
\bibitem{149} Id.
\end{thebibliography}
The substance of the government's defense to charges of discrimination lies at the end of a section entitled *Whether the FAA Exit Row Seating Rule Will Compromise Air Safety.* Recognition is given that Congress specifically intended the ACAA to close a gap in coverage of Section 504 of the Rehabilitation Act. Therefore, the Rehabilitation Act standards of reasonable accommodation and meaningful access enunciated by the Supreme Court apply to the ACAA.

The FAA maintains that disabled passengers are not denied meaningful access to air transportation by the exit row seating rules. The restriction is narrowly defined and excludes only people with certain disabilities - those which the FAA has determined are likely to impede evacuation. Most persuasively, the FAA points out that the regulation does not deny this narrowly defined class of people access to air transportation. It excludes them only from seats in the exit rows, a small fraction of available seating.

The FAA's position under Rehabilitation Act standards is compelling. Furthermore, the disabled groups' allegations of disparate impact in violation of the ACAA are unavailing. The crux of the disabled groups' complaint is that passengers with hidden health problems are treated preferentially to those with obvious disabilities simply because the hidden ailments are either undetected or undetectable at boarding. This argument assumes the presence of a class of passengers with hidden health

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150 Id. at 8061.
152 Southeastern Community College v. Davis, 442 U.S. 397 (1979); Alexander v. Choate, 469 U.S. 287 (1985). In these two cases the Supreme Court held that the Rehabilitation Act required a balance between the non-discriminatory objectives of the statute and the need to contain the statute within reasonable parameters. *Davis*, 442 U.S. at 410; *Alexander*, 469 U.S. at 300. This balance requires that the disabled have meaningful access to benefits offered by a recipient of federal funds. Meaningful access may necessitate reasonable accommodations in a benefitted program. *Alexander*, 469 U.S. at 301.
154 Id.
155 Id.
problems which would incapacitate them in a time of emergency. The argument also assumes that such passengers either will not comply with the air carriers’ mandatory request to identify themselves or that they will be unaware of their own hidden problems and, consequently, will be unable to comply. Alternatively, even perfectly healthy passengers could incapacitate themselves by becoming inebriated after being seated in an exit row. Little empirical evidence is cited to support either assumption. Assuming, arguendo, that both assumptions are valid and that those with obvious disabilities are in fact victims of discrimination, the premise still is not sufficient to find a violation of the non-discriminatory mandate of the ACAA. In order to prevail, the disabled groups must be able to show that the discrimination is not justified by safety considerations.

C. Safety

The disabled groups question whether the FAA has sufficient evidence to establish a safety necessity for restricting exit row seats. The FAA posits as its evidentiary basis: (1) the 1973 Civil Aeromedical Institute (CAMI) study; (2) an accident report and a separate study; and (3) anecdotal evidence supplied by air crash survivors.

The disabled groups criticize the substantial reliance

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156 See supra note 130 and accompanying text.
158 Id. § 1374(3) (stating that the Secretary of Transportation was instructed to promulgate regulations “to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers”).
160 See supra notes 102-115 and accompanying text for a discussion of the CAMI test.
161 See supra notes 116-121 and accompanying text.
162 55 Fed. Reg. 8054, 8061 (1990). One of the survivors was guided to safety by a glimpse of light. The same passenger also elected not to open an exit because it would have admitted smoke and flames into the cabin. The passenger made this decision based on visual ability to perceive the fire outside the exit door. Id.
placed upon the CAMI study by the FAA. \(^{163}\) First, the study measured evacuation time from seat to door only, and it did not measure performance on other evacuation-related functions. \(^{164}\) Second, the study did not involve statistically valid tests on the variety of disabilities that the rules address. Finally, while the other study \(^{165}\) and report \(^{166}\) relied upon by the FAA tend to support the conclusions drawn from the CAMI study relating to the problems encountered in evacuations involving the disabled, \(^{167}\) the FAA has offered no evidence showing that a disabled person’s presence led, in any instance, to additional injury or death. \(^{168}\) Significantly, no FAA rule on exit row seating was issued after completion of the CAMI study in 1973. \(^{169}\) If the study was as decisive as is now claimed by the FAA, it is odd that the FAA instigated no regulation at the time of the study’s completion.

The absence of conclusive evidence linking delays associated with the disabled in evacuations to actual injury or death is often invoked by disabled groups to refute the legitimacy of the FAA’s safety justifications for restricting exit row seating. \(^{170}\) This lack of evidentiary linkage is es-

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\(^{163}\) Id. at 8056.

\(^{164}\) Id. at 8058. See supra notes 108-114 and accompanying text for a discussion of the relevance of this measurement.

\(^{165}\) OFFICE OF AVIATION MEDICINE OF THE FAA, SURVIVAL IN EMERGENCY ESCAPE FROM PASSENGER AIRCRAFT, DOC. No. FAA-AM-70-16 (1970). See supra notes 116-118 and accompanying text. This study involved three actual emergency evacuations. It did not speak to evacuation of the disabled.

\(^{166}\) OFFICE OF AVIATION MEDICINE OF THE FAA, PROTECTION AND SURVIVAL LABORATORY MEMORANDUM, DOC. No. FAA-AM-119-87-6 (1987). The memorandum was based on the FAA Civil Aeromedical Institute’s ACCIDENT/INCIDENT BIO-MEDICAL DATA REPORTS. See supra notes 119-120 and accompanying text.


\(^{168}\) Fotos, supra note 134, at 94. Anthony Broderick, FAA Associate Administrator for Flight Standards, “conceded that he could not give an example of a blind passenger whose presence led to additional injury or death.” Id. at 95.

\(^{169}\) 55 Fed. Reg. at 8059.

\(^{170}\) See, e.g., News Conference, PR Newswire, Jan. 29, 1988, at 2 (available on LEXIS, Nexis library, PR file). The National Federation of the Blind, regarding the need for legislation to block the proposed FAA exit row seating rule, stated: 'In all of the recorded history of air travel, blindness has never been a hazard during emergency evacuations. . . . There has never been the slightest difficulty. Only now, with the passage of the new nondis-
peciallly significant in light of the fact that the report relied upon by the FAA surveyed all available entries in the CAMI Cabin Safety Data Bank.\textsuperscript{171} Of the 3,382 accident/incident entries, only 132 involved people with disabilities or other characteristics likely to affect evacuation.\textsuperscript{172} This suggests that evacuations of disabled passengers are not terribly noteworthy. Fifty entries were closely analyzed in the report, and these were individually reviewed by the FAA.\textsuperscript{173} While the report indicated that “certain factors generally impede rapid evacuation,”\textsuperscript{174} the FAA cited no reported instance in which any of these factors caused additional injury or death. In some cases, however, this lack of evidence is at best inconclusive since air carrier policies in the past generally excluded disabled passengers from exit rows.\textsuperscript{175} Thus, the relevant evidence from which to draw conclusions is simply lacking.

VI. THE NATIONAL FEDERATION OF THE BLIND AND THE WORLD AIRWAYS TEST

The National Federation of the Blind (NFB), other groups with blind membership and similar concerns, and the Paralyzed Veterans of America (PVA) were the primary groups involved in the debates surrounding exit row seating.\textsuperscript{176} The NFB was foremost in resisting exit row seating restrictions. The belief that the restrictions thwarted the intent of Congress in enacting the ACAA fueled the NFB’s resistance.\textsuperscript{177} The ACAA was enacted to

\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id. supra note 134, at 95.
\textsuperscript{176} See supra note 137. With regard to comments received by the FAA, “the largest number came from groups with blind membership.” 55 Fed. Reg. 8054, 8055 (1990).
\textsuperscript{177} See, e.g. News Conference, PR Newswire, Jan. 29, 1988 (available on LEXIS, Nexis library, PR file). The NFB stated: On the need for legislation to block the
relieve disabled passengers from unfounded restriction. The NFB considered exclusion of the blind from exit rows to be just such an unfounded restriction.

To support its position and to demonstrate the inaccuracy of the CAMI study as applied to the blind, the NFB conducted its own study. The NFB contends that a test evacuation it performed in 1985 with World Airways proves that blind people should not be excluded from the exit rows. The experiment involved two evacuation drills with twenty blind and ten sighted people. The experiment was videotaped. The NFB has refused to release the unedited tape to the FAA, purportedly for fear that the tape would be unfairly edited or disregarded by the FAA. Therefore, the FAA's analysis of the experiment was limited to eyewitness accounts and to a report of a Senate Subcommittee hearing in which an NFB official discussed certain aspects of the experiment.

Among other findings, the FAA found that the NFB followed no testing protocol, provided no properly instructed neutral observers, and published no formal report. It further asserted that the NFB conducted practice sessions that helped subjects open the exit. For these reasons, the FAA concluded that the study was not scientific.

Furthermore, far from supporting the NFB's position, flight attendants participating in the experiment reported

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proposed FAA exit row seating rule, "[t]he attempt to impose seat restriction regulations on the blind disregards the will of Congress expressed in Pub. L. 99-435 and its underlying legislative history. The statute, which was intended to remove unfounded limitations on the blind, is being turned on its head and used against the blind by the airlines." Id.


See supra note 177.


Id.

Fotos, supra note 134, at 94.

Id. at 95.


Id.

Id.

Id.
many problems with the evacuations. A second evacuation was aborted partially due to the danger posed to flight attendants and other passengers, especially those assisting at the bottom of the slide, by the blind passengers' canes. The flight attendants stated in affidavits that a passenger's cane punctured the escape slide, while the NFB insists that the damage was done by a sighted woman's high-heeled shoes. The NFB claims that the videotape revealed little apparent difference in exit times between blind and sighted evacuees. Any difference in evacuation times, however, resulted from "the flight attendants' singling out the blind for special help they did not require... slowing them down." Based on the available evidence, the NFB-World Airways study does not contradict the FAA's position but tends to support it. The NFB's failure to release an unedited tape of the experiment only lends credence to the FAA analysis.

VII. CONCLUSION

The FAA's evidentiary basis that justifies imposition of exit row seating restrictions consists of the highly criticized CAMI study; a study of actual emergency evacuations that did not involve the disabled; a report that failed to effectively link disabled passengers to poor results; and anecdotal evidence. Despite the various weaknesses previously discussed, in sum, the evidence supports the FAA's conclusion that "it is more probable than not that

188 Id.
These included the inability of the group to form a double line; hesitancy to jump without being pushed out [a maneuver which put the flight attendants in danger of being shoved out the exit]; insistence by a woman with a guide dog that she be allowed to sit down, holding the dog, instead of jumping without it; inability to leave the slide rapidly at the bottom; and failure to catch some passengers when blind persons assisted at the bottom of the slide.

189 Id.

190 Fotos, supra note 134, at 95.

191 Id.

192 Id. at 94.
persons with handicaps that prevent them from performing certain evacuation functions would be likely to impede emergency evacuation if seated in an exit row." The NFB-World Airways experiment cannot properly be considered credible evidence until the NFB releases an unedited videotape for examination. Given what is already known of the study and the eyewitness testimony, the release is unlikely to provide evidence favorable to the disabled groups’ position.

The disabled groups have failed to refute the safety considerations justifying exit row seating restrictions. Thus, their allegations of discrimination in violation of the ACAA are unavailing. Nevertheless, this is a small defeat in the face of a larger victory. The DOT promulgation of the ACAA through seat assignments is a broadly written prohibition of discrimination based on handicap. This broad protection is subject to only minor exceptions and to FAA safety regulations. Handicapped passengers, therefore, are no longer at the mercy of inconsistent air carrier policies. Through the DOT seating assignment rule, the ACAA acts as “a legal constraint on . . . carrier[s’] discretion to impose additional requirements, above the ‘minimum standards’ found to be neces-

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195 Exceptions in coverage exist under the DOT rule for involuntary behaviors and for service animals. 55 Fed. Reg. 8008, 8050 (1990) (to be codified at 14 C.F.R. § 382). Section 382.37 provides that:

(b) [i]f a person’s handicap results in involuntary active behavior that would result in the person properly being refused transportation . . . and the safety problem could be mitigated to a degree that would permit the person to be transported consistent with safety if the person is seated in a particular location, the carrier shall offer the person that particular seat location as an alternative to being refused transportation.

(c) If a service animal cannot be accommodated at the seat location of the qualified handicapped individual whom the animal is accompanying . . . the carrier shall offer the passenger the opportunity to move with the animal to a seat location, if present on the aircraft, where the animal can be accommodated, as an alternative to requiring that the animal travel with checked baggage.

Id.
sary for safety by the FAA, where the additional requirements affect handicapped persons in a way differently from other passengers."\textsuperscript{196} Disabled groups and individuals may disagree with the wisdom of the FAA's exit row seating rule, but they must concede that the ACAA and DOT section 382.37 represent a big step forward in the search for equal treatment.

\textsuperscript{196} \textit{Id.} at 8012.