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PRIVATE CAUSES OF ACTION UNDER FEDERAL AGENCY NONDISCRIMINATION STATUTES

by Julia Lamber*

I. INTRODUCTION

Title VI of the Civil Rights Act of 1964¹ prohibits discrimination on the basis of race in programs and activities receiving federal financial assistance. Similarly Title IX of the Education Amendments of 1972² prohibits sex discrimination in federally funded education programs or activities. Although the effect of Title VI has been felt primarily in education, the statutory prohibition applies to any federally funded activity, public or private, including hospitals, social service and welfare agencies, law enforcement agencies, housing, and recreational programs.³ Both statutes provide for administrative enforcement against prohibited activities.⁴ This article explores the

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From 1975 to 1977 the author was an attorney with the Office of General Counsel, Civil Rights Division, Department of Health, Education, and Welfare. During this time she was involved in the litigation of *Cannon v. University of Chicago* discussed in this article and *Mandel v. HEW*, *Romeo Community Schools v. HEW*, *Lodwig v. Board of Educ.*, *Leake v. University of Cincinnati*, noted in footnotes 5, 85, and 132.

1. 42 U.S.C. §§ 2000d-1 to 2000d-6 (1976).

2. 20 U.S.C. §§ 1681-1686 (1976).

3. 42 U.S.C. § 2000d (1976). Twenty-seven federal agencies have adopted regulations under 42 U.S.C. § 2000d-1 (1976); e.g., 7 C.F.R. § 15.1 *et seq.* (1977) (Department of Agriculture); 15 C.F.R. § 8.1 *et seq.* (1977) (Department of Commerce); 32 C.F.R. § 300.1 *et seq.* (1976) (Department of Defense); 45 C.F.R. § 80.1 *et seq.* (1976) (Department of Health, Education, and Welfare); 24 C.F.R. § 1.1 *et seq.* (1977) (Department of Housing and Urban Development); 43 C.F.R. § 17.1 *et seq.* (1976) (Department of Interior); 28 C.F.R. §§ 42.101-112, 50.3 (1976) (Department of Justice); 29 C.F.R. § 31.1 *et seq.* (1976) (Department of Labor); 22 C.F.R. § 141.1 *et seq.* (1976) (Department of State); 49 C.F.R. § 21.1 *et seq.* (1976) (Department of Transportation).

Federal financial assistance is defined by regulation, e.g., 7 C.F.R. § 15.2(g) (1977); 45 C.F.R. § 80.13(f) (1976), to include grants, loans, and contracts (other than procurement contracts). But contracts of insurance or guaranty, such as FHA mortgages or bank deposits insured by the Federal Deposit Insurance Corporation, are exempt by statute. 42 U.S.C. § 2000d-1 (1976).

4. 42 U.S.C. § 2000d-1 (1976); 20 U.S.C. § 1682 (1976). See notes 13, 141 *infra* and accompanying text.

question of whether a private cause of action should be implied against a noncomplying recipient of federal financial assistance under Titles VI and IX.⁵

Whether private causes of action may be implied under Titles VI and IX is relevant to civil rights litigation even though there are other statutes, Executive Orders, and constitutional provisions that prohibit discrimination on the basis of race and sex. Title VII of the Civil Rights Act of 1964⁶ prohibits employment discrimination on the basis of race and sex in the public and private sectors but does not proscribe discrimination against students.⁷ The fifth and fourteenth amendments of the United States Constitution prohibit invidious discrimination on the basis of race and sex but apply only to state action.⁸

5. This article does not address the availability of an action by an aggrieved individual against the appropriate federal agency charged with enforcement of a statute. Actual or intended beneficiaries of federally assisted programs do have a cause of action against these agencies. *See, e.g.,* Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (challenge to HUD procedures in approving change in urban renewal plan from owner-occupied dwellings to rental dwellings). *See also* Legal Aid Soc'y v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974) (action against federal compliance agencies to compel release of information relative to equal employment and affirmative action and to require enforcement of executive order); Thorn v. Richardson, 4 Fair Empl. Prac. Cas. 299 (W.D. Wash. 1971).

Moreover, this article does not address questions concerning the evidence necessary to establish substantive violations of Titles VI or IX nor with the thorny question of whether a recipient's program is covered by Titles VI or IX. This latter issue concerns an interpretation of the terms "program or activity," especially in the "pinpoint" provision, 42 U.S.C. § 2000d-1 (1976) (limiting sanctions only to the particular political entity or program or part thereof found to be not in compliance); 20 U.S.C. § 1682 (1976). For a discussion of this problem, *see* Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1968); Mandel v. HEW, 411 F. Supp. 542 (D. Md. 1976), *rev'd en banc*, 562 F.2d 914 (4th Cir. 1977), *opinion withdrawn and aff'd by equally divided court*, Nos. 76-1493, 76-1494 (4th Cir. Feb. 16, 1978) (the 1977 majority opinion included the vote of a judge who died after oral argument but before the decision was rendered); Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program,"* 52 IND. L.J. 651 (1977); Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 107-113 (1974).

6. 42 U.S.C. §§ 2000e to 2000e-15 (1976).

7. A plaintiff alleging discrimination in an apprentice program would be covered by Title VII, 42 U.S.C. § 2000e-2(d) (1976).

Other civil rights statutes are consistent with Titles VI and IX but cover different types of discrimination. *E.g.,* Equal Pay Act, 29 U.S.C. § 206(d) (1976) (prohibiting wage differentials based on sex); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1976) (prohibiting discrimination on the basis of race and sex in housing); Rehabilitation Act of 1973, §§ 503-504, 29 U.S.C. §§ 701-794 (1976) (prohibiting discrimination on the basis of handicap).

8. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (state's grant of liquor

Executive orders⁹ prohibiting discrimination on the basis of race and sex by government contractors and governmental agencies raise even more difficult problems concerning the private cause of action issue than do Titles VI and IX.¹⁰ Thus, the judicial determination of whether a private cause of action will be implied under Titles VI and IX may well determine whether a victim of racial or sexual discrimination is afforded an effective remedy.

II. STATUTORY FRAMEWORK

Section 601 of Title VI of the Civil Rights Act of 1964 provides that "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."¹¹ Section 602 authorizes each federal agency that extends federal financial assistance to issue regulations effectuating the provisions of section 601.¹² Regulations adopted under section 602 establish an elaborate administrative mechanism to enforce the provisions of section 601 including investigation of complaints filed by aggrieved persons, agency-initiated compliance reviews, findings of noncompliance, resolution by informal means, and, if necessary, an administrative hearing with the right of internal appeals and judicial review.¹³ Sections 901 and 902 of Title

license held insufficient to establish state action). *See also*, Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978).

9. *E.g.*, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), *as amended by* 3 C.F.R. 684 (1966-1970 Compilation), *reprinted in* 42 U.S.C. § 2000e (1976) (non-discrimination in employment by government contractors and subcontractors); Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 10,297 (1976) (mandating equal employment opportunities for federal employees).

10. *See* note 136 *infra*.

11. 42 U.S.C. § 2000d (1976).

12. *See* 45 C.F.R. §§ 80.1-.13 (1976) and regulations cited at note 3 *supra* (Title VI); 45 C.F.R. §§ 86.1-.61 (1976) (Title IX).

13. 42 U.S.C. § 2000d-1 (1976); 45 C.F.R. §§ 80.7-.11, 81.1-.131 (1977); other agency regulations, note 3 *supra*. In 1975 the Department of Health, Education, and Welfare (HEW) published a notice of proposed rulemaking designed to consolidate enforcement procedures applicable to all its civil rights authority. 40 Fed. Reg. 24,148 (1975) (to be codified in 45 C.F.R. § 81.1 *et seq.*). These proposed rules were seen as eliminating the filing and investigation of complaints. The department argued that the proposal did not eliminate complaints but it did not require HEW to respond to complaints. Responding to pressure from Congress and various civil rights groups, HEW withdrew the proposal and indicated that a revised proposed rule would be issued. 41 Fed. Reg. 18,394 (1976). To date, no new consolidated procedural regulation has been proposed.

IX parallel the provisions of Title VI with the exception that the prohibition in section 901 is limited to sex discrimination in federally assisted education programs and activities.¹⁴ Although several federal agencies have enforcement responsibility under Titles VI and IX, this article will focus on the Department of Health, Education, and Welfare, which has been the most actively involved in statutory enforcement.¹⁵

The HEW procedural regulation applicable to both Titles VI and IX provides that "[t]he responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with [the regulation]."¹⁶ Neither the statutes nor the regulations explicitly authorize an aggrieved individual to bring suit in federal court to enforce his or her rights under sections 601 and 901.¹⁷ Thus, the questions arise whether an individual can bring a private cause of action to enforce Titles VI and IX and if that right is dependent on the nonavailability of an administrative remedy.

III. HISTORICAL OVERVIEW OF IMPLIED PRIVATE CAUSE OF ACTION

The practice of implying a private cause of action has had a checkered history. As early as 1916 the Supreme Court in *Texas & Pacific*

14. 20 U.S.C. §§ 1681-1682 (1976). Section 901(a) has several exemptions not relevant to the issue of private causes of action. For example, the admission practices of private institutions of higher education, public or private elementary and secondary schools, and traditionally single-sex public institutions of undergraduate higher education are exempt. Section 901(a) does not apply to military educational institutions or to institutions controlled by religious organizations if § 901 would be inconsistent with the religious tenets of the organization. *See also* exemption in §§ 901(a)(6)-(9), 907, 20 U.S.C. §§ 1681(a)(6)-(9), 1686 (1976).

15. Other agencies have issued regulations under Title VI, *see* note 3 *supra*, and the Department of Justice has been designated as the coordinating agency. Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975 Compilation), *reprinted in* 42 U.S.C. § 2000d-1 app., at 10,291 (1976). However, no other federal agency has issued regulations under Title IX nor has any agency been designated as coordinator. For a discussion of the effect of this void, *see* note 148 *infra* and accompanying text.

16. 45 C.F.R. § 80.7(c) (1977). This section is applicable to enforcement under Title IX by incorporation, 45 C.F.R. § 86.71 (1977). Other agencies have adopted similar procedural regulations, *see* note 3 *supra*.

17. Other statutes outline both administrative remedies and private suits. *E.g.*, 42 U.S.C. § 2000e-5 (1976) (Title VII); 42 U.S.C. § 3610 (1976) (Title VIII); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976). Executive Order No. 11,246, *supra* note 9, does not specifically authorize a private remedy. It is questionable whether administrative regulations may authorize federal causes of action. *See* note 136 *infra*.

Railway Co. v. Rigsby,¹⁸ implied a private right to sue, and as recently as 1975 the Court reconfirmed the viability of the practice in *Cort v. Ash*.¹⁹ However, the Court's decisions have lacked consistency and have not been supported by articulated standards to guide future applications.²⁰

Although the Court has not adopted workable and generally applicable standards of implication, it has adopted various formulae to support its decisions. In *Rigsby* the Court implied a private cause of action to effectuate the purposes of the statute. *Rigsby*, the plaintiff, brought an action for damages against his employer, under the Federal Safety Appliance Acts²¹ for injuries caused by a defect in one of the grab-irons on a box car. The Federal Safety Appliance Acts required all cars to be equipped with ladders that have "secure handholds or grab-irons on their roofs at the tops of such ladders,"²² and provided for criminal penalties in cases brought by the United States. The Court stated that "disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."²³ This formulation might be labelled the tort theory of implication.²⁴ However, if the tort theory of implication were applied in isolation, without considera-

18. 241 U.S. 33 (1916).

19. 422 U.S. 66 (1975).

20. For a thorough analysis of the development of the doctrine of implication, see Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975) [hereinafter cited as *Private Rights*], where the author argues that two criteria must be met before a court may imply a private cause of action:

First, an implied private action must be consistent with the goals of the act in question. Second, an action should be implied only when the enforcement scheme adopted by Congress is found to be inadequate to attain Congress' goals, and when a private action is thus needed to correct the inadequacy.

Id. at 1393.

See also Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). But see Note, *The Phenomenon of Implied Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?* 43 FORDHAM L. REV. 441 (1974), arguing that consideration of the adequacy of the statutory enforcement scheme is of dubious validity because it is inconsistent with the separation of powers theory. A strict view of the separation of powers theory would invalidate the doctrine of implication since, once the court implies a cause of action, the plaintiff enjoys a cause of action not created by the legislature.

21. 45 U.S.C. §§ 1-16 (1976).

22. *Id.* § 11.

23. 241 U.S. at 39.

24. See *Private Rights*, *supra* note 20, at 1394.

tion of potential conflicts with the statute's goals or of the adequacy of the statutory enforcement scheme, a private cause of action would be implied under every federal statute.

In reaction to the broad scope of the *Rigsby* decision, lower courts began to restrict the practice of implication. Some courts narrowly construed either the class of intended beneficiaries or the potential damage to the plaintiff covered by the relevant statute.²⁵ Other courts rejected the applicability of implication because of the view that new rights and new remedies must be created explicitly by statute.²⁶ The standards governing implication became so restrictive that an implied private cause of action was unavailable even if it were consistent with the goals of the statute and the statutory enforcement scheme were inadequate.

In its second approach to the issue of implication, the Supreme Court itself moved to limit the broad standards enunciated in *Rigsby*. In *Montana-Dakota Utilities Co. v. North Western Public Service Co.*,²⁷ the Court held that a lower court may not imply a private cause of action granting retroactive relief where the agency entrusted with the enforcement of a statute is limited to granting prospective relief.²⁸ In *T.I.M.E. Inc. v. United States*,²⁹ the Court added a further limitation to the doctrine of implication by holding that when a statute is divided into parts, each of which is intended to govern the same basic conduct, and one part of the statute provides an express private remedy for a violation, a private cause of action will not be implied for a violation of a part of the statute that contains no express private remedy.³⁰

The third formula adopted by the Court to determine whether a private cause of action should be implied was enunciated in *J.I. Case Co. v. Borak*.³¹ *Borak* was an action brought by a stockholder of the defendant charging deprivation of the shareholders' preemptive rights by reason of a merger allegedly effected by the use of false and misleading proxy statements in violation of the Securities Exchange Act

25. *Id.* at 1394-95.

26. *See, e.g.,* *Acorn Iron & Supply Co. v. Bethlehem Steel Co.*, 96 F. Supp. 481 (E.D. Pa. 1951).

27. 341 U.S. 246 (1951) (Federal Power Act).

28. *Id.* at 251.

29. 359 U.S. 464 (1959) (Motor Carrier Act).

30. *Id.* at 470-78.

31. 377 U.S. 426 (1964). *See generally* Comment, *Private Rights From Federal Statutes: Toward a Rational Use of Borak*, 63 NW. U.L. REV. 454 (1968).

of 1934.³² The statute makes no provision for private actions, but the Court held that a private cause of action should be implied,³³ reasoning that the purpose of the statute was to protect investors like the plaintiff, and that a private cause of action, supplementing Securities and Exchange Commission (SEC) action, was necessary to effectuate the congressional purpose.³⁴ Although the Court considered the adequacy of the statutory enforcement scheme,³⁵ it did not consider whether an implied right would be inconsistent with the statute's other goals. The other factor the Court considered, interest of and harm to the plaintiff, adds little to a formulation of standards for implication because it speaks to the plaintiff's standing rather than the availability of a cause of action.³⁶

32. 15 U.S.C. § 78n(a) (1976).

33. The Court said: "It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act." 377 U.S. at 430-31. Section 27, 15 U.S.C. § 78aa (1976), grants federal courts exclusive jurisdiction over violations of the statute and suits brought to enforce the statute. There is both a conceptual and a practical difference between statutes creating federal court jurisdiction and those creating or supporting causes of action. See *Bell v. Hood*, 327 U.S. 678 (1946) (holding a complaint under the fourth amendment stated a claim for purposes of jurisdiction but expressing no opinion whether it stated a cause of action); *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (holding similar complaint did state cause of action and allowing damage remedy). See also Katz, *The Jurisprudence of Remedies: Constitutional Legality and The Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

34. The *Borak* Court analyzed the purposes of § 14(a) and offered several reasons for implying a cause of action in the face of an SEC enforcement scheme. 377 U.S. at 431-33. *Accord*, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). The *Allen* Court held that a private cause of action existed under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976), because "the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556. For an SEC enforcement scheme that precludes a private cause of action, see *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), discussed at note 46 *infra*, in which *Allen* is distinguished.

35. 377 U.S. at 433-34. See *Shelton & Berndt, Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CALIF. L. REV. 1121, 1151 (1974), asserting that the inadequacy of the statutory enforcement scheme is the most frequently successful basis for implying a private cause of action.

36. As with statutes creating jurisdiction and those creating causes of action, see note 33 *supra*, there is an obvious difference between standing and a private cause of action. One may exist without the other. Recognition of this distinction explains the apparent inconsistency between *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977), and *Borak*, both cases concerning an alleged private cause of action under § 14 of the Securities Exchange Act. For differing results under yet another section of the Securities Exchange Act of 1934 compare *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), and *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), with *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (all decided under § 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b) (1976)). More-

The *Borak* test generated renewed interest in finding potentially conflicting statutory purposes in order to narrow the applicability of *Borak*. In *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*,³⁷ the plaintiffs sought to enjoin Amtrak's termination of certain intercity lines. The district court dismissed the action on the basis of plaintiffs' lack of standing; the court of appeals reversed.³⁸ In denying the plaintiffs a private cause of action, the Supreme Court considered both the purpose of the statute and the statutory enforcement scheme. It found that the Rail Passenger Service Act of 1970³⁹ was intended to create a swift, efficient method by which uneconomical passenger services could be terminated without the delays previously incurred by Interstate Commerce Commission (ICC) or state regulatory commission review. However, the Court did not consider the adequacy of the agency's swift, efficient enforcement⁴⁰ nor the other purposes of the statute.⁴¹

The most recent formulation of implication standards appeared in *Cort v. Ash*,⁴² where the Court enunciated a four-pronged test to determine whether a court should imply a private cause of action. The plaintiff, a shareholder, brought a derivative action for damages and injunctive relief against the corporation's directors for allegedly making unlawful contributions in violation of the Federal Election Campaign Act.⁴³ Attempting to harmonize previous cases and formu-

over, standing has constitutional origins and causes of action do not. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); *Private Rights*, *supra* note 20, at 1410-11.

37. 414 U.S. 453 (1974) [hereinafter cited as *Amtrak*].

38. The decision of the district court is unreported. The opinion of the court of appeals appears at 475 F.2d 325 (D.C. Cir. 1973).

39. 45 U.S.C. §§ 501-644 (1976) (*Amtrak Act*).

40. 414 U.S. at 466 (1974) (Douglas, J., dissenting).

41. *Amtrak* can be read as an unsuccessful attempt to seek judicial review of the action of a private corporation acting as a federal agency because it was the administrative decision of Amtrak that the plaintiffs sought to overturn. However, the Amtrak statute gives the corporation unreviewable discretion to terminate services not part of the basic system and undertaken on its own initiative. 45 U.S.C. § 564(b)(2) (1976). *Amtrak* can also be read as an unsuccessful, poorly pleaded attempt at judicial review of the Attorney General's failure to act. See 414 U.S. at 465 (1974) (Brennan, J., concurring). *Amtrak* is distinguishable from other implication cases because Congress rejected a proposal to allow "any person adversely affected or aggrieved" to bring suit under the statute. 414 U.S. at 459-61.

42. 422 U.S. 66 (1975). For a discussion of the opinion of the court of appeals see *Private Rights*, *supra* note 20. For general discussions of *Cort* see 25 CATH. U.L. REV. 447 (1976); 47 MISS. L.J. 156 (1976); 50 TUL. L. REV. 713 (1976).

43. 18 U.S.C. § 610 (1976). The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 2 U.S.C. §§ 431-442 (1976), increased the fines for violation of

lations, Mr. Justice Brennan, speaking for a unanimous Court, declared that the following factors were relevant in the judicial implication of a private cause of action:

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 remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . ?⁴⁴

Applying this test to the facts in *Cort*, the Court found that none of the requisite factors were present.⁴⁵

By asking if a private cause of action is consistent with the underlying purpose of the legislative scheme, the Court directed its attention to the potentially numerous goals of a statute⁴⁶ but not to the adequacy of the statutory enforcement scheme.⁴⁷ However, in applying the third prong of the test, the Court, citing *Borak* with approval,⁴⁸ recognized its duty to provide remedies that are necessary to effectuate the legislative objective.

The weakness of the *Cort* test is its inquiry into legislative intent

§ 610, changed many statutory definitions applicable to § 610, and vested exclusive enforcement jurisdiction in the Federal Election Commission. 2 U.S.C. § 437c(b) (1976). The 1974 amendments were enacted after the decision by the court of appeals but before the decision of the Supreme Court. The Supreme Court held that the 1974 amendments precluded the requested prospective injunctive relief and then adopted the four-pronged test to deal with plaintiff's claim for damages.

44. 422 U.S. at 78 (citations omitted).

45. The Court stated that although one purpose of the statute was to protect shareholders, such as the plaintiff, this protection was a secondary concern. 422 U.S. at 81.

46. As an example of the appropriate judicial inquiry for determining whether a cause of action is consistent with the underlying purpose of the legislative scheme, see *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975), where the Court held that only the SEC had been authorized by Congress to sue the SIPC to initiate the liquidation of failing brokerage firms. The purpose of the SIPC was to protect innocent investors, such as the plaintiff, whose cash was tied up in failing brokerage houses. However, the Court reasoned that if private parties were permitted to trigger the machinery precipitous liquidations would be likely to result. 421 U.S. at 422.

47. The *Cort* test thus specifically includes one of the two criteria previously suggested as essential to implying a private cause of action. See *Private Rights*, *supra* note 20, at 1393.

48. 422 U.S. at 84. See discussion of *Borak* in text accompanying note 31 *supra*.

to the extent that the focus is one of statutory construction or legislative history. The issue of implication does not arise if there is express language prohibiting or granting a private cause of action. It is precisely because the legislature did not consider a private cause of action or thought it unnecessary at the time of a statute's enactment that the issue of implication arises. Thus a careful examination of the statute and its legislative history is unlikely to yield any insights for those cases that raise a significant question of implication. However, to the extent that the focus of the third prong of the *Cort* test is one of statutory purpose the emphasis is correctly placed on an examination of the potentially conflicting goals of the statute.⁴⁹

IV. LAU AND BAKKE

Although the Supreme Court has not directly addressed the issue of implying a private cause of action under Titles VI and IX, two cases could be read as tacit decisions of that question. In *Lau v. Nichols*⁵⁰ the plaintiffs, non-English speaking students of Chinese descent, brought a class action suit against the officials of their school district, alleging violations of the fourteenth amendment and section 601 of the Civil Rights Act of 1964. While plaintiffs suggested no particular remedy, they alleged that they were being denied a meaningful opportunity to participate in public school education because they were non-English speaking and the classes were in English. Both the district court⁵¹ and the court of appeals⁵² denied relief on the merits of the claim, holding that there was no violation of the equal protection clause of the fourteenth amendment or of Title VI.

The Supreme Court reversed but did not determine the appropriate relief.⁵³ The Court stated: "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 to reverse the Court of Ap-

49. It is unclear whether the Court's decision will provide any predictability as lower federal courts continue to decide private cause of action issues. For example, two federal courts have reached opposite conclusions on the issue of whether there is a private cause of action under a statute prohibiting discrimination on the basis of handicap. Compare *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977), with *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977). These cases are discussed in note 107 *infra*. See also cases cited in note 143 *infra*.

50. 414 U.S. 563 (1974).

51. The opinion of the district court is unpublished.

52. 483 F.2d 791 (9th Cir. 1973).

53. 414 U.S. at 569. The Court did suggest alternative remedies. *Id.* at 565.

peals."⁵⁴ The defendants did not contest the plaintiffs' right to bring an action under Title VI.

The argument that *Lau* recognizes a private cause of action under Title VI is based on the language quoted above. Although the plaintiffs raised violations of both the Constitution and the statute, the Court specifically declined to base its decision on the Constitution. In order to rest the decision solely on the statute, the Court implicitly determined that private individuals may bring an action against a recipient of federal assistance under Title VI.⁵⁵

Similarly, in *Regents of the University of California v. Bakke*,⁵⁶ the plaintiff brought an action in state court against the university alleging a violation of the fourteenth amendment, section 601, and a provision of the state constitution. Bakke alleged that he was denied admission, solely on the basis of race, to the university's medical school at Davis because of the operation of the defendant's voluntary special minority admissions program.

The trial court agreed on the merits with Bakke and declared that the special admissions program violated the fourteenth amendment, section 601, and the state constitution.⁵⁷ The California Supreme Court affirmed on the fourteenth amendment ground without passing on the state constitutional or Title VI claims.⁵⁸ The parties initially presented the issue in the United States Supreme Court in terms of the fourteenth amendment. After oral argument, the Court ordered supplemental briefs on the Title VI issues.⁵⁹

54. *Id.* at 566 (citation omitted).

55. For courts that adopt this view see cases cited at note 143 *infra*.

A majority of the Court in *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978), questioned the correctness of what appears to be the premise of the *Lau* decision. Five justices were of the opinion that Title VI proscribes only that conduct which is prohibited by the Constitution. *Id.* at 4901, 4918. The other four justices disagreed. *Id.* at 4935. Applying the majority's analysis of the scope of the statutory prohibitions to the private cause of action issue, it is clear that a separate cause of action under the statute would have little practical consequence.

56. 98 S. Ct. 2733 (1978).

57. The trial court did not order Bakke's admission to the medical school since he had not proven that he would have been admitted but for the special admissions program. On appeal the state supreme court held that the burden of proof on this issue was the defendant's. The defendant conceded its inability to meet this burden and the state supreme court ordered Bakke's admission. The United States Supreme Court affirmed that part of the order admitting Bakke but reversed that part of the order prohibiting the university from considering race as a factor in its admissions process.

58. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

59. 98 S. Ct. 293 (1977).

Affirming in part and reversing in part, the closely divided Court avoided the issue of whether a private cause of action may be implied under Title VI. On the merits the Court held that the university's special admissions program violated the fourteenth amendment and Title VI but that the university could consider race as a factor in its admissions decisions. Four Justices⁶⁰ voted to affirm the state court decision on the sole basis that the special admissions program violated Title VI. They stated that the private cause of action issue was not properly before the Court since the university had first questioned the availability of such an action in the Supreme Court.⁶¹ The four Justices further stated that implication of a private cause of action would be "in accord with the federal courts' consistent interpretation of the Act."⁶² Five Justices⁶³ reached their conclusions on the basis of the fourteenth amendment and Title VI, reading the two provisions as prohibiting essentially the same conduct.⁶⁴ Four of these Justices stated that it was unnecessary to decide the private cause of action issue but apparently assumed it for the purpose of the case. Mr. Justice White, in a separate opinion, addressed the private cause of action issue and determined that, consistent with the legislative purpose and history, one should not be inferred.⁶⁵ Since Title VI formed the basis of the decision for at least eight of the Justices, although they reached different results on the merits of a violation, it is arguable that, as in *Lau*, a majority of the Court implicitly determined that a private cause of action may be implied under Title VI.

It may be argued, however, that these cases do not determine the private cause of action issue, because in each case there was a coexistent remedy under section 1983, which provides a cause of action to redress deprivations "under color of state law" of rights se-

60. Justice Stevens wrote the opinion in which Chief Justice Burger and Justices Stewart and Rehnquist concurred.

61. 98 S. Ct. at 2814.

62. *Id.*

63. Justice Powell wrote a separate opinion announcing the judgment of the Court. Justices White, Blackmun, and Marshall wrote individual opinions and also joined with Justice Brennan in a joint opinion.

64. Justice Powell agreed with the Stevens plurality that the operation of the university's special admissions program illegally excluded Bakke on the basis of race. Justices White, Blackmun, Marshall, and Brennan thought the special admissions program lawful. Justice Powell and these four Justices agreed that the university could lawfully consider race in its admissions decision.

65. Justice White's approach reflects the principle of *expressio unius est exclusio alterius* discussed in the text accompanying note 90 *infra*.

cured by the federal "constitution or laws."⁶⁶ Since Title VI is a "law," there may thus be a 1983 *remedy* for violation of the Title VI duty if, as was the case in *Lau* and *Bakke*, the defendants' actions are attributable to the state. Section 1983 does not apply to the nonstate defendant, for example the private college, whose practices are not "under color of state law." Accordingly, the Court's decisions in *Lau* and *Bakke* do not necessarily lead to a conclusion that there would be a private remedy under Title VI alone.⁶⁷

It is clear that *Lau* and *Bakke* make implying a private cause of action under Title VI irrelevant when there is state action.⁶⁸ However, it is not clear that the two cases resolve the complex policy issues of implication or make judgments concerning the intent of Congress when private litigants seek to enforce Titles VI and IX against private entities. The Supreme Court's recent grant of certiorari in *Cannon v. University of Chicago*,⁶⁹ after its decision in *Bakke*, is a further indication that *Lau* and *Bakke* are not determinative.⁷⁰

66. 42 U.S.C. § 1983 (1976) (the statutory cause of action for constitutional violations). For courts that adopt this view see cases cited at note 143 *infra*.

67. In *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3799 (July 3, 1978) (No. 77-926) (see text accompanying notes 137 to 140 *infra*), the court rejected *Lau* as determinative, but partially on erroneous grounds. The court appears to have relied on Justice Blackmun's concurring opinion in *Lau*, 414 U.S. at 572, which states that the number of students affected is relevant to the appropriate remedy, for its decision that the number affected is relevant to the cause of action and the substantive violation issues. 559 F.2d at 1072, 1083. Although the number of beneficiaries affected by a recipient's discriminatory act may effect the potential remedies, the number is not relevant to the substantive violation. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (individual cause of action under 42 U.S.C. § 1982 (1976)); *Runyan v. McCrary*, 427 U.S. 160 (1976) (individual cause of action under 42 U.S.C. § 1981 (1976)). Titles VI and IX speak in terms of "no person." Although there may be some logic to limiting private cause of action under Titles VI and IX to class actions, classes may have less need of private actions than do individuals. It is more likely that a discriminatory act against numerous beneficiaries will cause the federal agency to respond than will a discriminatory act against an individual. See text accompanying notes 151 & 152 *infra*.

68. See, e.g., *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967) (alleging violation under Title VI of right to attend desegregated schools); *Blackshear Residents Organization v. Housing Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1972) (alleging violation under Title VI of right to desegregated public housing). See also *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967).

69. 559 F.2d 1063 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3799 (July 3, 1978) (No. 77-926).

70. Whatever the implications of *Lau* and *Bakke* for Title VI, the same would be true for Title IX. The prohibitions and enforcement schemes are nearly identical; the only

V. APPLICATION OF *Cort v. Ash* TO TITLES VI AND XI

A. *Especial Benefit or Zone of Interest*

The first prong of the test formulated by the Supreme Court in *Cort v. Ash*⁷¹ to determine whether a private cause of action should be implied is to determine if the statute creates a federal right in favor of the plaintiff; that is, is the plaintiff one of a class for whose "especial" benefit the statute was enacted?⁷² The federal right prong of the *Cort* test simply recognizes that the "where there is a wrong, there is a remedy" theory of *Texas & Pacific Railway Co. v. Rigsby*⁷³ is a necessary factor but is not alone sufficient for judicial implication. Virtually any statute can be read to embrace the plaintiff as an intended beneficiary.⁷⁴ The rare case that involves a statute under which the plaintiff receives no arguable benefit, protection, or right will be ousted from federal court under the familiar principles of standing. Other cases, like *Cort v. Ash*, that involve statutes under which the plaintiff's benefits, protections, and rights are subordinate to the main purpose of the statute, will be decided according to the other elements of the *Cort* test.

Title VI and Title IX are designed to protect individuals from unlawful discrimination. The language of both statutes expressly forbids particular class based discrimination against any individual.⁷⁵ It is arguable that Congress had an additional purpose in enacting Titles VI and IX; that is, to restrict the potential uses of federal monies. In enacting Titles VI and IX Congress declared its intent to support various programs and activities and by negative implication its desire not to support racially and sexually discriminatory programs or activ-

important difference is that Title VI contains a provision expressly limiting the coverage of employment matters. 42 U.S.C. § 2000d-3 (1976). See note 92 *infra*.

71. 422 U.S. 66 (1975).

72. See text accompanying note 44 *supra*.

73. 241 U.S. 33 (1916), discussed in text accompanying notes 21 to 24 *supra*.

74. In cases denying as well as allowing a private cause of action courts have not disputed plaintiffs' allegations that they are intended beneficiaries of the statute in question. See *Securities Investors Protection Corp. v. Barbour*, 421 U.S. 412, 421 (1975) (investors); *Allen v. State Bd. of Election*, 393 U.S. 544, 548, 556 (1969) (voters); *J.I. Case v. Borak*, 377 U.S. 426, 432 (1964) (investors). Cf. *Cort v. Ash*, 422 U.S. 61, 81 (1975) (stockholders); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, 414 U.S. 453, 461 (1974) (passengers). See also *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1977), discussed in text accompanying notes 137 to 140 *infra*.

75. Section 601 of Title VI and § 901 of Title IX provide that "no person" shall be subject to discrimination.

ities.⁷⁶ These purposes are consistent and mutually supportive. The statutes require agencies to attempt to bring recipients into compliance voluntarily.⁷⁷ This route is preferred over the explicitly authorized statutory remedy of termination of federal financial assistance.⁷⁸

B. *Legislative Intent*

The second prong of the *Cort v. Ash* test focuses on whether there is evidence of a legislative intent to create or deny a private cause of action. To the extent this factor looks for legislative intent in the four corners of the statute or in the legislative history, the search is probably a futile one.⁷⁹ The language of Titles VI and IX and their legislative histories are bereft of a clear indication of legislative intent to create or deny a private cause of action. While the statutes do set up administrative enforcement mechanisms, they do not specify that this method of enforcement is exclusive.⁸⁰

The legislative histories of Titles VI and IX are equally inconclu-

76. Before the enactment of Title VI, the question of whether to condition a grant of federal assistance on a policy of nondiscrimination arose under each specific funding act. The civil rights issue rather than the merit of the funding program became the focus of debate. A desire on the part of the sponsors of Title VI to sever the civil rights issue and settle it was at least one motivation for the introduction of Title VI. *See, e.g.*, 110 CONG. REC. 6544, 6561, 7061 (1964).

There is some support for the notion that Congress is required to condition federal assistance on a policy of nondiscrimination. If such condition did not attach, the federal government would be in the position of sponsoring discrimination in violation of the fifth amendment due process guarantees. *See McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), (Secretary of the Treasury may not allow charitable deductions for gifts to fraternal orders that exclude nonwhites and may not grant federal income tax exemptions to such organizations). *But cf. Stewart v. New York Univ.*, No. 74 Civ. 4126 (S.D.N.Y. March 16, 1976) (federal financial assistance too minimal for constitution or Title IX to apply).

77. 42 U.S.C. § 2000d-1 (1976); 20 U.S.C. § 1682 (1976).

78. In *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978), the United States asserted that Title VI was designed to end discrimination, not simply to allocate federal money to programs that did not discriminate. United States Supplemental Brief for Amicus Curiae at 28-29.

Citations to the legislative history of Titles VI and IX are given in note 81 *infra*. These statutes are more analogous to the Voting Rights Act discussed in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), than to the Federal Election Act discussed in *Cort v. Ash*, 422 U.S. 66 (1975).

79. *See* discussion in text accompanying note 49 *supra*.

80. Whether a court should infer that the administrative remedy is exclusive is considered in the context of the third prong of the *Cort* test. *See* text accompanying note 121 *infra*.

sive.⁸¹ Title VI was enacted as part of the Civil Rights Act of 1964, the first comprehensive civil rights statute since the Reconstruction period. The 1964 Act prohibits racial discrimination in public accommodations,⁸² in public facilities,⁸³ and in voting;⁸⁴ authorizes the Attorney General to initiate and to intervene in school desegregation suits,⁸⁵ and prohibits race and sex discrimination in employment.⁸⁶ One part of the 1964 Act specifically authorizes individual suits,⁸⁷ another combines individual suits and administrative procedures,⁸⁸ and another only specifies administrative enforcement.⁸⁹ If the private cause of action issue were considered in the context of the entire 1964 Act, the familiar principle of *expressio unius est exclusio alterius* would militate against such private actions. The explicit provision for private suits in some parts of the Act and the omission of a specific provision in others can be viewed as "evidence" of a congressional intent to deny a private cause of action under Title VI.⁹⁰

Title IX was first introduced in the House of Representatives as proposed Title X of the Higher Education Act of 1971 and charac-

81. For an overview see [1972] U.S. CODE CONG. & AD. NEWS 2462 (Title IX); [1964] U.S. CODE CONG. & AD. NEWS 2355 (Title VI).

82. 42 U.S.C. §§ 2000a to 2000a-6 (1976) (Title II).

83. 42 U.S.C. §§ 2000b to 2000b-3 (1976) (Title III).

84. 42 U.S.C. § 1971 (1976) (Title I).

85. 42 U.S.C. § 2000c-6 (1976) (Title IV). The same statute that enacted the provisions of Title IX also amended Title IV to prohibit segregation on the basis of sex. Act of June 23, 1972, Pub. L. No. 92-318, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. § 2000c (1976)).

86. 42 U.S.C. §§ 2000e to 2000e-15 (1976) (Title VII).

87. 42 U.S.C. § 2000a-3 (1976) (public accommodations).

88. 42 U.S.C. § 2000e-5 (1976) (employment).

89. 42 U.S.C. § 2000d-1 (1976) (federally assisted programs).

90. This was the position taken by the university in *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978). Supplemental Brief for Petitioner at 20-22.

This notion is derived from an extension of the holdings of *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), discussed in text accompanying notes 27-30 *supra*, and *Switchmen's Union v. Union Mediation Bd.*, 320 U.S. 297 (1943). In these cases the Court interpreted the relevant statutes as prohibiting a cause of action because of a specific grant in one section and the failure to provide for a cause of action in the section under which these cases were brought. However, these statutes, Interstate Commerce Act, 49 U.S.C. §§ 1-327 (1976), Federal Power Act, 16 U.S.C. §§ 791a-825r (1976), and Railway Labor Act, 45 U.S.C. §§ 151-161 (1976), are comprehensive, integrated statutes, each under the regulatory authority of a particular agency. In contrast, the Civil Rights Act of 1964 more closely resembles an omnibus bill considered as a legislative package because the central issue was outlawing racial discrimination. In the Civil Rights Act, the subject matter of each title is different, the prohibitions are directed to different entities, and the enforcement agencies are separate.

terized as an amendment to Title VII.⁹¹ In 1972 the House passed a version that contained, among the provisions that eventually became sections 901-903: (1) An exemption for employment practices identical to section 604 of Title VI;⁹² (2) a section extending the coverage of Title VII of the Civil Rights Act of 1964⁹³ to educational institutions; and (3) a section repealing the exemption for executive, administrative, and professional personnel previously contained in the Equal Pay Act.⁹⁴ The version of Title IX that passed both Houses of Congress contained the latter two provisions. Because the provision parallel to section 604 was inconsistent with the latter two provisions, it was dropped from the bill.

At the same time Congress was considering Title IX, with its sections relating to Title VII and the Equal Pay Act, Congress was also considering the Equal Employment Opportunity Act of 1972,⁹⁵ which contained an amendment to Title VII similar to that contained in Title IX. The Equal Employment Opportunity Act was enacted while the conference committee was working on Title IX. The duplicative amendment to Title VII was then removed from Title IX. Although this legislative history is particularly illustrative of Congress' intent to proscribe employment discrimination in federally assisted education programs,⁹⁶ it is unclear whether it is evidence of congressional intent to create or deny a private cause of action. It could be argued that because Congress expressly authorized a private cause of

91. 117 CONG. REC. 9822 (1971).

92. Section 604 of Title VI, 42 U.S.C. § 2000d-3 (1976), expressly limits the coverage of employment discrimination to those instances "where a primary objective of the Federal financial assistance is to provide employment." Case law has held that employment discrimination is also covered by the prohibitions of Title VI to the extent that discrimination against employees constitutes discrimination against students or other beneficiaries, such as patients or welfare applicants. *See, e.g., United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

Title IX has no provision parallel to § 604.

93. 42 U.S.C. § 2000e to 2000e-15 (1976). Title VII prohibits discrimination in employment on the basis of race, sex, religion, or national origin.

94. 29 U.S.C. § 206(d) (1976). The 1972 amendment is reflected in 29 U.S.C. § 213(a) (1976).

95. Pub. L. No. 92-261, 86 Stat. 103 (1972).

96. *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976) (employment discrimination suit maintainable against museum as educational activity receiving federal funds). *But see* *Romeo Community Schools*, 14 Fair Empl. Prac. Cas. 1177 (E.D. Mich. 1977), *appeal docketed*, No. 77-1692 (6th Cir. Nov. 16, 1977) (HEW regulations governing school teachers' pregnancy leave not in furtherance of legislative purpose of Title IX); *Seattle Univ. v. HEW*, 16 Empl. Prac. Dec. 8241 (W.D. Wash. 1978) (HEW general employment regulations for a university beyond the scope of Title IX).

action under Title VII, the concomitant failure to provide for a private cause of action under Title IX is determinative of Congress' intent to deny such an action.⁹⁷ On the other hand, since the provisions that eventually became Title IX were during most of their legislative history considered at the same time Congress was considering an amendment to Title VII, one could argue that a private cause of action should be implied because one is provided by Title VII. In all likelihood neither of these views of the legislative history is accurate. More probably, the legislative history tells us that Congress simply did not consider whether there should be a private cause of action under Title IX.

Another indication of legislative intent may be found in the arguably self-executing nature of Title VI's section 601 and Title IX's section 901. The effective date of these sections was not tied to the publication of final regulations authorized under sections 602 and 902. Although the Title VI regulations were published only six months after the passage of the statute,⁹⁸ more than three years elapsed before HEW issued its Title IX regulations in final form.⁹⁹ Congress made several exceptions to the prohibitions of section 901; in one such exception that postpones the applicability of section 901 the time runs from the effective date of Title IX.¹⁰⁰ Although the persuasiveness of this minor point of statutory construction is not compelling, it does indicate that Congress did not consider the effective date of the prohibitory language to be tied to the promulgation of agency regulations. Under this construction, immediate compliance with section 901 by recipients of federal financial assistance was mandated, even before clarification by the federal agencies of close or unsettled questions of sex discrimination. It is likely that an aggrieved individual could have successfully petitioned for a federal court order mandating a recipient's compliance during the interim period.¹⁰¹

97. See note 90 *supra*.

98. 29 Fed. Reg. 16298 (1964).

99. 40 Fed. Reg. 24128 (1975).

100. 20 U.S.C. § 1681(a)(2) (1976) provides that, in the case of an educational institution that has begun the process of changing, under a plan approved by the Commissioner of Education, from an institution that admits only students of one sex to an institution that admits students of both sexes, the prohibitions of § 1681(a) (§ 901) shall not apply for six years after June 23, 1972, or for seven years from the date the educational institution begins the process, whichever is later.

101. A violation of § 901 could have been established under principles enunciated in cases decided under other sex discrimination statutes or constitutional provisions.

Asserting that § 901 is self-executing is not necessarily inconsistent with the notion

That sections 601 and 901 may be self-executing is also supported by a similar statute (section 504) outlawing discrimination on the basis of handicap in programs and activities receiving federal financial assistance.¹⁰² As part of the Rehabilitation Act of 1973, Congress did not enact a provision parallel to Title VI's section 602 or to Title IX's section 902. However, the legislative history of the Rehabilitation Act Amendments of 1974 indicates that Congress intended the enforcement of section 504 to parallel that of Titles VI and IX.¹⁰³ Thus the provisions of sections 602, 902, or a hypothetical 505 were not seen as essential to the enforcement of the nondiscrimination sections.

Since Congress patterned section 504 on sections 601 and 901 and intended the enforcement of the three sections to be parallel, cases interpreting section 504 in terms of a private cause of action are also useful in determining the legislative intent of Congress to create or deny a private right to sue under sections 601 and 901. In *Lloyd v. Regional Transportation Authority*¹⁰⁴ the Court of Appeals for the Seventh Circuit concluded that a private cause of action should be implied under section 504. Plaintiffs brought a class action against municipal defendants claiming that their refusal to make the federally funded public transportation system accessible to plaintiffs violated several statutes, including section 504. Applying the four pronged test of *Cort v. Ash*, the court of appeals concluded that section 504 implicitly provides a private cause of action. However, the court did not reach the question of whether the implied cause of action would continue once a "meaningful administrative enforcement mechanism" had

that the regulations under Title IX (and Title VI) are substantive or legislative rules that have the force of law rather than interpretive rules. The difference between interpretive and legislative rules stems from the authority given to the agency by Congress rather than the interpretive or legislative nature or quality of the regulation. See generally Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

102. Act of Sept. 26, 1973, § 504, 29 U.S.C. § 794 (1976) [hereinafter cited as § 504].

103. S. REP. NO. 1297, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390-91. There was at least one attempt to include the prohibitions of § 504 in Title VI. 119 Cong. Rec. 7114 (1973).

HEW has been designated as the coordinating agency. Exec. Order No. 11,914, 3 C.F.R. 117 (1976 Compilation). HEW issued final regulations on May 4, 1977, 42 Fed. Reg. 22676 (1977) (to be codified in 45 C.F.R. § 84.1 *et seq.*), and other agencies' regulations will be forthcoming. Executive Order No. 11,914 also authorizes federal agencies to adopt rules, regulations, and orders to ensure that recipients comply with § 504. Although the Executive order is intended to supply the missing analogue to §§ 602 and 902, it is doubtful that it can authorize legislative rulemaking, for this authorization power belongs to Congress. See Shapiro, *supra* note 101.

104. 548 F.2d 1277 (7th Cir. 1977).

been implemented under section 504.¹⁰⁵ In applying the second prong of the *Cort* test the court quoted from the legislative history of the 1974 Amendments: "This approach to implementation of section 504, which closely follows the models of the above cited antidiscrimination provisions [sections 601 and 901], would . . . permit a judicial remedy through a private action."¹⁰⁶ Thus, section 504, the cases decided under it, and Congress' conscious parallelism in sections 601, 901, and 504 provide some indication of legislative intent to create a private cause of action.¹⁰⁷

105. 548 F.2d at 1286 n.29. *Lloyd* was decided after HEW published its proposed regulation implementing § 504, 41 Fed. Reg. 29,548 (1976), but before the final one was issued in May 1977. Whether the "meaningful administrative enforcement mechanism" is a separate basis of the court's decision must now be determined since there is a final regulation implementing § 504. See text accompanying note 144 *infra*.

106. [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390-91, as cited in 548 F.2d at 1286 (emphasis added by court of appeals). The court continued: "While the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court, still it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action." First, it is not apparent that the court's limitation is correct. Second, the allegedly aggrieved individual will not be a party at any administrative proceeding to determine the compliance of a recipient. 45 C.F.R. § 81.23 (1977), incorporated by reference in 45 C.F.R. § 86.61 (1977). Thus the individual's attempt to obtain judicial review of the agency's action may be limited and in any event will depend on the agency's initiative. See note 119 *infra*. "Private cause of action" as used in this article does not mean the right to seek judicial review of agency action but rather the right to initiate action in federal court on one's own. The importance of this distinction is rooted in the belief of many intended beneficiaries of §§ 601, 901, and 504 that the federal agencies responsible for enforcement cannot and will not be effective in enforcement, rather than a concern that the agencies will err in termination proceeding decisions. See text accompanying note 144 *infra*.

107. For other cases construing § 504 see, e.g., *Barnes v. Converse College*, No. 77-116 (D.S.C. July 18, 1977); *Bartels v. Biernot*, 427 F. Supp. 226 (E.D. Wisc. 1977) (private cause of action under § 504 on the basis of *Lloyd*; no discussion of the effect of the 504 regulation which was issued before the decision); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977) (private cause of action under § 504 but insufficient irreparable harm for preliminary injunction); *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D.W. Va. 1976) (exclusion of prisoner from vocational rehabilitation program because of alleged mental impairment violation of § 504); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (refusal to hire blind teacher violation of fourteenth amendment due process clause; court did not reach § 504 issue because refusal to hire predated effective date of statute). In *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977), the court held that plaintiff had a private cause of action under §§ 504 and 503 (similar statute that requires nondiscrimination in employment by federal contractors) but stayed any action until plaintiff had exhausted available remedies under § 503, which is administered by the Department of Labor. Cf. *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977) (denying a private cause of action under § 503). See generally Note, *Abroad in the Land: Legal Strategies to Effectuate Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973).

Another indication of legislative intent drawn from legislative action taken since the enactment of sections 601 and 901 is the Civil Rights Attorneys' Fees Award Act.¹⁰⁸ This 1976 law authorizes courts to grant to the prevailing party a reasonable attorney's fee in any action to enforce specifically identified civil rights laws, including Titles VI and IX. It is clear from the statute and the congressional debates that the Attorneys' Fees Act does not create new remedies but rather lends assistance to the private enforcement of rights already authorized under existing civil rights laws.¹⁰⁹ Supporters of the bill assumed that a private cause of action existed under Titles VI and IX, and the purpose of the bill was to encourage vindication of individual rights by individuals bringing suit.¹¹⁰

As always there is some legislative history that points to the opposite conclusion, that no private cause of action already existed. In the House, Representative Quie (R-Minn.) questioned if a private cause of action existed under Title IX. In response several representatives referred to *Cannon v. University of Chicago*¹¹¹ which held that no such cause of action should be implied.¹¹² On rehearing, the *Cannon* court, ignoring the equally clear indications of other representatives and senators,¹¹³ found the above colloquy dispositive of Congress' intent not to allow a private cause of action under Title IX.¹¹⁴ Yet the representatives who had discussed *Cannon* had not embraced the court's interpretation of legislative intent but rather had noted that the legislative history was ambiguous.

If Congress did not intend private causes of action to be available

108. Pub. L. No. 94-559, 90 Stat. 2641 (to be codified at 42 U.S.C. § 1988).

109. See, e.g., 122 Cong. Rec. S16,251 (daily ed. Sept. 21, 1976) (remarks of Sen. Scott); 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy).

110. See, e.g., 122 Cong. Rec. S17,051-52 (daily ed. Sept. 29, 1976) (remarks of Sen. Tunney & Sen. Abourezk); 122 Cong. Rec. H12,159, H12,162-64 (daily ed. Oct. 1, 1976) (remarks of Reps. Drinan, Kastenmeir, Fish, & Holtzman).

111. 406 F. Supp. 1257 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1063 (7th Cir. 1977). *Cannon* is discussed in text accompanying notes 137 to 140 *infra*.

112. 122 Cong. Rec. H12,161 (daily ed. Oct. 1, 1976). This debate occurred after the initial decision of the court of appeals but before the court granted rehearing, Nov. 30, 1976, or decided the rehearing issue, Aug. 9, 1977.

113. E.g., 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy):

Inclusion of cases brought under Title IX would mean that where educational programs which receive Federal financial assistance discriminate on the basis of sex . . . , courts would be able to make discretionary awards of attorneys' fees to successful litigants in order to assist private enforcement efforts in this crucial area of the law.

114. 559 F.2d at 1079-80.

under Titles VI and IX, there does not appear to be any purpose in including the statutes within the scope of the Attorneys' Fees Act. The court of appeals in *Cannon* embraced the defendants' argument that the statutes were incorporated into the Attorneys' Fees Act to cover the situation that would arise should a future court imply a private right to bring suit.¹¹⁵ However, the court's statement that Congress simply could have been providing for the contingency that future court decisions might imply a private right of action from the provisions of Title IX¹¹⁶ suggests that judicial rather than congressional intention is dispositive.

The defendants in *Cannon* also argued that Titles VI and IX were included in the Attorneys' Fees Act to cover those situations in which an allegedly aggrieved individual seeks judicial review under section 603 or 903¹¹⁷ of an administrative determination that the state agency had complied with the statutory antidiscrimination provisions.¹¹⁸ However, it is not clear that an allegedly aggrieved individual may seek judicial review under sections 603 and 903¹¹⁹ or that

115. 559 F.2d at 1078-80.

116. *Id.* at 1080.

117. Section 903, 20 U.S.C. § 1683 (1976), provides:

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Section 603, 42 U.S.C. § 2000d-2 (1976) is identical, substituting § 2000d-1 for § 1682.

118. Administrative determinations are required to be made at a hearing. 42 U.S.C. § 2000d-1 (1976); 20 U.S.C. § 1682 (1976).

119. See 20 U.S.C. § 1683 (1976), *quoted in* note 117 *supra*. The first sentence provides judicial review under specific funding statutes. *E.g.*, 20 U.S.C. §§ 241K, 585, 869a (1976). The second sentence provides judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976). Section 1683 limits APA review to findings of noncompliance which result in termination of funds. The victims of race and sex discrimination are not likely to seek judicial review of termination orders, but rather of determinations of compliance with no resulting termination order. Thus the question of an individual's right to judicial review will depend on his or her ability to comply with the two part standing test of *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970). The second part, whether the plaintiff is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question, can be satisfied by individuals

such judicial review would be the kind of private enforcement of rights contemplated by the Attorneys' Fees Act.¹²⁰

In summary, evidence of a legislative intent to create or deny a private cause of action is inconclusive. Clearly, no provision in the statute or in its legislative history specifically denies a private cause of action. Indeed, the legislative history indicates a congressional intent to end discrimination, preferably through voluntary compliance. However, under the *Cort* test, legislative intent alone is not determinative of the private cause of action issue.

C. Consistency With Statutory Purpose

The third prong of the *Cort v. Ash*¹²¹ test focuses on whether an implied private cause of action is consistent with the underlying purpose of the legislative scheme. In *Cort* the Supreme Court held that implying a private cause of action in favor of the plaintiff shareholder was not consistent with the perceived purpose of the Federal Election Campaign Act:

alleging they are victims of discrimination. See text accompanying note 75 *supra*. However, individuals may have difficulty with the first part, injury in fact, especially in light of the causation test announced in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). If the individuals allegedly remain subject to discrimination while federal financial assistance continues to programs and activities covered by Titles VI and IX, they will no doubt be affronted by the federal agency's action, or lack of action. However, termination, the remedy available to the agency, may not ensure that the recipient ceases the discrimination.

The few cases that discuss an individual's right to judicial review under § 2000d-2 or § 1683 do not clarify the standing issue. Some cases discuss an intended beneficiary's right to sue a federal agency for failure to enforce the statute in terms of standing. Compare *Green St. Ass'n v. Daley*, 373 F.2d 1 (7th Cir. 1976), *cert. denied*, 337 U.S. 932 (1967), *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974), and *SCLC, Inc. v. Connolly*, 331 F. Supp. 940 (E.D. Mich. 1971), with *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), and *Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976). Other cases discuss standing where the issue is whether communities may negate settlement agreements between recipients and the federal agency reached during compliance proceedings. *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968); *Linker v. Unified School Dist. #259*, 344 F. Supp. 1187 (D. Kan. 1972). *Taylor* and *Linker* questioned parents' standing in school desegregation cases, but the courts denied review on the basis of lack of a final termination order. Still other cases discuss standing in situations raising the issue of this article, private causes of action. See cases cited at note 143 *infra*. It is often necessary to distinguish between standing to review administrative determinations under §§ 603 or 903 and standing to initiate litigation for damages or equitable relief, or between individuals suing federal agencies and those suing recipients. See discussion in note 5 *supra*. Unfortunately, courts often fail to do so.

120. See text accompanying note 108 *supra*.

121. 422 U.S. 66 (1975).

Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to "borrow" corporate funds for a time; the later compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.¹²²

In *Amtrak*¹²³ the legislative scheme involved such integrated control over the railroad system that a decision concerning one line would affect another line. The Court in *Amtrak* and *Cort* properly focused on the diverse goals of the relevant statutes and concluded that implying a private cause of action would undermine the primary goals of the respective statutes.

The policies underlying Titles VI and IX, differ from the statutory objectives considered in *Cort* and *Amtrak*. The primary goal of Titles VI and IX is to end discrimination in federally assisted programs and activities. However, the administration of the statutes does not involve the federal funding agency in the day to day decisions of the recipients.¹²⁴ The administrative enforcement mechanism set up by the statutes is designed to provide the recipient with a fair and impartial procedure when the termination of funding is proposed because of the absence of voluntary compliance with the statutes' antidiscrimination provisions. An implied private cause of action would not appear to undermine these goals.

Titles VI and IX are more analogous to the Voting Rights Act of 1965 at issue in *Allen v. State Board of Elections*.¹²⁵ The primary purpose of the voting statute was to ensure blacks their right to vote. The administrative mechanism drafted recognized the states' interest in determining voter qualifications and standards. In *Allen*, the Court held that a private cause of action would not interfere with the Attor-

122. *Id.* at 84.

123. 414 U.S. 453 (1974).

124. The extent of federal regulation is a factor also considered by courts and commentators in the application of the doctrine of primary jurisdiction, which determines whether a court should refrain from exercising its jurisdiction until after an administrative agency has acted. In the same way that the doctrine of primary jurisdiction is concerned with the allocation of power and authority between the courts and administrative agencies so too is the third prong of the *Cort* test. See generally L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121-51 (1965).

125. 393 U.S. 544 (1969).

ney General's duties under the statute and was not otherwise inconsistent with the general statutory objectives.¹²⁶

Cases arising under the Hill-Burton Act¹²⁷ are also instructive. Under the Hill-Burton Act a state must adhere to certain general regulations prescribed by the Surgeon General¹²⁸ to qualify for federal hospital construction funds. The statute further requires a state plan that provides for adequate hospitals and medical services for those unable to pay for such services.¹²⁹ In *Cook v. Ochsner Foundation Hospital*¹³⁰ the plaintiff sued to compel the defendant hospital to provide a reasonable volume of services for those unable to pay. The court implied a private cause of action. Relying on *Gomez v. Florida State Employment Service*¹³¹ which allowed a private cause of action under the Wagner-Peyser Act, a similarly administered statute, the court reasoned it was consistent with the Act's purpose to allow a private beneficiary of the statute to enforce those requirements upon which the extension of federal financial assistance was conditioned.¹³²

126. *Id.* at 556-57.

127. 42 U.S.C. §§ 291-291o (1976).

128. 42 U.S.C. §§ 291c, 291d (1976). This function was transferred to the Secretary of HEW in 1966, Reorg. Plan No. 3 of 1966, 3 C.F.R. 1023 (1966-1970 Compilation), reprinted in 42 U.S.C. § 202 (1976).

129. 42 U.S.C. § 291c(e) (1976); 42 C.F.R. § 53.111(b) (1976).

130. 319 F. Supp. 603 (E.D. La. 1970).

131. 417 F.2d 569 (5th Cir. 1969). In *Gomez* migratory farm workers brought a private cause of action to enforce the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k (1976), which provides that for a state to receive federal financial assistance for public employment offices the state must comply with certain conditions. Statutory enforcement provides for termination of assistance. In allowing the workers to sue, the court stated: "It is unthinking that Congress, obviously concerned with people, would have left the Secretary with only the sanction of cutting off funds to the state. Moreover, the private civil remedy is a method of policy enforcement long honored . . ." 417 F.2d at 576.

Under the *Gomez* rationale a private litigant could sue to enforce the regulations issued under Title VI and IX and attack violations such as the failure to establish a grievance procedure, 45 C.F.R. § 86.8 (1977), or the failure to complete a self-evaluation, 45 C.F.R. § 86.3(c) (1977), rather than simply seeking to enforce the prohibitions of §§ 601 and 901.

132. *Accord*, *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Organized Migrants in Community Action, Inc. v. James Archer Smith Hosp.*, 325 F. Supp. 268 (S.D. Fla. 1971). *But cf.* *Stanturf v. Sipes*, 224 F. Supp. 883 (W.D. Mo. 1963), *aff'd*, 335 F.2d 224 (8th Cir. 1964) (no private cause of action for damages for failure to comply with reasonable volume of services requirement). *See also* *Poirrier v. St. James Parish Police Jury*, 372 F. Supp. 1021 (E.D. La. 1974), allowing a private suit against the hospital and HEW to compel the opening of a hospital built with Hill-Burton funds. In *Poirrier* the court treats the case as a review of agency action (or inaction) and holds that HEW is obligated to do something to enforce the Hill-Burton Act. *Poirrier*, like *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), and thus involves the right of an individual to sue a federal agency for enforcement. *See* note 119 *supra*.

It has been suggested that cases such as *Cook* are bottomed on a third party beneficiary contract theory.¹³³ Under this theory the federal program is viewed as a contract between the federal government and a designated state agency and recipient hospital under which federal financial assistance is provided in return for state and hospital compliance with certain conditions, in this case a reasonable volume of services for those unable to pay. Indigent patients are viewed as intended third party beneficiaries who may sue to enforce their rights under the contract. The remedy prescribed by the statute for a *hospital's* "breach of contract" is the suspension of federal assistance until the hospital complies with the statutory conditions or makes restitution to the federal government.¹³⁴ However, indigent patients are not compensated by such a suspension for they are still denied services. A private cause of action complements rather than contradicts the statutory purpose of providing federal funds in return for state and hospital compliance with statutorily imposed conditions.¹³⁵

Whether the third party beneficiary theory is a separate basis for allowing private causes of action or merely a description and application of the *Cort* test is probably irrelevant. In either case the statutory purpose and scheme of Titles VI and IX are analogous to those of the Hill-Burton Act. Federal financial assistance is authorized and extended to states and other entities in return for the recipient's compliance with certain conditions. In the case of Titles VI and IX that condition is nondiscrimination.¹³⁶ Allowing a private beneficiary of Ti-

133. See *Lau v. Nichols*, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) (Title VI); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 223 (1976).

134. 42 U.S.C. § 291g (1976). This provision is similar to § 602 of Title VI and § 902 of Title IX.

135. Arguably to allow an individual suit seeking termination of federal financial assistance to a noncomplying recipient would be inconsistent with the underlying purpose of the statutory scheme. However, individuals who attempt private causes of action typically do not seek termination but rather injunctive or declaratory relief. See *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974) (question of private termination specifically left open); *Stanturf v. Sipes*, 224 F. Supp. 883 (W.D. Mo. 1963), *aff'd*, 335 F.2d 224 (8th Cir. 1964) (damages sought).

136. The same third party beneficiary theory would seem to support a private cause of action under Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), as amended by 3 C.F.R. 684 (1966-1970 Compilation), reprinted in 42 U.S.C. § 2000e (1976), and at least one district court has so held. See *Lewis v. Western Airlines, Inc.*, 379 F. Supp. 684 (N.D. Cal. 1974). The majority of cases hold that there is no private cause of action by the alleged victim against the contractor, usually on the same grounds as stated in *Cannon*, inconsistency with statutory purpose and adequacy of administrative enforcement. See, e.g., *Lewis v. FMC Corp.*, 11 Fair Empl. Prac. Cas. 31 (N.D. Cal. 1975);

titles VI and IX to enforce that condition would appear to complement rather than interfere with the express remedy for disputes between the federal government and the recipient of federal funds.

In *Cannon v. University of Chicago*¹³⁷ however, the court found that an implied private cause of action would be inconsistent with the underlying legislative purpose of Title IX. In *Cannon*, the plaintiff sued the University of Chicago and Northwestern University alleging sex discrimination in the schools' denial of her application to medical school.¹³⁸ The court viewed HEW's argument that a private cause of action would be a useful means of enforcing the statutory policy¹³⁹ as begging the question, and focused instead on the existence of an administrative forum in which to raise complaints. The court concluded that "it was Congress's purpose to commit the screening of Title IX complaints to the administrative agencies charged with the responsibility of overseeing federally funded educational programs and to encourage resolution of those complaints by means of agency conciliation efforts directed at achieving voluntary compliance with the statutory prohibition."¹⁴⁰

Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974). To the extent that the arguments made in terms of Titles VI and IX are criticisms of the courts' articulation of the criteria for implying a private cause of action, the same arguments can be applied to the Executive order. However, there are more difficult problems under the Executive order. The basic support for the practice of implication comes from the fact that courts interpret the intention of Congress and are careful not to interfere with the stated goals of the statute or to allow unnecessary remedies. Moreover, Congress is free to amend a statute to correct the erroneous implication of a private cause of action. Thus the source of the cause of action is still in Congress' realm. In the case of an Executive order a court does not look at the intent of Congress but rather of the President. To allow the President to regulate the jurisdiction and business of the federal courts raises serious constitutional questions under Article III. See *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871 (N.D. Cal. 1975) (denying a cause of action under the Executive order). The same constitutional issue is not raised in the case of a private action against a governmental agency to compel enforcement of the Executive order. See *Legal Aid Soc'y of Alameda County v. Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974).

137. 559 F.2d 1063 (7th Cir. 1977).

138. The plaintiff's primary allegation was that the preference given to younger candidates was discriminatory on the basis of sex since the age preference has an adverse impact on women and has not been validated. It is apparent from the court's statement of facts that it saw little merit in the plaintiff's substantive claim. *Id.* at 1067.

139. HEW was originally a defendant since the plaintiff also alleged that HEW had failed in its duty to investigate her administrative complaint. The court of appeals affirmed the district court's dismissal of the complaint against HEW on the ground that HEW was actively investigating the complaint. On the issue of a private cause of action HEW first argued in the court of appeals that no such right existed. However, HEW later supported plaintiff's petition for rehearing and filed a brief on the issue. The brief does not give a reason for the change in the agency's position. *Id.* at 1080.

140. *Id.* at 1081.

However, Congress did not commit the screening of complaints to HEW or any other agency; HEW chose to adopt a complaint procedure in its regulations.¹⁴¹ In addition, it was HEW and not Congress that chose to encourage informal resolution of complaints. Congress set up an administrative mechanism and required attempts at voluntary compliance for resolution of disputes between federal funding agencies and the recipient before there could be a government termination of funds. However, as noted in connection with the Hill-Burton cases,¹⁴² a statutory remedy for disputes between a government agency and a recipient of federal financial assistance is not inconsistent with a separate private remedy for an intended beneficiary of the statute.¹⁴³

In determining whether an implied private cause of action under Titles VI and IX is consistent with the underlying purpose of the statutes, courts should consider the adequacy of statutory enforcement. While the *Cort* test does not specify an adequacy test as a separate factor, the language of the Supreme Court and cases cited in

141. 45 C.F.R. §§ 80.7, 86.71 (1976). A proposed change in the procedures is discussed at note 13 *supra*.

142. See text accompanying notes 127 to 132 *supra*.

143. Several cases have held that there is a private cause of action under Titles VI and IX, but the courts did not discuss the basis for their decisions. See *McCarthy v. Burkholder*, 15 Fair Empl. Prac. Cas. 682 (D. Kan. 1977) (Title IX); *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (Title VI); *Trent v. Perritt*, 391 F. Supp. 171 (S.D. Miss. 1975) (Title IX); *Hawthorne v. Kenbridge Recreation Ass'n*, 341 F. Supp. 1382 (E.D. Va. 1972) (Title VI). Other cases, relying on *Cannon*, hold there is not a private cause of action under Titles VI and IX. *Lodwig v. Board of Educ.*, No. C-76-604 (N.D. Ohio Mar. 31, 1977), *appeal docketed*, No. 77-3375 (6th Cir. July 20, 1977) (Title IX, student); *Cape v. Tennessee Secondary School Athletic Ass'n*, 424 F. Supp. 732 (E.D. Tenn. 1976), *aff'd on other grounds*, 563 F.2d 793 (6th Cir. 1977) (challenge to separate rules for girls basketball not entitled to relief under Title IX); *Leake v. University of Cincinnati*, 14 Fair Empl. Prac. Cas. 1 (S.D. Ohio 1976) (no private cause of action under Title IX to challenge alleged sex discrimination in hiring practices for professors), *appeal docketed*, No. 76-2430 (6th Cir. Oct. 29, 1976) (Title IX); *Stewart v. New York Univ.*, No. 74 Civ. 4126 (S.D.N.Y. Mar. 16, 1976) (no private cause of action under Titles VI or IX because amount of federal financial assistance and degree of government involvement is too minimal).

In *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976), the court addressed the issue and specifically held there was a private cause of action under Title IX. Applying the *Cort v. Ash* test, the court rejected the argument that the administrative remedy of § 902 was exclusive and discussed the need for a private cause of action: "Individual litigants who suffered from non-employment related sex discrimination which violated the express prohibitions of § 1681(a), would be left with no remedy for the personal injury which they suffered to their education." *Id.* at 781 n.1. The impact of *Piascik* is limited since the plaintiff also alleged a cause of action under Title VII and did not prevail on the merits.

support of the third prong of its test suggest that consideration of the enforcement mechanism is appropriate.¹⁴⁴

While it is difficult to measure objectively compliance with Titles VI and IX,¹⁴⁵ several facts point to the inadequacy of administrative enforcement. First, HEW, the major funding source of educational programs and activities, has a significant backlog of uninvestigated and unresolved sex discrimination complaints.¹⁴⁶ In addition, other agencies that also fund educational programs and activities have not promulgated regulations effectuating section 901 of Title IX.¹⁴⁷ The backlog of complaints has so impaired enforcement of Title VI, that one court issued a unique order that prescribed strict time periods for investigating and conciliating specific Title VI desegregation cases.¹⁴⁸

144. *Cort v. Ash*, 422 U.S. 66, 78-85 (1975); *Cannon v. University of Chicago*, 559 F.2d 1063, 1081-82 (7th Cir. 1977). *But see* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?* 43 *FORDHAM L. REV.* 441, 448 (1974), which argues that this factor is of "dubious propriety."

145. For example, it is impossible to determine how many recipients were already in compliance when Titles VI and IX were enacted, how many voluntarily complied, or how many changed procedures as the result of informal or internal pressure. Since voluntary compliance is one of the primary purposes of Titles VI and IX such action should be and has been encouraged.

146. HEW's enforcement responsibility under Title IX includes 16,000 public school districts and 2,697 institutions of higher education. The backlog is noted by HEW in the preamble of its now withdrawn proposed consolidated enforcement procedures regulation. 40 *Fed. Reg.* 24,148 (1975).

HEW has statutory enforcement responsibility under Title VI for 16,000 public school districts, 2,874 institutions of higher education, and 30,000 health and social service agencies. *See* 40 *Fed. Reg.* 24,148 (1975).

147. While most of the federal assistance for education programs comes from HEW, there are education-related programs in other agencies. In 1974 Executive Order No. 11,761, 3 *C.F.R.* 843 (1971-1975 Compilation), *reprinted in* 20 *U.S.C.* § 1221 app., at 1612 (1976), was issued to facilitate coordination of federal education programs, setting up a federal interagency committee on education with representatives from the Departments of State, Defense, Agriculture, and Labor, the Atomic Energy Commission, and the National Aeronautics and Space Administration, in addition to representatives from HEW. Many of these agencies provide federal financial assistance to education programs or activities. *See, e.g.*, Cooperative Agricultural Extension Work, 7 *U.S.C.* §§ 3-1-3-19 (1976) (Department of Agriculture, grants to state colleges); Mutual Education and Cultural Act of 1961, 22 *U.S.C.* §§ 2451-2459 (1976) (Department of State, exchange programs); Law Enforcement Assistance Act, 42 *U.S.C.* § 3731 (1976) (Department of Justice, grants for law enforcement personnel training and public education programs). Other agencies, such as the National Endowment for the Humanities and the National Endowment for the Arts, also provide federal financial assistance to education programs. 20 *U.S.C.* § 95-1 (1976) (NEA); 20 *U.S.C.* § 956 (1976) (NEH).

148. In *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), the court of appeals affirmed the holding of the trial court that HEW had failed in its statutory duty to enforce Title VI. The plaintiffs, students and parents, alleged that HEW had investigated

In January, 1977, the Department of Justice in its Title VI coordinating role issued coordinated enforcement procedures for Title VI to all federal agencies primarily because of the lack of effective enforcement by the various federal agencies.¹⁴⁹

Beyond inadequate enforcement by federal agencies, there is an additional limitation inherent in the statutory enforcement scheme. The ultimate enforcement weapon under Titles VI and IX is termination of federal financial assistance. Because of the extreme and harsh nature of the sanction, HEW has rarely terminated assistance in the nearly fourteen years since the enactment of Title VI.¹⁵⁰ An isolated instance of race or sex discrimination is unlikely to result in the termination of federal assistance. However, the individual has still suffered an injury for which injunctive relief should be available.¹⁵¹ Although there are some instances of race and sex discrimination covered by Titles VI and IX that are also covered by other civil rights statutes, the overlap is not total.¹⁵² In the absence of an implied pri-

cases but after several years had not made a finding of compliance or noncompliance, that HEW had issued findings of noncompliance but after several years of negotiation had not reached voluntary compliance or initiated enforcement proceedings, and that HEW in some instances had evidence of noncompliance but had failed to investigate. In 1975 the district court modified its order to require HEW to investigate complaints alleging racial discrimination in elementary and secondary schools from the 17 southern and border states within 90 days of receipt, to pursue voluntary compliance for no more than 90 days, and to initiate enforcement proceedings within 30 days. *Adams v. Weinberger*, 391 F. Supp. 269 (D.D.C. 1975). A similar order resulted in *Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976), for named school districts in the 33 northern and western states. The most recent order in this phase of the *Adams* litigation required HEW to seek additional staff from the Office of Management and Budget. *Adams v. Califano*, C.A. No. 3095-70 (D.D.C. Dec. 30, 1977) (unpublished consent order).

Various women and women's groups subsequently brought an *Adams* type suit alleging the failure of HEW to enforce Title IX, *Women's Equity Action League v. Califano*, C.A. No. 74-1720 (D.D.C., filed Nov. 26, 1974) (*WEAL*), and the same consent order issued in *Adams* resolved most of the outstanding issues in *WEAL*.

149. 41 Fed. Reg. 52,669 (1976) (to be codified in 28 C.F.R. § 42.401). For general criticism of HEW and its ineffective procedures see *Vocational Education*, *supra* note 35, at 1143-49; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 40-42 (1970); Kadzielski, *Title IX of the Education Amendments of 1972: Change or Continuity?* 6 J.L. & EDUC. 183, 194-96 (1977); Note, *SEX DISCRIMINATION—The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can be Strengthened to Make the Title IX Regulations More Effective*, 49 TEMPLE L.Q. 207, 216-19 (1975).

150. The Status of Civil Rights Compliance, Interagency Status Report, Department of Health, Education, and Welfare No. 372 (Nov. 10, 1977), shows one elementary and secondary school and two institutions of higher education against whom enforcement proceedings have been completed and assistance terminated.

151. See *Private Rights*, *supra* note 20, at 1429-30, arguing that the need to "make whole" is an important factor for implying a private cause of action.

152. See text accompanying notes 6 to 13 *supra*.

vate cause of action, the individual victim of race or sex discrimination may be left without an effective remedy.

D. *Relevance of State Law*

The fourth prong of the *Cort v. Ash* test considers whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a private cause of action in federal court. This final element of the *Cort* formula is irrelevant to the issue of an implied private cause of action under Titles VI and IX to the extent that the inquiry is designed to ensure comity between federal and state courts.¹⁵³ The argument that the protection of civil rights is not a federal as well as a state concern is no longer viable. The state law element of the *Cort* test is relevant only to those situations in which states have exclusive power to act and has no bearing on cases where the federal and state governments have concurrent authority.

However, the policy underlying the comity factor may apply if administrative agencies are substituted for state courts. It has been argued that federal courts should be as reluctant to imply a private cause of action when federal administrative remedies exist as they are when adequate state remedies exist.¹⁵⁴ On the other hand, stating the fourth prong as one of comity adds little to the factors already considered under the other parts of the *Cort* test. In any event the adequacy or inadequacy of the state or the federal administrative remedy should be considered.

CONCLUSION

Under the four-prong test enunciated in *Cort v. Ash* the issue of whether courts should imply a private cause of action under Titles VI or XI is not easily resolved. An implied private cause of action is clearly appropriate but not mandatory. Compelling arguments can be marshalled in support of both sides of the issue. However, in light of the statutory objectives of Titles VI and IX and the recently enacted Attorneys' Fees Act,¹⁵⁵ implying a private cause of action appears to be the more sensible approach. Moreover, an implied private cause of action promises increased compliance with the statutes' antidis-

153. The available and traditional remedy at state law was especially important to the decision in *Cort v. Ash*, 422 U.S. 66, 84 (1975).

154. See Note, *The Phenomenon of Implied Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?* 43 *FORDHAM L. REV.* 441, 449-50 (1974).

155. See note 108 *supra* and accompanying text.

crimination mandate, with little, if any, damage to the integrity of the administrative process.

Close cases such as this should turn on congressional policy and the social goals embodied in the statutes. It is clear that Congress intended to involve federal administrative agencies in the elimination of racial and sex based discrimination in federally assisted programs. However, the costs and delays inherent in administrative enforcement should be weighed against any tarnishing of the image of the administrative agency that might result from the implication of a private cause of action.

The history of compliance with the antidiscrimination mandates of Titles VI and IX has fallen short of congressional expectations and the hopes of the intended beneficiaries of the statutes. For example, considerable HEW resources are committed to complying with the numerous court orders in the *Adams v. Califano* litigation.¹⁵⁶ Since the court of appeals affirmance in 1973 much of the agency's time and energy has been directed toward eliminating the 1970-1973 backlog of racial discrimination complaints, complying with additional court orders, and attempting to settle the case.¹⁵⁷

The additional funding necessary for agencies adequately to staff their enforcement programs is unlikely given other important interests competing for portions of the limited federal budget. Moreover, additional funding may be unnecessary if the existing jurisdiction of the federal courts is invoked more often. While a federal court's reluctance to increase its own workload by implying a private cause of action is understandable, the fact is that agency action under Titles VI and IX is presently reviewable in federal court.¹⁵⁸

Two factors inherent in the administrative scheme suggest that a private cause of action is necessary to fulfill the congressional policy and social goals underlying the statutes. First, because of the harsh nature of the sanction, federal agencies have been reluctant to exercise the termination power vigorously. Moreover, the real victims of a termination order are the very beneficiaries that Titles VI and IX were enacted to protect. Second, it may be unwise for agencies to

156. See note 148 *supra*. The case was originally styled *Adams v. Richardson* and each new Secretary of HEW has been substituted as the named defendant.

157. See note 148 *supra*. The problem of complying with the *Adams* order is discussed in HEW's now withdrawn proposed consolidated enforcement procedures regulation. 40 Fed. Reg. 24,148 (1975); 41 Fed. Reg. 18,394 (1976).

158. See 42 U.S.C. § 2000d-2 (1976); 20 U.S.C. § 1683 (1976); notes 117, 119 *supra*.

focus on individual complaints of discrimination rather than implementing their own enforcement priorities.

Finally, two factors inherent in the federal court scheme point to the utility of an implied cause of action under Titles VI and IX. First, the prestige of the federal courts is more likely to induce public support and ultimate compliance. Second, the remedies of declaratory judgment and injunctive relief which the judiciary alone can issue, are uniquely suited to the effectuation of the congressional policies underlying Titles VI and IX.