



Volume 25 | Issue 6

Article 10

1980

Federal Practice and Procedure - Implied Cause of Action - Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 Imply Private Causes of Action

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Recommended Citation

Jane Duffy, *Federal Practice and Procedure - Implied Cause of Action - Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 Imply Private Causes of Action*, 25 Vill. L. Rev. 1021 (1980).

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FEDERAL PRACTICE AND PROCEDURE—IMPLIED CAUSE OF ACTION—TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND SECTION 504 OF THE REHABILITATION ACT OF 1973 IMPLY PRIVATE CAUSES OF ACTION.

NAACP v. Wilmington Medical Center, Inc. (1979)

Plaintiffs, representing ethnic and racial minorities as well as handicapped persons residing in the city of Wilmington, Delaware,¹ brought suit against the Medical Center, Inc. (WMC),² the Secretary of the United States Department of Health, Education and Welfare (HEW), and two state health planning agencies for declaratory judgment against the relocation of major health care facilities³ and for an injunction against the construction of a new suburban hospital designed for the replacement and relocation of these facilities.⁴ Plaintiffs claimed that the proposed transfer of medical services from existing urban hospitals would have a discriminatory impact on inner city minorities and on elderly and handicapped persons.⁵ The action was brought under Title VI of the Civil Rights Act of 1964 (Title VI)⁶ and section 504 of the Rehabilitation Act of 1973 (section 504),⁷ which proscribe dis-

1. *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280, 284 (D. Del. 1978). Plaintiffs, five organizations and six individuals, were granted class action certification pursuant to FED. R. CIV. P. 23(b)(2). 453 F. Supp. at 284 n.1. The city of Wilmington intervened as a plaintiff. *Id.* at 284 n.2.

2. *NAACP v. Wilmington Medical Center*, 426 F. Supp. 919 (D. Del. 1977). The Medical Center is a privately owned, nonprofit hospital system consisting, in part, of three major urban facilities. 453 F. Supp. at 285. The Medical Center, Inc. was identified in the lower court as Wilmington Medical Center, Inc., and was designated WMC throughout the litigation. *See* 426 F. Supp. at 919.

3. *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1249 (3d Cir. 1979). The lawsuit concerns WMC's "Plan Omega," an \$88 million project involving the construction of an 800-bed medical facility eight miles southwest of Wilmington, Delaware, modernization of an existing urban hospital, and the transfer of all inpatient and outpatient services from the remaining urban facilities to the newly constructed suburban hospital. 453 F. Supp. at 286-87. For a history of the WMC facilities and further details concerning Plan Omega, *see* 453 F. Supp. at 285-87. For a discussion of the HEW review of Plan Omega, *see id.* at 288-92.

4. 599 F.2d at 1249. Although the plan provides that ambulatory and emergency services are to be maintained at both the urban and suburban facilities, numerous inpatient services, outpatient clinical services, and ancillary or support services (*e.g.*, laboratory and X-ray services) would be offered only at the suburban hospital. 453 F. Supp. at 286-87 & n.14.

5. 599 F.2d at 1248. *See also* 453 F. Supp. at 289. Plaintiffs claimed that the relocation would make certain services inaccessible to them and to members of their class. 453 F. Supp. at 289. They further claimed that Plan Omega would have a discriminatory impact, creating a segregated hospital system in which the new suburban facility would service the affluent white population, and the remaining, scaled-down, urban facility would become a "ghetto" hospital. *Id.*

6. 42 U.S.C. § 2000d (1976). Section 601 of Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

7. 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987. Section 504 provides in pertinent part: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his hand-

crimination on the basis of race or handicap in federally funded programs.⁸

HEW and the state health planning agencies initially approved the capital expenditures necessary for construction of the new hospital,⁹ but HEW later determined that the proposed relocation would violate Title VI and section 504.¹⁰ The relocation plan was then revised to include certain safeguards¹¹ against possible disparities in the quality and accessibility of health care to be provided by the proposed facilities, and was approved, as modified, by HEW.¹²

The district court, in ruling that plaintiffs had no private cause of action under Title VI or section 504,¹³ declared the administrative remedy for terminating federal funds¹⁴ exclusive¹⁵ and, in a limited review of the agency's

icap, 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. . . ." *Id.* The amendment extends rulemaking authority to the funding agencies. *Id.*

8. See 42 U.S.C. § 2000d (1976); 29 U.S.C. § 794 (1976), as amended by Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987. Approximately 35% of WMC's operating funds come from federal assistance. 599 F.2d at 1248 n.4.

9. 599 F.2d at 1248 n.4. HEW and the state health planning agencies approved the relocation plan during the course of a review process established by § 1122 of the Social Security Act (§ 1122), which is designed to discourage capital expenditure for unnecessary expansion by hospitals participating in federal medical assistance programs. 42 U.S.C. § 1320a-1 (1976), as amended by Health Maintenance Organization Amendments of 1978, Pub. L. No. 95-559, § 14(b), 92 Stat. 2141. Section 1122 review and certification assures a hospital that HEW will not later withhold medicaid and medicare payments on the ground that the capital expenses component of hospital charges is the result of an unnecessary capital expenditure. 426 F. Supp. at 922. Plaintiffs claimed that by certifying the plan under § 1122, HEW had, in effect, approved federal funding of an unlawfully discriminatory project in violation of the requirements of Title VI and § 504. 426 F. Supp. at 923.

After a six-month investigation, HEW concluded that the original plan violated Title VI and § 504, but subsequently found that, with certain modifications, the plan comported with the statutes. See 453 F. Supp. at 291-92. Note that the plaintiffs were excluded from participation in the agency hearings by HEW's procedural regulations. See 45 C.F.R. §§ 81.11, .21, .22(a), .23, 84.61 (1979). For a discussion of HEW's Title VI and § 504 enforcement procedures, see note 14 *infra*; notes 24-28 and accompanying text *infra*.

10. 599 F.2d at 1249. Recognizing the express statutory prohibition against judicial review of HEW's § 1122 certification, the district court ordered HEW to conduct a Title VI compliance review of Plan Omega. 453 F. Supp. at 288 n.27, 290. HEW regulations enacted pursuant to Title VI require an HEW investigation "whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply" with Title VI regulations. 45 C.F.R. § 80.7(c) (1979). Although HEW had demanded that plaintiffs file an administrative complaint, the court ordered HEW to treat plaintiffs' complaint in the instant suit as information sufficient to initiate an investigation. 599 F.2d at 1249 n.7. See also 453 F. Supp. at 290.

11. 599 F.2d at 1250. The proposed modifications included 1) maintenance by WMC of free and adequate transportation between the two hospital facilities for all patients, visitors, and employees; 2) a patient utilization control plan; 3) procedures and financial commitment to ensure the maintenance by WMC of the urban facility as a coequal, integrated unit of the hospital system; and 4) equal employment opportunity at both facilities. See 453 F. Supp. at 310-29.

12. 599 F.2d at 1250. HEW's final approval of the modified Plan Omega was upheld on judicial review. *Id.*

13. 453 F. Supp. at 302.

14. Section 602 of Title VI grants the federal funding agency power to enforce the statute's nondiscrimination policy through the withdrawal or refusal of financial assistance, and through rulemaking. 42 U.S.C. § 2000d-1 (1976). Section 603 of Title VI provides for judicial review of the funding agency's action under § 602. 42 U.S.C. § 2000d-2 (1976). For the text of § 602, see note 24 *infra*.

action,¹⁶ affirmed HEW's determination that the proposed relocation, as modified, would have no discriminatory impact.¹⁷ The United States Court of Appeals for the Third Circuit¹⁸ reversed and remanded,¹⁹ *holding* that private beneficiaries of federally funded programs, seeking declaratory and injunctive relief, have a private cause of action against recipients of federal funds under section 601 of Title VI²⁰ and under section 504 of the Rehabilitation Act.²¹ *NAACP v. Medical Center, Inc.* 599 F.2d 1247 (3d Cir. 1979).

Title VI of the Civil Rights Act of 1964, section 601, codifies the federal policy forbidding racial discrimination in any program or activity receiving federal financial assistance.²² Section 504 of the Rehabilitation Act extends this policy of nondiscrimination in federally funded programs by prohibiting discrimination against handicapped persons.²³ To prevent the use of federal funds for unlawfully discriminatory purposes, section 602 of Title VI²⁴ and

Section 504's funding termination procedure was modeled after that in § 602. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1976). Section 504 also extends rulemaking authority to the funding agencies. 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987.

15. 453 F. Supp. at 302. It should be noted that the administrative remedies available under Title VI and § 504 do not provide direct relief to, or allow participation by, victims of discriminatory treatment. *See* 42 U.S.C. § 2000d-1 (1976); 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987. Note, also, that plaintiffs herein sought specific declaratory and injunctive relief, not funding termination. *See* notes 3-4 and accompanying text *supra*. For a discussion of the administrative process and the plaintiff's limited role therein, *see* notes 27-30 and accompanying text *infra*.

16. 599 F.2d at 1250. Judicial review of agency action is limited. *See* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Section 603 of Title VI specifically provides that agency action under Title VI "shall not be deemed committed to unreviewable agency discretion" and shall be governed by the Administrative Procedure Act, 5 U.S.C. § 706 (1976). *See* 42 U.S.C. § 2000d-2 (1976). The district court determined that the scope of review was the arbitrary and capricious standard. 599 F.2d at 1250. *See also* 5 U.S.C. § 706(2)(A). For a discussion of the arbitrary and capricious standard, *see* note 30 *infra*. Concerning the limited scope of judicial review, *see* notes 29-30 and accompanying text *infra*.

17. 453 F. Supp. at 330.

18. The case was heard by Judges Hunter and Garth, and by District Judge Brotman of the District of New Jersey, sitting by designation. Judge Hunter wrote the unanimous opinion.

19. 599 F.2d at 1259. The case against WMC was remanded for a trial on the merits. *Id.*

20. *Id.* at 1250 n.10.

21. *Id.* at 1258. The lower court was directed to dismiss the suit against HEW. *Id.* at 1259 n.49. Depending on the decision on remand of the plaintiffs' claim against WMC, HEW's determination that Plan Omega complies with Title VI and § 504 may be subject to limited judicial review. *See id.* at 1250 n.10. For a critical analysis of the court's treatment of the claim against HEW, *see* notes 96-112 and accompanying text *infra*.

22. 42 U.S.C. § 2000d (1976). For the text of § 601 of Title VI, *see* note 6 *supra*. The purpose of the Civil Rights Act of 1964 "is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation." S. REP. NO. 872, 88th Cong., 2d Sess., 1, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2355.

23. 29 U.S.C. § 794 (1976). For the relevant text of this provision, *see* note 7 *supra*.

24. 42 U.S.C. § 2000d-1 (1976). Section 602 of Title VI provides in pertinent part:

Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions

section 504²⁵ provide that, as a last resort, the funding agency may terminate federal funds.²⁶ Funding termination is a bipartite, administrative process,²⁷ involving the funding agency and the recipient of its aid.²⁸ A person aggrieved by agency funding termination can, pursuant to section 603 of Title VI,²⁹ appeal the agency decision to the courts for limited judicial

of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Id.

Agency action under § 602 is subject to limited judicial review under § 603. 42 U.S.C. § 2000d-2 (1976). For discussion of the nature and scope of judicial review under § 603, *see* notes 29-30 and accompanying text *infra*.

25. Exec. Order No. 11,914, 3 C.F.R. 117 (1976) (authorizing administrative funding termination where § 504 has been violated). It should be noted that the language of both funding termination provisions is almost identical. For the text of § 602, *see* note 24 *supra*.

26. 42 U.S.C. § 2000d-1 (1976); Exec. Order No. 11,914, 3 C.F.R. 117 (1976). Legislative comment suggests that funding termination should occur infrequently: "The withholding of funds would be the last step to be taken only after the administrator or the agency had used every other possible means to persuade or to influence the person or the agency offending to stop the discrimination." *See* 110 CONG. REC. 13,129 (1964) (remarks of Sen. Ribicoff). *See also id.* at 5090, 6544 (remarks of Sen. Humphrey); *id.* at 7103 (remarks of Sen. Javits). Note that the language of the Title VI and § 504 funding termination provisions reflects congressional reluctance to resort to funding termination.

27. *See* 110 CONG. REC. 8978-80 (1964). "Section 601 is a statement of policy. Section 602 is the section that gives authority to the agencies." *Id.* at 13,435 (remarks of Sen. Pastore). "What would be done by section 602 and certain following sections would be to prescribe ways in which branches of the Government . . . shall conduct themselves in the implementation of the broad and unfettered policy announced in section 601. But that is all." *Id.* at 13,930 (remarks of Sen. Case). The language of § 602 is essentially a limitation on agency power to terminate funds. *See* 42 U.S.C. § 2000d-1 (1976).

HEW regulations enacted pursuant to § 602 provide for periodic review of the recipients' conduct, agency investigation, voluntary compliance negotiation, and, if necessary, funding termination. *See* 45 C.F.R. §§ 80.7(a)-7(d), .8(c) (1979). These procedural regulations also apply to § 504. *Id.* at § 84.61.

28. For a discussion of agency control of the funding termination process, *see* note 27 *supra*. The language of § 602 does not contemplate representation of, or participation by, victims of unlawful discrimination. 42 U.S.C. § 2000d-1 (1976). Only the agency and the recipient are parties to the administrative proceedings pursuant to Title VI. 45 C.F.R. §§ 81.11-.21 (1979). A beneficiary can trigger agency action by filing a complaint, and can then petition to participate as an *amicus curiae*, but will not be a party and will not be entitled to introduce evidence at any hearings. *Id.* at §§ 80.7(b), 81.22-.23. These procedural regulations also apply to § 504. *Id.* at § 84.61.

29. *See* 42 U.S.C. § 2000d-2 (1976). It has been suggested that beneficiaries are not "persons aggrieved" under § 603. *See* *Green St. Ass'n v. Daley*, 250 F. Supp. 139 (D.C. Ill. 1966), *aff'd*, 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967). The *Green* court noted:

Although the members of the public are intended to be the ultimate beneficiaries of federal subsidy programs granting aid . . . , plaintiffs certainly are not the direct recip-

review.³⁰ Neither Title VI nor section 504, however, expressly creates or denies the right of a private party to sue for relief from discrimination in violation of the statute.³¹

As noted by the United States Supreme Court, a legal right without a legal remedy has little meaning.³² Thus, even when not expressly provided by statute, private causes of action have often been judicially inferred³³ based upon the language of the applicable statute,³⁴ the manifested legisla-

ients of such funds referred to in the Civil Rights Act of 1964, which grants those recipients a right to judicial review. Therefore, plaintiffs are not persons who suffered "legal wrong" because of agency action.

250 F. Supp. at 146. Beneficiaries have, however, obtained judicial review under § 603. *See Hardy v. Leonard*, 377 F. Supp. 831 (D.C. Cal. 1974) (woman denied employment sought review of agency decision to continue federal financial assistance to city police department). It should be noted that while the language of § 603 authorizes judicial review only when funding has been terminated, the *Hardy* court found that judicial review of an agency decision not to terminate funds is "equally proper and necessary if the integrity of the scheme erected by Congress under Title VI is to be protected." *Id.* at 837.

30. 42 U.S.C. § 2000d-2 (1976). Section 603 provides that review of § 602 actions shall be governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976). 42 U.S.C. § 2000d-2 (1976). Under the Administrative Procedure Act, judicial review of agency action is not a trial de novo and the reviewing court must focus on the "administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard of review prescribed by the Administrative Procedure Act has been deemed the appropriate standard under § 603. *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1978). This standard of review is deferential to the agency decision; the reviewing court simply determines whether the agency considered the relevant factors and whether a clear error of judgment was made. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

31. *See* 42 U.S.C. § 2000d (1976); 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987. A private cause of action has been defined as the "right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement." *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

32. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 238 (1969). *See also NAACP v. Medical Center, Inc.*, 599 F.2d at 1255.

33. *See generally* Comment, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. MICH. J.L. REF. 294 (1976), Comment, *Private Rights of Action under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975). A basis for a policy argument against judicial inference of private rights of action is the limited jurisdiction of the federal courts. *See Cannon v. University of Chicago*, 441 U.S. 677, 746 (1979) (Powell, J., dissenting). "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve." *Id.*

34. For cases in which statutory language was a factor in determining whether a private cause of action is implied, *see, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (language of § 10b of Securities Exchange Act of 1934, 15 U.S.C. § 78aaa (1976), does not support an implied private cause of action against a person who is neither a purchaser nor a seller); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (private cause of action for declaratory and injunctive relief implied by language of Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976)); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (language of § 14(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976), expressing broad remedial purpose, implies a private cause of action); *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (1930) (implied private right to seek judicial enforcement of express prohibitions in Railway Labor Act of 1926, 45 U.S.C. § 152 (1976)).

tive intent,³⁵ the ultimate purpose of the statute,³⁶ and the availability of alternative remedies.³⁷ In *Cort v. Ash*,³⁸ the Supreme Court, in a unanimous opinion, identified the relevant factors to be considered before a court may infer a private cause of action:³⁹ 1) plaintiff's membership in the class for whose "especial" benefit the statute was enacted; 2) the existence of legislative intent for or against private rights under the statute; 3) the degree to which a private cause of action is consistent with the purposes of the legislative scheme; and 4) the presence or absence of a traditional relegation of the particular cause of action to state, rather than federal, law.⁴⁰ The

35. For cases in which legislative intent was a factor in determining whether a private cause of action is implied, *see, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (legislative intent to create private actions is an "acorn" which grows into a "judicial oak"); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (in light of its legislative history and express language, § 307 of Rail Passenger Service Act of 1970, 45 U.S.C. § 547 (1976), does not create a private cause of action); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Civil Rights Act of 1866, 42 U.S.C. § 1982 (1976), implies a private cause of action based on legislative intent to prohibit all racial discrimination).

36. For cases in which the ultimate purpose of the statute was a factor in determining whether a private cause of action is implied, *see, e.g.*, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (private cause of action denied because "inimical" to the purposes of Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa (1976)); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (citizen enforcement consistent with broad purpose of Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976)); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (statutory purpose of § 14(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), to protect investors implies availability of judicial relief).

37. For cases in which the availability of alternative remedies was a factor in determining whether a private cause of action is implied, *see, e.g.*, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (statutory SIPC liquidation proceedings obviate need for private enforcement of Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa (1976)); *Rosado v. Wyman*, 397 U.S. 297 (1970) (administrative funding termination process under Aid to Families with Dependent Children program, 42 U.S.C. § 601 (1976), found inadequate to grant declaratory and injunctive relief sought by plaintiffs); *Calhoon v. Harvey*, 379 U.S. 134 (1964) (exclusive statutory remedy provided in Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(1) (1976), precludes a private cause of action). For a discussion of the *Medical Center* court's reliance on *Rosado*, *see* note 87 and accompanying text *infra*.

38. 422 U.S. 66 (1975), *noted in the Third Circuit Review*, 20 VILL. L. REV. 615 (1975). *See also* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash*, 23 VILL. L. REV. 657 (1978). The controversy in *Cort* concerned whether a private cause of action for damages against corporate directors arose from a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for." 422 U.S. at 68, *quoting* 18 U.S.C. § 610 (1970 & Supp. III 1975) (repealed 1976).

39. 422 U.S. at 78. The Court synthesized the relevant considerations applied in prior Supreme Court cases. *Id. See, e.g.*, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (purpose of the legislative scheme); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (legislative intent); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (connection with state or federal law); *Texas & Pac. R.R. v. Rigsby*, 241 U.S. 33 (1916) (plaintiff's membership in the protected class).

40. 422 U.S. at 78. The Court stated:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or 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?

Id. (citations omitted) (emphasis in original).

Court did not, however, suggest that these factors carry equal weight⁴¹ and subsequently, the Court indicated that the inquiry should focus on legislative intent.⁴²

The Supreme Court has yet to expressly decide whether there is a private right to sue under Title VI.⁴³ Although the lower courts have adjudicated private claims for relief under Title VI⁴⁴ and section 504,⁴⁵ most have

41. *Id.* See note 40 *supra*. The Court subsequently commented: "It is true that in *Cort v. Ash* . . . the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

42. See *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* at 575. See also *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

In *Transamerica*, the Court refused to infer a private cause of action for damages from § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6, without reaching a *Cort* analysis. 444 U.S. at 24. The Court began and ended its inquiry with the "dispositive" issue of congressional intent and indicated that, where a statute neither grants private rights to an identifiable class nor prohibits some conduct as illegal, no private cause of action can result. *Id.*

The effect of *Touche Ross* and *Transamerica* would appear to be to lessen the importance of the last two factors of the *Cort* analysis which focus on the consistency of a private cause of action with the purposes of the legislative scheme and the relegation of the issue to state law. See 444 U.S. at 24. Both *Touche Ross* (decided June 18, 1979) and *Transamerica* (decided November 13, 1979) postdate the Third Circuit's opinion in *Medical Center*. See *NAACP v. Medical Center, Inc.*, 599 F.2d at 1247 (decided June 4, 1979).

43. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, this issue was, for the first time, directly addressed by the Supreme Court; however, the existence of a private cause of action under Title VI was not decided by the *Bakke* Court. *Id.* Justices Powell, Brennan, Marshall, and Blackmun declined to pass on the issue on the ground it was not properly before the Court. See 438 U.S. at 283 (Powell, J., writing for the Court); *id.* at 325 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). In a separate opinion, Justice White concluded that no private cause of action exists under Title VI. See *id.* at 381-87 (White, J., dissenting in part). Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, failing to command a majority, argued that the four-part *Cort* test supports a private cause of action under Title VI. See *id.* at 418-21 & n.28 (Stevens, J., concurring in part and dissenting in part).

44. See, e.g., *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974) (action for declaratory and injunctive relief against school district for alleged discrimination against Spanish-surnamed children); *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (student alleged university racially discriminated in awarding financial assistance); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976) (loan applicant sued loan association which was member of Federal Home Loan Bank Board); *Player v. Alabama Dept. of Pensions & Security*, 400 F. Supp. 249 (M.D. Ala. 1975), *aff'd mem.*, 536 F.2d 1385 (5th Cir. 1976) (class action on behalf of black children allegedly discriminated against by Alabama Department of Pensions and Security and six state childcare institutions); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D. Neb.), *aff'd on other grounds*, 524 F.2d 1013 (8th Cir. 1975) (suit for monetary damages by employee against municipal corporation and federally funded employment program); *Soria v. Oxnard School Dist. Bd. of Trustees*, 386 F. Supp. 539 (C.D. Cal. 1974) (suit by Mexican-American and Black-American students for affirmative desegregation order against school board); *Natonabah v. Board of Educ.*, 355 F. Supp. 716 (D.N.M. 1973) (class action alleging school district policies were racially discriminatory); *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1972) (class action by individuals eligible for public housing to halt construction of housing project which would allegedly result in racial segregation); *Hawthorne v. Kenbridge Recreation Ass'n*, 341 F. Supp. 1382 (E.D. Va. 1972) (class action alleging racial discrimination in recreational facility).

45. See, e.g., *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977) (class action by severely handicapped persons against local officials responsible for public transportation system); *United*

simply assumed that the private cause of action is available.⁴⁶ In a pre-*Cort* case, *Bossier Parish School Board v. Lemon*,⁴⁷ however, the United States Court of Appeals for the Fifth Circuit recognized and addressed the issue, finding that a private cause of action under Title VI is necessary to enforce the statute.⁴⁸ In *Lloyd v. Regional Transportation Authority*,⁴⁹ the United States Court of Appeals for the Seventh Circuit, using the *Cort* analysis, found explicit congressional intent to create a private cause of action under section 504.⁵⁰

Although no court has held that Congress intended a private cause of action under Title VI at the time the statute was enacted,⁵¹ the Supreme

Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977) (suit by handicapped individuals and associations of disabled persons against municipal and federal officials for alleged failure to make urban mass transit fully accessible to the handicapped); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (suit on behalf of visually handicapped children denied permission by school authorities to participate in school's contact sports program); *Vanko v. Finley*, 440 F. Supp. 656 (N.D. Ohio 1977) (individual confined to wheelchair sued federal officials for declaratory and injunctive relief to make mass transit accessible to the mobility handicapped); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. Va. 1976) (parents of handicapped child challenged refusal of school district to admit child to regular classes); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977) (individual confined to wheelchair sued local and federal transportation officials for declaratory and injunctive relief to make mass transit accessible to the mobility handicapped).

46. It should be noted that in the pre-*Cort* Title VI cases as well as in *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. Va. 1976), and *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), the courts did not directly decide the issue of whether plaintiffs have the right to sue under the statutes which were being considered. See notes 44 & 45 *supra*. Post-*Cort* §504 cases expressly recognized a private cause of action, the seminal case being *Lloyd v. Regional Transp. Auth.*, 458 F.2d 1277 (7th Cir. 1977). The *Lloyd* court applied the *Cort* factors to §504 and concluded that a private cause of action is implicit in that statute. 458 F.2d at 1284-86. For further discussion of *Lloyd*, see notes 49-50 and accompanying text *infra*.

The Third Circuit had neither assumed nor decided the existence of private rights under Title VI, nor expressly decided whether there exists a private cause of action under § 504. See, e.g., *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979) (Gibbons, Van Dusen, and Rosenn, JJ.; opinion by Rosenn, J.) (disposed of on the merits; *Lloyd* supported in dicta); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) (Forman, Gibbons, and Rosenn, JJ.; opinion by Gibbons, J.) (*Lloyd* supported in dicta; unnecessary to decide private cause of action issue).

47. 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

48. *Id.* at 852. Plaintiffs sought relief from the school board's refusal to permit their children to attend integrated public schools. *Id.* at 849-50. The court stated: "In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts." *Id.* at 852.

49. 548 F.2d 1277 (7th Cir. 1977).

50. *Id.* at 1284-87. *Lloyd* was a class action on behalf of mobility disabled persons against a city transportation authority, seeking injunctive relief from the inaccessibility of mass transit. *Id.* The court in *Lloyd* noted: "Because all four *Cort* tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy." *Id.* at 1287. It should be noted that the Supreme Court has not had occasion to apply the *Cort* test to § 504. See *Southeastern Community College v. Davis*, 442 U.S. 397, 404-05 n.5 (1979) (case involving private action based on § 504 was disposed of on its merits; hence, Court did not address the private remedy issue).

51. 599 F.2d at 1256. The courts have "concluded" or "assumed" the existence of Title VI private causes of action. See *id.* The *Medical Center* court observed that the references to a private cause of action in the legislative history of Title VI are, at best, "inconclusive." *Id.* The

Court, in *Cannon v. University of Chicago*,⁵² recognized that Congress has since assumed that Title VI implies a private right to sue.⁵³ In so doing, the *Cannon* Court noted the existence of a widely accepted assumption that Title VI creates a private cause of action.⁵⁴ In several recent decisions, for example, the Supreme Court implicitly assumed the existence of the private right, reached the merits of the cases, and focused on the relief granted.⁵⁵

conflicting judicial conclusions concerning the legislative intent behind Title VI support this characterization. Compare *Cannon v. University of Chicago*, 441 U.S. 677, 704 n.36, 711-16 & nn.48-52 (1979) with *id.* at 723-24 nn.11 & 13 (White, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 283 n.18 (1978); *id.* at 379-87 (White, J., dissenting in part).

Some of the comments during the congressional debates on Title VI, however, have been interpreted as a reflection of Congress's explicit intent to deny a private cause of action under the statute. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 385 (1978) (White, J., dissenting in part). In his partial dissent in *Bakke*, Justice White quoted three legislators' comments:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 CONG. REC. 2467 (1964) (remarks of Rep. Gill). "[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.*, at 6562 (remarks of Sen. Kuchel). "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. . . ." *Id.*, at 7065 (remarks of Sen. Keating).

438 U.S. at 385 n.4. But see 110 CONG. REC. at 7067 (remarks of Sen. Ribicoff). Senator Ribicoff stated: "Personally, I think it would be a rare case when funds would actually be cut off. In most cases, alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy." *Id.*

52. 441 U.S. 677 (1979).

53. *Id.* at 703. The *Cannon* Court found it necessary to ascertain the legislative intent behind Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1975), which prohibits sex discrimination in federally funded educational programs or activities. 441 U.S. at 677. Noting that Title IX was modeled after Title VI, the Court examined Congress's understanding of Title VI in order to ascertain whether Congress intended to create a private cause of action under Title IX. *Id.* at 694-96 & nn.16 & 19, 699-703. The *Cannon* Court decided that, when Congress enacted Title IX in 1972, it understood Title VI as authorizing a private cause of action for victims of the statutorily prohibited discrimination. *Id.* at 703, 710-11. For further discussion of *Cannon*, see notes 54-59 and accompanying text *infra*. For a discussion of Congress's treatment of Title VI after its enactment in 1964, see notes 57 & 60 and accompanying text *infra*.

54. 441 U.S. at 702 n.33. Legislators, judges, executive officials, litigants, and counsel have assumed that Title VI grants private rights to sue. *Id.* at 702.

55. *Id.* at 702 n.33, citing *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Lau v. Nichols*, 414 U.S. 563 (1974). The *Lau* Court, relying solely on § 601 of the Civil Rights Act of 1964, remanded a class action suit brought by non-English speaking Chinese students against school district officials, and instructed the lower court to fashion "appropriate relief." 414 U.S. at 566, 569. The Court's pointed reliance on Title VI is made more significant by the fact that the lower courts had based their decisions solely on the Equal Protection Clause. See *Lau v. Nichols*, 483 F.2d 791, 798-99 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974). The equal protection argument was rejected by the Supreme Court. 414 U.S. at 566, 569.

In *Hills*, a group of Negroes who were tenants in, or who had applied for, public housing in Chicago, brought a class action alleging that the site-selection policy of the Chicago Housing Authority violated Title VI. 425 U.S. at 286. The Court simply noted that defendant United States Department of Housing and Urban Development (HUD) had been found to have violated Title VI, and then proceeded to decide only the propriety of the relief ordered against HUD. *Id.*

Similarly, while Congress has not directly responded to judicial recognition of a private right to sue under Title VI,⁵⁶ congressional comment, likening Title VI to the subsequently enacted Title IX of the Civil Rights Act⁵⁷ which implicitly provides a private remedy,⁵⁸ has been construed as legislative approval of a Title VI private cause of action.⁵⁹ In a like manner, legislation enacted in 1972 and 1976, authorizing awards of attorney's fees to private litigants who successfully sue under Title VI,⁶⁰ has been interpreted as support for private enforcement of Title VI.⁶¹

Even where the courts have implied a private cause of action under Title VI and section 504, it is unclear precisely how these remedies relate to the administrative process of funding termination.⁶² Some courts have re-

56. See *Cannon v. University of Chicago*, 441 U.S. at 702-03. The *Cannon* Court presumed that Congress, by its silence, approved of the judicially implied private cause of action under Title VI. *Id.* at 699.

57. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1683 (1976). Title IX is patterned after Title VI and forbids sex discrimination in federally funded educational programs or activities. See *id.* See also *Cannon v. University of Chicago*, 441 U.S. at 694 & n.16; note 53 *supra*.

58. See *Cannon v. University of Chicago*, 441 U.S. at 700-01, 709. The *Cannon* Court held that a private cause of action is implicit in Title IX. *Id.* at 709. For a brief discussion of the Court's reasoning in *Cannon*, see note 53 *supra*.

59. See *Cannon v. University of Chicago*, 441 U.S. at 696-98. The *Cannon* Court stated:

In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. . . . It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Id. In *Red Lion Broadcasting Co. v. FCC*, the Court noted that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." 395 U.S. 367, 380-81 (1969).

It should be observed that the *Cannon* Court found only that, in 1972, when Title IX was enacted, Congress believed it had previously provided for private rights under Title VI. 441 U.S. at 710-11. The Court did not find that Congress intended to create a private cause of action at the time it enacted Title VI. *Id.* at 696.

60. See § 718 of the Emergency School Aid Act of 1972 which authorizes awards to the "prevailing party, other than the United States," in suits against education agencies for violations of Title VI. 20 U.S.C. § 1617 (1976). See also Civil Rights Attorney's Fees Awards Act of 1976, which provides awards to the "prevailing party, other than the United States," in suits under a variety of civil rights statutes, including Title VI. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1976)).

61. See, e.g., *Cannon v. University of Chicago*, 441 U.S. at 699 (language of § 718 of Emergency School Aid Act of 1972 presumes the availability of private suits to enforce Title VI in the education context); *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978) (purpose of Civil Rights Attorney's Fee Awards Act of 1976 is to encourage injured individuals to seek judicial relief).

62. No court which has recognized a private right under these statutes has recommended how such rights interrelate with agency enforcement. See notes 44-45 and accompanying text *supra*. The Supreme Court has recognized that an injunction or declaratory judgment in a private suit may not be inconsistent with the administrative enforcement scheme of § 602. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1977). In *Bakke*, Justice Stevens observed that

there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. . . . Section

quired a beneficiary to exhaust the administrative remedy as a prerequisite to a private suit under Title VI.⁶³ In other cases, however, private suit has been permitted both as an alternative to the administrative process⁶⁴ and as a means of challenging agency action under Title VI and section 504.⁶⁵ The private suit provides the plaintiff with the opportunity to fully litigate his claim in a judicial forum,⁶⁶ whereas judicial review of agency action is limited.⁶⁷

601 is specifically addressed to personal rights, while § 602—the funding cutoff provision—establishes “an elaborate mechanism for governmental enforcement by federal agencies.” . . . Arguably, private enforcement of this “elaborate mechanism” would not fit within the congressional scheme But Bakke did not seek to cut off the University’s federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant.

Id. at 419-20 n.26 (Stevens, J., concurring in part and dissenting in part), quoting Supplemental Brief for the United States as Amicus Curiae, at 24-34 (emphasis in original).

63. See *Santiago v. Philadelphia*, 435 F. Supp. 136, 158 (E.D. Pa. 1977) (plaintiffs claiming that segregation at youth study center violated Title VI had duty to exhaust administrative remedies). See also *NAACP v. Wilmington Medical Center, Inc.*, 426 F. Supp. 919 (D. Del. 1977).

Regarding the development of HEW’s views on the interaction between the private cause of action and the administrative remedy, see *Cannon v. University of Chicago*, 441 U.S. at 687-88 n.8. HEW “has rejected any strict-exhaustion, primary-jurisdiction, or election-of-remedies position in favor of a more flexible approach.” *Id.* It is HEW’s view that, when a private suit is filed, the district courts have discretion to proceed, to defer to agency enforcement, or to stay judicial proceedings pending conclusion of an ongoing agency investigation. *Id.*

64. See notes 44-45 and accompanying text *supra*.

65. See *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (black students, citizens, and taxpayers obtained declaratory judgment that HEW was derelict in its duty to enforce Title VI and injunctive relief requiring agency investigation of state school system). The *Adams* court noted that the plaintiffs, who claimed that HEW had violated Title VI by “affirmatively continu[ing] to channel federal funds to defaulting schools,” were not appealing an agency decision. *Id.* at 1163. See also *Gautreaux v. Romney*, 448 F.2d 731, 740 (7th Cir. 1971), *aff’d on other grounds sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976) (Seventh Circuit found that United States Department of Housing and Urban Development (HUD) violated § 601 by assisting in the maintenance of a racially discriminatory housing system). In *Hills*, the Supreme Court upheld the nature and scope of the remedial order against HUD in *Romney*, without considering the propriety of a beneficiary suing a funding agency under § 601. 425 U.S. at 306. For a discussion of *Hills*, see note 55 *supra*.

Sovereign immunity does not protect federal officials from suit when they act beyond the scope of their authority. *Hardy v. Leonard*, 377 F. Supp. 831, 839 (1974). As the *Hardy* court noted, “[t]he ultra vires exception to the doctrine of sovereign immunity permits suit against a federal officer when the plaintiff alleges the officer’s powers are controlled by statute and that the officer has acted in a manner not authorized by the statute.” *Id.*, citing *Washington v. Udall*, 417 F.2d 1319 (9th Cir. 1969). The *Hardy* court found this exception to sovereign immunity applicable where a beneficiary sues an agency for failure to investigate a violation of Title VI. *Hardy v. Leonard*, 377 F. Supp. at 839.

66. A private cause of action has been defined as “the right of a private party to seek judicial relief from injuries caused by another’s violation of a legal requirement.” *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting). For cases recognizing private causes of action under Title VI and § 504, see notes 44-45 and accompanying text *supra*.

67. For a discussion of the limitations on judicial review of agency action under § 603, see notes 29-30 and accompanying text *supra*. Note that while beneficiaries can complain to funding agencies in order to trigger Title VI and § 504 compliance investigations, they are not entitled to participate further or offer evidence in the agency proceedings. See note 28 *supra*.

Applying the four-part *Cort* analysis,⁶⁸ the *Medical Center* court concluded that a private cause of action against a recipient of federal funds⁶⁹ is implied in section 601 of Title VI.⁷⁰ Since both parties had conceded that plaintiffs were "of the class for whose especial benefit" Title VI was enacted,⁷¹ and that the issue was one of federal concern,⁷² the court focused on the second and third factors of the *Cort* test.⁷³ Finding no explicit congressional intent to create or deny a private cause of action under Title VI,⁷⁴ the court sought to determine the legislature's implicit intent by considering the third factor of the *Cort* test: whether a private cause of action is consistent with the underlying purposes of the legislative scheme.⁷⁵

The court first acknowledged that Congress had explicitly created the administrative remedy of funding termination in sections 602 and 603,⁷⁶ but characterized those provisions as procedural guidelines for the funding agencies rather than as limits on individual rights.⁷⁷ While agreeing that this procedure does constitute the exclusive means to terminate funds, the court maintained that it was not intended to be the exclusive remedy for violations of Title VI.⁷⁸ The court found that Congress, in enacting Title VI, had

68. 599 F.2d at 1251. For a discussion of *Cort*, see notes 38-42 and accompanying text *supra*.

69. It is interesting to note that HEW supported the beneficiary's private right of action against WMC. Brief for Appellee at 35-36, *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979). Once agency action had been taken, however, HEW maintained that judicial review was limited. See *id.* at 42.

70. 599 F.2d at 1259.

71. *Id.* This is the first factor of the *Cort* test. See 422 U.S. at 78; notes 38-40 and accompanying text *supra*.

72. 599 F.2d at 1252. This is the fourth factor of the *Cort* test. See 422 U.S. at 78; notes 38-40 and accompanying text *supra*.

73. See 599 F.2d at 1252; notes 38-40 and accompanying text *supra*. For recent developments in the Supreme Court's treatment of *Cort*, see notes 41 & 42 *supra*. For an analysis of the Third Circuit's application of *Cort* in light of these recent developments, see notes 91-95 and accompanying text *infra*.

74. 599 F.2d at 1253. For a discussion of the conflicting judicial conclusions concerning the legislative intent behind Title VI, see note 51 *supra*. The *Medical Center* court observed that "[s]tronger evidence of a purposeful rejection of a private cause of action is required for the court to refuse to consider whether such an action may be implied." 599 F.2d at 1253. For a thorough treatment of the relevance of legislative remarks counter to private rights under Title VI, see *Cannon v. University of Chicago*, 441 U.S. at 711-16 & nn. 49-52.

Additionally, the *Medical Center* court found that the absence of statutory language explicitly creating a private cause of action under Title VI did not raise the presumption that one was not intended, even though Congress has explicitly created private causes of action under Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3, 2000e(f)(1) (1976). 599 F.2d at 1253 n.18. *Accord*, *Cannon v. University of Chicago*, 441 U.S. at 710 & n.45.

75. 599 F.2d at 1254.

76. *Id.* See 42 U.S.C. §§ 2000d-1, -2 (1976). For the pertinent text of § 602, see note 24 *supra*. HEW regulations under Title VI prevent the participation of beneficiaries in the administrative hearing process. For a discussion of the beneficiary's limited participation and interest in funding termination, see notes 27-28 and accompanying text *supra*.

77. 599 F.2d at 1254. The court relied on the remarks of Senator Case: "I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602." 110 CONG. REC. 5254 (1964) (remarks of Sen. Case).

78. 599 F.2d at 1254-55.

focused primarily on prohibiting discrimination rather than on regulating federal funds⁷⁹ and that the “unequivocal, broad and remedial” rights guaranteed by section 601⁸⁰ necessarily imply a broad remedy.⁸¹ Citing *Cannon*⁸² and several cases in which a private cause of action under section 601 had been assumed⁸³ or expressly found,⁸⁴ and taking note of legislative action subsequent to the enactment of Title VI,⁸⁵ the *Medical Center* court concluded that, when Congress enacted Title VI in 1964, it had intended that there be a private right of action.⁸⁶

The Third Circuit went on to note that the Supreme Court had refused to find that the government’s statutory authority over the termination of funds precludes private enforcement of the federal nondiscrimination policy,⁸⁷ and added that an implied private right of action is not inconsistent with the government’s express statutory authority under Title VI.⁸⁸ Relying on the section 504 *Cort* analysis in *Lloyd*,⁸⁹ the *Medical Center* court simi-

79. *Id.* at 1254, citing 110 CONG. REC. 2468 (1964) (remarks of Rep. Rodino). The court observed:

There were two concerns embodied in section 601—that discrimination existed and that such discrimination was being funded by the United States government. . . . That Congressional debate focused on the second issue should not obscure the fact that, while not incidental, the funding issue was subordinate to the broader principle being established.

599 F.2d at 1254 (citation omitted).

80. 599 F.2d at 1251. See 42 U.S.C. § 2000d (1976). For the text of § 601, see note 6 *supra*.

81. 599 F.2d at 1254. The court remarked: “We find it impossible to square the plaintiffs’ peripheral role in the section 602 and 603 process with their critical status as protected beneficiaries under section 601, unless section 601 is read to include a right of action distinct from the limitations of sections 602 and 603.” *Id.*, citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

82. See 599 F.2d at 1256.

83. See *id.* at 1255 n.32, citing *Lau v. Nichols*, 414 U.S. 563 (1974). For a discussion of *Lau* and other cases assuming that the private cause of action exists, see notes 44 & 45 *supra*.

84. 599 F.2d at 1255 n.32, 1256, citing *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). For a discussion of *Bossier*, see notes 47-48 and accompanying text *supra*.

85. 599 F.2d at 1255. For a discussion of this subsequent supportive legislative conduct, see note 60 and accompanying text *supra*.

86. 599 F.2d at 1257. For a critical discussion of the court’s holding, see notes 91-95 and accompanying text *infra*.

87. 599 F.2d at 1255, citing *Rosado v. Wyman*, 397 U.S. 397 (1970). The *Rosado* Court “considered and rejected the argument that a federal court is without power to . . . prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements.” 397 U.S. at 420. The *Rosado* Court rejected the lower court’s finding that the plaintiffs (welfare beneficiaries) had to exhaust administrative remedies by first complaining to HEW about their state government’s allegedly discriminatory federal welfare distribution laws. *Id.* at 406. The Court’s reasoning was that these beneficiaries were not appealing from an administrative order and had no role in the administrative process. *Id.*

88. 599 F.2d at 1255. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 419-20 n.26 (1978) (Stevens, J., concurring in part and dissenting in part), citing Supplemental Brief for the United States as Amicus Curiae at 24-34. In its Amicus Curiae brief, the Government stated, “[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602.” Supplemental Brief for the United States as Amicus Curiae at 30 n.25, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 420 n.26.

89. See 599 F.2d at 1258, citing *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1284-86. For a discussion of *Lloyd*, see notes 49-50 and accompanying text *supra*.

larly recognized a private cause of action under section 504 of the Rehabilitation Act.⁹⁰

The Third Circuit's emphasis on legislative intent⁹¹ in determining that Title VI affords beneficiaries a private cause of action against recipients of federal funds appears to be consistent with recent Supreme Court guidance concerning the primary significance of legislative intent among the *Cort* factors.⁹² The Third Circuit focused closely on legislative intent by considering the overall purpose of the legislative scheme as a means of assessing congressional intent.⁹³ It should be noted, however, that the Supreme Court, in *Cort*, did not insist that, for purposes of determining private rights under federal statutes, legislative intent be determined as of the time the statute was enacted.⁹⁴ Consequently, it is submitted that the Third Circuit need not have found that Congress intended in 1964 to create a private cause of action. It is suggested that the court could have considered the degree to which congressional intent regarding private rights of action under Title VI has evolved and, in doing so, could have provided the lower courts with a framework for analyzing similar cases.⁹⁵

As noted by the *Medical Center* court, many courts have accepted, at least implicitly, the theory that Title VI authorizes private judicial action against recipients of federal funds.⁹⁶ Of continuing concern, however, is the court's proscription of private suits against the funding agency.⁹⁷ As recognized by the Third Circuit, violations of Title VI and section 504 can be administratively or judicially remedied.⁹⁸ Denial of complainants' private action against HEW effectively limits beneficiaries to the administrative remedy of funding termination whenever they seek to resolve a grievance against the funding agency.

90. 599 F.2d at 1258. For other cases permitting a private right of action under § 504, see note 45 *supra*.

91. See 599 F.2d at 1252-55. Note that, prior to this decision, the *Cort* analysis had not been applied to Title VI. See note 51 and accompanying text *supra*.

92. See *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). For a discussion of *Touche Ross* and *Transamerica*, see notes 41-42 and accompanying text *supra*.

93. See 599 F.2d at 1254. For a discussion of this aspect of the *Medical Center* court's opinion, see notes 76-86 and accompanying text *supra*.

94. See 422 U.S. at 78. While legislative intent at the time of enactment is certainly relevant under the *Cort* analysis, legislative intent expressed as the statute develops after enactment is also significant. See note 59 *supra*.

95. See 599 F.2d at 1257. Although concluding "that Congress intended that there be a private right of action when it enacted Title VI in 1964," the Third Circuit had earlier noted that "[a]t best, it may be said that the legislative references to a private cause of action are inconclusive." *Id.* at 1252, 1257 (emphasis in original). Note that the *Cannon* Court did not find that Congress intended to create a private cause of action at the time it enacted Title VI. See *Cannon v. University of Chicago*, 441 U.S. at 696, 710-11; note 59 *supra*.

96. See 599 F.2d at 1256. For a discussion of judicial assumption of private rights under Title VI and section 504, see notes 44-46 and accompanying text *supra*.

97. See 599 F.2d at 1254 n.27. The court concluded that "a beneficiary may not sue the administrative agency under section 601." *Id.*

98. See *id.* at 1254. For a discussion distinguishing the administrative and judicial remedies, see notes 24-31 & 62 and accompanying text *supra*.

In concluding that beneficiaries' private actions against the funding agency would only, "in essence, compel funding termination" and thus "circumvent the limitations of sections 602 and 603,"⁹⁹ the *Medical Center* court appears not to have considered the fact that an agency can violate section 601 by dereliction of its duty to enforce the statute.¹⁰⁰ It is submitted that declaratory or injunctive relief may simply compel agency investigation and action; it need not force the agency to terminate funds.¹⁰¹

Similarly, it is suggested that the Third Circuit's apparent satisfaction with the administrative process as an effective alternative remedy is subject to criticism. The victim/beneficiary's interest in the elimination of unlawful discrimination is not necessarily protected by funding termination. Termination of federal financial assistance might eliminate the program completely or cause the discriminating recipient to evade sanction by rejecting federal aid.¹⁰² Furthermore, requiring beneficiaries concerned about a funding agency's neglect of its statutory enforcement duties to complain to the recalcitrant agency itself is likely to be unproductive.

In addition, although aggrieved beneficiaries can trigger agency investigation under section 602, their continuing, effective participation in the administrative process is very limited.¹⁰³ Agency decisions are subject to more cursory judicial review than are suits brought before the courts in the first instance.¹⁰⁴ Having thus been denied the right to participate in the agency decision, the beneficiary is then also precluded from presenting a case in the courts by the limited scope of review.

While the Third Circuit may prefer to accord agencies the deference typical of judicial review of administrative action, such preference, it is suggested, can be accommodated with less hardship on the beneficiary by

99. 599 F.2d at 1254 n.27.

100. See *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971), *aff'd on other grounds sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976). In *Adams*, plaintiffs alleged that the agency had "consciously and expressly adopted a general policy which is, in effect, an abdication of its statutory duty." 480 F.2d at 1163. The court stated that its purpose on review was "to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties. . . ." *Id.* at 1163-64. For further discussion of *Adams*, *Romney*, and *Hills*, see note 65 *supra*.

It is submitted that the Third Circuit's bar against any suit by a beneficiary against an agency under § 601 will deprive courts of opportunities to interpret the agencies' statutory obligations under Title VI. The *Adams* court found such judicial interpretation consistent with the limited nature of judicial review of administrative action. 480 F.2d at 1164 n.6, *citing* Board of Pub. Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). Note that sovereign immunity does not operate to prevent a beneficiary from suing an agency for dereliction of statutory duty. See note 65 *supra*.

101. See note 65 *supra*. See also *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* court noted that its purpose was not to decide whether particular recipients were or were not complying with Title VI. *Id.* at 1163.

102. See 110 CONG. REC. 7067 (1964) (remarks of Sen. Ribicoff).

103. For a discussion of the limited participation of beneficiaries in the agency process, see note 28 and accompanying text *supra*.

104. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973). See generally notes 27-30 and accompanying text *supra*.

adopting a case-by-case analysis, rather than by barring private suits against funding agencies altogether.¹⁰⁵

The Supreme Court has recently stressed the significance of the first two *Cort* factors—plaintiff's membership in the protected class and Congress's intent in enacting the statute.¹⁰⁶ The fact that membership in the protected class had been conceded, coupled with the *Medical Center* court's thorough examination of the legislative intent behind Title VI, indicates that the Third Circuit's *Cort* analysis of Title VI will be likely to withstand current Supreme Court scrutiny.¹⁰⁷

The continuing effectiveness of judicially implied private rights of action in areas in which administrative procedures are available, however, will depend upon a careful delineation of the roles of and interaction between the judicial and administrative processes.¹⁰⁸ The apparent trend in administrative law toward increased participation by private interests¹⁰⁹ may create a situation in which complainants are as apt to choose the administrative as the judicial route, leading to a dual enforcement structure.¹¹⁰ Such duplication of efforts prolongs the resolution of specific controversies and breeds incon-

105. For cases where declaratory and injunctive relief against a funding agency was found appropriate, see notes 64-65 & 99-101 and accompanying text *supra*.

106. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); notes 41-42 and accompanying text *supra*.

107. It should be noted, however, that in the most recent Supreme Court decision on this issue, the *Cort* analysis was not used in determining the existence of private rights under a federal statute. See *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

108. See *Cannon v. University of Chicago*, 441 U.S. at 741-42. (Powell, J., dissenting). Since the decision in *Cort*, courts of appeals have, on at least twenty occasions, implied private causes of action under federal statutes. *Id.* It would appear that, in *Medical Center*, the district court's denial of plaintiffs' private cause of action, and its subsequent referral of the claim to HEW, were based on the conclusion that the limited scope of review applicable to agency action could not be forcibly broadened by a beneficiary's simply bringing a claim in the form of a private suit. The Third Circuit, however, took no position on either the proper scope of judicial review under § 602 or the interaction between administrative and judicial proceedings to enforce Title VI and § 504. See 599 F.2d at 1250 n.10. It is suggested that the Third Circuit should have identified as error the district court's initial referral of plaintiffs' complaint to the administrative agency, as that referral led to the dilemma of conflicting standards of review. Had the Third Circuit more thoroughly discussed the points where administrative and private remedies conflict, beneficiaries would appreciate the necessity of choosing administrative or judicial remedies in the first instance, and lower courts would be less likely to relegate judicially cognizable private claims to administrative agencies.

109. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). See also Reform of Federal Regulation Act, S. 262, 96th Cong., 1st Sess., 125 CONG. REC. S861 (daily ed. Jan. 31, 1979).

110. See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1040 (1979). Breyer and Stewart observed that

creation of private rights of action would ordinarily require courts to decide all issues of statutory interpretation presented in such suits. But if some enforcement suits continue to be brought by the agency, the agency will be deciding these same issues and in such cases a reviewing court would often defer to the agency's ruling even though the court might decide the issue the other way as an initial matter. Thus, a dual enforcement structure raises a serious possibility of persistent inconsistency in the interpretation of the same regulatory statute.

Id.

sistent judgments.¹¹¹ Consequently, while the Third Circuit's recognition of a private cause of action under Title VI and section 504 is a significant step in protecting the rights of the beneficiaries of those statutes, it is submitted that the court's refusal to support private suits against a funding agency denies those beneficiaries access to a potentially more effective and efficient remedy, and further complicates the relationship between judicial review of agency action and adjudication of private suits. It is further submitted that the most effective solution to the dilemma may be a merger of administrative and judicial effort, work product, and expertise through agency participation in the litigation of private suits under Title VI and section 504.¹¹²

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111. See Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L.L. REV. 425, 446-51 (1978). Note that the plaintiff beneficiaries in the instant case filed suit in September, 1976. 426 F. Supp. at 922. In March, 1980, no final order had been filed by the trial court.

112. See note 20 and accompanying text *supra*. For HEW's position on the interaction of judicial and administrative enforcement, see note 63 *supra*. It has been suggested that justifications for limited judicial review are not applicable where unlawful discrimination is at issue. See House Judiciary Committee Report on Civil Rights Act of 1964, H.R. REP. NO. 914, 88th Cong., 1st Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2469-70. This report stated:

The limited review procedure authorized in the Administrative Procedure Act was justified when the act was written on the grounds that administrative agencies were supposed to have more expertise in their particular fields than the courts themselves. . . . Outside the Department of Justice itself, no administrative agency can claim to have any special expertise in the field of racial discrimination. Accordingly, the theoretical justification for the limited procedure established in the Administrative Procedure Act does not exist; tying the judicial remedy of Title VI to the Administrative Procedure Act is not justified

Id.