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

Plaintiffs, representing ethnic and racial minorities as well as handicapped persons residing in the city of Wilmington, Delaware, brought suit against the Medical Center, Inc. (WMC), the Secretary of the United States Department of Health, Education and Welfare (HEW), and two state health planning agencies for declaratory judgment against the relocation of major health care facilities and for an injunction against the construction of a new suburban hospital designed for the replacement and relocation of these facilities. Plaintiffs claimed that the proposed transfer of medical services from existing urban hospitals would have a discriminatory impact on inner city minorities and on elderly and handicapped persons. The action was brought under Title VI of the Civil Rights Act of 1964 (Title VI) and section 504 of the Rehabilitation Act of 1973 (section 504), which proscribes dis-
HEW and the state health planning agencies initially approved the capital expenditures necessary for construction of the new hospital, but HEW later determined that the proposed relocation would violate Title VI and section 504. The relocation plan was then revised to include certain safeguards against possible disparities in the quality and accessibility of health care to be provided by the proposed facilities, and was approved, as modified, by HEW.

The district court, in ruling that plaintiffs had no private cause of action under Title VI or section 504, declared the administrative remedy for terminating federal funds exclusive and, in a limited review of the agency's
action, affirmed HEW's determination that the proposed relocation, as modified, would have no discriminatory impact. The United States Court of Appeals for the Third Circuit reversed and remanded holding that private beneficiaries of federally funded programs, seeking declaratory and injunctive relief, have a private cause of action against recipients of federal funds under section 601 of Title VI and under section 504 of the Rehabilitation Act. NAACP v. Medical Center, Inc. 599 F.2d 1247 (3d Cir. 1979).


Judicial review of agency action is limited. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Section 603 of Title VI specifically provides that agency action under Title VI shall not be deemed committed to unreviewable agency discretion and shall be governed by the Administrative Procedure Act, 5 U.S.C. § 706 (1976). The district court determined that the scope of review was the arbitrary and capricious standard. 599 F.2d at 1250. The court made no provision for judicial review of the decision on remand of the plaintiffs' claim against WMC, WMC's determination that Plan Omega complies with Title VI and § 504 may be subject to limited judicial review. See id. at 1250 n.10. For a critical analysis of the court's treatment of the claim against WMC, see notes 96-112 and accompanying text infra.

Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions 22. 42 U.S.C. § 2000d (1976). For the text of § 601 of Title VI, see note 6 supra. The purpose of the Civil Rights Act of 1964 is "to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation." S. Rep. No. 872, 88th Cong., 2d Sess. 1, reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2355, 2355.

For the relevant text of this provision, see note 7 supra.
section 504 provide that, as a last resort, the funding agency may terminate federal funds. Funding termination is a bipartite, administrative process involving the funding agency and the recipient of its aid. A person aggrieved by agency funding termination can, pursuant to section 603 of Title VI, appeal the agency decision to the courts for limited judicial review of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Id.

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

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

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

27 See 110 Cong. Rec. 8978-80 (1966). "Section 601 is a statement of policy. Section 602 is the section that gives authority to the agencies." Id. at 13,435 (remarks of Sen. Pastore). "What would be done by section 602 and certain following sections would be to prescribe ways in which branches of the Government . . . shall conduct themselves in the implementation of the broad and unfettered policy announced in section 601. But that is all." Id. at 13,930 (remarks of Sen. Case). The language of § 602 is essentially a limitation on agency power to terminate funds. See 42 U.S.C. § 2000d-1 (1976).

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

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

29 See 42 U.S.C. § 2000d-2 (1976). It has been suggested that beneficiaries are not "persons aggrieved" under § 603. See Green St. Ass'n v. Daley, 250 F. Supp. 139 (D.C. Ill. 1966), aff'd, 373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932 (1967). The Green court noted: Although the members of the public are intended to be the ultimate beneficiaries of federal subsidy programs granting aid . . ., plaintiffs certainly are not the direct recip-
Neither Title VI nor section 504, however, expressly creates or denies the right of a private party to sue for relief from discrimination in violation of the statute.  

As noted by the United States Supreme Court, a legal right without a legal remedy has little meaning. Thus, even when not expressly provided by statute, private causes of action have often been judicially inferred based upon the language of the applicable statute, the manifested legisla-
tive intent, the ultimate purpose of the statute, and the availability of alternative remedies. In *Cort v. Ash*, the Supreme Court, in a unanimous opinion, identified the relevant factors to be considered before a court may infer a private cause of action: 1) plaintiff’s membership in the class for whose “especial” benefit the statute was enacted; 2) the existence of legislative intent for or against private rights under the statute; 3) the degree to which a private cause of action is consistent with the purposes of the legislative scheme; and 4) the presence or absence of a traditional relegation of the particular cause of action to state, rather than federal, law.


40. 422 U.S. at 78. The Court stated: In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the class for whose especial benefit the statute was enacted,” . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (citations omitted) (emphasis in original).
Court did not, however, suggest that these factors carry equal weight\footnote{41} and subsequently, the Court indicated that the inquiry should focus on legislative intent.\footnote{42}

The Supreme Court has yet to expressly decide whether there is a private right to sue under Title VI.\footnote{43} Although the lower courts have adjudicated private claims for relief under Title VI\footnote{44} and section 504,\footnote{45} most have

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


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

The effect of Touche Ross and Transamerica would appear to be to lessen the importance of the last two factors of the Cort analysis which focus on the consistency of a private cause of action with the purposes of the legislative scheme and the relegation of the issue to state law.

\footnote{43}{See supra. The Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight." Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979).

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\footnote{45}{See supra. The Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight." Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979).}
simply assumed that the private cause of action is available. In a pre-Cort case, Bossier Parish School Board v. Lemon, however, the United States Court of Appeals for the Fifth Circuit recognized and addressed the issue, finding that a private cause of action under Title VI is necessary to enforce the statute. In Lloyd v. Regional Transportation Authority, the United States Court of Appeals for the Seventh Circuit, using the Cort analysis, found explicit congressional intent to create a private cause of action under section 504.

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

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

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

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

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

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

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

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

51. 599 F.2d at 1256. The courts have "concluded" or "assumed" the existence of Title VI private causes of action. See id. The Medical Center court observed that the references to a private cause of action in the legislative history of Title VI are, at best, "inconclusive." Id. The
Court, in *Cannon v. University of Chicago*,52 recognized that Congress has since assumed that Title VI implies a private right to sue.53 In so doing, the *Cannon* Court noted the existence of a widely accepted assumption that Title VI creates a private cause of action.54 In several recent decisions, for example, the Supreme Court implicitly assumed the existence of the private right, reached the merits of the cases, and focused on the relief granted.55

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

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

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

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

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

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

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

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

In *Hills*, a group of Negroes who were tenants in, or who had applied for, public housing in Chicago, brought a class action alleging that the site-selection policy of the Chicago Housing Authority violated Title VI. 425 U.S. at 286. The Court simply noted that defendant United States Department of Housing and Urban Development (HUD) had been found to have violated Title VI, and then proceeded to decide only the propriety of the relief ordered against HUD. *Id.*
Similarly, while Congress has not directly responded to judicial recognition of a private right to sue under Title VI, congressional comment, likening Title VI to the subsequently enacted Title IX of the Civil Rights Act which implicitly provides a private remedy, has been construed as legislative approval of a Title VI private cause of action. In a like manner, legislation enacted in 1972 and 1976, authorizing awards of attorney’s fees to private litigants who successfully sue under Title VI, has been interpreted as support for private enforcement of Title VI.

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

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

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

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

59. See Cannon v. University of Chicago, 441 U.S. at 696-98. The Cannon Court stated: In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. . . . It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

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

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

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

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

62. No court which has recognized a private right under these statutes has recommended how such rights interrelate with agency enforcement. See notes 44-45 and accompanying text supra. The Supreme Court has recognized that an injunction or declaratory judgment in a private suit may not be inconsistent with the administrative enforcement scheme of § 602. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1977). In Bakke, Justice Stevens observed that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. . . .
acquired a beneficiary to exhaust the administrative remedy as a prerequisite to a private suit under Title VI. In other cases, however, private suit has been permitted both as an alternative to the administrative process and as a means of challenging agency action under Title VI and section 504. The private suit provides the plaintiff with the opportunity to fully litigate his claim in a judicial forum, whereas judicial review of agency action is limited.

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

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


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

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

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

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

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

67. For a discussion of the limitations on judicial review of agency action under § 603, see notes 29-30 and accompanying text supra. Note that while beneficiaries can complain to funding agencies in order to trigger Title VI and § 504 compliance investigations, they are not entitled to participate further or offer evidence in the agency proceedings. See note 28 supra.
Applying the four-part Cort analysis, the Medical Center court concluded that a private cause of action against a recipient of federal funds is implied in section 601 of Title VI. Since both parties had conceded that plaintiffs were “of the class for whose special benefit” Title VI was enacted, and that the issue was one of federal concern, the court focused on the second and third factors of the Cort test. Finding no explicit congressional intent to create or deny a private cause of action under Title VI, the court sought to determine the legislature’s implicit intent by considering the third factor of the Cort test: whether a private cause of action is consistent with the underlying purposes of the legislative scheme.

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

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

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

70. 599 F.2d at 1259.

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

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

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

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

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

75. 599 F.2d at 1254.

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

77. 599 F.2d at 1254. The court relied on the remarks of Senator Case: “I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602.” 110 CONC. REC. S254 (1964) (remarks of Sen. Case).

78. 599 F.2d at 1254-55.
focused primarily on prohibiting discrimination rather than on regulating federal funds and that the "unequivocal, broad and remedial" rights guaranteed by section 601 necessarily imply a broad remedy. Citing Cannon and several cases in which a private cause of action under section 601 had been assumed or expressly found, and taking note of legislative action subsequent to the enactment of Title VI, the Medical Center court concluded that, when Congress enacted Title VI in 1964, it had intended that there be a private right of action.

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

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

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

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


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

82. See 599 F.2d at 1256.

83. See id. at 1235 n.32, citing Lau v. Nichols, 414 U.S. 563 (1974). For a discussion of Lau and other cases assuming that the private cause of action exists, see notes 44 & 45 supra.


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

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

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

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

89. See 599 F.2d at 1258, citing Lloyd v. Regional Transp. Auth., 548 F.2d at 1284-86. For a discussion of Lloyd, see notes 49-50 and accompanying text supra.
larly recognized a private cause of action under section 504 of the Rehabilitation Act.\textsuperscript{90}

The Third Circuit’s emphasis on legislative intent\textsuperscript{91} in determining that Title VI affords beneficiaries a private cause of action against recipients of federal funds appears to be consistent with recent Supreme Court guidance concerning the primary significance of legislative intent among the Cort factors.\textsuperscript{92} The Third Circuit focused closely on legislative intent by considering the overall purpose of the legislative scheme as a means of assessing congressional intent.\textsuperscript{93} It should be noted, however, that the Supreme Court, in\textit{Cort}, did not insist that, for purposes of determining private rights under federal statutes, legislative intent be determined as of the time the statute was enacted.\textsuperscript{94} Consequently, it is submitted that the Third Circuit need not have found that Congress intended in 1964 to create a private cause of action. It is suggested that the court could have considered the degree to which congressional intent regarding private rights of action under Title VI has evolved and, in doing so, could have provided the lower courts with a framework for analyzing similar cases.\textsuperscript{95}

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

\textsuperscript{90} 599 F.2d at 1258. For other cases permitting a private right of action under § 504, see note 45 supra.
\textsuperscript{91} See 599 F.2d at 1252-55. Note that, prior to this decision, the Cort analysis had not been applied to Title VI. See note 51 and accompanying text supra.
\textsuperscript{93} See 599 F.2d at 1254. For a discussion of this aspect of the\textit{Medical Center} court’s opinion, see notes 76-86 and accompanying text supra.
\textsuperscript{94} See 422 U.S. at 78. While legislative intent at the time of enactment is certainly relevant under the Cort analysis, legislative intent expressed as the statute develops after enactment is also significant. See note 59 supra.
\textsuperscript{95} See 599 F.2d at 1257. Although concluding “that Congress intended that there be a private right of action when it enacted Title VI in 1964,” the Third Circuit had earlier noted that “[a]t best, it may be said that the legislative references to a private cause of action are inconclusive.” Id. at 1252, 1257 (emphasis in original). Note that the\textit{Cannon} Court did not find that Congress intended to create a private cause of action at the time it enacted Title VI. See\textit{Cannon} v. University of Chicago, 441 U.S. at 696, 710-11; note 59 supra.
\textsuperscript{96} See 599 F.2d at 1256. For a discussion of judicial assumption of private rights under Title VI and section 504, see notes 44-46 and accompanying text supra.
\textsuperscript{97} See 599 F.2d at 1254 n.27. The court concluded that “a beneficiary may not sue the administrative agency under section 601.” Id.
\textsuperscript{98} See\textit{id.} at 1254. For a discussion distinguishing the administrative and judicial remedies, see notes 24-31 & 62 and accompanying text supra.
In concluding that beneficiaries' private actions against the funding agency would only, "in essence, compel funding termination" and thus "circumvent the limitations of sections 602 and 603," the Medical Center court appears not to have considered the fact that an agency can violate section 601 by dereliction of its duty to enforce the statute. It is submitted that declaratory or injunctive relief may simply compel agency investigation and action; it need not force the agency to terminate funds.

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

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

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

99. 599 F.2d at 1254 n.27.
100. See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), aff'd on other grounds sub nom. Hills v. Gautreaux, 425 U.S. 284 (1976). In Adams, plaintiffs alleged that the agency had "consciously and expressly adopted a general policy which is, in effect, an abdication of its statutory duty." 480 F.2d at 1163. The court stated that its purpose on review was "to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties. . . ." Id. at 1163-64. For further discussion of Adams, Romney, and Hills, see note 65 supra.

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

101. See note 65 supra. See also Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). The Adams court noted that its purpose was not to decide whether particular recipients were or were not complying with Title VI. Id. at 1163.
103. For a discussion of the limited participation of beneficiaries in the agency process, see note 28 and accompanying text supra.
adopting a case-by-case analysis, rather than by barring private suits against funding agencies altogether.105

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

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

105. For cases where declaratory and injunctive relief against a funding agency was found appropriate, see notes 64-65 & 99-101 and accompanying text supra.
107. It should be noted, however, that in the most recent Supreme Court decision on this issue, the Cort analysis was not used in determining the existence of private rights under a federal statute. See Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).
108. See Cannon v. University of Chicago, 441 U.S. at 741-42. (Powell, J., dissenting). Since the decision in Cort, courts of appeals have, on at least twenty occasions, implied private causes of action under federal statutes. Id. It would appear that, in Medical Center, the district court's denial of plaintiffs' private cause of action, and its subsequent referral of the claim to HEW, were based on the conclusion that the limited scope of review applicable to agency action could not be forcibly broadened by a beneficiary's simply bringing a claim in the form of a private suit. The Third Circuit, however, took no position on either the proper scope of judicial review under § 602 or the interaction between administrative and judicial proceedings to enforce Title VI and § 504. See 599 F.2d at 1250 n.10. It is suggested that the Third Circuit should have identified as error the district court's initial referral of plaintiffs' complaint to the administrative agency, as that referral led to the dilemma of conflicting standards of review. Had the Third Circuit more thoroughly discussed the points where administrative and private remedies conflict, beneficiaries would appreciate the necessity of choosing administrative or judicial remedies in the first instance, and lower courts would be less likely to relegate judicially cognizable private claims to administrative agencies.
110. See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1040 (1979). Breyer and Stewart observed that creation of private rights of action would ordinarily require courts to decide all issues of statutory interpretation presented in such suits. But if some enforcement suits continue to be brought by the agency, the agency will be deciding these same issues and in such cases a reviewing court would often defer to the agency's ruling even though the court might decide the issue the other way as an initial matter. Thus, a dual enforcement structure raises a serious possibility of persistent inconsistency in the interpretation of the same regulatory statute.

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

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

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

Id.