

Lucille YOUNG, et al.

v.

Samuel PIERCE, Jr., Secretary of the
Department of Housing and Urban
Development, et al.

No. P-80-8-CA.

United States District Court,
E. D. Texas,
Paris Division.

July 1, 1982.

Black applicants for public housing programs in East Texas brought a civil action charging that Department of Housing and Urban Development and certain local housing authorities maintained racially segregated housing in violation of the Constitution and laws of the United States. On HUD's motion for reconsideration of order denying its motion to dismiss, the District Court, Justice, Chief Judge, held that: (1) plaintiffs stated causes of action under the Constitution and laws of the United States; (2) plaintiffs had standing to bring the action against HUD since they alleged that they suffered an actual injury that could be traced to the conduct of HUD which was in contravention of a statute designed to protect or regulate a "zone of interest" of plaintiffs; (3) the action against HUD would be severed from two separate actions brought against housing authorities of two cities; and (4) the action was maintainable as a class action with the class to consist of black applicants for, and residents of, racially identifiable HUD-assisted housing in 36 East Texas counties.

Ordered accordingly.

1. Civil Rights $\Rightarrow$ 13.7

When individual plaintiff seeks relief from purported discrimination by recipient of federal grant money in violation of a federal statute, appropriate avenue is a suit against recipient. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

retain jurisdiction for the purposes of ente.

2. Civil Rights $\Rightarrow$ 13.7

To extent a plaintiff asserts that federal agency is violating terms of a federal statute by abdicating affirmative duty to eliminate discrimination, action is properly brought against the agency; in such circumstance, agency is a partner in discrimination, and may be held responsible for such complicity. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

3. Civil Rights $\Rightarrow$ 13.7

Deprivation of substantive right to equal treatment, in contravention of section of Civil Rights Act which provides that no person shall "on the ground of race, color or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," may be redressed by private civil action against the federal funding agency. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C.A. §§ 2000d, 2000d-1.

4. Civil Rights $\Rightarrow$ 13.4(1)

Private right of action exists against Department of Housing and Urban Development for violation of its affirmative duties under section of Civil Rights Act which requires Secretary of HUD to administer programs and activities relating to housing and urban development "in a manner affirmatively to further the policies of this title," in order to insure that HUD complies with its explicit duties created by statute since failure of HUD to perform its legal duties mandated by statute constitutes discriminatory housing practice, in itself. Civil Rights Act of 1968, § 808(d)(5), 42 U.S.C.A. § 3608(d)(5).

5. Civil Rights $\Rightarrow$ 13.7

Applicants for public housing programs properly brought suit against Department of Housing and Urban Development under sections of Civil Rights Act which provide that all persons within jurisdiction of the United States shall have equal rights to

such supplemental order.

"make and enforce contracts," and "to lease real property," where plaintiffs charged that HUD and certain local housing authorities maintained racially segregated housing, since actions under such statutes could properly be brought against federal agencies which have allegedly contravened guarantee of equal treatment. 42 U.S.C.A. §§ 1981, 1982.

6. Constitutional Law ⇌ 253.2(2)

Due process clause of Fifth Amendment incorporates constitutional guarantee of racial equality. U.S.C.A.Const.Amend. 5.

7. Constitutional Law ⇌ 253.2(2)

Any classification that violates equal protection clause of Fourteenth Amendment similarly offends Fifth Amendment. U.S.C.A.Const.Amend. 5, 14.

8. Civil Rights ⇌ 13.3(2)

Cause of action against federal officials to redress alleged discrimination may be implied directly under Fifth Amendment. U.S.C.A.Const.Amend. 5.

9. Civil Rights ⇌ 13.12(3)

Applicants for public housing programs had cause of action against United States Department of Housing and Urban Development under Fifth Amendment where plaintiffs alleged that HUD and certain local housing authorities maintained racially segregated housing. U.S.C.A.Const. Amend. 5.

10. Federal Civil Procedure ⇌ 103

Core of question of standing is whether party seeking relief has alleged such personal stake in outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues upon which court so largely depends for illumination of difficult questions. U.S.C.A.Const.Art. 3, § 1 et seq.

11. Federal Civil Procedure ⇌ 103

Black applicants for public housing programs in East Texas had standing to bring action against Department of Housing and Urban Development which alleged that HUD and certain local housing authorities maintained racially segregated housing,

since black residents of East Texas, otherwise eligible for public housing, who were denied such housing due to their race sustained injury in fact, such alleged injury would be in contravention of statutes designed to protect or regulate a "zone of interest" of plaintiffs, and such alleged injury could be traced to conduct of HUD. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.; 42 U.S.C.A. §§ 1981, 1982.

12. Federal Civil Procedure ⇌ 103

While black applicants for public housing programs in East Texas had standing to bring action against Department of Housing and Urban Development charging that HUD maintained racially segregated housing, and while plaintiffs had standing to raise a claim against practices of local housing authority in city of their residence, plaintiffs did not have standing to challenge practices of local housing authorities of other cities; thus, actions would be severed into three separate civil actions consisting of plaintiffs' action against HUD, plaintiffs who were residents of one city against local housing authority of such city, and plaintiffs who were residents of other city against local housing authority of such city. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.; 42 U.S.C.A. §§ 1981, 1982; Fed.Rules Civ.Proc. Rule 21, 28 U.S.C.A.

13. Federal Civil Procedure ⇌ 163

Requirement for class certification of numerosity is not to be resolved on basis of an arbitrary numerical calculation, but, rather with reference to the particular circumstances of the action. Fed.Rules Civ. Proc. Rule 23(a), 28 U.S.C.A.

14. Federal Civil Procedure ⇌ 163

For purposes of establishing numerosity requirement for class certification, smaller classes are more readily certified when relief sought is injunctive relief, benefits of which would inure not only to the known class, but also to future class of indefinite

size. Fed.Rules Civ.Proc. Rules 23, 23(a), (b)(2), 28 U.S.C.A.

15. Federal Civil Procedure $\Leftarrow$ 186.15

Action brought against Department of Housing and Urban Development charging that HUD maintained racially segregated housing could be maintained as class action with class consisting of black applicants for, and residents of, racially identifiable HUD-assisted housing in 36 East Texas counties, since actual and potential class members satisfied requirement of numerosity, common questions of law and fact were alleged, claims of named plaintiffs were typical of claims of class as a whole, plaintiffs and their counsel satisfied requirements that they would fairly and adequately represent interests of the entire class, and relief sought to be obtained was generally applicable to the class. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.; 42 U.S.C.A. §§ 1981, 1982; Fed.Rules Civ.Proc. Rules 23, 23(a), (a)(2, 3), 28 U.S.C.A.

Elizabeth Julian, East Texas Legal Services, Dallas, Tex., for plaintiffs.

William J. Cornelius, Jr., Asst. U. S. Atty., Tyler, Tex., Christine Nicholson, Dept. of Justice, Washington, D. C., for defendants.

ORDER

JUSTICE, Chief Judge.

The above-styled civil action is brought by Lucille Young, Virginia Wyatt and Helen Ruth Jackson, charging that the United States Department of Housing and Urban Development (HUD) and certain local housing authorities in East Texas have, through

policy and practice, maintained racially segregated housing in violation of the Constitution and laws of the United States. Plaintiffs Young and Wyatt are residents of Clarksville, Texas; plaintiff Jackson is a resident of Pittsburg, Texas. The three plaintiffs, all black, are applicants for public housing programs¹ in the areas of their residence. Defendants are the Secretary of HUD, the Regional Administrator of HUD responsible for the public housing programs in the relevant areas of East Texas, the Housing Authority of Clarksville and its Executive Director, and the Housing Authority of Pittsburg.

Plaintiffs claim that HUD has knowingly acquiesced in the racially discriminatory housing practices of local housing authorities in East Texas. They allege that this complicity violates the affirmative duty, incumbent on HUD as a result of certain statutes and regulations, and the United States Constitution as well, to eliminate financial participation by the federal government in illegal racial discrimination. Specifically, plaintiffs bring their action against HUD under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1982, and the Fifth Amendment to the United States Constitution. The suit against the Housing Authorities of Clarksville and Pittsburg includes claims under 42 U.S.C. § 1983, but does not include the constitutional claim.

This civil action was filed as a class action. Plaintiffs seek to represent a class of black applicants for, and residents of, HUD-assisted housing in thirty-six East Texas

1. The action was initially brought by Young and Wyatt against HUD and the Clarksville Housing Authority. On March 15, 1982, plaintiffs filed their motion for leave to file a First Amended Complaint. The amended complaint seeks to add Helen Ruth Jackson as a named plaintiff; additionally, plaintiffs seek to join the Housing Authority of Pittsburg, Texas, as a defendant. (Jackson is a resident of Pittsburg.) For reasons set forth in this order, the motion

for leave to amend will be granted. See Rule 15(a), F.R.Civ.P. See *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1968) (leave to amend should be liberally granted).

The housing programs involved in this action are actually of three kinds—public housing, rent supplement programs, and Section 8 housing. The content of these three programs is discussed at length in this order. *Infra*, at pp. 1027-1028.

I.

PLAINTIFFS' CAUSES OF ACTION

A. Title VI, Civil Rights Act of 1964.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI further creates an administrative mechanism, by which federal funding agencies are required to implement this plain principle of equality. The Act directs each federal funding agency to effectuate the provisions of § 2000d, by issuing rules, regulations, or orders of general applicability which are consistent with the underlying statute authorizing federal financial assistance. 42 U.S.C. § 2000d-1. Under § 2000d-1, federal agencies are authorized to implement the non-discrimination policy of Title VI.

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 ... of a failure to comply with [the] requirement [of non-discrimination].

Further, § 2000d-1 sets forth the procedure by which such funding termination may be accomplished.

It has been clearly held that § 2000d creates a private right of action against recipients of federal funding who do not comply with the underlying principle of equality. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967). See *Cannon v. University of Chicago*, 441

per, Jefferson, Lamar, Liberty, Marion, Morris, Nacogdoches, Newton, Orange, Panola, Polk, Red River, Rusk, Sabine, St. Augustine, Shelby, Smith, Titus, Tyler, Upshur, Van Zandt and Wood. Plaintiffs contend there are 111 racially identifiable housing projects in these counties which receive federal funding.

counties.² HUD strenuously opposes the certification of such a class. In addition to disputing the propriety of certifying this action as a class action pursuant to Rule 23, F.R.Civ.P., defendant HUD has raised a variety of questions which logically precede the Rule 23 inquiry. Specifically, defendant contends, first, that plaintiffs do not have a cause of action against HUD under Title VI. Second, defendant argues that plaintiffs have standing only to bring suit against the local housing authorities which allegedly have denied them housing on the basis of race. HUD first advanced its standing contention in a motion to dismiss filed May 6, 1980. This motion was denied on May 13, 1980. Shortly thereafter, HUD filed a Motion for Reconsideration of this order, in which it elaborated on its thesis that plaintiffs lack standing to challenge HUD's practices in East Texas. In addition, HUD has filed three lengthy briefs challenging the standing of plaintiffs, as well as the maintainability of this action as a class action. A hearing on the issue of class certification was held on October 30, 1981. In the course of the hearing, the parties adduced evidence concerning the Rule 23 requirements for class certification; additionally, the parties orally argued the threshold questions of the existence of a cause of action under Title VI and the standing of plaintiffs to bring suit against HUD.

In the course of the hearing and the parties' subsequent submissions in this matter, the issues of justiciability and standing have been blended with the questions of class certification. In complex actions such as this, this coalescence is understandable. Nonetheless, the issues are distinct and must be analyzed separately. Accordingly, the threshold issues of private right of action and standing will be addressed before the requirements of Rule 23.

2. At different points in the record of this action, plaintiffs have stated they are representing residents of 36, 38 and 39 counties. It appears that the proper scope of the action involves housing authorities in the following 36 counties: Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Delta, Franklin, Gregg, Hardin, Harrison, Henderson, Hopkins, Houston, Jas-

U.S. 677, 696 & nn.20, 21, 99 S.Ct. 1946, 1957 & nn. 20, 21, 60 L.Ed.2d 560 (1979). Thus, in this civil action, it is unquestioned that plaintiffs have a valid cause of action, implied under § 2000d, against the local housing authorities which receive federal financial assistance. However, HUD argues that Title VI contemplates a dual enforcement mechanism by which the egalitarian goals of § 2000d are to be effected: (1) private suits against recipients of federal largesse; (2) the compliance processes codified in § 2000d-1, including, ultimately, the sanction of funding termination. Under this view, the two modes of enforcement are wholly separate; i.e., private individuals are not permitted to interfere, in any manner, with the federal agency's enforcement proceedings; on the other hand, a suit by a private litigant challenging allegedly discriminatory conduct on the part of a local recipient of federal grant funds is not barred by agency actions directed toward federal de-funding.

This dichotomous view has received the imprimatur of two federal courts. *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979); *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Authority*, 523 F.Supp. 779 (D.Mass.1981). Neither of these holdings is particularly persuasive. The finding of the Third Circuit concerning private right of action under § 2000d is relegated to a footnote, the internal logic of which is open to question. 599 F.2d at 1254, n. 27. (The conclusion "that the beneficiary may not sue the administrative agency under [§ 2000d]" does not, in any sense, "follow" from the previous premises set forth in the footnote, nor is it implicit in the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1977), cited as the dispositive authority for the entire discussion.³) The holding of the district court in

Community Brotherhood similarly hails *Cannon* as mandating the conclusion that no private right of action exists under § 2000d. The court quoted at length from the problematic footnote in *NAACP v. Medical Center, Inc.*, and added little more than its assent. 523 F.Supp. at 781-82.

Both the court in *Community Brotherhood*, and HUD cite *Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30 (7th Cir. 1980), for further support. *Davis* holds that no private right of action against the federal funding agency exists under the Hill-Burton Act. 42 U.S.C. § 291 *et seq.* The opinion in *Davis* will not bear the weight of this reliance. The holding is highly conclusory in its logic, is tied closely to the particular facts of that action, and does not implicate the powerful governmental proscription of race-based discrimination.

[1] Similarly, HUD's reference to the holding in *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), is not persuasive. First, the decision in *Camenisch* has been vacated. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (question of whether preliminary injunction should have been issued was moot). Second, the court's discussion of a private right of action against a federal agency took place in the context of an individual plaintiff's attempt to secure immediate relief for alleged discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In such a situation, the court properly concluded that "a complete cut-off of federal funds to the institution was an inappropriate result for an individual complainant." 616 F.2d at 135, citing *Cannon*, 441 U.S. at 706, n. 41, 99 S.Ct. at 1962, n.41. The logic behind this holding is simple: in *Camenisch*, the plaintiff's complaint was a single complaint against the University of Texas, for failure to comply

3. In *Cannon v. University of Chicago*, the Supreme Court found that a private right of action exists under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The conclusion was reached by application of the factors mandated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Cannon* in no way settles the question of whether a pri-

vate right of action against the federal funding agency is precluded by a statutorily authorized administrative complaint process. At most, *Cannon* holds that there is no private right to participate in the actual administrative decision concerning defunding under § 2000d-1. The court in *N.A.A.C.P.* milks footnote 41 of *Cannon* for far more than it is worth.

with the provisions of the Rehabilitation Act. He did not claim that HEW had systematically failed to enforce the provisions of the act, or that it had knowingly acquiesced in ongoing non-compliance by one or more recipient institutions. In view of the limited scope of the plaintiff's complaint and the restricted nature of the remedy he sought, the court properly concluded that the administrative processes for enforcement by HEW of the terms of the act were singularly inappropriate for the claim set forth in plaintiff's private suit. The court cogently summarized its rationale:

The purpose of the administrative framework is to provide a forum in which to initiate fund termination proceedings in the event a grant recipient fails to meet its obligations. It is not intended to provide a forum for program beneficiaries to press claims of discrimination against grant recipients.

616 F.2d at 135 (emphasis supplied). It follows that, when an individual plaintiff seeks relief from purported discrimination by a recipient of federal grant money in violation of a federal statute, the appropriate avenue is a suit against the recipient. In *Camenisch*, for example, there was no question that the plaintiff had properly named the University of Texas as a defendant, in an action under § 2000d. 616 F.2d at 130-31. Such a suit might seek monetary damages, *University of Texas v. Camenisch*, *supra*, 451 U.S. at 398, 101 S.Ct. at 1835; additionally, equitable relief, enjoining further violations of the substantive statute, might be requested. However, such an action would not necessarily involve a claim that the federal agency distributing the grants had, itself, knowingly participated in discrimination, either actively or passively, by failing to pursue an affirmative duty.

4. HUD attempts to dismiss these three holdings as "pre-*Cannon*," and therefore not binding. There is, of course, no reason to assume that *Cannon* overruled these cases, *sub silentio*; nor may it be said, in any sense, that the internal reasoning of the *Cannon* decision un-

[2] The presence of such an allegation of dereliction by the federal agency wholly transforms the nature of the suit, and renders the express rationale of the *Camenisch* decision inapplicable. To the extent a plaintiff asserts that the federal agency is violating the terms of the federal statute, by abdicating an affirmative duty to eliminate discrimination, then the action is properly brought against the agency. In such a circumstance, the agency is a partner in discrimination, and may be held responsible for this complicity. See, e.g., *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974) (HUD officials were aware of discriminatory impact of housing plan they had approved; therefore, HUD should be held responsible for violation of § 2000d. 503 F.2d at 1246-47); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (same standard of discriminatory conduct applies to § 2000d action against HUD as applies to § 2000d action against local housing authority. 448 F.2d at 740); *Hicks v. Weaver*, 302 F.Supp. 619 (E.D.La.1969) ("HUD sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step of the program. Consequently, its own discriminatory conduct . . . is violative of 42 U.S.C. § 2000d." 302 F.Supp. at 623.)⁴ See also *United States v. City of Chicago*, 395 F.Supp. 329 (N.D.Ill.1975), *aff'd* 525 F.2d 695 (7th Cir. 1975) (unpublished opinion) (Secretary of Treasury enjoined from funding municipal police department which engages in racially discriminatory employment practices); *Adams v. Richardson*, 480 F.2d 1159 (D.C.Cir.1973) (*en banc*) (HEW enjoined to begin compliance proceedings against school systems operating in violation of federal constitutional and statutory requirements. HEW must engage in "good faith performance of its general obligation not to allow federal funds to be supportive

dermines the logic of the three cases cited here. If HUD is to contend that these decisions are without value, they should support their contention with argument, rather than summary citations.

of illegal discrimination." 480 F.2d at 1166. Emphasis supplied).⁵

The logic of the decisions cited here is compelling. The specific goal of Title VI is to eliminate racial discrimination from the social fabric of the nation. The constraints of comity and federalism have presented an historical limitation on the authority of the government to pursue that ambition. However, to the extent that the federal government participates in local endeavors by allocating financial resources to them, then the federal government has a legal base from which leverage may be derived to advance the principle of racial equality. From its position of benefactor, the federal government may, under § 2000d-1, use the threat of de-funding to implement the underlying policies of Title VI.

The view that Title VI is designed merely to eliminate financial participation by the federal government in racial discrimination presents an unduly narrow portrait of the Civil Rights Act of 1964. The scope of that Act and the Congressional debates which generated it stand as ample testimony to the breadth of congressional intent behind the Act. See, e.g., H.R.Rep.No.914, 1964 U.S. Code Congressional and Administrative News, p. 2391; S.Rep.No.872, *id.* at 2355. Certainly, the unarticulated premise of Title VI is that the government and private attorneys general (empowered by the private right of action implied under the Act) will, through their respective efforts, cooperatively enforce the provisions of § 2000d. Yet it is imperative to note that the implied right of private action is necessarily permissive; there is no binding obligation on private individuals victimized by discrimination in contravention of § 2000d to bring law suits challenging the proscribed conduct. On the other hand, the federal government, through its agencies, is directed, by the terms of the Act, to pursue the principle of racial equality. § 2000d-1. This direction is in the form of an affirmative duty to enforce the substantive rights of all persons within its intendantance. Ultimately, the purpose of Title VI is to codify,

and provide further protection for, the plain ~~"law of the land": that all persons living within the United States have a right to be treated equally with all others, without regard to race, color, or national origin.~~ See, e.g., 110 Cong.Rec. 5252 ("The existing law of the land is stated in [2000d].") (Sen. Humphrey).

The de-funding provisions of § 2000d-1 provide an explicit process by which the federal government is to effectuate this fundamental right. However, to the extent that these procedures stand as a limitation, they limit only the power of agencies, and they in no way undermine or compromise the breadth of the underlying principle of non-discrimination. See 110 Cong.Rec. at 5254 (Sen. Case); *id.* at 6562 (Sen. Kuchel). It is axiomatic that statutes will be read in such a manner that the various provisions are complementary and harmonious. To read § 2000d-1 as a limitation on the very rights that are protected by the previous section would violate this principle, and would also traduce elementary canons of logic.

[3] The Supreme Court has plainly held that where there is a legal right, a legal remedy will exist to protect the right. See, e.g., *Jones v. Alfred H. Mayer*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). The benefits of the affirmative duty placed on federal funding agencies, created by § 2000d, inure to all persons whose rights to equal treatment are enhanced by the positive efforts of the government. A breach of this duty, either through frank timidity or a more subtle lack of vigilance, is a violation of the underlying right, and so, *a fortiori*, is actionable. If the government fails to contribute its crucial share to the collective endeavor of eliminating discrimination, as codified in Title VI; then this failure itself amounts to a violation of that title. See *Garrett v. City of Hamtramck*, *supra*; *Gautreaux v. Romeny*, *supra*; *Hicks v. Weaver*, *supra*. This deprivation of the substantive

5. For discussion of *Adams v. Richardson*, see

below, at p. 1024.

purpose

right to equal treatment, in contravention of § 2000d, may be redressed by a private civil action. This private right of action against the federal funding agency is implied under § 2000d, according to precisely the same logic which justifies the private right of action against the recipient of federal aid. See e.g., *N.A.A.C.P. v. Medical Center, Inc.*, *supra*, 559 F.2d at 1253-58; see also *Cannon v. University of Chicago*, *supra*, 441 U.S. at 689-716, 99 S.Ct. at 1953-1967 (private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681).⁶

B. Title VIII of the Civil Rights Act of 1968.

[4] Section 801 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, provides:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

In many respects, this simple declaration of the principle of non-discrimination is the equivalent, within Title VIII, of the policy of equality which undergirds Title VI, as enunciated in § 2000d. See *supra*. The remainder of Title VIII elaborates upon the meaning of "fair housing" as used in § 3601, and delineates, with considerable specificity, certain practices which "shall be unlawful." §§ 3604-3606. However, Title VIII substantially differs from Title VI, in the articulation of the administrative process by which the goal of racial equality is to be effected. Specifically, Title VIII contains no "pinpoint" provision similar to § 2000d-1, which severely constrains the means of enforcement available to the federal funding agency. As noted previously, § 2000d-1 sets forth elaborate and often cumbersome procedures, by which the federal funding agency seeking to enforce the

non-discrimination principle of Title VI may cut off funds to grant recipients guilty of discrimination. Even after satisfaction of the procedural prerequisites, the sanctioning power of the federal agency is limited to termination of funding "to the particular program or part thereof, in which such [discrimination] has been so found." § 2000d-1(1).

Title VIII contains no similar limitation on the enforcement powers of funding agencies acting to further the fundamental principles set forth therein. The scope of the Civil Rights Act of 1968 is majestic, and its enforcement provisions are commensurately broad. The Act was passed in recognition of the

sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Traditionally the American Government has been more than neutral on this issue. The record of the U. S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heart-breaking living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong.Rec. 2278 (1968) (Senator Mondale, introducing Title VIII). The "purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups." *Id.* at 9563 (Rep. Celler). As the Supreme Court noted in its

standing. In particular, plaintiffs must establish that they are among the class of persons for whose benefit the statute was passed. The standing doctrine, and its application to this action, are discussed at length, below, at pp. 1019-1025.

6. A finding that a private right of action exists under a particular decision does not, without more, entail a finding that the action in question is properly brought. Additionally, the plaintiffs must establish that they are the proper parties to bring the action. This demonstration may be placed under the general rubric of

pathbreaking decision under Title VIII, "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1973).

In furtherance of this broad and honorable objective, Title VIII provides:

The Secretary of Housing and Urban Development shall—

* * * * *

- (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.

42 U.S.C. § 3608(d)(5).

This statute explicitly commands the Secretary of HUD to act in furtherance of the ideal of fair housing, at least so far as that goal is defined in the context of the Civil Rights Act. A variety of cases have explicitly recognized this affirmative duty. As stated by the Court of Appeals for the Second Circuit, § 3608(d)(5) requires that [a]ction must be taken to fulfill, as much as possible, the goal of open, integrated housing patterns, and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.

Otero v. New York City Housing Authority, 484 F.2d 1122, 1133 (2nd Cir. 1973); accord: *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970); *Banks v. Berk*, 341 F.Supp. 1175 (N.D. Ohio 1972); *Blackshear Residents Org. v. Housing Authority of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1971); *Sadler v. 218 Housing Corp.*, 417 F.Supp. 348 (N.D. Ga. 1976); *King v. Harris*, 464 F.Supp. 827 (E.D. N.Y. 1979), *aff'd* 614 F.2d 1288 (2nd Cir. 1980), *vacated on other grounds*, 446 U.S. 905, 100 S.Ct. 1828, 64 L.Ed.2d 256 (1980); *Resident Advisory Board v. Rizzo*, 429 F.Supp. 222 (E.D. Pa. 1977), 425 F.Supp. 987 (E.D. Pa. 1976), *aff'd on other grounds*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1457, 1458, 55 L.Ed.2d 499 (1978). See also *Cole v. Lynn*, 389 F.Supp. 99 (D.D.C. 1975).

In view of the clarity of this duty, it seems axiomatic that violations of it through inaction or indolence must be actionable. Failure of HUD "affirmatively to further the policies of [Title VIII]" is illegal in a fundamental sense. An agent of the federal government is no more at liberty to flout federal law than is a state governmental unit, or a private citizen. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). A private person victimized by an illegal act of the federal government may seek redress, by means of legal action against the offending governmental unit.

Viewed another way, the failure of HUD to perform its legal duties mandated by § 3608(d)(5) constitutes a discriminatory housing practice, in itself. Title VIII is founded on the irrefutable premise that the prevailing structure of the housing market in this country bears the stamp of a long history of discrimination in all forms of social life. Present housing allocation is distorted, both by the after-effects of legally sanctioned racial discrimination, and by the enduring prevalence of discrimination, despite a "complete arsenal of federal authority" aimed at eradicating it. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417, 88 S.Ct. 2186, 2191, 20 L.Ed.2d 1189 (1968). The Supreme Court has acknowledged the "enormity of the task of assuring fair housing," *Trafficante, supra*, 409 U.S. at 211, 93 S.Ct. at 367. In view of the scope of the mission, the "main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of highest priority.'" *Id.* The Attorney General is charged with enforcing the law against all persons, including federal agencies. *United States v. Nixon, supra*. Similarly, the concept of private attorneys general vindicating Congressional policy logically extends to suits brought to insure that federal agencies comply with their explicit duties created by statute. For this purpose,

then, a private right of action exists against HUD for violation of its affirmative duties under § 3608(d)(5).

C. Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

[5] Plaintiffs also seek relief under the post-bellum Civil Rights statutes, 42 U.S.C. §§ 1981 and 1982. Broadly put, these statutes were passed to further the principle of racial equality embodied in the Thirteenth Amendment. *Jones v. Alfred H. Mayer, supra*. The statutes provide that all persons within the jurisdiction of the United States shall have equal rights to "make and enforce contracts," (§ 1981), and "to lease real property," (§ 1982). The prohibitions of these sections plainly apply to any racial discrimination in the sale or rental of property. *Jones v. Mayer, supra*; *Stevens v. Dobs*, 483 F.2d 82 (4th Cir. 1973); *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974). Actions under this section may properly be brought against federal agencies which have allegedly contravened the guarantee of equal treatment. *Penn v. Schlesinger*, 490 F.2d 700 (5th Cir. 1973); *Baker v. F & F Investment Co.*, 489 F.2d 829 (7th Cir. 1973) (*overruled on other grounds, Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977)). Whether the action or inaction of HUD, as alleged by plaintiffs in this action, constitutes a violation of the statutes is a factual matter that must be determined after trial; plainly, though, the statutes provide a cause of action for racially discriminatory conduct. This suit is properly brought under §§ 1981 and 1982.

D. Fifth Amendment of the United States Constitution.

[6-9] Finally, plaintiffs contend that action or inaction of HUD in relation to the maintenance of public housing in East Texas violates the rights secured to them by the Fifth Amendment of the United States Constitution. It is beyond doubt that the due process clause of that amendment incorporates the constitutional guarantee of

racial equality. Any classification that violates the equal protection clause of the Fourteenth Amendment similarly offends the Fifth Amendment. *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1972); *Johnson v. Robison*, 415 U.S. 361, 364 n.4, 94 S.Ct. 1160, 1164 n.4, 39 L.Ed.2d 389 (1974). A cause of action against federal officials to redress alleged discrimination may be implied directly under the Fifth Amendment. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (gender discrimination). If the actions of HUD here implicated would constitute racial discrimination in violation of the guarantees of the Fourteenth Amendment, relief may be granted plaintiffs directly under the Fifth Amendment.

II.

STANDING

Defendant HUD has advanced, at several different times in the course of this litigation, the argument that plaintiffs lack standing to bring the present action, at least as presently structured. HUD has conceded that plaintiffs Young and Wyatt have standing to challenge the practices of the Clarksville Housing Authority. Presumably, this concession implicitly acknowledges, as well, that plaintiff Jackson may properly challenge the local policies of the Pittsburg Housing Authority. However, HUD strenuously challenges the validity of the charges brought against HUD, and the propriety of residents of Clarksville challenging the practices of local housing authorities in other areas of East Texas. In large measure, all of HUD's arguments against the maintainability of the present action have been incorporated into the general rubric of standing. Among the various contentions set forth in HUD's submission in this relation are the arguments concerning private rights of action under Title VI, previously addressed. Also, a number of arguments concerning the maintainability of this action as a class action are set forth, specifically, challenges to the commonality and typicality of the claims of the named plaintiffs.

This coalescence of the legal arguments of HUD in relation to the legal structure of this action is understandable. The doctrine of standing historically has presented enormous problems in logic and elaboration. Typically, a number of issues which are not "standing" issues technically have been subsumed under that heading, for analytical convenience. See, e.g., *Joint Anti-Fascist Refugee Committee, Inc. v. McGrath*, 341 U.S. 123, 150-157, 71 S.Ct. 624, 637-641, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); see generally Hart and Wechsler, *The Federal Courts and the Federal System*, 150-183 (1973). The standing doctrine has its jurisprudential roots in the "case or controversy" requirement of Article III. Perhaps for reasons of common origin, standing has been fused with considerations of ripeness, justiciability, reviewability, finality, or mootness, all of which are derived from Article III. Nonetheless, each concept is logically discrete; the distinct character of each doctrine is important, not merely for intellectual precision, but, more importantly, because the ultimate ability of plaintiffs to vindicate their rights depends on the resolution of these questions in a proper and logical manner.

Article III "standing", as it relates to the present action, may be reduced to two fundamental considerations: The first is whether the action challenged by plaintiffs is properly subject to judicial review, through litigation. This branch of standing is, in substance, part of the justiciability question of Article III. Nonetheless, in cases such as the present action, the question of reviewability is closely aligned with standing. The claim of defendants is that HUD's actions with respect to federal funding of housing are beyond judicial review, except insofar as the suit is brought under the Administrative Procedure Act. 5 U.S.C. § 701 *et seq.* Such a review would evaluate HUD's decisions in this relation under the familiar "arbitrary and capricious" standard. (See HUD's post-hearing brief, p. 12.) Alternatively, the argument, in its more extreme form, suggests that agency action with respect to funding decisions is conclusive, and thus beyond judicial

challenge by anyone. *Barlow v. Collins*, 397 U.S. 159, 169 n.2, 90 S.Ct. 832, 839 n.2, 25 L.Ed.2d 192 (1970).

These claims have been resolved by the previous discussion of the availability of a private right of action under the various statutes and constitutional clauses discussed above. HUD's funding decision may be characterized legitimately as administrative decisions; however, these decisions are made and effected under the aegis of statutes that, as analyzed above, create substantive rights which may be vindicated through litigation. As the Supreme Court has plainly said, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3, 93 S.Ct. 1146, 1148 n.3, 35 L.Ed.2d 536 (1973) citing *Trafficante supra*, 409 U.S. at 212, 93 S.Ct. at 368 (1973) (White, J., concurring). Thus, in view of the previous finding as to private rights of action, plaintiffs' claims satisfy the first portion of the "standing" requirement.

[10] The second, and more searching, inquiry mandated by Article III standing considerations relates to whether the particular plaintiffs bringing the action are the proper persons to be contesting the actions of defendant. *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). As the Supreme Court has said, the core of the question of standing is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

The Supreme Court, and also the lower courts, have had extraordinary difficulty articulating a cogent and manageable standard for implementing this relatively abstract concern. Every term of the court has generated an attempt to clarify the doctrine, typically without notable success.

See, most recently, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, — U.S. —, —, 102 S.Ct. 752, 757, 65, 70 L.Ed.2d 700 (1982). From these decisions, a variety of precepts may be garnered which collectively shed some light on the question of standing. The origin of these axioms is not plain. As Justice Rehnquist stated in *Valley Forge*, "it has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." — U.S. at —, 102 S.Ct. at 758. In *Trafficante*, the Supreme Court concluded that, under Title VIII, Congress intended to define standing as broadly as is permitted by Article III of the Constitution. 409 U.S. at 209, 93 S.Ct. at 366. This holding was qualified as applying only "insofar as tenants of the same housing unit that is charged with discrimination are concerned." *Id.* This limitation, though important, does not bear on the present discussion of standing; it will be addressed below, with respect to defendant HUD's contentions concerning typicality and commonality. Of importance here is the plain conclusion that any judicially imposed standing requirements, however appropriate elsewhere, would be improper in the context of suits under the Civil Rights Act of 1968. A similar conclusion would seem to apply, *perforce*, to the Civil Rights Act of 1964. Thus, an effort should be made to identify and separate those strands of the prevailing standing doctrine which are rooted in Article III; for once discerned, these elements will govern the resolution of defendant HUD's standing arguments in the instant action.

In *Valley Forge*, *supra*, the Court noted that

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and the injury

"fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. (citations omitted). Following this simple articulation of the constitutional principle of standing, the Court relegated the remaining body of familiar axioms concerning standing to the status of "prudential principles that bear on the question of standing." *Id.* at —, 102 S.Ct. at 759. Firm reliance on this dichotomy would be unwise, in view of the volatile nature of the doctrine. It may not be said with certainty that the formulation articulated by Justice Rehnquist will endure the tides of the Court's opinions on standing; rather, what Justice Rehnquist denominated as "prudential principles" may, at some time in the future, emerge as having a substantially closer tie to Article III. Hence, certain specific principles which have consistently recurred in the Court's standing decisions, albeit in different linguistic formulations, will be set forth.

In the foreground of this panoply is the statement that

[t]he "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee.

Association of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Though the "zone of interest" test of *Camp* represented, in most respects, a broadening of the class of persons who might be deemed proper plaintiffs, the Court, shortly after that decision, pointed out that this extension "is a different matter from abandoning the requirement that a party seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). The caution delivered in *Sierra Club v. Morton* signalled the commencement of a process of evolution and refine-

ment, which has largely focused on the question of "injury in fact" or, in other words, the nature of the injury. In *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674, the Court stressed that "[a]bstract injury is not enough." In *O'Shea*, the Court approved a prior holding that "[i]t must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct." 414 U.S. at 494, 94 S.Ct. at 675, quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). See also *Linda R. S. v. Richard D.*, *supra*, 410 U.S. at 617, 93 S.Ct. at 1148. Finally, of course, the "injury in fact" requirement has been interpreted to be a barrier against claims which amount to little more than "generalized grievances about the conduct of government." *Flast v. Cohen*, *supra*, 392 U.S. at 106, 88 S.Ct. at 1956; see also *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 225, 94 S.Ct. 2925, 2934, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 198, 94 S.Ct. 2940, 2957, 41 L.Ed.2d 678 (1974).

[11] The various principles set forth above should be reduced to a more manageable standard. The following matters must be considered: (1) Did the plaintiffs suffer an actual injury that (2) may be traced to the conduct of defendants, which, in turn, (3) was in contravention of a statute designed to protect or regulate a "zone of interest" of the plaintiffs? With these principles articulated, the evaluation of plaintiffs' standing to bring the present action may be conducted.

It should be noted at the outset that "[f]or the purpose of ruling on a motion to dismiss for want of standing . . . the trial . . . court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). The fundamental allegation raised by plaintiffs' complaint is the acquiescence of HUD in the racially discriminatory practices of local suppliers of housing and housing-related services in East Texas. If, in

fact, HUD has participated, either actively or passively, in the maintenance of racially segregated housing in East Texas, as alleged in the complaint, then the focus of the standing inquiry is the nature of any injury suffered by plaintiffs as a result of this conduct. Beyond doubt, black residents of East Texas, otherwise eligible for public housing, who are denied such housing because of their race, sustain an injury in fact, one that is in no way abstract. As noted previously, HUD concedes the propriety of a class action by these plaintiffs against the local housing authority of Clarksville (and impliedly Pittsburg). This concession necessarily includes an admission that the allegations of the complaint, if taken as true, constitute an "injury in fact" for the threshold purpose of determining standing.

Similarly, the third part of the three-prong test set forth above is plainly satisfied by plaintiff's complaint in this action. It is beyond doubt that the Civil Rights Act of 1964 and 1968 (Title VI and Title VIII) were enacted to protect and defend the rights of black persons to equal treatment. The sweep of Title VI is broad, and is intended to eradicate discrimination from all forms of social life. The statute explicitly enlists the power of federal funding agencies in this program. Title VIII is narrower, and is more explicitly focused on providing "fair housing" throughout the United States. The legislative history of both statutes makes clear that their purpose is to erase the legacy of racial segregation and discrimination, by equalizing the provision of services to all persons within the jurisdiction of the United States, without regard to color. Plaintiffs are obviously among those persons in whose interests the statutes were passed. The same finding is unconfutable with respect to §§ 1981 and 1982, since these statutes were designed to give direct legal effect to the Thirteenth Amendment. Of course, in broad terms all society benefits from eradication of the badges and incidents of slavery. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). However, if a specific group of

persons were to be identified as being particularly subject to the benefits of these actions, surely black Americans, who seek nothing more than equal access to governmental services, would be that group. Finally, plaintiffs have standing under the Fifth Amendment to raise claims of racial discrimination which contravene the protections of the Equal Protection Clause.

HUD's contention that plaintiffs lack standing to bring this action, then, is focused on the second part of the inquiry, as structured above: whether the injury sustained by plaintiffs may fairly be traced to the conduct of the officials. The core of this argument is that local housing programs are administered under the autonomous direction of local housing authorities without meaningful participation by HUD. Moreover, HUD argues that, even conceding for the moment HUD's culpability with respect to Clarksville and Pittsburg, plaintiffs have no standing to challenge HUD's conduct with respect to the remaining 109 housing projects in East Texas. These arguments fundamentally miss the point of this civil action. Plaintiffs' claim is that HUD's failure to comply with the terms of its affirmative duties created by § 2000d and § 3608(d)(5) violates their statutory rights. These rights are held in common by all residents of East Texas, regardless of the locality of their residence, and irrespective of the particular practices of the local housing authority.

As outlined above, Title VI and Title VIII create an affirmative duty on federal funding agencies to eradicate racial discrimination. Under the terms of traditional legal analysis, the obverse of the legal duty of one person is the creation of a right which inures to the benefit of another person. Terry, *Legal Duties and Rights*, 12 Yale L.J. 185 (1903). Black residents of East Texas are plainly within the class of persons for whose benefit these statutes were enacted. In other words, black residents are vested with a right, by virtue of the statutes, which mandate a form of affirmative action on the part of federal funding agencies. Plaintiffs Young and Wyatt, who reside in Clarksville, enjoy this right on

equal terms with plaintiff Helen Ruth Jackson, who resides in Pittsburg. Simply put, all the black persons who might benefit from effective enforcement by HUD of the policies of Title VI and Title VIII are directly injured by the reluctance or indifference of HUD toward the enforcement of their undoubted rights. This injury is related to injuries that might be sustained as the result of the active racially discriminatory housing practices implemented by local housing authorities. However, the disheartening fact that a black resident of a community may be victimized by racial prejudice that operates at two separate levels does not vitiate the right of that person to seek redress from either, or both, forms of discrimination.

An instructive analogy may be drawn to civil actions challenging racial discrimination in education. The saddening legacy of segregation in education has been the target of a long and uneven legal struggle. The goal of this battle is to eliminate the vestiges of segregation, root and branch, from the system of public education. Of necessity, legal remedies have been aimed at trucklers to discrimination at all levels of the governmental hierarchy. Local school boards may be sued for their direct role in maintaining dual school systems. *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). A state funding education agency charged with affirmatively enforcing standards of racial equality in public education may be properly named as a defendant in a suit challenging a state-wide pattern of segregation. *United States v. State of Texas*, 321 F.Supp. 1043 (E.D.Tex.1970); supplemental opinion, 330 F.Supp. 235 (E.D.Tex. 1971), *aff'd with modifications* 447 F.2d 441 (5th Cir. 1971) *stay denied sub nom. Edgar v. United States*, 404 U.S. 1206, 92 S.Ct. 8, 30 L.Ed.2d 10, *cert. denied*, 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663 (1972). Finally, the Secretary of the relevant federal agency may be sued for dereliction of the agency's duty to enforce Title VI, by not taking appropriate action to end segregation in public institutions receiving federal funds.

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir.1973) (en banc).

The last-named case, *Adams v. Richardson*, is especially illuminating. In that case, a nation-wide class action against the Secretary of Health, Education and Welfare, the court ordered the Secretary of HEW to institute a variety of Title VI compliance actions against state public education agencies. The relief was explicitly predicated on HEW's affirmative obligation under Title VI to eliminate racial discrimination from federally funded programs. The availability of judicial relief against the state agencies, or, alternatively, against the local school boards, in no way compromised the propriety of relief sought in the action against HEW.

HUD acknowledges *Adams v. Richardson* as a relevant decision, and attempts to distinguish it in a footnote in its post-hearing submission. The several points of distinction are singularly unpersuasive. First, HUD contends *Adams* was a nation-wide class action, and was not confined to a region; in other words, apparently, the instant action is too narrowly defined. This argument is bizarre, since a large part of HUD's argument has been that the action is too broad.⁷ Ultimately, in terms of class certification, these claims implicate the typicality and commonality requirements of Rule 23(a), and do not involve considerations of standing. Once it is established that plaintiffs have a legitimate cause of action against HUD, its argument in this

relation is defeated. Second, HUD contends that *Adams* is not valid precedent for the present action, because it predates *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). *Warth* is wholly inapposite to the present action against HUD. As applied to the claims of plaintiffs here, *Warth* might suggest that the residents of Clarksville could not challenge the discriminatory practices of the local housing authorities of Pittsburgh. Conspicuously absent from this analogy is any claim against HUD, the overarching federal authority whose practices commonly affect residents of both towns, regardless of the practices of the local authorities. *Warth* in no way limits the holding of *Adams*, as it relates to the present action against HUD. Third, HUD claims that factual circumstances underlying the *Adams* case presented a considerably more monolithic situation, susceptible to direct relief, than exists in this action. Briefly put, HUD argues that in *Adams*, HEW was ordered to begin compliance proceedings against a large number of education systems, all of which were essentially at the same point in terms of legal compliance. On the other hand, HUD contends, the relationships between HUD and the local housing authorities in East Texas are widely variant in form and content. In other words, there has been no uniformity of action or inaction on the part of HUD with respect to the local housing authorities.

7. HUD's contentions in this relation have been extremely idiosyncratic. HUD has maintained that the action is too broad, in that it is not confined to one local housing authority; that the action is too narrow, because it is not nation-wide; and that it is too narrow, because it does not conform to a particular geographical region of HUD. Only the last of these three arguments merits response. There is no reason that plaintiffs should be compelled to fashion their action in a manner that coincides with the administrative convenience of HUD. The proper scope of the action is to be governed by two considerations: the requirements of Rule 23 concerning commonality and typicality; and the nature of any relief to be granted. Though no arguments in this relation have been made, it might be true, for instance, that the structure of the housing market varies so substantially

within the so-called "Region VI" of HUD that a class action concerning that entire region might be impracticable under the terms of Rule 23(a). For example, as the area of school desegregation has made clear, what constitutes racial identifiability is heavily contingent on the demographical patterns of the area. It seems plain that the problems of South Texas with respect to federally-assisted housing differ markedly from those of East Texas. In any event, the nature of the plaintiff class is the central determinant of the proper scope of the class action. Of course, a court retains plenary power to supervise the litigation of the class action, to insure the interests of the class are protected. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1981), vacated on other grounds, 51 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981).

This argument is factually incorrect as it interprets the *Adams* decision, and irrelevant as well, in relation to the present action. Actually, the situation presented in *Adams* involved a wide variety of local problems; the injunction entered in that case required HEW to begin action, at a number of different points in the compliance process, depending on the status of local efforts at integration and a number of other variants. 480 F.2d at 1161. The significance of *Adams* is that the plaintiffs were permitted to secure injunctive relief against HEW, for its failure to pursue its affirmative obligation to eradicate segregation. The structure of an equitable remedy is dictated by the nature of the violation, in accordance with orthodox principles of equity. It may be true, as HUD alleges, that the nature of HUD's action or inaction with respect to local housing situations will vary widely. This is obviously a factual issue properly resolved after trial. The crucial point is that this action challenges HUD, not the local housing authorities; relief against HUD will be tailored to the nature and scope of the violation, if any. Simply stated, HUD cannot escape liability merely by claiming that its alleged derelictions lack consistency.

Plaintiffs' complaint satisfies the fundamental requirements of Article III; plaintiffs have alleged an injury in fact, which was caused by action of defendants, in contravention of statutes (and constitutional provisions) designed to protect and defend the rights of a class of persons to which plaintiffs belong. Thus, as a threshold matter, plaintiffs have standing to bring this action against HUD. This discussion has been extensive, because of the confusion generated by the parties' submissions in this relation. Essentially, the question is simple; whether the action is properly maintained against HUD for its action or inaction with respect to public housing in East Texas. Not all of the confusion may properly be traced to defendants' repeated arguments concerning the practices of local

housing authorities. As noted, plaintiffs' complaint names the local authorities of Clarksville and Pittsburg as defendants, as well as HUD. This joint action is logically untenable, in view of the nature of the class action against HUD, for its practices in East Texas.

[12] Residents of Clarksville obviously have standing to raise a claim, on behalf of all residents of that town, against the practices of the housing authority of Clarksville. Hence, plaintiffs Young and Wyatt may properly bring a civil action against the Clarksville Housing Authority, for maintenance of racially discriminatory public housing. Similarly, plaintiff Jackson may bring an action against the Pittsburg Housing Authority, for its allegedly illegal housing practices. Moreover, as here analyzed, all three of these persons may bring a civil action challenging the practices of HUD, with respect to the respective areas of their residence.⁸ As an initial matter, plaintiffs are at liberty to define the geographical scope of their cause of action.

Here, confusion is generated because these actions are combined into one civil action. Plaintiffs Young and Wyatt do not have standing to challenge the practices of the Pittsburg Housing Authority directly, except insofar as they may demonstrate direct injury to themselves as a result of those practices. Correspondingly, Jackson cannot challenge the purely local actions of the Clarksville Housing Authority, except under the same conditions. These limitations are plainly entailed in the holding in *Warth v. Seldin*, *supra*, and the general tenets of the doctrine of standing. It is apodictic that persons may not gain standing to sue a certain defendant merely by joining that defendant in a lawsuit against an entity which may properly be sued. Standing to sue is a particularized consideration, based on the relationship between the specific plaintiff and the specific defendant. The threshold requirements must be satis-

8. Again, it should be stressed that this discussion concerns standing to bring an action; the propriety of a class action of this nature addi-

tionally is contingent on the requirements of Rule 23; most particularly here, the prerequisites of commonality and typicality.

fied in each instance; otherwise, the action with respect to that defendant must fail.

Logically, then, the action as presently structured encompasses three separate civil actions: *Young, Wyatt, et al. v. Clarksville Housing Authority*; *Jackson, et al. v. Pittsburg Housing Authority*; and *Young, Wyatt, Jackson, et al. v. HUD*. Each of these actions is maintainable separately. In combination, they present insurmountable hurdles, both jurisdictional and pragmatic. Reason dictates they should be severed. Rule 21, F.R.CIV.P. provides:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court . . . of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Severance of claims is particularly appropriate when, by so doing, the nature of the actions in question is substantially clarified and the interests of the parties are thereby served. The interests of the plaintiffs are clearly advanced, by maintaining their action against HUD separate and apart from their several actions against the local housing authorities. Further, it is to the advantage of HUD that the discrete action against it does not require that it be held responsible for the autonomous actions of local housing authorities. Similarly, it is to the benefit of the local authorities to permit them to defend their actions individually, without the implication of HUD's actions under Title VI and VIII. It follows that the claims should be severed. Severance does not necessarily entail separate trials; the actions may be consolidated for trial, pursuant to Rule 42(a), even after severance, should it appear that such consolidation is warranted. *Kenvin v. Newburger, Loeb & Co.*, 37 F.R.D. 473, 475 (S.D.N.Y. 1965).

This procedural device is required by the demands of the rules governing class actions. Those rules will be examined at length below, with respect to the maintainability of this action as a class action. Insofar as this action is against HUD for its

acquiescence in racially discriminatory housing in East Texas, the named plaintiffs seek to represent a class of black residents in thirty-six East Texas counties, who are applicants for residence, or who are residents of, HUD-assisted rental housing projects which are one-race in composition or are racially identifiable. The viability of this class will be scrutinized. It is obvious that only portions of this putative class have standing to challenge the practices of any particular local housing authority. In this regard, the identification of sub-classes appears to be a proper course of action. This expedient is peculiarly appropriate as a means of solving potential conflicts within the class, and it serves to avoid such basic jurisdictional problems as lack of standing. The severance of these claims, with the potential for joint trial, likens this action to a large class action, in which certain sub-classes have been denominated. By way of analogy, the large class would consist of the residents of the thirty-six East Texas counties who are challenging HUD's enforcement practices with respect to this area; and within this broad class would be sub-classes, defined by their place of residence, who might legitimately challenge the practices of the local housing authority. The local authorities of Clarksville and Pittsburg have been named; other local authorities might be challenged. Alternatively, of course, HUD might choose to bring in the local authorities as third-party defendants in this action, pursuant to their claim that these entities, rather than HUD, are properly responsible for the maintenance of racially discriminatory housing in East Texas.

In any event, the class analysis will proceed with an examination of the class seeking to challenge HUD's practices in the area denominated by plaintiffs as East Texas. Before this analysis is undertaken, the nature of HUD's participation in the provision of federally assisted housing should be set forth, so that the nature of HUD's involvement in any alleged discrimination may be clarified.

HUD does not construct, own, or operate any housing on its own; rather, its role is

essentially promotional, through financial support, technical assistance, and regulatory oversight. Within this promotional role, of course, HUD is directed to implement the types of affirmative programs mentioned previously, as a means of fulfilling its mandate to eliminate racial discrimination in housing. Three different programs of HUD participation in local housing facilities are implicated by plaintiffs' action: public housing, rent supplement programs, and Section 8 housing. These programs involve different methods of financing; therefore, the nature of the relationship between HUD and the local housing authority in question varies according to the kind of program administered by HUD.

1. Public housing

Under the Housing Act of 1937, as amended, 42 U.S.C. § 1437, *et seq.*, HUD is authorized to make loans and annual contributions to public housing agencies, to enable these agencies to develop, operate, and maintain low-income public housing projects. Under the Act, the local housing authority which receives HUD assistance may be a creation of any governmental entity authorized to provide low-income housing, provided the authority is sanctioned by the governmental body. The housing units are owned by the local housing authority, which finances the construction costs through tax-exempt bonds. HUD guarantees repayment of the bonds through annual contributions to the authority. This financial assistance is contingent on local compliance with HUD regulations promulgated to enforce the objectives of Title VI. In substance, the regulations seek to assure non-discrimination in public housing, by requiring the local authorities to adopt tenant-selection and tenant-assignment plans consistent with the basic principle of racial equality. See 24 C.F.R. § 860.203; *e.g.*, 24 C.F.R. § 1.4(b)(2)(ii). Specifically, HUD's involvement with local housing authorities providing public housing pursuant to the Housing Act of 1937 includes HUD approval of tenant selection and assignment plans, site-selection, affirmative fair housing mar-

keting programs for new projects, and Title VI compliance reviews. See 24 C.F.R. § 200.600, *et seq.* (fair housing marketing), and § 841.202 (site and neighborhood selection).

2. Rent-supplement

The HUD rent-supplement program was established as part of the Housing and Urban Development Act of 1965, 12 U.S.C. § 1701s, essentially to assist failing multi-family rental projects, through the provision of Federal Housing Administration mortgages. The program was suspended in 1973, and replaced by the Section 8 program, 42 U.S.C. § 1437f. However, HUD continues to pay rent supplements under existing contracts. The rent-supplement program authorized HUD to contract with eligible owners of housing to make annual payments, supplemental of rent payments by qualified tenants. 12 U.S.C. § 1701s; 24 C.F.R. Part 215. Participation in the rent-supplement program was conditioned on local governmental approval, similar to that required for public housing. 24 C.F.R. § 215.15(c)(2). Though local housing owners are not required to file, for HUD's approval, specific tenant selection procedures, the owner's discretion in tenant selection must be exercised consistently with HUD's regulations, which prohibit racial discrimination. *E.g.*, 24 C.F.R. §§ 1.4(a), (b)(1). Moreover, HUD is empowered to review and approve or disapprove the owner's affirmative fair housing marketing program. 24 C.F.R. § 200.600, *et seq.*

3. Section 8 Housing

The Housing Act of 1937 was amended in 1974 by the Housing and Community Development Act. Among the amendments is Section 8, 42 U.S.C. § 1437f, which provides housing assistance payments for low income families occupying new, substantially rehabilitated, or existing units. Unlike the previous two programs, no cooperation agreement between the housing provider and a local governmental authority is required. Under Section 8 "Existing Housing" programs, HUD is authorized to make annual

contributions to housing authorities, who, in turn, may contract with specific housing owners to provide rental housing to low income families. 24 C.F.R. Part 882. In its application to HUD for financial assistance, the local housing authority is required to submit an equal opportunity housing plan. 24 C.F.R. § 882.204.

Under Section 8 "New Construction/Substantially Rehabilitated Units" programs, HUD may make financial assistance payments to owners, prospective owners, or local housing authorities who intend to provide housing for families eligible for Section 8 housing. 24 C.F.R. Parts 880-881. With limited exceptions, proposed sites for new construction of Section 8 housing will not be approved by HUD, if the site will have the effect of contravening the goal of equal housing, by increasing minority concentration in a particular area. 24 C.F.R. §§ 880.206, 881.206. The owner is required to undertake affirmative fair housing marketing programs to attract renters of all racial groups. 24 C.F.R. §§ 880.601, 881.601. Tenant selection is governed by the general principle of non-discrimination, embodied in Title VI and the accompanying regulations. See 24 C.F.R. §§ 1.4(a), (b)(1).

Thus, HUD is bound by its own regulations to implement the objectives of Title VI and Title VIII, as well as the general constitutional principle of equal protection of the laws. In this action, plaintiffs charge HUD has wholly abrogated these affirmative duties in East Texas. The action is brought as a class action, on behalf of black residents of East Texas eligible for federally assisted housing and denied the benefits of such housing, in part because of the inaction of HUD.

III.

MAINTAINABILITY AS A CLASS ACTION

Upon motion for class certification, Rule 23, F.R.CIV.P., requires that a determination be made as to whether the civil action is properly maintainable as a class action. As noted, a hearing for this purpose was

held on October 30, 1981. On the basis of the evidence adduced at that hearing and in the supplemental submissions by the parties, it has been determined that the plaintiff class in this action meets the requirements set forth in Rule 23, and should be certified as a class, for purposes of the action against HUD.

This action involves a broad-gauged challenge to the policies and practices of HUD, with respect to enforcement of the anti-discrimination principles of Title VI and VIII. HUD has registered several arguments against certification, which may be traced ultimately to the scope of plaintiffs' claim. For example, HUD has argued that the very breadth of the complaint, coupled with the possibility that HUD's response to any local problem might vary greatly, confutes the attempt of plaintiffs to bring this as a class action. These arguments will be addressed under the relevant headings of commonality and typicality. Insofar as the arguments of HUD bear more directly on the propriety of this action as a class action, they have been resolved by the foregoing discussions regarding the existence of a private right of action and the standing of plaintiffs to bring the action. In view of those threshold discussions, the requirements of Rule 23(a) will be addressed serially.

A. Numerosity

[13, 14] The requirement of numerosity is not to be resolved on the basis of an arbitrary numerical calculation, but, rather, with reference to the particular circumstances of the action. *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 1706, 64 L.Ed.2d 319 (1980). For purposes of establishing numerosity, smaller classes are more readily certified when the relief sought is injunctive relief, the benefits of which would inure not only to the known class, but also to a future class of indefinite size. *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975). See Rule 23(b)(2). Properly considered, the plaintiff class should include these unknown future class members. Of

course, joinder of such persons is inherently impracticable. *Jack v. American Linen Service*, 498 F.2d 122, 124 (5th Cir. 1974). See also *Adams v. Jefferson Davis Parish School Board*, 76 F.R.D. 621, 622 (W.D.La. 1977).

[15] As already stated, plaintiffs seek to represent a class of black applicants for, and residents of, racially identifiable HUD-assisted housing in thirty-six East Texas counties. This putative class thus includes persons in two different positions: one group who are eligible for publicly-assisted housing and who currently reside in such housing; and another group of persons who are eligible for the housing, who have applied for it, and who are currently on a waiting list. Uncontested evidence presented by plaintiffs, derived from HUD reports for 1980, indicate the following estimated numbers for the putative class:

2,292 black households, residing in public housing projects that have one or more one-race or racially identifiable sites.

3,018 black households, residing in HUD Insured/Rent Supplement projects that are one-race or racially identifiable.

156 black households, residing in HUD Section 8 New Construction or Substantial Rehabilitation Projects that are one-race or racially identifiable.

Thus, approximately 5,466 black households presently occupy rental housing which is of one race or is racially identifiable. HUD does not maintain, nor have available to it, figures indicating the number of black households presently on waiting lists for the various HUD-assisted housing projects in East Texas. Plaintiffs submitted data indicating that there are 35,080 black households in East Texas eligible for, and in need of, HUD assisted rental housing. Given that 5,466 of these households currently reside in such housing, roughly 29,614 households remain eligible for, yet currently do not reside in public housing. Clearly not all these households are presently on the waiting lists for HUD-assisted housing; however, this figure provides some indication of the magnitude of the potential class which

would benefit from any injunctive relief granted as a result of this action.

Comparison of the number of actual and potential class members in this action with the size of other classes certified in actions challenging discriminatory housing practices renders inescapable the conclusion that plaintiffs in this action have satisfied the requirement of numerosity. *E.g.*, *Drake v. Crouch*, 377 F.Supp. 722 (M.D.Tenn.1971), *aff'd* 471 F.2d 653 (6th Cir. 1972); *Ross v. Community Serv., Inc.*, 396 F.Supp. 278, 282 (D.Md.1975), *aff'd* 544 F.2d 514 (4th Cir. 1976).

B. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. On its face, the rule does not mandate absolute commonality, in the sense of identity; nor does the rule require common questions of law and fact. The language of the rule is disjunctive. Factual differences among the claims of members of the class are not fatal, if common questions of law exist. *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045, 92 S.Ct. 1309, 31 L.Ed.2d 588 (1972). Generally, the approach of courts to the commonality issue has been flexible. The requirement is generally considered satisfied, if the common questions raised by the factual and legal matters in the action predominate over any differences or variations which might exist. *E.g.*, *Doe v. First City Bancorporation of Texas, Inc.*, 81 F.R.D. 562 (S.D.Tex.1978).

Plaintiffs here allege common questions of law and fact. Initially, the common question of law is asserted to be whether HUD's action or inaction with respect to its alleged acquiescence in the maintenance of racially discriminatory housing in East Texas violates its duties under the Constitution, Title VI or Title VIII. Next, plaintiffs maintain that there are at least two common questions of fact: (a) whether HUD knowingly funds housing which is racially discriminatory; and (b) what steps HUD has taken to enforce the constitutional and

statutory mandates that racial discrimination in housing be eliminated.

HUD contends flatly that "there are no questions of law or fact common to" the putative class. In substance, HUD's claim in this relation is that the local housing authorities operate autonomously; the authorities are not united by any cognizable organizational entity, whether within East Texas or within HUD's organizational scheme. Moreover, since the projects implicated in this action include public housing projects, rent supplement programs, and Section 8 housing, HUD's involvement is of a widely varying character, which assertedly disproves any allegations of commonality. HUD further argues that HUD's compliance efforts are contingent on local circumstances, and, therefore, may not be assessed in a uniform review such as would be required by the instant action.

These arguments have been addressed above, in the section concerning standing. The possibility, even the probability, that HUD's action with respect to housing authorities in East Texas will vary greatly from locality to locality does not undermine the legitimacy of a class challenge to HUD's behavior. A useful analogy here is to "across the board" class actions brought under Title VII, challenging racial discrimination in employment. The Court of Appeals for the Fifth Circuit has plainly held that plaintiffs may challenge the employment actions of a company, at all levels of employment, even if the named plaintiff has been victimized by only one element of the policy. *Johnson v. Georgia Highway*

Express, 417 F.2d 1122 (1969); *Phillips v. Joint Legislative Committee, etc.*, 637 F.2d 1014, 1024 (5th Cir. 1981) (affirming the vitality of *Johnson*). In explanation, a person who allegedly has been terminated on the basis of race may represent all persons affected by the employer's allegedly discriminatory practices, including persons who have not been promoted, who have been underpaid, or who have been discharged, all on the basis of race. The obvious fact that the actual pattern of personnel decisions in any of these areas is likely to differ does not defeat the claim of commonality. Indeed, the "across the board" doctrine has been extended to permit a challenge to the hiring practices of a central corporation, even though the local facilities make essentially autonomous decisions. *Doe v. First City Bancorporation of Texas, supra* ("general policies [may] override local autonomy", 81 F.R.D. at 567). In a simplified sense, "across the board" class actions are approved under Rule 23 because, among other things, there is present in the claims either a common question of fact or law, or both fact and law,⁹ that is, the existence *vel non* of illegal racial discrimination in the employment practices of the defendant employer. The inevitable variations in the factual underpinnings of the claims of individual class members do not invalidate the class.

HUD's mandate under Title VI and Title VIII is plain. The agency has developed several programs by which the ultimate goal of elimination of discrimination in housing may be achieved; moreover, this

9. The phrase used here, "a common question of fact and/or law" is admittedly ambiguous. The ambiguity is the result of a recent Supreme Court decision concerning the nature of final determinations made by a trial court in actions challenging employment discrimination under Title VII. In *Pullman-Standard v. Swint*, — U.S. —, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the Court held that a trial court's finding with respect to discriminatory intent was a "pure question of fact." At —, 102 S.Ct. at 1789. The effect of this holding is not plain. It seems clear that a conclusion by a trial court that HUD had violated § 2000d, § 3608, or the Con-

stitution in its actions with respect to housing would be a conclusion of law. The component parts of such a conclusion, concerning the specific action or inaction, and also the effect and intent of HUD's behavior, would seem to be factual findings. Beyond this simple polarity, the import of the Court's decision in *Swint* is not discernible. However, in view of the present discussion, the matter need not be resolved presently. It is sufficient to say that the basic claims of the named plaintiffs share a high degree of commonality with those of the class generally.

variety of programs plainly share that common purpose. Not only do the broad directives of the statutes in question designate this singular purpose, but the accompanying regulations are explicitly aimed at effectuating the provisions of the statutes. *E.g.*, 24 C.F.R. §§ 1.1, 1.4(a), 1.4(b)(1). Whether HUD has violated the law, by abrogating its affirmative duties and thereby funding racially discriminatory housing projects in East Texas, is a common question of law in this action; indeed, in a crucial sense, that question is *the* issue in this action. The form of this alleged acquiescence may vary, but its central import is uniform, regardless of the local housing authority with which HUD works, and irrespective of the particular funding program involved.¹⁰ In many respects, commonality of this nature involves parallel, substantially overlapping considerations, such as are involved in the inquiry required under Rule 23(a)(2) for class actions of this nature: *i.e.*, whether "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." See *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335 (D.Minn.1971).¹¹ The named plaintiffs in this action claim HUD has knowingly funded racially discriminatory housing in Clarksville and Pittsburg; these assertions have in common with the claims of the class generally the basic question of

law concerning HUD's adherence to its affirmative duty. The requirement of Rule 23(a)(2) is satisfied.

C. Typicality

Rule 23 also requires that the claims of the named plaintiffs be typical of the claims of the class as a whole. Simply put, this provision requires that the claims of the plaintiffs at once be established by factual allegations concerning their own experience, and also be typical of the individualized claims of the other class members. Typicality of course, does not mean identity, but rather a broader form of congruity. See *Herbert v. Monsanto Company*, 576 F.2d 77 (5th Cir. 1978), *vacated on other grounds* 580 F.2d 178 (5th Cir. 1978); *Leisner v. New York Tel. Co.*, 358 F.Supp. 359 (S.D.N.Y.1973). The claims of plaintiffs Young, Wyatt and Jackson are typical of the claims of the class as a whole. The basic claim is identical: HUD has knowingly acquiesced in the maintenance of racially discriminatory housing facilities in East Texas. More particularly, the claims of the plaintiffs are typical, in the specific factual content of the allegations. Young and Wyatt claim they are eligible for, and desirous of, HUD-assisted housing in Clarksville; Jackson claims she is in a similar position with respect to Pittsburg. Young and Wyatt are on a waiting list for housing in Clarksville.¹² Jackson is presently awaiting placement in a housing unit in Pittsburg,

frivolous, in that it seems flatly to contradict the explicit provisions of Rule 23(b)(2), rendering cases involving injunctive relief for the class specifically appropriate for class certification.

10. HUD has argued strenuously that this class action is not properly maintainable because HUD's involvement in housing programs is likely to vary greatly from town to town. HUD cites two major reasons for these alleged variations: the different programs involved, and the likelihood that HUD efforts to monitor compliance with Title VI will be at different stages. Neither of these arguments have merit. See pp. 1030-1031, (variations in programs), and pp. 1024-1025 (different stages of compliance monitoring).

11. HUD has argued that class certification is not necessary, because the benefits of any injunctive relief against HUD would inure to all residents of the effected area, even in the absence of class certification. This argument is

12. HUD has contended that plaintiff Wyatt is not a suitable class representative because she no longer lives in Clarksville. At the class certification hearing, counsel for the plaintiff class represented that Ms. Wyatt moved out of Clarksville as a matter of desperation, because she could not find housing within that city. No factual finding in this relation may be made at this time; for present purposes, it is sufficient that Wyatt resides in East Texas, and apparently is eligible for, and has applied for, HUD assisted housing.

pursuant to an alleged agreement that she will be provided a unit as quickly as possible. Even if Jackson were to obtain housing in Pittsburg, her claim against HUD would not be rendered moot. *Trafficante v. Metropolitan Life Insurance Co.*, *supra*, plainly establishes that residents of racially discriminatory housing projects, as well as persons denied residence as a result of the discrimination, have legitimate claims against the alleged discrimination. 409 U.S. at 208-212, 93 S.Ct. at 366-368.

Thus, the positions of the three plaintiffs in their efforts to secure HUD-assisted housing in East Texas are typical of the claims of the class as a whole; each named plaintiff, like each member of the putative class, has allegedly been deprived of the opportunity to reside in HUD-assisted housing which is free from the taint of racial discrimination. Though HUD's responses to local housing practices in the specific localities of the named plaintiffs' residences may be different in degree from its response in other East Texas communities, the fundamental claims of the named plaintiffs are typical of the claims of the entire class. Hence, Rule 23(a)(3) has been satisfied.

D. Adequacy of Representation

The requirement that plaintiffs fairly and adequately represent the interests of the entire class involves two considerations. The first requirement is that the attorneys representing the class must be capable of zealously protecting the interests of the class. The court is familiar with the abilities of the attorneys representing the plaintiff class and is well satisfied that they will conscientiously and competently handle all phases of this action. The rule also requires that the named plaintiffs adequately assert and support the legal claims which form the basis of the civil action. In part, this rule mandates that the interests of the named plaintiffs coincide with those of the class as a whole. In large measure, this matter overlaps with the commonality and

typicality requirements, discussed above. Beyond that, it is necessary that the interests of plaintiffs in remedial relief not conflict with other members of the incipient class in any respect. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). All plaintiffs here have a uniform interest in the elimination of racially discriminatory housing from East Texas, and, specifically, in permanently enjoining HUD's participation in such housing. Should such relief be granted, the benefits would inure to the entire class, under the general principle undergirding the Supreme Court's decisions mandating an end to the maintenance of dual public service facilities. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Should conflicts in the specific effect or content of any remedial orders develop, in view of the limited availability of housing, such conflicts might appropriately be resolved by the use of subclasses. See *Oatis v. Crown Zellerbach*, 398 F.2d 496 (5th Cir. 1968); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981). Defendants have made no substantive argument on standing, as it concerns the possibility of conflict among the class. The presence or possibility of such a fatal conflict does not appear at this time. Accordingly, plaintiffs and their counsel have satisfied the requirements concerning adequacy of representation.

E. Relief generally applicable to the class

Apart from the requirement that any potential class satisfy each of the four portions of Rule 23(a), the Federal Rules additionally require that the class satisfy at least one of the three sub-sections of Rule 23(b). Plaintiffs in this action assert that their action meets the test of Rule 23(b)(2). This section provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . :

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this action, the plaintiff class charges that HUD has failed to take the required affirmative steps to enforce the anti-discrimination principles of Title VI and Title VIII. Though the action or inaction of HUD with respect to a given locality may vary, the claims of the plaintiff class against HUD are essentially unified. The challenged acts or inaction of HUD apply, as a broad matter, to the full class, and not merely to isolated residents of East Texas. This pattern of conduct on the part of HUD renders the action maintainable as a class action under Rule 23(b)(2). See *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973); *Rowe v. General Motors Corporation*, 457 F.2d 348, 359 n. 24 (5th Cir. 1972). See also Advisory Committee Notes to Rule 23, 39 F.R.D., at 102. ("Illustrative [of Rule 23(b)(2) actions] are various actions . . . where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

On the basis of the foregoing, this action may properly be maintained as a class action. As noted previously, the challenges lodged by HUD to certification of the class have been made in a variety of circumstances. Resolution of the issue of maintainability of the class action also dispenses with the arguments raised in defendant HUD's Motion for Reconsideration. (See, *supra*, pp. 1012-1013.) In accordance with the foregoing, it is

ORDERED that this civil action may be maintained as a class action, pursuant to Rule 23(b)(2), F.R.Civ.P. It is further

ORDERED that the plaintiff class shall consist of all black applicants for, and residents of, HUD-assisted housing in the thirty-six East Texas counties enumerated herein. It is further

ORDERED that defendant HUD's Motion for Reconsideration of the court's order of May 12, 1980, is hereby DENIED. It is further

ORDERED that plaintiff's Motion For Leave to File First Amended Complaint is GRANTED. It is further

ORDERED that the Motion of Mae Lee and Charlie Davis to intervene as plaintiffs in this civil action is DENIED. It is further

ORDERED that the actions of plaintiff class against the Clarksville Housing Authority and the Pittsburg Housing Authority shall be, and they are hereby, SEVERED from the action against the Department of Housing and Urban Development; and it is further

ORDERED that such severed actions be assigned separate numbers, but that each be retained on the docket of the undersigned judge.



JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in Parts I, III, IV, and V of which JUSTICE REHNQUIST joined.

The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.*,¹ and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.² However, I conclude that the judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations. There being four other Justices who would affirm the judgment of the Court of Appeals, that judgment is accordingly affirmed.

Thomas I. Atkins and Michael H. Sussman filed a brief for the NAACP as *amicus curiae*.

¹Section 601 of the Act, 78 Stat. 252, 42 U. S. C. § 2000d, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

²The five of us reach the conclusion that the Court of Appeals erred by different routes. JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. *Post*, at 642-645. JUSTICE MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary. *Post*, at 623. I agree with JUSTICE MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination. Part II, *infra*.

I

This class action involves a challenge by black and Hispanic police officers, petitioners here,³ to several written examinations administered by New York City between 1968 and 1970 that were used to make entry-level appointments to the city's Police Department (Department) through October 1974.⁴ The District Court found that the challenged examinations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings were not disturbed in the Court of Appeals.

fact Each member of the plaintiff class seeking relief from discrimination achieved a passing score on one of the challenged examinations and was hired as a police officer. Since appointments were made in order of test scores, however, the examinations caused the class members to be hired later than similarly situated whites, which lessened the petitioners' seniority and related benefits. Accordingly, when the Department laid off police officers in June 1975 on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores on the examinations were laid off first, and the plaintiff black and Hispanic officers were disproportionately affected by the layoffs.

On April 30, 1976, petitioners filed the present suit⁵ against the Department and other New York City officials

³The class representatives are The Guardians Association of the New York City Police Department, Inc., The Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez, and Felix E. Santos.

⁴Petitioners also alleged that the Department's 5' 7" minimum height requirement discriminated against Hispanics. The disposition of this issue in the lower courts is not now before us.

⁵This was petitioners' second judicial attack on the Department's use of the examinations. Petitioners first filed suit in 1972, but the District Court denied their motion for a preliminary injunction restraining the making of appointments from the ranked eligibility lists generated by the challenged examinations, on the basis that the eligibility lists would soon be

and entities; the respondents here. Petitioners' amended complaint alleged that the June 1975 layoffs violated their rights under Titles VI and VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, and § 2000e *et seq.*, under 42 U. S. C. § 1983, and under various other state and federal laws.⁶ The primary allegation of the complaint was that but for the discriminatory impact of the challenged examinations upon minorities, petitioners would have been hired earlier and therefore would have accumulated sufficient seniority to withstand the layoffs.

After a hearing, the District Court held that, although petitioners had failed to prove that the respondents had acted with discriminatory intent, the use of the examinations violated Title VII, because the tests had a disparate impact upon minorities and were not proved by respondents to be job-related.⁷ The court therefore granted petitioners' motion for a preliminary injunction restraining the Department from firing or recalling any police officers until seniority lists were reordered to accord petitioners the seniority they would have had but for respondents' discriminatory practices. 431 F. Supp. 526 (SDNY 1977). In light of its holding under

fully exhausted. The Court of Appeals affirmed. *Guardians Assn. v. Civil Service Comm'n*, 490 F. 2d 400 (CA2 1973). Petitioners unsuccessfully sought to revive the earlier case before filing the present suit. See 633 F. 2d 232, 235 (CA2 1980).

Among these was a claim under 42 U. S. C. § 1981, which the District Court twice rejected because petitioners failed to prove discriminatory intent, which the court found to be a necessary element of a § 1981 cause of action. 431 F. Supp. 526, 534 (SDNY 1977); 466 F. Supp. 1273, 1276, n. 4 (SDNY 1979). The Court of Appeals affirmed. 633 F. 2d, at 263-268. Petitioners raised this § 1981 issue in their petition for certiorari, but they abandoned it after our decision last Term in *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982), resolved the issue adversely to them. See Reply Brief for Petitioners 1, n.

The District Court correctly relied on *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), and its progeny, as the framework for its Title VII disparate-impact analysis. 431 F. Supp., at 538-539.

Title VII, the District Court deemed it unnecessary to decide the merits of petitioners' claims under Title VI. *Id.*, at 530, n. 2.

On respondents' appeal, the Second Circuit vacated the District Court's decision and remanded the case for reconsideration in light of our holding in *Teamsters v. United States*, 431 U. S. 324 (1977), in which we ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U. S. C. § 2000e-2(h). 562 F. 2d 38 (1977). On remand, the District Court found that *Teamsters* had rendered its previous holding untenable to the extent that it granted relief with respect to discrimination occurring prior to March 24, 1972, the date on which Title VII became applicable to municipalities. See Pub. L. 92-261, § 2(1), 86 Stat. 103. This meant that, under Title VII, class members hired prior to the effective date were not entitled to any relief, and that the remaining members of the class were only entitled to back seniority awards that did not take into account time periods prior to that date. 466 F. Supp. 1273, 1280 (SDNY 1979).

The court then turned to Title VI, which has been applicable to municipalities since its enactment in 1964, to see if it would provide relief for the time periods prior to March 24, 1972. After considering *Cort v. Ash*, 422 U. S. 66 (1975), and the various opinions in *University of California Regents v. Bakke*, 438 U. S. 265 (1978), the District Court concluded that an implied private right of action exists under Title VI. 466 F. Supp., at 1281-1285. Then, citing *Lau v. Nichols*, 414 U. S. 563 (1974), and Title VI administrative interpretative regulations adopted by several federal agencies, the court reasoned that proof of discriminatory effect is enough to establish a violation of Title VI in a private action, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. 466 F. Supp., at 1285-1287. Finally, turning to the question of relief, the court held that the

same remedies available under Title VII should be available under Title VI, unless they would conflict with some purpose peculiar to Title VI. "In the instant case, back seniority, approved as a Title VII remedy in *Franks v. Bowman Transportation Co.*, 424 U. S. 747 . . . (1976), is just as necessary to make discriminatees 'whole' under Title VI." *Id.*, at 1287.

Accordingly, relief was granted to the entire class pursuant to Title VI. In a subsequent order, the court set forth a detailed plan for the determination of the constructive seniority to which each individual member of the class would be entitled, and the corresponding monetary and nonmonetary entitlements that would be derived therefrom. The court also ordered respondents to meet and consult with petitioners on the preparation and use of future examinations. App. A99-A107.

Respondents appealed once again to the Second Circuit, which affirmed the relief under Title VII but reversed as to Title VI. 633 F. 2d 232 (1980). All three members of the panel agreed that the award of Title VI relief could not be sustained, but the panel divided on the rationale for this conclusion. Two judges held that the trial court erred by concluding that Title VI does not require proof of discriminatory intent. They believed that this Court's decision in *Lau v. Nichols*, *supra*, which held that proof of discriminatory impact could suffice to establish a Title VI violation, had been implicitly overruled by the judgment and supporting opinions in *Bakke*, *supra*. 633 F. 2d, at 270 (Kelleher, J.); *id.*, at 274-275 (Coffrin, J.).

The third member of the panel, Judge Meskill, declined to reach the question whether Title VI requires proof of discriminatory intent. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." *Id.*, at 255. Nothing in the legislative history, Judge Meskill observed, indicated that Title VI was intended to compensate individuals excluded from the benefits of a program receiving federal assistance, and in his view a compen-

satory private remedy would work at cross-purposes with the administrative enforcement mechanism expressly provided by § 602 of Title VI, 42 U. S. C. § 2000d-1, and with the objectives of the federal assistance statutes. 633 F. 2d, at 255-262.⁸

After the Second Circuit denied petitions for rehearing from both sides, 633 F. 2d 232 (1980), we granted the plaintiffs' petition for certiorari, 454 U. S. 1140,⁹ which claimed error solely on the basis that proof of discriminatory intent is not required to establish a Title VI violation.

II

The Court squarely held in *Lau v. Nichols*, *supra*, that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities. The Court of Appeals recognized this but was of the view, as are respondents, that *University of California Regents v. Bakke*, *supra*, had confined the reach of Title VI to those programs that are operated in an intentionally discriminatory manner. For two reasons, I disagree with this reading of *Bakke*.

A

First, I recognize that in *Bakke* five Justices, including myself, declared that Title VI on its own bottom reaches no

⁸ The panel majority disagreed with Judge Meskill's views, reading our decisions in *Bakke* and *Cannon v. University of Chicago*, 441 U. S. 677 (1979), as allowing a private right of action under Title VI irrespective of the compensatory effect of the relief sought or granted. Also, fearing that part of the noncompensatory relief in the District Court's order might not be available to the entire class under Title VII, the court could not agree with Judge Meskill's conclusion that his rationale made it unnecessary to decide whether Title VI requires proof of discriminatory intent. 633 F. 2d, at 274.

⁹ Respondents also filed a petition for certiorari, in which they seek review of the Court of Appeals' determination that the plaintiff class is entitled to relief under Title VII. *Civil Service Comm'n of the City of New York v. Guardians Assn.*, No. 81-432.

further than the Constitution,¹⁰ which suggests that, in light of *Washington v. Davis*, 426 U. S. 229 (1976), Title VI does not of its own force proscribe unintentional racial discrimination. The Court of Appeals thought these declarations were inconsistent with *Lau*'s holding that Title VI contains its own prohibition of disparate-impact racial discrimination. The issue in *Bakke*, however, was whether Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination, even though such affirmative action is permitted by the Constitution. Holding that Title VI does not bar such affirmative action if the Constitution does not is plainly not determinative of whether Title VI proscribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids.

It is sensible to construe Title VI, a statute intended to protect racial minorities, as not forbidding those intentional, but benign, racial classifications that are permitted by the Constitution, yet as proscribing burdensome, nonbenign discriminations of a kind not contrary to the Constitution. Although some of the language in the *Bakke* opinions has a broader sweep, the holdings in *Bakke* and *Lau* are entirely consistent. Absent some more telling indication in the *Bakke* opinions that *Lau* was being overruled, I would not so hold.¹¹

¹⁰See *University of California Regents v. Bakke*, 438 U. S., at 287 (POWELL, J.); *id.*, at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

¹¹JUSTICE STEVENS correctly states that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. . . . If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress." *Post*, at 641. However, JUSTICE STEVENS appears to ignore his own admonition by disregarding the square holding of *Lau v. Nichols*, the only case that directly addressed the present issue. In *Lau*, we "unequivocally reject[ed]" the notion that Title VI requires proof of discriminatory intent. Since Congress has chosen not to modify

B

Even if I am wrong in concluding that *Bakke* did not overrule *Lau*, as so many of my colleagues believe, there is another reason for holding that disproportionate-impact discrimination is subject to the Title VI regime. In *Lau*, the Court was unanimous in affirming a holding that the school district there involved was forbidden by Title VI to practice unintentional as well as intentional discrimination against racial minorities. Five Justices were of the view that Title VI itself forbade impact discrimination. *Lau*, 414 U. S., at 566-569. Justice Stewart, joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN, concurred in the result. The concurrence stated that it was not at all clear that Title VI, standing alone, would prohibit unintentional discrimination, but that the Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because not inconsistent with the purposes of Title VI. *Id.*, at 569-571.¹² Even if *Bakke* must be taken as overruling *Lau*'s holding that the statute itself does not reach disparate impact, none of the five Justices whose opinions arguably compel this result considered whether the statute would permit regulations that clearly reached such discrimination. And no Justice in *Bakke* took issue with the view of the three concurring Justices in *Lau*, who concluded that even if Title VI itself did not proscribe unintentional racial discrimina-

Title VI after it was "authoritatively construed" in *Lau*, we should be especially slow to adopt a new construction of the statute at this late date.

¹²Section 602 of Title VI, 78 Stat. 252, 42 U. S. C. § 2000d-1, empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance" Justice Stewart explained that the regulations therefore should be upheld as valid, because they were "reasonably related to the purposes of the enabling legislation." *Lau v. Nichols*, 414 U. S., at 571 (opinion concurring in result) (quoting *Mourning v. Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973), in turn quoting *Thorpe v. Housing Authority of City of Durham*, 393 U. S. 268, 280-281 (1969)).

tion, it nevertheless permitted federal agencies to promulgate valid regulations with such effect. The upshot of Justice Stewart's opinion was that those charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination. Nothing that was said in *Bakke* is to the contrary.

Of course, this leaves the question whether THE CHIEF JUSTICE, Justice Stewart, and JUSTICE BLACKMUN were correct in their reading of the statute. I am convinced that they were. The language of Title VI on its face is ambiguous; the word "discrimination" is inherently so. It is surely subject to the construction given the antidiscrimination proscription of Title VII in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), at least to the extent of permitting, if not requiring, regulations that reach disparate-impact discrimination. As Justice Stewart pointed out, the federal agency given enforcement authority had consistently construed Title VI in that manner. *Lau, supra*, at 570 (opinion concurring in result). Moreover, soon after the passage of Title VI, the Department of Justice, which had helped draft the legislation, assisted seven agencies in the preparation of regulations incorporating the disparate-impact standard of discrimination.¹³ These regulations were early interpretations of the statute by the agencies charged with its enforcement, and we should not reject them absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history. *Zenith Radio Corp. v. United States*, 437 U. S. 443, 450 (1978). I discern nothing in the legislative history of Title VI, and nothing has been presented by respondents, that is at odds with the administrative construction of the statutory terms. The Title, furthermore, has been consistently administered in this manner

¹³ See 29 Fed. Reg. 16274-16305 (1964). As JUSTICE MARSHALL notes, *post*, at 619, shortly after these initial regulations were promulgated, every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination.

for almost two decades without interference by Congress.¹⁴ Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.

III

Although the Court of Appeals erred in construing Title VI, it does not necessarily follow that its judgment should be reversed. As an alternative ground for affirmance, respondents defend the judgment on the basis that there is no private right of action available under Title VI that will afford petitioners the relief that they seek.¹⁵ I agree that the relief denied petitioners under Title VII is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here.

A

I deal first with the matter of a private cause of action under Title VI. In *Lau v. Nichols*, non-English-speaking Chinese students sought relief against the San Francisco School District, claiming that they should be taught the English language, that instruction should proceed in Chinese, or that some other way should be provided to afford them equal educational opportunity. This Court, reversing the Court of Appeals, gave relief under Title VI. The existence of a private cause of action under that Title, however, was not disputed in that case.

Four years later, the Court decided *University of California Regents v. Bakke*, which also involved a private suit

¹⁴ JUSTICE MARSHALL details, *post*, at 620, how Congress has rebuffed efforts to overturn the Title VI disparate-impact regulations, and how Congress, with full awareness of how the agencies were interpreting Title VI, has modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition. Cf. *Bob Jones University v. United States*, 461 U. S. 574 (1983); *Haig v. Agee*, 453 U. S. 280, 291-300 (1981) (agency interpretation of a statute may be confirmed or ratified by congressional inaction).

¹⁵ See Brief for Respondents 8-9; Tr. of Oral Arg. 21-22.

seeking relief under Title VI against state educational authorities. Four Justices assumed, but did not decide, that a private action was available under Title VI.¹⁶ A fifth Justice was of the view that no private cause of action could be implied under the Title.¹⁷ The four remaining Justices concluded that a private action was available.¹⁸

Still later, in *Cannon v. University of Chicago*, 441 U. S. 677 (1979), the Court, applying the factors specified in *Cort v. Ash*, 422 U. S. 66 (1975), held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. 441 U. S., at 694-703. Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI. *Id.*, at 710-716. Two Justices, in dissent, were of the view that private remedies under Title VI itself were not available and that the same was true under Title IX. Those Justices, however, asserted that 42 U. S. C. § 1983 was available to enforce the proscriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law. *Id.*, at 717-730 (WHITE, J., dissenting, joined by BLACKMUN, J.). Thus at least eight Justices in *Cannon* were of the view that Title VI and Title IX could be

¹⁶ *Bakke*, 438 U. S., at 281-284 (POWELL, J.); *id.*, at 328 (BRENNAN, MARSHALL, and BLACKMUN, JJ.).

¹⁷ *Id.*, at 379 (WHITE, J.). This Justice, however, was of the view that where the alleged discriminatory conduct constitutes state action, a cause of action under 42 U. S. C. § 1983 is available.

¹⁸ *Id.*, at 419-421, 420, n. 28 (STEVENS, J., joined by BURGER, C. J., and Stewart and REHNQUIST, JJ.).

enforced in a private action against a state or local agency receiving federal funds, such as the respondent Department.¹⁹ See also *Maine v. Thiboutot*, 448 U. S. 1 (1980).

B

Petitioners, however, are not entitled to a "make whole" remedy for respondents' Title VI violations. Whether a litigant has a cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U. S. 228, 239 (1979). The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief. *Bell v. Hood*, 327 U. S. 678, 684 (1946). The general rule nevertheless yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.

For example, in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11 (1979), the Court found that a private right of action for only limited relief could be implied under the Investment Advisers Act of 1940, 15 U. S. C. § 80b-1 *et seq.*, which prohibits certain practices in connection with investment advisory contracts. Section 215 of the Act declared that contracts whose formation or performance would violate the Act were void, and the Court concluded that Congress intended "that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract." 444 U. S., at 19. But the Court refused to allow recovery of monetary relief in a private suit alleging violations of the Act, stating that, in the absence of a contrary legislative intent, "where a statute expressly provides a par-

¹⁹ One Justice disagreed with the Court's holding that a private right of action could be implied under Title IX itself, without expressing a view as to whether Title IX could be privately enforced via § 1983. 441 U. S., at 730-749 (POWELL, J., dissenting).

ticular remedy or remedies, a court must be chary of reading others into it." *Ibid.*

We have also indicated that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its "power under the Spending Clause to place conditions on the grant of federal funds." *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 15 (1981). This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt. Typically, before funds are advanced, the appropriate federal official will determine whether the grantee's plan, proposal, or program will satisfy the conditions of the grant or other extension of federal funds, and the grantee will have in mind what its obligations will be. When in a later private suit brought by those for whose benefit the federal money was intended to be used it is determined, contrary to the State's position, that the conditions attached to the funds are not being complied with, it may be that the recipient would rather terminate its receipt of federal money than assume the unanticipated burdens.

Thus, the Court has more than once announced that in fashioning remedies for violations of Spending Clause statutes by recipients of federal funds, the courts must recognize that the recipient has "alternative choices of assuming the additional costs" of complying with what a court has announced is necessary to conform to federal law or of "not using federal funds" and withdrawing from the federal program entirely. *Rosado v. Wyman*, 397 U. S. 397, 420-421 (1970). Although a court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money, the recipient has the option of withdrawing and hence terminating the prospective force of the injunction.

Pennhurst State School and Hospital v. Halderman, *supra*, reiterated the *Rosado* approach: Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance. 451 U. S., at 29-30, 30, n. 23; *id.*, at 53-55 (WHITE, J., dissenting in part). The Court noted that "in no [Spending Clause] case . . . have we required a State to provide money to plaintiffs, much less required" a State to assume more burdensome obligations. *Id.*, at 29.

IV

Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder. Because it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to the benefits of a federal program but who has been intentionally discriminated against by the administrators of the program. In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.²⁰

²⁰ It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the

However that may be, the Court of Appeals in this case did not disturb the District Court's finding that there was no intentional discrimination on racial grounds. The discrimination was unintentional and resulted from the disproportionate impact of the entry-level tests on racial minorities. In this and similar situations, it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations. In such cases, proof of discriminatory impact does not end the matter. If the grantee can bear the burden of proving some "business necessity" for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation. *Griggs v. Duke Power Co.*, 401 U. S., at 431. In the typical case where deliberate discrimination on racial grounds is not shown, the recipient will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

The foregoing considerations control decision in this case. I note first that Title VI is spending-power legislation:

time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable "so as to have the opportunity of judging for himself as to the degree of this probability." 5 A. Corbin, *Contracts* § 1014 (1964). See also *id.*, §§ 1006-1019; 11 W. Jaeger, *Williston on Contracts* § 1344A (3d ed. 1968). And in tort law, usually only persons who have intentionally or recklessly violated another's rights are liable for punitive damages. See *Smith v. Wade*, 461 U. S. 30 (1983); W. Prosser, *Law of Torts* 9-10 (4th ed. 1971).

"It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' *Oklahoma v. Civil Service Commission*, 330 U. S. 127, 143 (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered." 110 Cong. Rec. 3546 (1964) (Sen. Humphrey).

Accord, *id.*, at 1527 (memorandum by Rep. Celler) (validity of Title VI "rests on the power of Congress to fix the terms on which Federal funds will be made available"); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore). Title VI rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination." *Id.*, at 7064 (Sen. Ribicoff). Accord, *id.*, at 7054-7055, 7062 (Sen. Pastore); *id.*, at 7102 (Sen. Javits); *id.*, at 6566 (memorandum by the Republican Members of the House Committee on the Judiciary). The mandate of Title VI is "[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money." *Id.*, at 1542 (Rep. Lindsay). Title VI imposes no obligations but simply "extends an option" that potential recipients are free to accept or reject. *Id.*, at 1527 (memorandum by Rep. Celler) (quoting *Massachusetts v. Mellon*, 262 U. S. 447, 480 (1923)). This legislative history clearly shows that Congress intended Title VI to be a typical "contractual" spending-power provision.

Since Title VI is Spending Clause legislation, it is presumed that private litigants seeking to enforce compliance with its terms are entitled to no more than the limited remedy deemed available to the plaintiffs in *Pennhurst*. The inquiry is not at this point complete, however, because, like all rules of statutory construction, the *Pennhurst* presumption must "yield . . . to persuasive evidence of contrary legislative intent." *Transamerica*, 444 U. S., at 20. As in *Transamerica*, however, the relevant legislative history of Title VI reveals that "what evidence of intent exists in this case, cir-

cumstantial though it may be, weighs against the implication of a private right of action for a monetary award in a case such as this," *ibid.*, at least absent proof of intentional discrimination.

Title VI does not explicitly allow for *any* form of a private right of action. This fact did not go unnoticed by Senators Keating and Ribicoff, who unsuccessfully proposed an amendment adding to Title VI a provision expressly allowing the institution of "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, . . . by the person aggrieved." 109 Cong. Rec. 15375 (1963). Senator Keating explained that, under this proposal, if someone violated Title VI, funds could be denied or "a suit for specific performance of the nondiscrimination requirement could be brought . . . by the victim of the discrimination." *Id.*, at 15376. The relevant language of the proposed amendment was identical to that of § 204(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a-3(a), the provision creating a private right of action to enforce Title II of the Act, which deals with discrimination in public accommodations. Suits under § 204(a) are "private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U. S. 400, 401-402 (1968). Senator Keating thought that elementary fairness required that victims of Title VI-proscribed discrimination be accorded the same private right of action as allowed in the "proposed education and public accommodations titles of the [Civil Rights] bill."²¹

The Keating-Ribicoff proposal was not included in Title VI, but the important point for present purposes is that even the

²¹ Hearings on S. 1731 and S. 1750 before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 335 (1963) (Sen. Keating).

most ardent advocates of private enforcement of Title VI contemplated that private plaintiffs would only be awarded "preventive relief." Like the drafters of Title II, they did not intend to allow private plaintiffs to recover monetary awards. Although the expressed intent of Senators Keating and Ribicoff is alone not determinative of whether a compensatory remedy may be obtained in a private action to enforce Title VI, "it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Transamerica Mortgage Advisors, Inc. v. Lewis*, *supra*, at 22. Surely, it did not intend to do so where intentional discrimination is not shown.

The remaining indications of congressional intent are also circumstantial, but they all militate in favor of the conclusion that only prospective relief ordering compliance with the terms of the grant is appropriate as a private remedy for Title VI violations in cases such as this. The "greatest possible emphasis" was given to the fact that the "real objective" of Title VI was "the elimination of discrimination in the use and receipt of Federal funds." 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). See also *id.*, at 7062 (Sen. Pastore). The remedy of termination of assistance was regarded as "a last resort, to be used only if all else fails," because "cutoffs of Federal funds would defeat important objectives of Federal legislation, without commensurate gains in eliminating racial discrimination or segregation." *Id.*, at 6544, 6546 (Sen. Humphrey).²²

To ensure that this intent would be respected, Congress included an explicit provision in § 602 of Title VI that requires that any administrative enforcement action be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U. S. C. § 2000d-1. Although an award of damages would not be as drastic a remedy as a cutoff of funds,

²² See also, *e. g.*, 110 Cong. Rec. 1520 (1964) (Rep. Celler); *id.*, at 7063 (Sen. Pastore); *id.*, at 7065 (Sen. Ribicoff).

the possibility of large monetary liability for unintended discrimination might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes. See 633 F. 2d, at 261-262 (opinion of Meskill, J.).

In summary, there is no legislative history that in any way rebuts the *Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power. What little evidence there is evinces an intent not to allow any greater relief.²³ I conclude that compensatory relief, or

²³ The lower courts are generally in agreement that it is not appropriate to award monetary damages for Title VI violations. See *Lieberman v. University of Chicago*, 660 F. 2d 1185 (CA7 1981) (Title IX case), cert. denied, 456 U. S. 937 (1982); *Drayden v. Needville Independent School District*, 642 F. 2d 129, 133 (CA5 1981); *Nabke v. HUD*, 520 F. Supp. 5, 10-11 (WD Mich. 1981); *Concerned Tenants Assn. v. Indian Trails Apartments*, 496 F. Supp. 522, 526-527 (ND Ill. 1980); *Rendon v. Utah State Dept. of Employment Security Job Service*, 454 F. Supp. 534 (Utah 1978). See also C. Antieau, Federal Civil Rights Acts §317 (1980); 2 N. Dorsen, P. Bender, B. Neuborne, & S. Law, Political and Civil Rights in the United States 608 (4th ed. 1979). But cf. *Miener v. Missouri*, 673 F. 2d 969, 977-979 (CA8 1982) (holding that damages may be recovered under § 504 of the Rehabilitation Act of 1973, which was considered to be "closely analogous" to Title VI); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (Neb.) (dicta), aff'd without mention of remedies, 524 F. 2d 1013 (CA8 1975); *Quiroz v. City of Santa Ana*, 18 FEP Cases 1138 (CD Cal. 1978) (dicta); *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (DC 1976) (dicta).

JUSTICE STEVENS argues, *post*, at 638, that even if Title VI authorizes only a limited remedy, full relief is available in this case because the petitioners "sought relief under 42 U. S. C. § 1983," and § 1983 "provides a damages remedy." Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute. Thus, in *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 27-29 (1981), the Court indicated that, even if the plaintiffs were entitled to relief under § 1983 for defendants' alleged violations of certain Spending Clause legislation, the defendants would not be required "to provide money to [the] plaintiffs."

other relief based on past violations of the conditions attached to the use of federal funds, is not available as a private remedy for Title VI violations not involving intentional discrimination.²⁴

V

If the relief unavailable under Title VII and ordered under Title VI is the kind of relief that should be withheld in enforcing a Spending Clause statute, the Court should affirm the judgment of the Court of Appeals without more. Only if all or some of this relief is the kind of declaratory or prospective relief that private enforcement of Title VI properly contemplates should the Court of Appeals be reversed in whole or in part. To resolve this matter, I now consider the items of re-

²⁴ JUSTICE MARSHALL erroneously contends, *post*, at 632, that my view "would allow recipients to violate the conditions of their contracts until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money." This is not so, because the Federal Government can always sue any recipient who fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. See *Bell v. New Jersey*, 461 U. S. 773, 794 (1983) (WHITE, J., concurring). But it is an entirely different matter to subject the recipient to open-ended liability to private plaintiffs. JUSTICE MARSHALL's third-party beneficiary analogy, *post*, at 632-633, is appealing, but he ignores the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs. Of course, not every contract that benefits third persons accords enforceable rights in such persons; it is a question of intent. See 4 A. Corbin, Contracts § 777 (1951). Section 313 of the Restatement (Second) of Contracts (1981) states that a party who contracts with a government agency to do an act or render a service to the public is generally *not* subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform. The only exceptions to this rule involve situations where the terms of the contract provide for such liability, or where the governmental entity would be subject to liability to the injured member of the public. *Ibid.* Neither of these exceptions is applicable in the present context.

relief ordered by the District Court to determine if any element is a permissible injunctive remedy.

Although the Eleventh Amendment cases are not dispositive here, in holding that only prospective relief is available to remedy violations of federal law by state officials, the Court in *Edelman v. Jordan*, 415 U. S. 651, 667 (1974), observed that the difference between permissible and impermissible relief "will not in many instances be that between day and night." It seems as patent here as in the Eleventh Amendment context that the relief cannot include a monetary award for past wrongs, even if the award is in the form of "equitable restitution" instead of damages. See *id.*, at 665-667. However, prospective relief need not be "totally without effect on the [defendant's] revenues"; injunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court's decree, will have to spend more money "than if they had been left free to pursue their previous course of conduct." *Id.*, at 667-668. The key question for present purposes is whether the decree requires the payment of funds or grants other relief, "not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" or other relief based on or flowing from violations at a prior time when the defendant "was under no court-imposed obligation to conform to a different standard." *Id.*, at 668.

The District Court in the present case granted a number of relatively discrete items of relief. First, each class member was awarded constructive seniority, which included the right to: (1) "all monetary entitlements which [the class members] would have received had they been appointed on their constructive seniority date," including backpay and back medical and insurance benefits; and (2) all other entitlements relative to the award of constructive seniority, including salary, benefits, and pension rights. Also, respondents were directed to give a sergeant's examination to those class members whose

constructive seniority would have entitled them to take the last such examination. Finally, in an effort to insure that future hiring practices would be nondiscriminatory, respondents were ordered to consult with petitioners on the preparation and use of future police officer examinations for the next two years, and to provide petitioners with race and ethnicity information regarding the scores of the next scheduled examination. App. A99-A107.²⁵

On the one hand, it is obvious that the award of backpay and back benefits constitutes relief based upon past conduct no longer permissible; it therefore should not stand. On the other hand, it is without doubt that the portion of the order requiring consultation to insure that future examinations will not have discriminatory effects constitutes permissible injunctive relief aimed at conforming respondents' future conduct to the declared law.

This leaves the award of constructive seniority for purposes of future entitlements: the right to take the special sergeant's examination ordered by the District Court and the right to an increase of salary and benefits to the level warranted by the constructive seniority. Because such an award affects only the future conduct of a defendant, it arguably could be categorized as permissible prospective relief. I conclude, however, that an award of constructive seniority, for any purpose whatsoever, must be deemed impermissible retroactive relief.

In *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 766-767 (1976), we identified two types of seniority—"benefit" and "competitive status." The first of these, "which determines pension rights, length of vacations, size of insurance coverage and unemployment benefits, and the like, is analogous to backpay. . . . Benefit-type seniority, like backpay, serves to work complete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the

²⁵ As permitted by 42 U. S. C. § 2000e-5(k) and 42 U. S. C. § 1988, the District Court also awarded attorney's fees to petitioners. App. A107.

one who was wronged." *Id.*, at 786-787 (POWELL, J.). A general bar to the award of retroactive seniority "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law." *Id.*, at 767, n. 27 (opinion of the Court). Since constructive benefit-type seniority in this case is obviously restitutionary and remedial in nature, it is "a form of compensation" to those whose rights were violated at a time when the respondents were "under no court-imposed obligation to conform to a different standard." *Edelman v. Jordan*, 415 U. S., at 668. It is therefore not an appropriate remedy for the Title VI violations alleged here.

An award of "competitive status" seniority, although prospective in form, nevertheless constitutes a form of compensation or relief based on past conduct now deemed violative of the Act. In no respect can such an award be said to be "a necessary consequence," *ibid.*, of future Title VI compliance by the employer. It therefore must also be considered an inappropriate Title VI remedy. I also note that competitive-type seniority "determines an employee's preferential rights to various economic advantages at the expense of other employees. These normally include the order of layoff and recall of employees, job and trip assignments, and consideration for promotion." *Franks, supra*, at 787 (POWELL, J.). Although an award of constructive seniority of this nature does not result in any increased costs to the wrongdoing employer, it "directly implicate[s] the rights and expectations of perfectly innocent employees," 424 U. S., at 788, and it can only be viewed as compensation for a past wrong. Accordingly, I conclude that neither "benefit" nor "competitive status" constructive seniority may be obtained as a private remedy for Title VI violations, at least in the absence of proof of intentional discrimination.

In view of the foregoing, it is apparent to me that the only proper Title VI relief granted by the District Court is the order directing the respondents to take actions and make disclosures intended to insure that future hiring practices will

be nondiscriminatory and valid. However, this relief is wholly sustainable under the District Court's findings and conclusions with respect to petitioners' Title VII claim, and all members of the class will fully benefit from it.²⁶ There is thus no need to disturb the judgment of the Court of Appeals.

VI

In conclusion, for the reasons expressed above, I am convinced that discriminatory intent is not an essential element of a Title VI violation, but that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI. Such relief should not include an award of constructive seniority. Albeit on different grounds, the judgment below is

*Affirmed.*²⁷

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE REHNQUIST joins as to Part II, concurring in the judgment.

With reluctance, I write separately. The many opinions filed in this case draw lines that are not required by, and

²⁶ Under Title VII, this type of relief can be granted unconditionally. Under Title VI, the defendants should be given the option of complying or terminating participation in the federal program. See Parts IV and V, *supra*.

²⁷ Despite the numerous opinions, the views of at least five Justices on two issues are identifiable. The dissenters, JUSTICES BRENNAN, MARSHALL, BLACKMUN, and STEVENS, join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard. See n. 2, *supra*. A different majority, however, would not allow compensatory relief in the absence of proof of discriminatory intent. JUSTICE REHNQUIST and I reach this conclusion directly. See Parts III and IV, *supra*; *post*, at 612 (REHNQUIST, J., concurring in judgment). JUSTICE POWELL, joined by THE CHIEF JUSTICE, *post*, at 608-610, believes that no private relief should ever be granted under Title VI under any circumstances. JUSTICE O'CONNOR, *post*, at 615, would hold that all relief should be denied unless discriminatory intent is proved. It follows from the views of these three latter Justices that no compensatory relief should be awarded if discriminatory animus is not shown.

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GUARDIANS ASS'N v. CIV. SERV. COM'N OF CITY OF N.Y.

163 U.S. 582

Cite as 103 S.Ct. 3221 (1983)

3221

in some rare circumstances the presence
of state-law issues may weigh in favor of
that surrender . . . the presence of feder-
al-law issues must always be a major
consideration weighing against surren-
der." *Id.*, at 25-26, 103 S.Ct., at 941-942.

Today that "major consideration" is but a
peppercorn in the scales, outweighed by
the phantom command of the McCarran
Amendment. Instead of trying to reconcile
this decision with *Moses H. Cone* and other
prior cases, the Court ¹⁵⁸¹merely says: "But
water rights adjudication is a virtually
unique type of proceeding, and the McCar-
ran Amendment is a virtually unique federal
statute, and we cannot in this context be
guided by general propositions." *Ante.*, at
3216.

I submit that it is the analysis in Part IV
of the Court's opinion that is "virtually
unique." Accordingly, I respectfully dis-
sent.



463 U.S. 582, 77 L.Ed.2d 866

GUARDIANS ASSOCIATION, etc., et
al., Petitioners

v.

CIVIL SERVICE COMMISSION OF the
CITY OF NEW YORK et al.

No. 81-431.

Argued Nov. 1, 1982.

Decided July 1, 1983.

Black and Hispanic members of city
police department brought employment dis-
crimination suit alleging that layoffs, car-
ried out pursuant to department's "last-
hired, first-fired" policy were discriminato-
ry. The United States District Court for
the Southern District of New York, 431
F.Supp. 526, Robert L. Carter, J., granted
preliminary injunction and defendants ap-
pealed. The Court of Appeals, 562 F.2d 38,
vacated and remanded. On reman^d the

United States District Court for the South-
ern District of New York, 466 F.Supp.
1273, Robert L. Carter, J., granted prelimi-
nary injunctive relief, and defendants ap-
pealed. The Court of Appeals, Meskill, Cir-
cuit Judge, 633 F.2d 232, affirmed in part
and reversed in part and remanded, and
certiorari was granted. The Supreme
Court, Justice White, held that Black and
Hispanic members of city police depart-
ment who brought Title VI suit challenging
city police department's "last-hired, first-
fired" policy were not entitled to compensa-
tory relief, or other relief based on past
violations of conditions attached to use of
federal funds, in absence of showing of
intentional discrimination.

Affirmed.

Justice Powell concurred in the judg-
ment and filed an opinion in which Chief
Justice Burger joined and in part of which
Justice Rehnquist joined.

Justice Rehnquist filed an opinion con-
curring in the judgment.

Justice O'Connor filed an opinion con-
curring in the judgment.

Justice Marshall dissented and filed an
opinion.

Justice Stevens, dissented and filed an
opinion in which Justice Brennan and Jus-
tice Blackmun joined.

1. Civil Rights ⇐9.10

Black and Hispanic members of city
police department who challenged depart-
ment's "last-hired, first-fired" policy as dis-
crimination had only to show that the de-
partment's actions and policies produced
discriminatory effects in order to prove a
violation of regulations promulgated pursu-
ant to Title VI of the Civil Rights Act of
1964. Civil Rights Act of 1964, § 601 et
seq., as amended, 42 U.S.C.A. § 2000d et
seq.

2. Civil Rights ⇐9.12

Black and Hispanic members of city
police department who brought Title VI
suit challenging city police department's

discriminatory
intent
3226 - 7-intent
3228 - private cause
3230 - remedy
3231 - Title VI

"last-hired, first-fired" policy were not entitled to compensatory relief, or other relief based on past violations of conditions attached to use of federal funds, in absence of showing of intentional discrimination. Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.

3. Civil Rights § 13.4(6)

Proof of purposeful discrimination is a necessary element of a valid claim under Title VI of the Civil Rights Act of 1964. (Per concurring opinions of Justice Powell and Justice O'Connor and dissenting opinion of Justice Stevens.) Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.

Syllabus *

Petitioner black and Hispanic police officers were appointed to the New York City Police Department upon achieving passing scores on the examinations administered to make entry-level appointments. Since appointments were made in order of test scores, however, the examinations caused blacks and Hispanics to be hired later than similarly situated whites, which lessened petitioner officers' seniority and related benefits. Accordingly, when the Department subsequently laid off police officers on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores were laid off first, and petitioner officers were disproportionately affected by the layoffs. Petitioner officers and petitioner organizations then brought a class action in Federal District Court against respondents (the Department and other New York City officials and entities), alleging that the layoffs violated their rights under, *inter alia*, Titles VI and VII of the Civil Rights Act of 1964. Citing administrative regulations promulgated under Title VI, the District Court ultimately held that an implied private right of action existed under Title VI and that proof of discriminatory effect was enough to establish a viola-

tion of Title VI, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. The District Court granted certain relief under Title VII, and also granted the following relief under Title VI: (1) Each class member was awarded constructive seniority, including the right to backpay and back medical and insurance benefits which he would have received had he been appointed on his constructive seniority date; (2) respondents were directed to give a sergeant's examination to those class members whose constructive seniority would have entitled them to take the last such examination; and (3) respondents were ordered to consult with petitioners on the preparation and use of future examinations to insure that future hiring practices would be nondiscriminatory. The Court of Appeals affirmed the relief under Title VII, but reversed as to Title VI, holding that the awards of Title VI relief could not be sustained because proof of discriminatory intent was required.

Held: The judgment is affirmed.

633 F.2d 232 (CA 2, 1980), affirmed.

Justice WHITE concluded that discriminatory intent is not an essential element of a Title VI violation. Justice WHITE, joined by Justice REHNQUIST, also concluded that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI, that such relief should not include an award of constructive seniority, and that the Court of Appeals' judgment should be affirmed on this basis, since the relief denied petitioners under that judgment is unavailable to them under Title VI. Pp. 3227-3234.

Justice POWELL, joined by THE CHIEF JUSTICE, would affirm the Court of Appeals' judgment on the ground that private suits to enforce Title VI are not authorized or, joined by THE CHIEF JUSTICE and Justice REHNQUIST, would affirm the judgment on the alternative

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ground that the Court of Appeals correctly held that a showing of intentional discrimination is a prerequisite to a successful Title VI claim. Pp. 3235-3237.

Justice O'CONNOR would affirm the Court of Appeals' judgment on the ground that proof of purposeful discrimination is a necessary element of a valid Title VI claim and that hence implementing regulations incorporating an impact standard are not valid. Pp. 3237-3239.

mus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations. There being four other Justices who would affirm the judgment of the Court of Appeals, that judgment is accordingly affirmed.

11

1585

1583 1 Christopher Crowley, New York City, for petitioners.

Leonard Koerner, New York City, for respondents.

1584 1 Justice WHITE announced the judgment of the Court and delivered an opinion, in Parts I, III, IV, and V of which Justice REHNQUIST joined.

The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*,¹ and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.² However, I conclude that the judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory ani-

This class action involves a challenge by black and Hispanic police officers, petitioners here,³ to several written examinations administered by New York City between 1968 and 1970 that were used to make entry-level appointments to the city's Police Department (Department) through October 1974.⁴ The District Court found that the challenged examinations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings were not disturbed in the Court of Appeals.

Each member of the plaintiff class seeking relief from discrimination achieved a passing score on one of the challenged examinations and was hired as a police officer. Since appointments were made in order of test scores, however, the examinations caused the class members to be hired later than similarly situated whites, which lessened the petitioners' seniority and related benefits. Accordingly, when the Department laid off police officers in June

1. Section 601 of the Act, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

2. The five of us reach the conclusion that the Court of Appeals erred by different routes. Justice STEVENS, joined by Justice BRENNAN and Justice BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. *Post*, at 3253-3255. Justice MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is neces-

sary. *Post*, at 3243. I agree with Justice MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination. Part II, *infra*.

3. The class representatives are The Guardians Association of the New York City Police Department, Inc., The Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez, and Felix E. Santos.

4. Petitioners also alleged that the Department's 5'7" minimum height requirement discriminated against Hispanics. The disposition of this issue in the lower courts is not now before us.

1975 on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores on the examinations were laid off first, and the plaintiff black and Hispanic officers were disproportionately affected by the layoffs.

On April 30, 1976, petitioners filed the present suit⁵ against the Department and other New York City officials¹⁵⁸⁶ and entities, the respondents here. Petitioners' amended complaint alleged that the June 1975 layoffs violated their rights under Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and § 2000e *et seq.*, under 42 U.S.C. § 1983, and under various other state and federal laws.⁶ The primary allegation of the complaint was that but for the discriminatory impact of the challenged examinations upon minorities, petitioners would have been hired earlier and therefore would have accumulated sufficient seniority to withstand the layoffs.

After a hearing, the District Court held that, although petitioners had failed to prove that the respondents had acted with discriminatory intent, the use of the examinations violated Title VII, because the tests had a disparate impact upon minorities and were not proved by respondents to be job-related.⁷ The court therefore granted petitioners' motion for a preliminary injunction restraining the Department from firing or recalling any police officers until seniority lists were reordered to accord petitioners the seniority they would have had but for respondents' discriminatory practices. 431

5. This was petitioners' second judicial attack on the Department's use of the examinations. Petitioners first filed suit in 1972, but the District Court denied their motion for a preliminary injunction restraining the making of appointments from the ranked eligibility lists generated by the challenged examinations, on the basis that the eligibility lists would soon be fully exhausted. The Court of Appeals affirmed. *Guardians Assn. v. Civil Service Comm'n*, 490 F.2d 400 (CA2 1973). Petitioners unsuccessfully sought to revive the earlier case before filing the present suit. See 633 F.2d 232, 235 (CA2 1980).

6. Among these was a claim under 42 U.S.C. § 1981, which the District Court twice rejected because petitioners failed to prove discriminatory intent, which the court found to be a neces-

F.Supp. 526 (SDNY 1977). In light of its holding under Title VII, the District Court¹⁵⁸⁷ deemed it unnecessary to decide the merits of petitioners' claims under Title VI. *Id.*, at 530, n. 2.

On respondents' appeal, the Second Circuit vacated the District Court's decision and remanded the case for reconsideration in light of our holding in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), in which we ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U.S.C. § 2000e-2(h). 562 F.2d 38 (1977). On remand, the District Court found that *Teamsters* had rendered its previous holding untenable to the extent that it granted relief with respect to discrimination occurring prior to March 24, 1972, the date on which Title VII became applicable to municipalities. See Pub.L. 92-261, § 2(1), 86 Stat. 103. This meant that, under Title VII, class members hired prior to the effective date were not entitled to any relief, and that the remaining members of the class were only entitled to back seniority awards that did not take into account time periods prior to that date. 466 F.Supp. 1273, 1280 (SDNY 1979).

The court then turned to Title VI, which has been applicable to municipalities since its enactment in 1964, to see if it would provide relief for the time periods prior to March 24, 1972. After considering *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d

sary element of a § 1981 cause of action. 431 F.Supp. 526, 534 (SDNY 1977); 466 F.Supp. 1273, 1276, n. 4 (SDNY 1979). The Court of Appeals affirmed. 633 F.2d, at 263-268 (CA2 1980). Petitioners raised this § 1981 issue in their petition for certiorari, but they abandoned it after our decision last Term in *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982), resolved the issue adversely to them. See Reply Brief for Petitioners 1, n.

7. The District Court correctly relied on *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and its progeny, as the framework for its Title VII disparate-impact analysis. 431 F.Supp., at 538-539.

25 (1975), and the various opinions in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the District Court concluded that an implied private right of action exists under Title VI. 466 F.Supp., at 1281-1285. Then, citing *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), and Title VI administrative interpretative regulations adopted by several federal agencies, the court reasoned that proof of discriminatory effect is enough to establish a violation of Title VI in a private action, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. 466 F.Supp., at 1285-1287. Finally, turning to the question of relief, the court held that the same remedies available under Title VII should be available under Title VI, unless they would conflict with some purpose peculiar to Title VI. "In the instant case, back seniority, approved as a Title VII remedy in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 ... [96 S.Ct. 1251, 47 L.Ed.2d 444] (1976), is just as necessary to make discriminatees 'whole' under Title VI." *Id.*, at 1287.

Accordingly, relief was granted to the entire class pursuant to Title VI. In a subsequent order, the court set forth a detailed plan for the determination of the constructive seniority to which each individual member of the class would be entitled, and the corresponding monetary and non-monetary entitlements that would be derived therefrom. The court also ordered respondents to meet and consult with petitioners on the preparation and use of future examinations. App. A99-A107.

Respondents appealed once again to the Second Circuit, which affirmed the relief

8. The panel majority disagreed with Judge Meskill's views, reading our decisions in *Bakke* and *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), as allowing a private right of action under Title VI irrespective of the compensatory effect of the relief sought or granted. Also, fearing that part of the noncompensatory relief in the District Court's order might not be available to the entire class under Title VII, the court could not agree with Judge Meskill's conclusion that his rationale

under Title VII but reversed as to Title VI. 633 F.2d 232 (1980). All three members of the panel agreed that the award of Title VI relief could not be sustained, but the panel divided on the rationale for this conclusion. Two judges held that the trial court erred by concluding that Title VI does not require proof of discriminatory intent. They believed that this Court's decision in *Lau v. Nichols*, *supra*, which held that proof of discriminatory impact could suffice to establish a Title VI violation, had been implicitly overruled by the judgment and supporting opinions in *Bakke*, *supra*. 633 F.2d, at 270 (Kelleher, J.); *id.*, at 274-275 (Coffrin, J.).

The third member of the panel, Judge Meskill, declined to reach the question whether Title VI requires proof of discriminatory intent. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." *Id.*, at 255. Nothing in the legislative history, Judge Meskill observed, indicated that Title VI was intended to compensate individuals excluded from the benefits of a program receiving federal assistance, and in his view a compensatory private remedy would work at cross-purposes with the administrative enforcement mechanism expressly provided by § 602 of Title VI, 42 U.S.C. § 2000d-1, and with the objectives of the federal assistance statutes. 633 F.2d, at 255-262.*

After the Second Circuit denied petitions for rehearing from both sides, 633 F.2d 232 (1980), we granted the plaintiffs' petition for certiorari, 454 U.S. 1140, 102 S.Ct. 997, 71 L.Ed.2d 291,⁹ which claimed error solely on the basis that proof of discriminatory

made it unnecessary to decide whether Title VI requires proof of discriminatory intent. 633 F.2d, at 274.

9. Respondents also filed a petition for certiorari, in which they seek review of the Court of Appeals' determination that the plaintiff class is entitled to relief under Title VII. *Civil Service Comm'n of the City of New York v. Guardians Assn.*, No. 81-432.

intent is not required to establish a Title VI violation.

II

The Court squarely held in *Lau v. Nichols*, *supra*, that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities. The Court of Appeals recognized this but was of the view, as are respondents, that *University of California Regents v. Bakke*, *supra*, had confined the reach of Title VI to those programs that are operated in an intentionally discriminatory manner. For two reasons, I disagree with this reading of *Bakke*.

A

First, I recognize that in *Bakke* five Justices, including myself, declared that Title VI on its own bottom reaches no ¹⁵⁹⁰ further than the Constitution,¹⁰ which suggests that, in light of *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), Title VI does not of its own force proscribe unintentional racial discrimination. The Court of Appeals thought these declarations were inconsistent with *Lau*'s holding that Title VI contains its own prohibition of disparate-impact racial discrimination. The issue in *Bakke*, however, was whether Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination, even though such affirmative action is permitted by the Constitution. Holding that Title VI does not bar such affirmative action if the Constitution does not is plainly not determinative of whether Title VI pro-

scribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids.

It is sensible to construe Title VI, a statute intended to protect racial minorities, as not forbidding those intentional, but benign, racial classifications that are permitted by the Constitution, yet as proscribing burdensome, nonbenign discriminations of a kind not contrary to the Constitution.

Although some of the language in the *Bakke* opinions has a broader sweep, the holdings in *Bakke* and *Lau* are entirely consistent. Absent some more telling indication in the *Bakke* opinions that *Lau* was being overruled, I would not so hold.¹¹ *Lau* was not overruled.

B

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[1] Even if I am wrong in concluding that *Bakke* did not overrule *Lau*, as so many of my colleagues believe, there is another reason for holding that disproportionate-impact discrimination is subject to the Title VI regime. [In *Lau*, the Court was unanimous in affirming a holding that the school district there involved was forbidden by Title VI to practice unintentional as well as intentional discrimination against racial minorities.] Five Justices were of the view that Title VI itself forbade impact discrimination. *Lau*, 414 U.S., at 566-569, 94 S.Ct., at 788-790. Justice Stewart, joined by THE CHIEF JUSTICE and Justice BLACKMUN, concurred in the result. The concurrence stated that it was not at all clear that Title VI, standing alone, would prohibit unintentional discrimination, but that the Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because not inconsistent with the purposes of Title VI. *Id.*,

10. See *University of California Regents v. Bakke*, 438 U.S., at 287, 98 S.Ct., at 2746-2747, 57 L.Ed.2d 750 (POWELL, J.); *id.*, at 328, 98 S.Ct., at 2767-2768 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

11. Justice STEVENS correctly states that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation.... If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be

performed by Congress." *Post*, at 3253. However, Justice STEVENS appears to ignore his own admonition by disregarding the square holding of *Lau v. Nichols*, the only case that directly addressed the present issue. In *Lau*, we "unequivocally reject[ed]" the notion that Title VI requires proof of discriminatory intent. Since Congress has chosen not to modify Title VI after it was "authoritatively construed" in *Lau*, we should be especially slow to adopt a new construction of the statute at this late date.

at 569-571, 94 S.Ct., at 789-791.¹² Even if *Bakke* must be taken as overruling *Lau*'s holding that the statute itself does not reach disparate impact, none of the five Justices whose opinions arguably compel this result considered whether the statute would permit regulations that clearly reached such discrimination. And no Justice in *Bakke* took issue with the view of the three concurring Justices in *Lau*, who concluded that even if Title VI itself did not proscribe unintentional racial discrimination, it nevertheless permitted federal agencies to promulgate valid regulations with such effect. [The upshot of Justice Stewart's opinion was that those charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination. Nothing that was said in *Bakke* is to the contrary.]

Of course, this leaves the question whether THE CHIEF JUSTICE, Justice Stewart, and Justice BLACKMUN were correct in their reading of the statute. I am convinced that they were. The language of Title VI on its face is ambiguous; the word "discrimination" is inherently so. It is surely subject to the construction given the antidiscrimination proscription of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), at least to the extent of permitting, if not requiring, regulations that reach disparate-impact discrimination. As Justice

12. Section 602 of Title VI, 78 Stat. 252, 42 U.S.C. § 2000d-1, empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance...." Justice Stewart explained that the regulations therefore should be upheld as valid, because they were "'reasonably related to the purposes of the enabling legislation.'" *Lau v. Nichols*, 414 U.S., at 571, 94 S.Ct., at 790-791 (opinion concurring in result) (quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318 (1973), in turn quoting *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-281, 89 S.Ct. 518, 525-526, 21 L.Ed.2d 474 (1969)).

13. See 29 Fed.Reg. 16274-16305 (1964). As Justice MARSHALL notes, *post*, at 3241, shortly

Stewart pointed out, the federal agency given enforcement authority had consistently construed Title VI in that manner. *Lau, supra*, 414 U.S., at 570, 94 S.Ct., at 790 (opinion concurring in result). Moreover, soon after the passage of Title VI, the Department of Justice, which had helped draft the legislation, assisted seven agencies in the preparation of regulations incorporating the disparate-impact standard of discrimination.¹³ These regulations were early interpretations of the statute by the agencies charged with its enforcement, and we should not reject them absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978). I discern nothing in the legislative history of Title VI, and nothing has been presented by respondents, that is at odds with the administrative construction of the statutory terms. The Title, furthermore, has been consistently administered in this manner [for almost two decades without interference by Congress.¹⁴ Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.]

III

Although the Court of Appeals erred in construing Title VI, it does not necessarily

after these initial regulations were promulgated, every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination.

14. Justice MARSHALL details, *post*, at 3241-3242, how Congress has rebuffed efforts to overturn the Title VI disparate-impact regulations, and how Congress, with full awareness of how the agencies were interpreting Title VI, has modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition. Cf. *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983); *Haig v. Agee*, 453 U.S. 280, 291-300, 101 S.Ct. 2766, 2773-2778, 69 L.Ed.2d 640 (1981) (agency interpretation of a statute may be confirmed or ratified by congressional inaction).

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follow that its judgment should be reversed. As an alternative ground for affirmance, respondents defend the judgment on the basis that there is no private right of action available under Title VI that will afford petitioners the relief that they seek.¹⁵ I agree that the relief denied petitioners under Title VII is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here.

A

I deal first with the matter of a private cause of action under Title VI. In *Lau v. Nichols*, non-English-speaking Chinese students sought relief against the San Francisco School District, claiming that they should be taught the English language, that instruction should proceed in Chinese, or that some other way should be provided to afford them equal educational opportunity. This Court, reversing the Court of Appeals, gave relief under Title VI. The existence of a private cause of action under that Title, however, was not disputed in that case.

Four years later, the Court decided *University of California Regents v. Bakke*,¹⁵⁹⁴ which also involved a private suit seeking relief under Title VI against state educational authorities. Four Justices assumed, but did not decide, that a private action was available under Title VI.¹⁶ A fifth Justice was of the view that no private cause of action could be implied under the Title.¹⁷ The four remaining Justices concluded that a private action was available.¹⁸

15. See Brief for Respondents 8-9; Tr. of Oral Arg. 21-22.

16. *Bakke*, 438 U.S., at 281-284, 98 S.Ct., at 2743-2745 (POWELL, J.); *id.*, at 328, 98 S.Ct., at 2767-2768 (BRENNAN, MARSHALL, and BLACKMUN, JJ.).

17. *Id.*, at 379, 98 S.Ct., at 2793 (WHITE, J.). This Justice, however, was of the view that where the alleged discriminatory conduct constitutes state action, a cause of action under 42 U.S.C. § 1983 is available.

Still later, in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Court, applying the factors specified in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. 441 U.S., at 694-703, 99 S.Ct., at 1956-1961. Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI. *Id.*, at 710-716, 99 S.Ct., at 1964-1968. Two Justices, in dissent, were of the view that private remedies under Title VI itself were not available and that the same was true under Title IX. Those Justices, however, asserted that 42 U.S.C. § 1983 was available to enforce the prescriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law. *Id.*, at 717-730, 99 S.Ct., at 1968-1975 (WHITE, J., dissenting, joined by BLACKMUN, J.). Thus at least eight Justices in *Cannon* were of the view that Title VI and Title IX could be enforced in a private action against a state or local agency receiving federal funds, such as the respondent Department.¹⁹ See also *Maine v. Thi-*

18. *Id.*, at 419-421, 420, n. 28, 98 S.Ct., at 2813-2815, 2814, n. 28 (STEVENS, J., joined by BURGER, C.J., and Stewart and REHNQUIST, JJ.).

19. One Justice disagreed with the Court's holding that a private right of action could be implied under Title IX itself, without expressing a view as to whether Title IX could be privately enforced via § 1983. 441 U.S., at 730-749, 99 S.Ct., at 1974-1985 (POWELL, J., dissenting).

process by which
it decided
there was a
private cause
of action under
Title VI

boutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

B

[2] Petitioners, however, are not entitled to a "make whole" remedy for respondents' Title VI violations. Whether a litigant has a cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979). [The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief. *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). The general rule nevertheless yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.]

For example, in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), the Court found that a private right of action for only limited relief could be implied under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, which prohibits certain practices in connection with investment advisory contracts. Section 215 of the Act declared that contracts whose formation or performance would violate the Act were void, and the Court concluded that Congress intended "that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract." 444 U.S., at 19, 100 S.Ct., at 247. But the Court refused to allow recovery of monetary relief in a private suit alleging violations of the Act, stating that, in the absence of a contrary legislative intent, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Ibid.*

We have also indicated that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress

pursuant to its "power under the Spending Clause to place conditions on the grant of federal funds." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 15, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt. Typically, before funds are advanced, the appropriate federal official will determine whether the grantee's plan, proposal, or program will satisfy the conditions of the grant or other extension of federal funds, and the grantee will have in mind what its obligations will be. When in a later private suit brought by those for whose benefit the federal money was intended to be used it is determined, contrary to the State's position, that the conditions attached to the funds are not being complied with, it may be that the recipient would rather terminate its receipt of federal money than assume the unanticipated burdens.

Thus, the Court has more than once announced that in fashioning remedies for violations of Spending Clause statutes by recipients of federal funds, the courts must recognize that the recipient has "alternative choices of assuming the additional costs" of complying with what a court has announced is necessary to conform to federal law or of "not using federal funds" and withdrawing from the federal program entirely. *Rosado v. Wyman*, 397 U.S. 397, 420-421, 90 S.Ct. 1207, 1221-1222, 25 L.Ed.2d 442 (1970). Although a court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money, the recipient has the option of withdrawing and hence terminating the prospective force of the injunction.

¹⁵⁹⁶ *Pennhurst State School and Hospital v. Halderman*, *supra*, reiterated the *Rosado* approach: Remedies to enforce spending

power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance. 451 U.S., at 29-30, 30, n. 23, 101 S.Ct., at 1546, n. 23; *id.*, at 53-55, 101 S.Ct., at 1558-1559 (WHITE, J., dissenting in part). The Court noted that "in no [Spending Clause] case ... have we required a State to provide money to plaintiffs, much less required" a State to assume more burdensome obligations. *Id.*, at 29, 101 S.Ct., at 1546.

IV

Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder. Because it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to the benefits of a federal program but who has been intentionally discriminated against by the administrators of the program. In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.²⁰

20. It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable "so as to have the opportunity of judging for

However that may be, the Court of Appeals in this case did not disturb the District Court's finding that there was no intentional discrimination on racial grounds. The discrimination was unintentional and resulted from the disproportionate impact of the entry-level tests on racial minorities. In this and similar situations, it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations. In such cases, proof of discriminatory impact does not end the matter. If the grantee can bear the burden of proving some "business necessity" for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation. *Griggs v. Duke Power Co.*, 401 U.S., at 431, 91 S.Ct., at 853. In the typical case where deliberate discrimination on racial grounds is not shown, the recipient will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

The foregoing considerations control decision in this case. I note first that Title VI is spending-power legislation:

himself as to the degree of this probability." 5 A. Corbin, Contracts § 1014 (1964). See also *id.*, §§ 1006-1019; 11 W. Jaeger, Williston on Contracts § 1344A (3d ed. 1968). And in tort law, usually only persons who have intentionally or recklessly violated another's rights are liable for punitive damages. See *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); W. Prosser, Law of Torts 9-10 (4th ed. 1971).

remedy

proof defense

remedy

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"It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 [67 S.Ct. 544, 553, 91 L.Ed. 794] (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered." 110 Cong.Rec. 6546 (1964) (Sen. Humphrey).

Accord, *id.*, at 1527 (memorandum by Rep. Celler) (validity of Title VI "rests on the power of Congress to fix the terms on which Federal funds will be made available"); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore). Title VI rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination." *Id.*, at 7064 (Sen. Ribicoff). Accord, *id.*, at 7054-7055, 7062 (Sen. Pastore); *id.*, at 7102 (Sen. Javits); *id.*, at 6566 (memorandum by the Republican Members of the House Committee on the Judiciary). The mandate of Title VI is "[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money." *Id.*, at 1542 (Rep. Lindsay). Title VI imposes no obligations but simply "extends an option" that potential recipients are free to accept or reject. *Id.*, at 1527 (memorandum by Rep. Celler) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 480, 43 S.Ct. 597, 598, 67 L.Ed. 1078 (1923)). This legislative history clearly shows that Congress intended Title VI to be a typical "contractual" spending-power provision.

Since Title VI is Spending Clause legislation, it is presumed that private litigants seeking to enforce compliance with its terms are entitled to no more than the limited remedy deemed available to the plaintiffs in *Pennhurst*. The inquiry is not at this point complete, however, because, like all rules of statutory construction, the *Pennhurst* presumption must "yield ... to

persuasive evidence of contrary legislative intent." *Transamerica*, 444 U.S., at 20, 100 S.Ct., at 247. As in *Transamerica*, however, the relevant legislative history of Title VI reveals that "what evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action for a monetary award in a case such as this," *ibid.*, at least absent proof of intentional discrimination. 1600

Title VI does not explicitly allow for *any* form of a private right of action. This fact did not go unnoticed by Senators Keating and Ribicoff, who unsuccessfully proposed an amendment adding to Title VI a provision expressly allowing the institution of "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, ... by the person aggrieved." 109 Cong.Rec. 15375 (1963). Senator Keating explained that, under this proposal, if someone violated Title VI, funds could be denied or "a suit for specific performance of the nondiscrimination requirement could be brought ... by the victim of the discrimination." *Id.*, at 15376. The relevant language of the proposed amendment was identical to that of § 204(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), the provision creating a private right of action to enforce Title II of the Act, which deals with discrimination in public accommodations. Suits under § 204(a) are "private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-402, 88 S.Ct. 964, 965-966, 19 L.Ed.2d 1263 (1968). Senator Keating thought that elementary fairness required that victims of Title VI-proscribed discrimination be accorded the same private right of action as allowed in the "proposed education and

public accommodations titles of the [Civil Rights] bill." 21

The Keating-Ribicoff proposal was not included in Title VI, but the important point for present purposes is that even the ¹⁶⁰¹ most ardent advocates of private enforcement of Title VI contemplated that private plaintiffs would only be awarded "preventive relief." Like the drafters of Title II, they did not intend to allow private plaintiffs to recover monetary awards. Although the expressed intent of Senators Keating and Ribicoff is alone not determinative of whether a compensatory remedy may be obtained in a private action to enforce Title VI, "it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Transamerica Mortgage Advisors, Inc. v. Lewis*, *supra*, 444 U.S., at 22, 100 S.Ct., at 248. Surely, it did not intend to do so where intentional discrimination is not shown.

The remaining indications of congressional intent are also circumstantial, but they all militate in favor of the conclusion that only prospective relief ordering compliance with the terms of the grant is appropriate as a private remedy for Title VI violations in cases such as this. The "greatest possible emphasis" was given to the fact that the "real objective" of Title VI was "the elimination of discrimination in the use and receipt of Federal funds." 110 Cong.Rec. 6544 (1964) (Sen. Humphrey). See also *id.*,

at 7062 (Sen. Pastore). The remedy of termination of assistance was regarded as "a last resort, to be used only if all else fails," because "cutoffs of Federal funds would defeat important objectives of Federal legislation, without commensurate gains in eliminating racial discrimination or segregation." *Id.*, at 6544, 6546 (Sen. Humphrey). 22

To ensure that this intent would be respected, Congress included an explicit provision in § 602 of Title VI that requires that any administrative enforcement action be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. § 2000d-1. Although an award of damages would not be as drastic a remedy as a cutoff of funds, ¹⁶⁰² the possibility of large monetary liability for unintended discrimination might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes. See 633 F.2d, at 261-262 (opinion of Meskill, J.).

In summary, there is no legislative history that in any way rebuts the *Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power. What little evidence there is evinces an intent not to allow any greater relief. 23 I conclude

21. Hearings on S. 1731 and S. 1750 before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 335 (1963) (Sen. Keating).

22. See also, *e.g.*, 110 Cong.Rec. 1520 (1964) (Rep. Celler); *id.*, at 7063 (Sen. Pastore); *id.*, at 7065 (Sen. Ribicoff).

23. The lower courts are generally in agreement that it is not appropriate to award monetary damages for Title VI violations. See *Lieberman v. University of Chicago*, 660 F.2d 1185 (CA7 1981) (Title IX case), cert. denied, 456 U.S. 937, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982); *Drayden v. Needville Independent School District*, 642 F.2d 129, 133 (CA5 1981); *Nabke v. HUD*, 520 F.Supp. 5, 10-11 (WD Mich.1981); *Concerned Tenants Assn. v. Indian Trails Apartments*, 496 F.Supp. 522, 526-527 (ND Ill.1980); *Rendon v. Utah State Dept. of Employment Security Job*

Service, 454 F.Supp. 534 (Utah 1978). See also C. Anticau, *Federal Civil Rights Acts* § 317 (1980); 2 N. Dorsen, P. Bender, B. Neuborne, & S. Law, *Political and Civil Rights in the United States* 608 (4th ed. 1979). But cf. *Miener v. Missouri*, 673 F.2d 969, 977-979 (CA8 1982) (holding that damages may be recovered under § 504 of the Rehabilitation Act of 1973, which was considered to be "closely analogous" to Title VI); *Gilliam v. City of Omaha*, 388 F.Supp. 842 (Neb.) (dicta), aff'd without mention of remedies, 524 F.2d 1013 (CA8 1975); *Quiroz v. City of Santa Ana*, 18 FEP Cases 1138 (CD Cal.1978) (dicta); *Flanagan v. President & Directors of Georgetown College*, 417 F.Supp. 377 (DDC 1976) (dicta).

Justice STEVENS argues, *post*, at 3251, that even if Title VI authorizes only a limited remedy, full relief is available in this case because the petitioners "sought relief under 42 U.S.C.

¹⁶⁰³ that compensatory relief, or ¹⁶⁰⁴ other relief based on past violations of the conditions attached to the use of federal funds, is not available as a private remedy for Title VI violations not involving intentional discrimination.²⁴

V

If the relief unavailable under Title VII and ordered under Title VI is the kind of relief that should be withheld in enforcing a Spending Clause statute, the Court should affirm the judgment of the Court of Appeals without more. Only if all or some of this relief is the kind of declaratory or prospective relief that private enforcement of Title VI properly contemplates should the Court of Appeals be reversed in whole or in part. To resolve this matter, I now consider the items of ¹⁶⁰⁴ relief ordered by the District Court to determine if any element is a permissible injunctive remedy.

Although the Eleventh Amendment cases are not dispositive here, in holding that only prospective relief is available to remedy violations of federal law by state officials, the Court in *Edelman v. Jordan*, 415 U.S. 651, 667, 94 S.Ct. 1347, 1357, 39 L.Ed.2d 662 (1974), observed that the dif-

§ 1983," and § 1983 "provides a damages remedy." Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute. Thus, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 27-29, 101 S.Ct. 1531, 1544-1546, 67 L.Ed.2d 694 (1981), the Court indicated that, even if the plaintiffs were entitled to relief under § 1983 for defendants' alleged violations of certain Spending Clause legislation, the defendants would not be required "to provide money to [the] plaintiffs."

24. Justice MARSHALL erroneously contends, *post*, at 3248, that my view "would allow recipients to violate the conditions of their contracts until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money." This is not so, because the Federal Government can always sue any recipient who fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. See *Bell v. New Jersey*, 461 U.S. 773, 794, 103 S.Ct. 2187, 2198, 75 L.Ed.2d 2187 (1983) (WHITE, J., con-

ference between permissible and impermissible relief "will not in many instances be that between day and night." It seems as patent here as in the Eleventh Amendment context that the relief cannot include a monetary award for past wrongs, even if the award is in the form of "equitable restitution" instead of damages. See *id.*, at 665-667, 94 S.Ct., at 1356-1358. However, prospective relief need not be "totally without effect on the [defendant's] revenues"; injunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court's decree, will have to spend more money "than if they had been left free to pursue their previous course of conduct." *Id.*, at 667-668, 94 S.Ct., at 1358. The key question for present purposes is whether the decree requires the payment of funds or grants other relief, "not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" or other relief based on or flowing from violations at a prior time when the defendant "was under no court-imposed obligation to conform to a different standard." *Id.*, at 668, 94 S.Ct., at 1358.

curing). But it is an entirely different matter to subject the recipient to open-ended liability to private plaintiffs. Justice MARSHALL's third-party beneficiary analogy, *post*, at 3248-3249, is appealing, but he ignores the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs. Of course, not every contract that benefits third persons accords enforceable rights in such persons; it is a question of intent. See 4 A. Corbin, *Contracts* § 777 (1951). Section 313 of the Restatement (Second) of Contracts (1981) states that a party who contracts with a government agency to do an act or render a service to the public is generally *not* subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform. The only exceptions to this rule involve situations where the terms of the contract provide for such liability, or where the governmental entity would be subject to liability to the injured member of the public. *Ibid.* Neither of these exceptions is applicable in the present context.

The District Court in the present case granted a number of relatively discrete items of relief. First, each class member was awarded constructive seniority, which included the right to: (1) "all monetary entitlements which [the class members] would have received had they been appointed on their constructive seniority date," including backpay and back medical and insurance benefits; and (2) all other entitlements relative to the award of constructive seniority, including salary, benefits, and pension rights. Also, respondents were directed to give a sergeant's examination to those class members whose ¹⁶⁰⁵constructive seniority would have entitled them to take the last such examination. Finally, in an effort to insure that future hiring practices would be nondiscriminatory, respondents were ordered to consult with petitioners on the preparation and use of future police officer examinations for the next two years, and to provide petitioners with race and ethnicity information regarding the scores of the next scheduled examination. App. A99-A107.²⁵

On the one hand, it is obvious that the award of backpay and back benefits constitutes relief based upon past conduct no longer permissible; it therefore should not stand. On the other hand, it is without doubt that the portion of the order requiring consultation to insure that future examinations will not have discriminatory effects constitutes permissible injunctive relief aimed at conforming respondents' future conduct to the declared law.

This leaves the award of constructive seniority for purposes of future entitlements: the right to take the special sergeant's examination ordered by the District Court and the right to an increase of salary and benefits to the level warranted by the constructive seniority. Because such an award affects only the future conduct of a defendant, it arguably could be categorized as permissible prospective relief. I conclude, however, that an award of construc-

tive seniority, for any purpose whatsoever, must be deemed impermissible retroactive relief.

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766-767, 96 S.Ct. 1251, 1265, 47 L.Ed.2d 444 (1976), we identified two types of seniority—"benefit" and "competitive status." The first of these, "which determines pension rights, length of vacations, size of insurance coverage and unemployment benefits, and the like, is analogous to backpay.... Benefit-type seniority, like backpay, serves to work complete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the ¹⁶⁰⁶one who was wronged." *Id.*, at 786-787, 96 S.Ct., at 1275 (POWELL, J.). A general bar to the award of retroactive seniority "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law." *Id.*, at 767, n. 27, 96 S.Ct., at 1265, n. 27 (opinion of the Court). Since constructive benefit-type seniority in this case is obviously restitutionary and remedial in nature, it is "a form of compensation" to those whose rights were violated at a time when the respondents were "under no court-imposed obligation to conform to a different standard." *Edelman v. Jordan*, 415 U.S., at 668, 94 S.Ct., at 1357. It is therefore not an appropriate remedy for the Title VI violations alleged here.

An award of "competitive status" seniority, although prospective in form, nevertheless constitutes a form of compensation or relief based on past conduct now deemed violative of the Act. In no respect can such an award be said to be "a necessary consequence," *ibid.*, of future Title VI compliance by the employer. It therefore must also be considered an inappropriate Title VI remedy. I also note that competitive-type seniority "determines an employee's preferential rights to various economic advantages at the expense of other employees.

25. As permitted by 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988, the District Court also award-

ed attorney's fees to petitioners. App. A107.

These normally include the order of layoff and recall of employees, job and trip assignments, and consideration for promotion." *Franks, supra*, 424 U.S., at 787, 96 S.Ct., at 1275 (POWELL, J.). Although an award of constructive seniority of this nature does not result in any increased costs to the wrongdoing employer, it "directly implicate[s] the rights and expectations of perfectly innocent employees," 424 U.S., at 788, 96 S.Ct., at 1276, and it can only be viewed as compensation for a past wrong. Accordingly, I conclude that neither "benefit" nor "competitive status" ~~constructive seniority may be obtained as a private remedy for Title VI violations, at least in the absence of proof of intentional discrimination.~~

In view of the foregoing, it is apparent to me that the only proper Title VI relief granted by the District Court is the order directing the respondents to take actions and make disclosures intended to insure that future hiring practices will be nondiscriminatory and valid. However, this relief is wholly sustainable under the District Court's findings and conclusions with respect to petitioners' Title VII claim, and all

members of the class will fully benefit from it.²⁶ There is thus no need to disturb the judgment of the Court of Appeals.

VI

In conclusion, for the reasons expressed above, I am convinced that discriminatory intent is not an essential element of a Title VI violation, but that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI. Such relief should not include an award of constructive seniority. Albeit on different grounds, the judgment below is

*Affirmed.*²⁷

Justice POWELL, with whom THE CHIEF JUSTICE joins, and with whom Justice REHNQUIST joins as to Part II, concurring in the judgment.

With reluctance, I write separately. The many opinions filed in this case draw lines that are not required by, and indeed in some instances seem incompatible with, our prior decisions. Our opinions today will further confuse rather than guide.¹

26. Under Title VII, this type of relief can be granted unconditionally. Under Title VI, the defendants should be given the option of complying or terminating participation in the federal program. See Parts IV and V, *supra*.

27. Despite the numerous opinions, the views of at least five Justices on two issues are identifiable. The dissenters, Justices BRENNAN, MARSHALL, BLACKMUN, and STEVENS, join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard. See n. 2, *supra*. A different majority, however, would not allow compensatory relief in the absence of proof of discriminatory intent. Justice REHNQUIST and I reach this conclusion directly. See Parts III and IV, *supra*; *post*, at 3237 (REHNQUIST, J., concurring in judgment). Justice POWELL, joined by THE CHIEF JUSTICE, *post*, at 3235-3236, believes that no private relief should ever be granted under Title VI under any circumstances. Justice O'CONNOR, *post*, at 3239, would hold that all relief should be denied unless discriminatory intent is proved. It follows from the views of these three latter Justices that no compensatory relief should be awarded if discriminatory animus is not shown.

1. In particular, the Court is divided as to the standard of proof required to prove violations of rights in cases involving Title VI. Seven Members of the Court agree that a violation of the statute itself requires proof of discriminatory intent. See *infra*, at 3236-3237; *post*, at 3237 (REHNQUIST, J., concurring in judgment); *post*, at 3237-3238, and n. 1 (O'CONNOR, J., concurring in judgment); *post*, at 3253 (STEVENS, J., dissenting, joined by BRENNAN and BLACKMUN, JJ.) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim"). Only Justices WHITE and MARSHALL believe that a violation of Title VI may be established by proof of discriminatory effect, and Justice WHITE would recognize only noncompensatory, prospective relief for such a violation. See *ante*, at 3232-3233. Justices BRENNAN, BLACKMUN, and STEVENS, however, believe that a violation of the regulations adopted pursuant to Title VI may be established by proof of discriminatory impact. See *post*, at 3255 (STEVENS, J., dissenting).

Thus, a majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations

I

In *Cannon v. University of Chicago*, 441 U.S. 677, 730, 99 S.Ct. 1946, 1974-1975, 60 L.Ed.2d 560 (1979) (POWELL, J., dissenting), I would have held that Congress intended no implied private right of action under Title IX of the Education Amendments of 1972. For the same general reasons, I also would hold that petitioners may not maintain this action under Title VI of the Civil Rights Act, 1964.

1609 Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without clear legislative guidance. We have recognized repeatedly that whether a private right of action may be implied requires a determination of congressional intent. See, e.g., *Jackson Transit Authority v. Transit Union*, 457 U.S. 15, 20-23, 102 S.Ct. 2202, 2206-2207, 72 L.Ed.2d 639 (1982); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979). We look, of course, to the legislative history, and in particular to what other remedies have been provided. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62

may be enforced only in a suit pursuant to 42 U.S.C. § 1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard required to prove violations of Title VI. Thus, the apparent result is that a suit against governmental recipients of federal funds—who may be sued under § 1983—will be governed by a different standard of liability than a suit against private recipients of federal funds. One would have difficulty explaining this result in terms of the legislative history of Title VI.

2. Justice MARSHALL argues that private relief must be available because the statutory remedy of a fund cutoff is "impractical" and "too Draconian to be widely used." *Post*, at 3245 (dissenting opinion). See *post*, at 3251, n. 7 (STEVENS, J., dissenting). In my view, such reasoning evinces a departure from the principle that legislative intent is the guide to implying a right of action. The judiciary is not free to decide that remedies affirmatively and expressly adopted by Congress are so "impractical" or "Draconian" that judicially created remedies are necessary.

L.Ed.2d 146 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that taxpayers' money be spent nondiscriminatorily. See *ante*, at 3230-3231 (opinion of WHITE, J.). In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds.² In addition, it created a carefully constructed administrative procedure to ensure that such withholding of funds is ordered only where appropriate. In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertence. See also *University of California Regents v. Bakke*, 438 U.S. 265, 381, 98 S.Ct. 2733, 2795, 57 L.Ed.2d 750 (1978) (opinion of WHITE, J.) ("[T]here is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI").³ I would

1610 See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S.Ct. 2479, 2490, 61 L.Ed.2d 82 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law"). Rather, Congress' express adoption of one remedy—and one only—should be viewed as a congressional choice that should be obeyed. See *Cannon v. University of Chicago*, 441 U.S. 677, 749, 99 S.Ct. 1946, 1985, 60 L.Ed.2d 560 (1979) (POWELL, J., dissenting) ("Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes").

3. I also would hold that private actions asserting violations of Title VI may not be brought under 42 U.S.C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately

affirm the judgment below solely on this issue.

II

[3] There is, however, an alternative ground for affirmance. Both the District Court and the Court of Appeals agreed that petitioners had failed to show any intentional discrimination. The Court of Appeals, relying on the opinions in *Bakke*, held that such a showing—one that must be made to establish an equal protection claim—is a prerequisite to a successful Title VI claim. I agree with Justice STEVENS, *post*, at 3252–3253, that the Court of Appeals was correct in its reading of our opinions in *Bakke*.

My conclusion in *Bakke* was that “[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” 438 U.S., at 287, 98 S.Ct., at 2746. Justices BRENNAN, WHITE, MARSHALL, and BLACKMUN undertook a thorough analysis of the legislative history in reaching the same conclusion. See *id.*, at 328–340, 98 S.Ct., at 2767–2774. They concluded “that Title VI’s definition of ra-

cial discrimination is absolutely coextensive with the Constitution’s.” *Id.*, at 352, 98 S.Ct., at 2780. This construction necessarily requires rejection of the prior decision in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), that discriminatory impact suffices to establish liability under Title VI.⁴ In my view, the Court of Appeals therefore was fully justified in holding that petitioners failed to establish their Title VI claims.⁵

For these reasons, I concur in the Court’s judgment.

Justice REHNQUIST, concurring in the judgment. 1612

I join in Parts I, III, IV, and V of Justice WHITE’s opinion and join in Part II of Justice POWELL’s opinion. I therefore would affirm the judgment of the Court of Appeals.

Justice O’CONNOR, concurring in the judgment.

[3] For reasons given in Part I of the dissent by Justice STEVENS, *post*, at 3250–3252, I cannot agree with the limitations that Justice WHITE’s opinion would place on the scope of equitable relief available to

either under the statute itself or under § 1983. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 20–21, 101 S.Ct. 2615, 2626–2627, 69 L.Ed.2d 435 (1981); cf. *Maine v. Thiboutot*, 448 U.S. 1, 22, n. 11, 100 S.Ct. 2502, 2514, n. 11, 65 L.Ed.2d 555 (1980) (POWELL, J., dissenting) (an exception to § 1983 liability is “where the governing statute provides an exclusive remedy for violations of its terms”).

4. The *Lau* Court did not undertake any analysis of the legislative history of Title VI, reaching its conclusion essentially without supporting reasoning. I have no occasion here to consider whether the result in *Lau* may stand despite rejection of its assumed premise.

5. For the reasons stated by Justice O’CONNOR, *post*, at 3238–3239, I reject Justice STEVENS’ novel argument that an administrative agency is free to adopt any regulation that may be said to further the purposes of an enabling statute. Administrative agencies do not have—and should not have—such lawmaking power.

Justices WHITE and MARSHALL would avoid the explicit reasoning of *Bakke* by defer-

ring to a prior administrative construction of Title VI. See *ante*, at 3227 (opinion of WHITE, J.); *post*, at 3240–3243 (MARSHALL, J., dissenting). I do not question the view that the Court should “sustain a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding.” *Post*, at 3242 (MARSHALL, J., dissenting). But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive—and contrary—construction of its own. Moreover, in *Bakke* Justices WHITE and MARSHALL agreed that “[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.” 438 U.S., at 332, 98 S.Ct., at 2769 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). If “nowhere” is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, clearly an agency interpretation to the contrary is entitled to no deference.

private litigants suing under Title VI.¹ Therefore, like the dissent, I would address two further questions: (1) whether proof of purposeful discrimination is a necessary element of a valid Title VI claim, and (2) if so, whether administrative regulations incorporating an impact standard may be upheld as within the agency's statutory authority. My affirmative answer to the first question leads me to conclude that regulations imposing an impact standard are not valid. On that basis, I would affirm the judgment below.

Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination. Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 412-418, 98 S.Ct. 2733, 2810-2813, 57 L.Ed.2d 750 (1978) (opinion of STEVENS, J.). In *Bakke*, however, a majority of the Court concluded otherwise. *Id.*, at 287, 98 S.Ct., at 2746 (opinion of POWELL, J.); *id.*, at 328, 98 S.Ct., at 2767-2768 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Like Justice STEVENS, *post*, at 3253, I feel constrained by *stare decisis* to follow that interpretation of the statute. I part company with Justice STEVENS' dissent, however, when it concludes that administrative regulations incorporating an "effects" standard may be upheld notwithstanding the statute's proscription of intentional discrimination only. See *post*, at 3253-3255. Administrative regulations having the force of law may be set aside only if they exceed the statutory authority of the agency or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Batterton v. Francis*, 432 U.S. 416, 426, 97 S.Ct. 2399, 2406, 53 L.Ed.2d 448 (1977). Justice STEVENS' dissent argues that agency regulations incorporating

an "effects" standard reflect a reasonable method of "further[ing] the purposes of Title VI." *Post*, at 3254. If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.

The Court's decision in *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), does not persuade me to the contrary. The challenge there was to the constitutionality of a federal statute that imposed a stricter standard of nondiscrimination than that required by the constitutional provision pursuant to which the statute was enacted. Specifically, the Court held that, under the enabling authority in § 2 of the Fifteenth Amendment, Congress may enact a statute banning voting practices having a discriminatory effect, even if § 1 of the Amendment prohibits only intentional discrimination in voting. *Id.*, at 178, 100 S.Ct., at 1562. The Court reasoned that Congress' power under § 2 of the Amendment is "no less broad than its authority under the Necessary and Proper Clause." *Id.*, at 175, 100 S.Ct., at 1560. Therefore, as long as the statute was an appropriate means of enforcing the Fifteenth Amendment's prohibition, the statute was valid.

The breadth of authority granted to Congress under the enabling provision of the Fifteenth Amendment is not equivalent to the amount of discretion that an administrative agency possesses in implementing the provisions of a federal statute.² An

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1. Because I conclude that the decision below should be affirmed on the ground that petitioners have failed to prove intentional discrimination, I have no occasion to address the question whether there is a private cause of action under Title VI for damages relief.

2. Justice STEVENS relies upon a 1900 decision by this Court for the proposition that "an administrative regulation's conformity to statutory authority [is] to be measured by the same standard as a statute's conformity to constitutional authority." *Post*, at 3254 (citing *Boske v. Comin-gore*, 177 U.S. 459, 470, 20 S.Ct. 701, 705-706).

administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973), we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with." Yet that would be the effect of upholding the administrative regulations at issue in this case if, as five Justices concluded in *Bakke*, the expressed will of Congress is that federal funds recipients are prohibited only from purposefully discriminating on the grounds of race, color, or national origin in the administration of funded programs.

I acknowledge that in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Court approved liability under Title VI for conduct having only a discriminatory impact. Nevertheless, I believe that Justices BRENNAN, WHITE, MAR-

Boske, however, is distinguishable in that the statutory authority for the regulation at issue there conferred the general administrative power to adopt rules to carry out the functions of the office. 177 U.S., at 467, 20 S.Ct., at 704-705. With respect to this same statute, the Court observed in a subsequent case that it conferred "administrative power only. . . . [C]ertainly under the guise of regulation legislation cannot be exercised." *United States v. George*, 228 U.S. 14, 20, 33 S.Ct. 412, 414, 57 L.Ed. 712 (1913). In *George* the Court disapproved a regulation by the Interior Department which had the effect of enlarging the statute, emphasizing the fundamental "distinction between the legislative and administrative function." *Id.*, at 22, 33 S.Ct., at 415.

Moreover, cases since *Boske* articulating the limitations applicable to agency rulemaking power indicate that the scope of agency discretion is indeed narrower than the language of *Boske* would suggest. For example, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), the Court declined to endorse an interpretation of Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5 (1975), as proscribing mere negligent conduct. The Court observed:

SHALL, and BLACKMUN accurately observed in *Bakke*, 438 U.S., at 352, 98 S.Ct., at 2779, that *Bakke's* interpretation of "Title VI's definition of racial discrimination [to be] absolutely coextensive with the Constitution's" casts serious doubt on the correctness of the *Lau* decision. In my view, the logical implications of that interpretation require that *Lau* be overruled. Accordingly, I would conclude that the Title VI regulations at issue here cannot validly serve as the basis for liability. Because petitioners have failed to prove intentional discrimination, I would affirm the judgment of the Court of Appeals.

Justice MARSHALL, dissenting.

We granted certiorari in this case to consider whether proof of discriminatory intent is required to establish a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* For the reasons outlined below, I agree with Justice WHITE that proof of discriminatory animus should not be required. Unlike Justice WHITE, however, I believe that compensatory relief may be awarded to private Title VI plaintiffs in the absence of proof

"More importantly, Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Dixon v. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965), quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936). Thus, . . . [the Rule] cannot exceed the power granted the Commission by Congress under § 10(b)." 425 U.S., at 212-214, 96 S.Ct., at 1390-1391.

See also *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936) ("A regulation which does not [carry into effect the will of Congress as expressed by the statute], but operates to create a rule out of harmony with the statute, is a mere nullity"). Cf. *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296, 74 S.Ct. 593, 600-601, 98 L.Ed. 699 (1954) (agency cannot make illegal by regulation what is legal under the statute).

of discriminatory animus. I would therefore reverse the judgment of the Court of Appeals.

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The question presented by the petition for certiorari is whether a Title VI plaintiff can obtain relief upon proof that a non-job-related employment requirement has a discriminatory effect on minority applicants, or must also prove discriminatory intent. Pet. for Cert. i. This issue has divided the Courts of Appeals.¹ To resolve it we must decide whether our decision in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), which held that proof of discriminatory impact is sufficient to establish a violation of Title VI, must be overruled in light of the views subsequently expressed by five Justices in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

In *Lau v. Nichols*, this Court held that the San Francisco school system had violated Title VI by failing to provide supplemental language instruction to children of Chinese ancestry who did not speak English. The plaintiffs in *Lau* did not show that the officials in charge of the school system had intended to discriminate against students of Chinese ancestry. See *Fullilove v. Klutznick*, 448 U.S. 448, 479, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980) (opinion of BURGER, C.J., joined by WHITE and POWELL, JJ.). Because the failure to provide supplemental instruction had a discriminatory impact, this Court nevertheless concluded that the school system had violated Title VI. Looking to departmental regulations for guidance, the Court emphasized that Title VI bars programs that have

a discriminatory "effect even though no purposeful design is present." 414 U.S., at 568, 94 S.Ct., at 789 (emphasis in original).

1617 In *University of California Regents v. Bakke*, *supra*, five Justices concluded that Title VI does not prohibit a recipient of federal aid from taking race into account in an affirmative-action program designed to eradicate the vestiges of past discrimination. Since the special admissions program challenged in *Bakke* deliberately used racial criteria, that case did not require consideration of whether proof of discriminatory intent is necessary to establish a violation of Title VI. The only question posed was whether a conceded resort to race was permissible as a means of eliminating the effects of past discrimination. However, in reaching the conclusion that the consideration of race in an affirmative-action program does not violate Title VI, we relied in part on our view that Title VI's proscription of racial discrimination is coextensive with that of the Equal Protection Clause. 438 U.S., at 287, 98 S.Ct., at 2746 (opinion of POWELL, J.); *id.*, at 328, 98 S.Ct., at 2767-2768 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the Equal Protection Clause has been held to prohibit only intentional discrimination, *Washington v. Davis*, 426 U.S. 229, 238-248, 96 S.Ct. 2040, 2046-2052, 48 L.Ed.2d 597 (1976), the view we expressed in *Bakke* calls into question the holding in *Lau v. Nichols* that proof of discriminatory impact is sufficient to establish a violation of Title VI.²

If we were required to decide the issue presented by this case in the absence of a persuasive administrative interpretation of

1. Compare *Castaneda v. Pickard*, 648 F.2d 989, 1000 (CA5 1981) (intent standard); *Cannon v. University of Chicago*, 648 F.2d 1104, 1108 (CA7 1981) (same); *Lora v. Board of Education*, 623 F.2d 248, 250 (CA2 1980) (same), with *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1328 (CA3 1981) (en banc) (impact standard); *Board of Education of City School Dist. v. Califano*, 584 F.2d 576, 589 (CA2 1978) (same), *aff'd* on other grounds, *sub nom. Board of Education, New York City v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979); *Guadalupe Organization,*

Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1029, and n. 6 (CA9 1978) (same).

2. We have not resolved the inconsistency between the two decisions in any of our subsequent cases. See, e.g., *Board of Education, New York City v. Harris*, *supra*, 444 U.S., at 149, 100 S.Ct., at 374 ("There thus is no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard").

the statute, I would hold, in accordance with the view expressed in *Bakke*, that Title VI requires proof of discriminatory intent, even though this holding would entail overruling *Lau v. Nichols*. But the case comes to us against the background of administrative regulations that have uniformly and consistently interpreted the statute to prohibit programs that have a discriminatory impact and that cannot be justified on nondiscriminatory grounds. As Justice Frankfurter once observed, the doctrine of *stare decisis* is not "an imprisonment of reason." *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236, 249, 75 S.Ct. 259, 266, 99 L.Ed. 290 (1955) (dissenting opinion). The broad view expressed in *Bakke*, which was not necessary to the decision in that case, does not foreclose consideration of whether this longstanding administrative interpretation of the statute is a reasonable one which should be followed by this Court.

Shortly after the enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination." 45 CFR § 80.3(b)(2) (1964) (emphasis added).³ The Justice Department, which had helped draft the language of Title VI,⁴ participated heavily in preparing the regulations.⁵ Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate-impact or "effects" test. See 29 Fed.

Reg. 16274-16305 (1964). As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978); *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933). See also *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight"). When an administrative agency has exercised its judgment with respect to an issue that is not clearly resolved by the language and purposes of the statute it is statutorily mandated to enforce, this Court will accord due consideration to the views of the agency. Indeed, in *Bakke* itself, the opinion of four Justices which I coauthored stressed that agency regulations authorizing and in some cases requiring affirmative-action programs⁶ were "entitled to considerable deference in construing Title VI." 438 U.S., at 342, 98 S.Ct., at 2775 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Following the initial promulgation of regulations adopting an impact standard, every Cabinet Department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact.⁷ The statute has been

3. See Comment, 36 Geo.Wash.L.Rev. 824, 845-846 (1968).

4. Civil Rights: Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. 2703 (1963) (testimony of Attorney General Kennedy).

5. See Comment, 36 Geo.Wash.L.Rev., at 845-846.

6. See, e.g., 34 CFR § 100.3(b)(6) (1982) (Dept. of Education); 24 CFR § 1.4(b)(6) (1982) (Dept. of Housing and Urban Development); 45 CFR § 80.3(b)(6) (1982) (Dept. of Health and Human

Services); 28 CFR § 42.104(b)(6) (1982) (Dept. of Justice); 29 CFR § 31.3(b)(6) (1982) (Dept. of Labor). However, these regulations were not prepared contemporaneously with enactment of Title VI and, for that reason alone, are less weighty than the "impact" regulations.

7. Regulations of the Cabinet Departments are as follows. Dept. of Agriculture, 7 CFR § 15.3(b)(2) (1982); Dept. of Commerce, 15 CFR § 8.4(b)(2) (1982); Dept. of Defense, 32 CFR § 300.4(b)(2) (1982); Dept. of Education, 34 CFR § 100.3(b)(2) (1982); Dept. of Energy, 10 CFR §§ 1040.13(c), (d) (1982); Dept. of Health and Human Services, 45 CFR §§ 80.3(b)(2), (3)

uniformly and consistently so construed by the agencies responsible for its enforcement for nearly two decades. Our cases make clear that a longstanding and consistent administrative interpretation of a statute is entitled to special weight. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275, 94 S.Ct. 1757, 1761-1762, 40 L.Ed.2d 134 (1974); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972); *United States v. Bergh*, 352 U.S. 40, 46-47, 77 S.Ct. 106, 109-110, 1 L.Ed.2d 102 (1956).

It is also significant that this administrative interpretation of Title VI has never been altered by Congress, despite its awareness of the interpretation. In 1966, the House of Representatives defeated a proposal to alter Title VI to prohibit only intentional discrimination, and the proposal never emerged from committee in the Senate.⁸ In the Elementary and Secondary Education Amendments of 1969, Congress directed that guidelines and criteria established under Title VI dealing with *de jure* and *de facto* school segregation be applied uniformly across the country regardless of the origin or cause of such segregation. Pub.L. 91-230, § 2, 84 Stat. 121, 42 U.S.C.

§ 2000d-6. Since the passage of the 1964 Act, Congress has also enacted 10 additional statutes modeled on § 601 of Title VI, none of which define discrimination to require proof of intent.⁹ Although caution must be exercised when dealing with congressional inaction, we have recognized that it is appropriate to attribute significance to such inaction where an administrative interpretation "involves issues of considerable public controversy," *United States v. Rutherford*, 442 U.S. 544, 554, 99 S.Ct. 2470, 2476, 61 L.Ed.2d 68 (1979), and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter, *ibid.*

A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence "creates a presumption in favor of the administrative interpretation, to which we should give great weight, *even if we doubted the correctness of the ruling of the Department...*" *Costanzo v. Tillinghast*, 287 U.S. 341, 345, 53 S.Ct. 152, 154, 77 L.Ed. 350 (1932) (emphasis added). Thus, in construing statutes this Court has repeatedly sustained a

(1982); Dept. of Housing and Urban Development, 24 CFR §§ 1.4(2)(i), (3) (1982); Dept. of the Interior, 43 CFR §§ 17.3(b)(2), (3) (1982); Dept. of Justice, 28 CFR §§ 42.104(b)(2), (3) (1982); Dept. of Labor, 29 CFR §§ 31.3(b)(2), (3) (1982); Dept. of State, 22 CFR § 141.3(b)(2) (1982); Dept. of Transportation, 49 CFR §§ 21.5(b)(2), (3) (1982); Dept. of Treasury, 31 CFR § 51.52(b)(4) (1982). For a listing of the federal agencies with such standards, see CFR Index (1982).

8. See 112 Cong.Rec. 18715 (1966) (House vote). The identical amendment was introduced by Senator Ervin and Representative Whitener, both strong critics of the 1964 Act. The amendment would have conditioned fund termination on a constitutional violation and would have defined "discrimination" under Title VI to require a showing of "affirmative intent to exclude." *Id.*, at 10062, 18701. Both sponsors stated that one purpose of their proposals was "to negate the application of purely mechanistic and statistical criteria in the determination of discrimination." *Id.*, at 10061 (Sen. Ervin); *id.*, at 18701 (Rep. Whitener). Proponents of the measure criticized the administrative guidelines

that had been issued under the 1964 Act. *E.g., id.*, at 18703 (Rep. Landrum). Opponents of the measure asserted that it would constitute "a complete repealer of title VI," *ibid.* (Rep. Rodino), and that it "would gut title VI of the 1964 law." *Id.*, at 18705 (Rep. Kastenmeier).

9. See 20 U.S.C. § 1681(a) (Title IX of the Education Amendments of 1972); 29 U.S.C. § 794 (Rehabilitation Act of 1973); 31 U.S.C. § 1242 (Revenue Sharing Act); 42 U.S.C. § 3766(c)(1) (Crime Control Act of 1973); 42 U.S.C. § 5309 (Housing and Community Development Act of 1976); 42 U.S.C. § 5672(b) (Juvenile Justice Act of 1974); 42 U.S.C. § 6102 (Age Discrimination Act); 42 U.S.C. § 6709 (Public Works Employment Act); 42 U.S.C. § 6870(a) (Energy Conservation and Resources Renewal Act of 1976); 45 U.S.C. § 803 (Railroad Revitalization and Regulatory Reform Act). Congress directed its attention to the Title VI regulations in enacting the Public Works Employment Act of 1976, which provides for enforcement "through agency provisions and rules similar to those already established, with respect to racial and other discrimination under title VI of the Civil Rights Act of 1964." 42 U.S.C. § 6709.

reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); *United States v. Alexander*, 12 Wall. 177, 179-181, 20 L.Ed. 381 (1871).

While not the only reasonable construction of the statute, the uniform administrative construction of Title VI is "far from unreasonable." *Zenith Radio Corp. v. United States*, 437 U.S., at 451, 98 S.Ct., at 2445. The Civil Rights Act was aimed at "eradicating significant areas of discrimination on a nationwide basis." H.R.Rep. No. 914, 88th Cong., 1st Sess., 18 (1963), U.S.Code Cong. & Admin.News 1964, pp. 2355, 2393. The "[m]ost glaring" problem was "the discrimination against Negroes which exists throughout our Nation." *Ibid.* Given that Title VI was meant to remedy past discrimination against minorities, 438 U.S., at 285, 98 S.Ct., at 2745-2746 (POWELL, J.); *id.*, at 328, 98 S.Ct., at 2767-2768 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), an "effects" test is a reasonable means of effectuating this goal. See *City of Rome v. United States*, 446 U.S. 156, 177, 100 S.Ct. 1548, 1561-1562, 64 L.Ed.2d 119 (1980) (ban on electoral changes having a discriminatory impact is an appropriate method of en-

forcing prohibition against intentional discrimination). In addition, when the agencies first interpreted the statute in 1964, 12 years before *Washington v. Davis*, 426 U.S. 229, the equal protection standard could easily have been viewed as one of discriminatory impact. See, e.g., *Arnold v. North Carolina*, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964) (*per curiam*); *Anderson v. Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964).¹⁰ Moreover, given the need for an objective and administrable standard applicable to thousands of federal grants under Title VI, the "effects" test is far more practical than a test that focuses on the motive of the recipient, which is typically very difficult to determine.¹¹

The legislative history of Title VI fully confirms that Congress intended to delegate to the Executive Branch substantial leeway in interpreting the meaning of discrimination under Title VI. See Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 Geo.L.J. 1, 20-39 (1981). The word "discrimination" was nowhere defined in Title VI.¹² Instead, Congress authorized executive departments and agencies to adopt regulations with the antidiscrimination principle of § 601 of the Act "as a general criterion to follow." Civil Rights: Hearings on H.R. 7152 before the House Committee on the Judiciary, 88th Cong., 1st Sess., 2740 (1963) (testimony of Attorney General Kennedy). Congress willingly conceded "[g]reat powers" to the Executive Branch in defining the reach of the statute. *Id.*, at 1520 (statement of Rep.

10. See also *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U.Pa.L.Rev. 540, 544 (1977) ("Considerable uncertainty existed prior to *Washington* in regard to whether the principal element of a constitutional claim of racial discrimination was discriminatory purpose or simply discriminatory effect"). Of course, even in *Washington v. Davis*, the Court made clear that evidence of discriminatory impact may be highly probative of discriminatory intent, 426 U.S., at 242, 96 S.Ct., at 2049.

11. See *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (CA7 1977) (discussing Title VIII), cert. denied, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978).

12. See 110 Cong.Rec. 5612 (1964) (Sen. Ervin); *id.*, at 1619 (Rep. Abernathy); *id.*, at 1632 (Rep. Dowdy); *id.*, at 5251 (Sen. Talmadge); *id.*, at 6052 (Sen. Johnston).

Celler, Chairman of the House Judiciary Committee).¹³ Indeed, the significance of the administrative role in the statutory scheme is underscored by the fact that Congress required the President to approve all Title VI regulations.¹⁴

In the face of a reasonable and contemporaneous administrative construction that has been consistently adhered to for nearly 20 years, originally permitted and subsequently acquiesced in by Congress, and expressly adopted by this Court in *Lau*, I would hold that Title VI bars practices that have a discriminatory impact and cannot be justified on legitimate grounds.¹⁵ I frankly concede that our reasoning in *Bakke* was broader than it should have been. The statement that Title VI was "absolutely coextensive" with the Equal Protection Clause, 438 U.S., at 352, 98 S.Ct., at 2779, was clearly superfluous to the decision in that case. Whatever the precise relationship between Title VI and the Equal Protection Clause may be, it would have been perverse to construe a statute designed to ameliorate the plight of the victims of racial discrimination to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination. *Id.*,

13. See Civil Rights—the President's Program, 1963: Hearings before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 400 (1963) (colloquy between Sen. Ervin and Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 before the House Committee on the Judiciary, 88th Cong., 1st Sess., 2765-2766 (1963) (colloquy between Rep. Mathias and Attorney General Kennedy); *id.*, at 1890 (remarks of Rep. Celler); 110 Cong.Rec. 2498 (1964) (remarks of Rep. Selden); *id.*, at 12320 (remarks of Sen. Byrd).

14. 42 U.S.C. § 2000d-1. See 110 Cong.Rec. 2499 (1964) (quoting amendment of Rep. Lindsay).

15. Proof of the disproportionate racial impact of a program or activity is, of course, not the end of the case. Rather a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity. See *Bryan v. Koch*, 627 F.2d 612, 623 (CA2 1980) (Kearse, J., concurring

at 336-350, 353-355, 98 S.Ct., at 2771-2779, 2779-2781 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).¹⁶

II

While agreeing that the Court of Appeals erred in requiring proof of discriminatory intent, Justice WHITE has addressed an alternative ground for affirming the Court of Appeals judgment. He concludes that compensatory relief should not be awarded to private Title VI plaintiffs in the absence of proof of discriminatory animus. I cannot agree.

A

It is "well settled" that where legal rights have been invaded, "federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). See, e.g., *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238-240, 90 S.Ct. 400, 405-406, 24 L.Ed.2d 386 (1969); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 207, 65 S.Ct. 226, 234, 89 L.Ed. 173 (1944) (courts have a "duty" to provide injunctive and damages remedies for violation of Railway Labor Act's command to represent union members without racial discrimination); *Deckert v. Indepen-*

in part and dissenting in part). In this case, respondents failed to provide an adequate justification.

I also agree with Justice WHITE, *ante*, at 3223, n. 2, that the administrative regulations are valid even assuming, *arguendo*, that Title VI itself does not proscribe disparate-impact discrimination.

16. Although we recognized in *Bakke* that our reasoning cast serious doubts on *Lau*, we took pains to explain that our decision was fully consistent with *Lau*. See 438 U.S., at 353, 98 S.Ct., at 2780. Indeed, we noted that the existence of an impact standard "strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI." *Ibid.* As we explained, "[i]f discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation." *Ibid.*

dence Shares Corp., 311 U.S. 282, 288, 61 S.Ct. 229, 233, 85 L.Ed. 189 (1940); *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 569-570, 50 S.Ct. 427, 433-434, 74 L.Ed. 1034 (1930). In accord with *Bell v. Hood*, the Court has previously found no merit in "the contention that such remedies are limited to prospective relief." *J.I. Case Co. v. Borak*, 377 U.S. 426, 434, 84 S.Ct. 1555, 1561, 12 L.Ed.2d 423 (1964). Cf. *Schine Theatres v. United States*, 334 U.S. 110, 128, 68 S.Ct. 947, 957, 92 L.Ed. 1245 (1948) (Court "start[s] from the premise" that an injunction against future violations of a statute is inadequate). The use of all available judicial remedies, including compensatory relief, is no less appropriate to redress discrimination in violation of Title VI. "Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492, 80 S.Ct. 884, 890, 4 L.Ed.2d 903 (1960). In Title VI actions, as in other private suits for violations of federal statutes, the federal judiciary may employ remedies "according to reasons related to the substantive social policy embodied in an act of positive law." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 403, n. 4, 91 S.Ct. 1999, 2008, n. 4, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring in judgment). See, e.g., *Sullivan v. Little Hunting Park*, *supra*, 396 U.S., at 239, 90 S.Ct., at 405-406; *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 202, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, 63 S.Ct. 172, 173-174, 87 L.Ed. 165 (1942); *Deitrick v. Greaney*, 309 U.S. 190, 200-201, 60 S.Ct. 480, 484-485, 84 L.Ed. 694 (1940).

Denying private plaintiffs the right to recover compensatory relief for all viola-

tions involving programs with a discriminatory effect would frustrate the fundamental purpose of Title VI. Section 601 unequivocally creates victims' rights. But a right without an effective remedy has little meaning. See *Sullivan v. Little Hunting Park*, *supra*, 396 U.S., at 238, 90 S.Ct., at 405. As President Kennedy stated in his 1963 Message to Congress on Civil Rights, "[t]he venerable code of equity law commands 'for every wrong, a remedy.'" H.R.Doc. No. 124, 88th Cong., 1st Sess., 2 (1963). Non-compensatory relief by its very nature cannot "remedy" an injustice that has already occurred. A failure to correct adequately for individual violations depreciates the law, which was specifically intended to deal with "the injustices and humiliations of racial and other discrimination." H.R.Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), U.S.Code Cong. & Admin. News 1964, p. 2394.

Indeed, the unavailability of a retrospective remedy may often result in the deprivation of *any* relief whatsoever. Many programs and activities receiving federal financial assistance, such as construction projects, are necessarily short in duration. By the time that a private plaintiff had successfully brought suit challenging discrimination in such a program, prospective relief could be a nullity. Cf., e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (CA2 1968) (urban renewal project completed by the time the court recognized plaintiff's standing to sue).

Private retrospective relief also constitutes a "necessary supplement" to the administrative enforcement mechanism contained in Title VI. See *J.I. Case Co. v. Borak*, *supra*, 377 U.S., at 432, 84 S.Ct., at 1559-1560. The statutory sanction of a fund cutoff cannot sufficiently ensure general compliance with the command of Title VI, because the sheer quantity of federal financial assistance programs makes Government enforcement alone impractical¹⁷ and because a fund cutoff is too Dra-

17. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401, 88 S.Ct. 964, 966, 19 L.Ed.2d

1263 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement

¹⁶²⁷ conian to be widely used.¹⁸ Retrospective liability for Title VI violations complements administrative enforcement by providing a more realistic deterrent against unlawful behavior. Moreover, the fund cutoff is no "remedy" at all for victims of past acts of discrimination because it merely assures that other innocent individuals will also be denied the benefits of federal assistance.¹⁹ Regardless of the alternative administrative sanction, individual acts of discrimination still violate the law and can be remedied only by compensatory relief. Restricting relief to prospective remedies can only encourage recipients acting in bad faith to make no effort to comply with the statute and to stall private litigants in the knowledge that justice delayed will be justice denied.

B

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946). See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 ¹⁶²⁸ U.S. 288, 291-292, 80 S.Ct. 332, 334-335, 4 L.Ed.2d 323 (1960). In enacting Title VI, Congress clearly did not choose to restrict relief to prospective or noncompensatory remedies.²⁰

would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law"). The Federal Government's actual performance under Title VI has been very inadequate. See *Brown v. Weinberger*, 417 F.Supp. 1215 (DC 1976); *Adams v. Weinberger*, 391 F.Supp. 269 (DC 1975); U.S. Commission on Civil Rights, *The State of Civil Rights: 1977* (1978); U.S. Commission on Civil Rights, *The State of Civil Rights: 1976* (1977); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1970); Comptroller General, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI* (B-197815, Apr. 15, 1980); Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 *Hastings L.J.* 137 (1976); Note, 65 *Cornell L.Rev.* 689, 692-695 (1980); Note, 85 *Yale L.J.* 721, 727-728 (1978); Comment, 36 *Geo.Wash.L.Rev.* 824 (1968).

18. See, e.g., Lamber, *Private Causes of Action Under Federal Agency Nondiscrimination Statutes*, 10 *Conn.L.Rev.* 859, 888, and n. 150 (1978)

When Congress has intended to place restrictions on private rights of action in the Civil Rights Act of 1964, it has proved capable of saying so explicitly. For example, Title II provides that a court may defer action on a private suit by referring the case to the Community Relations Services. 42 U.S.C. § 2000a-3(d). Similarly, Title VII conditions a private action on the plaintiff's having first brought a claim before the Equal Employment Opportunity Commission. § 2000e *et seq.* (1976 ed. and Supp. V). But nothing in Title VI or in its history supports a restriction on a federal court's ability to remedy a statutory violation.

C

Justice WHITE attempts to justify the departure from well-established remedial principles by relying in large part on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). See *ante*, at 3229. *Pennhurst* involved the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (1976 ed. and Supp. V), a grant program through which the Federal Government provides funding to the States. The Court focused on § 111 of the Act, 42 U.S.C. § 6010, which states various rights of persons with developmental disabilities. "Noticeably absent" from

(because of "extreme and harsh" nature of the sanction, the Health, Education, and Welfare Department had terminated funding for only three educational institutions in 14 years).

19. Congress itself noted that a cutoff was only to be a last resort after other devices, including lawsuits, failed. See, e.g., 110 *Cong.Rec.* 7067 (1964) (Sen. Ribicoff); *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

20. By contrast, in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), see *ante*, at 3228-3229, the Investment Advisors Act had created an explicit remedy in one section, which precluded the implicit creation of a damages remedy. Title VI, by contrast, contains no explicit private remedy and the administrative remedy is clearly not exclusive. Similarly, in *Cannon v. University of Chicago*, 441 U.S. 677, 705-706, 99 S.Ct. 1946, 1962, 60 L.Ed.2d 560 (1979), this Court rejected the notion that an administrative mechanism was the exclusive remedy under Title IX of the Education Amendments of 1972.

¹⁶²⁹ the provision was "any language suggesting that § 6010 is a 'condition' for the receipt of federal funding." 451 U.S., at 13, 101 S.Ct., at 1538. This omission stood in stark contrast to other sections of the Act. Because receipt of federal funds was not conditioned on compliance with § 6010, the Court held that § 6010 imposed no enforceable rights or obligations. The Court analogized spending power legislation to a contract, stating that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*, 451 U.S., at 17, 101 S.Ct., at 1540.²¹

In contrast to the statutory provision in *Pennhurst*, Title VI of the Civil Rights Act unambiguously imposes a condition on the grant of federal moneys. Section 601 of Title VI states that "[n]o person . . . 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." 42 U.S.C. § 2000d. Recipients of federal financial assistance are automatically subject to the nondiscrimination obligation imposed by the statute.

The statutory mandate can hardly escape notice. Every application for federal finan-

cial assistance must, "as a *condition* to its approval and the extension of any Federal financial assistance," contain assurances that the program will comply with Title VI and with all requirements imposed pursuant to the executive regulations issued under Title VI.²² In fact, applicants for federal assistance literally sign contracts in which they agree to comply with Title VI and to "immediately take any measures necessary" to do so. This assurance is given "in consideration of" federal aid, and the Federal Government extends assistance "in reliance on" the assurance of compliance.²³ See 3 R. Cappalli, *Federal Grants* § 19:20, p. 57, and n. 12 (1982) (written assurances are merely a formality because the statutory mandate applies and is enforceable apart from the text of any agreement).

The obligation to comply with § 601 does not place upon a recipient unanticipated burdens because any recipient must anticipate having to comply with the law. Certainly no applicant has a legitimate expectation that he can evade the statutory obligation and the expense that compliance may entail. Indeed, in extending grants the United States has always retained an inherent right to sue for enforcement of the recipient's obligation.²⁴ All traditional

21. Only in dicta did the Court also discuss the question of the appropriate remedy for violation of conditions contained in an Act. 451 U.S., at 29, 101 S.Ct., at 1546. Because the Court of Appeals had not even addressed the issue, this Court did not purport to resolve the remedial question but merely remanded the matter for further consideration. *Id.*, at 30, 101 S.Ct., at 1546-1547. Similarly, in *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), the Court never addressed the propriety of retrospective relief because the plaintiffs had requested only declaratory and injunctive relief against enforcement of a state law. See *id.*, at 421, 90 S.Ct., at 1222. Justice WHITE finds solace in *Rosado*, see *ante*, at 3229, even though that decision emphasized the authority of a federal court to oversee use of federal funds in a private suit notwithstanding Congress had lodged in an executive department the power to cut off federal funds for noncompliance with statutory requirements. 397 U.S., at 420, 90 S.Ct., at 1221-1222.

22. See 7 CFR § 15.4 (1982) (Dept. of Agriculture); 15 CFR § 8.5 (1982) (Dept. of Commerce); 32 CFR § 300.6 (1982) (Dept. of Defense); 34 CFR § 100.4 (1982) (Dept. of Edu-

cation); 10 CFR § 1040.4 (1982) (Dept. of Energy); 45 CFR § 80.4 (1982) (Dept. of Health and Human Services); 24 CFR § 1.5 (1982) (Dept. of Housing and Urban Development); 43 CFR § 17.4 (1982) (Dept. of the Interior); 28 CFR § 42.105 (1982) (Dept. of Justice); 29 CFR § 31.6 (1982) (Dept. of Labor); 22 CFR § 141.4 (1982) (Dept. of State); 49 CFR § 21.7 (1982) (Dept. of Transportation); 31 CFR § 51.59 (1982) (Dept. of Treasury).

23. See, e.g., Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964, reprinted in 3 R. Cappalli, *Federal Grants*, Appendix 19-G (1982).

24. E.g., *Rex Trailer Co. v. United States*, 350 U.S. 148, 151, 76 S.Ct. 219, 221, 100 L.Ed. 149 (1956); *United States v. San Francisco*, 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Cotton v. United States*, 11 How. 229, 231, 13 L.Ed. 675 (1851); *Dugan v. United States*, 3 Wheat. 172, 181, 4 L.Ed. 362 (1818). As this Court once said with respect to a grant of lands by the Federal Government to a State:

"It is not doubted that the grant by the United States to the State upon conditions, and the

¹⁶³¹ judicial remedies can be applied in such situations.²⁵ This right to sue is equally applicable to Title VI. See 42 U.S.C. § 2000h-3. For example, in *United States v. Marion County School Dist.*, 625 F.2d 607 (CA5 1980), the court concluded "that the United States is entitled to sue to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including 'transportation relief.'" *Id.*, at 617.²⁶

¹⁶³² When respondents requested, received, and expended federal funds to pay the salaries of policemen and trainees and to finance recruitment programs, 466 F.Supp. 1287, 1281, their duty not to discriminate was manifest. The obligation to comply with the law attached at the time respondents agreed to take federal money, not when the District Court concluded that respondents had violated the law. Thus, the

acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction,—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State." *McGee v. Mathis*, 4 Wall. 143, 155, 18 L.Ed. 314 (1866).

25. See, e.g., *Rex Trailer Co. v. United States*, *supra*, 350 U.S., at 151, 76 S.Ct., at 221; *United States v. Stevenson*, 215 U.S. 190, 197, 30 S.Ct. 35, 36, 54 L.Ed. 153 (1909); *Cotton v. United States*, *supra*, 11 How., at 231; *Dugan v. United States*, *supra*, 3 Wheat., at 181.

26. Accord, e.g.: *Brown v. Califano*, 201 U.S.App. D.C. 235, 246, 627 F.2d 1221, 1232 (1980); *United States v. Tatum Independent School Dist.*, 306 F.Supp. 285, 288 (ED Tex. 1969); *United States v. Frazer*, 297 F.Supp. 319 (MD Ala.1968), 317 F.Supp. 1079 (MD Ala.1970) (broad remedial order); *United States v. Board of Education*, 295 F.Supp. 1041 (SD Ga.1969). See also, e.g., *United States v. Harrison County, Miss.*, 399 F.2d 485 (CA5 1968), cert. denied, 397 U.S. 918, 90 S.Ct. 925, 25 L.Ed.2d 99 (1970); *United States v. County School Bd.*, 221 F.Supp. 93 (ED Va.1963). The Civil Rights Act of 1964 itself provides for compliance by any other lawful means and for suits by the Government. § 602, 42 U.S.C. § 2000d-1; § 1103, 42 U.S.C. § 2000h-3. See 110 Cong.Rec. 7066 (1964) (Sen. Pastore) (agency may sue to enforce contractual nondiscrimination requirement); *id.*, at 7060 (Sen. Ribicoff) (calling such a suit "the most effective way for an agency to proceed"). Shortly after the Act

District Court properly provided a remedy for past failure to carry out the statutory obligation. The relief fashioned by the District Court requires respondents to remedy their failure to shoulder the burden that existed from the moment they received federal funding.

The analogy drawn in *Pennhurst* between the acceptance of funds under spending legislation and the formation of a contract only reinforces the propriety of awarding retrospective relief. Having benefited from federal financial assistance conditioned on an obligation not to discriminate, recipients of federal aid must be held to their part of the bargain. Yet, Justice WHITE would allow recipients to violate the conditions of their contracts until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money. See *ante*, at 3232. This is surely a bizarre view of contract law.²⁷

was passed, agencies charged with its execution confirmed the availability of governmental suits to enforce Title VI. E.g., 29 Fed.Reg. 16301 (1964) (HEW). See 31 Fed.Reg. 5292 (1966) (Department of Justice Guidelines for Enforcement of Title VI) ("Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances..."). Indeed, even before enactment of the Civil Rights Act of 1964, the President had asserted authority to impose nondiscrimination obligations on the extension of certain forms of federal financial assistance. See Exec. Order No. 10925, 3 CFR 448 (1959-1963 Comp.); Exec. Order No. 11114, 3 CFR 774 (1959-1963 Comp.). Title VI resolved any questions about the President's authority to enforce such obligations since it was undisputed that Congress had the constitutional power to attach reasonable conditions under the Spending Clause. See 3 R. Cappalli, *supra*, § 19:14, at 38.

27. Justice WHITE notes that the Federal Government can sue recipients who fail to comply with grant agreements and force the violators to repay funds. See *ante*, at 3232, n. 24. But this merely demonstrates that recipients do not have any legitimate expectations that only limited injunctive relief is available as a remedy for violations of the statute. Moreover, the grant agreements under Title VI specifically mention compliance with the executive regulations, which unambiguously incorporate an effects standard.

Only by providing retrospective relief to private litigants can the courts fulfill the terms of the "contract" between the Federal Government and recipients of federal financial assistance. In exchange for federal moneys, recipients have promised not to discriminate. Because Title VI is intended to ensure that "no person" is subject to discrimination in federally assisted programs, private parties function as third-party beneficiaries to these contracts. *Lau v. Nichols*, 414 U.S., at 571, n. 2, 94 S.Ct., at 790, n. 2 (Stewart, J., concurring in result). See Restatement (Second) of Contracts § 304 (1981). When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. See *id.* § 344, Comment a. The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed. This requires precisely the kind of make whole remedy that Justice WHITE rejects, see *ante*, at 3232, despite his accurate characterization of Title VI as a "'contractual' spending-power provision," *ante*, at 3231.²⁸

For the foregoing reasons, I would hold that a court has broad discretion to remedy violations of Title VI in actions brought by private parties. Of course, in determining appropriate relief, a court must exercise its discretion equitably. This requires consideration of a myriad of factors including the potential for unreasonable hardship to the party in breach, the extent of mitigation, and the like. The details of the relief would normally be best left to the sound judgment of the District Court. As the District Court noted, remedies adopted in Title VII suits provide a useful guidepost. 466 F.Supp., at 1287; see also *Association Against Discrimination v. City of Bridgeport*, 479 F.Supp. 101, 112 (Conn.1979). In my view, the relief ordered by the District Court in this case was entirely appropriate.

III

Because the relief petitioners received was available to them under Title VI, and because that relief was justified without proof of discriminatory intent, I would reverse the judgment of the Court of Appeals. Accordingly, I dissent.

28. Justice WHITE's approach is also fraught with the serious difficulties inherent in attempting to classify relief as either retrospective or prospective. For example, Judge Meskill thought that the order that a new sergeant's examination be given was prospective and non-compensatory, 633 F.2d, at 255-256, n. 43, but Justice WHITE adopts the contrary position, *ante*, at 3234. Judge Coffrin thought that constructive seniority was noncompensatory. "This court should not view such a remedy as retrospective compensation for past harm simply because the judicial process takes time." 633 F.2d, at 274, n. 2 (concurring). Justice WHITE obviously disagrees, *ante*, at 3234.

Justice WHITE rests his analysis on *Edelman v. Jordan*, 415 U.S. 651, 667, 94 S.Ct. 1347, 1357-1358, 39 L.Ed.2d 662 (1974), see *ante*, at 3233. But Eleventh Amendment considerations have absolutely no relevance to this case because respondents are not state but rather municipal entities. See *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572-573, 50 L.Ed.2d 471 (1977) (local governments have no immunity against retroactive liability). Even accepting the relevance of *Edelman*, the resulting characterizations of the relief in this case are questionable. For instance, the order placing the police officers who were victims of discrimination in

the position on the seniority roster that they would have occupied but for the discriminatory examinations certainly alters their employment status for the future. Just because a program is also "compensatory" in nature is clearly not controlling under the Eleventh Amendment. In considering compensatory and remedial educational programs in *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), we stated:

"That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment." *Id.*, 433 U.S., at 290, 97 S.Ct., at 2762 (emphasis in original) (footnote omitted).

Finally, even if the Eleventh Amendment applied, the relief would not necessarily be inappropriate. In *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), we held that by choosing to operate a railroad, Alabama became subject to duties imposed by the Federal Employers' Liability Act, and could be held liable in an action for damages for violations of these duties. A similar analysis could be applied with respect to the receipt of federal funds.

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¹⁶³⁵ Justice STEVENS, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.

It is not an easy task to harmonize the Court's cases under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.* (1976 ed. and Supp. V). Unless the Court is to repudiate what it has already written, however, I believe the judgment of the Court of Appeals must be reversed. I reach this conclusion by answering three separate questions: (1) whether federal law authorizes private individuals to recover damages for injuries caused by violations of Title VI and the regulations promulgated thereunder; (2) if so, whether Title VI requires recipients of federal funds to do any more than refrain from engaging in conduct that would, if performed by a State, violate the Fourteenth Amendment; and (3) if not, whether an administrative agency may validly impose additional requirements on recipients of funds from that agency. I shall discuss each question in turn.

I

In the last five years at least eight Members of this Court have endorsed the view that Title VI, as well as the comparable provisions of Title IX of the Education Amendments of 1972, may be enforced in a private action against recipients of federal funds, such as the respondents in this case.¹ This Court has authorized relief in at least four such cases. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976); *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Cannon v. University of Chicago*,

¹ Six Members of the Court—Chief Justice BURGER, Justice BRENNAN, Justice Stewart, Justice MARSHALL, Justice REHNQUIST, and Justice STEVENS—endorsed the view that a private right of action exists directly under Title VI and Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *University of California Regents v. Bakke*, 438 U.S. 265, 418-421, 98 S.Ct. 2733, 2813-2815, 57 L.Ed.2d 750 (1978) (STEVENS, J., joined by BURGER, C.J., and STEWART and REHNQUIST, JJ., dissenting). Two Members of the Court—Justice WHITE and Justice BLACK-

441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

Justice WHITE suggests that some plaintiffs who prevail in suits under Title VI are entitled only to a limited form of prospective relief.² That suggestion is somewhat surprising, since no Member of the Court in *Lau*, *Bakke*, or *Cannon* mentioned such a limitation on remedies. Presumably, it rests on a belief that Congress, in enacting Title VI, intended to distinguish between prospective and retroactive relief. Yet it seems to me most improbable that Congress contemplated so significant and unusual a limitation on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute. It is one thing to conclude, as the Court did in *Cannon*, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification.

In reaching his novel conclusion about the scope of available relief under Title VI, Justice WHITE relies heavily on the proposition that *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), establishes a "presumption that only limited injunctive relief should be granted as a remedy for violations of statutes passed pursuant to the spending power." *Ante*, at 3232. That characterization seriously distorts the opinion of the Court in *Pennhurst*, which concerned the existence or nonexistence of statutory rights, not remedies.³ We held

MUN—endorsed the view that private individuals may enforce Title VI and Title IX against appropriate defendants under 42 U.S.C. § 1983. *Cannon*, *supra*, 441 U.S., at 722-724, 99 S.Ct., at 1970-1972 (WHITE, J., joined by BLACKMUN, J., dissenting).

² He limits his analysis to situations where no discriminatory intent is shown. *Ante*, at 3229-3230.

³ We framed our opinion as follows: "Petitioners first contend that 42 U.S.C. § 6010 does not create in favor of the mentally retard-

that Congress will not be presumed to have created substantive legal obligations under the spending power by legislation so ambiguous that "a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U.S., at 17, 101 S.Ct., at 1540.⁴ In dictum,⁵ we went on to speculate that an injunction requiring a State to provide "'appropriate' treatment in the 'least restrictive' environment" might be improper, noting that the Eleventh Amendment prohibits federal courts from requiring States to pay money damages. *Id.*, at 29-30, 101 S.Ct., at 1546. Without explaining why, Justice WHITE divines a general principle of statutory interpretation from this discussion of the Eleventh Amendment. The Eleventh Amendment obviously has no relevance in most Title VI litigation; it certainly is not implicated in this suit against the officials and agencies of the City of New York. I cannot fathom the supposition that Congress regularly analogizes to the Eleventh Amendment when it drafts spending power legislation. There is certainly nothing in the text or the legislative history of Title VI to suggest that the 1964 Congress did so.

Even if it were not settled by now that Title VI authorizes appropriate relief, both prospective and retroactive, to victims of racial discrimination at the hands of recipi-

ed any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or § 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual habilitation plans for the mentally retarded. *Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.*" 451 U.S., at 10-11, 101 S.Ct., at 1536 (emphasis added).

4. Obviously, there can be no argument that the respondent Police Department in this case was unaware of its obligations. Both the statute and the regulations clearly prohibit racial discrimi-

ents of federal funds, the same result would follow in *this* case because the petitioners have sought relief under 42 U.S.C. § 1983. While Title VI applies to all recipients of federal funds, § 1983 governs a different class of persons: those who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Our past decisions establish that respondent Police Department in this case is bound by § 1983 as well as by Title VI. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Our past decisions also establish that § 1983 provides a damages remedy. *Ibid.* And finally, it is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law. See *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).⁶ See also *Cannon*, 441 U.S., at 722-724, 99 S.Ct., at 1970-1972 (WHITE, J., dissenting); *ante*, at 3228, n. 17.

The policy arguments Justice WHITE advances in support of his position may be perfectly sound. There may well be situations in which one would fear that strict retroactive enforcement of a federal grant condition would discourage grant applications that are a high federal priority.⁷

nation, and they did so at the time the respondent accepted the federal money.

5. After the sentence fragment quoted *ante*, at 3229, the Court concluded: "These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here." 451 U.S., at 30, 101 S.Ct., at 1546.

6. *Thiboutot* itself involved only federal statutes, not regulations. Its analysis of § 1983, however, applies equally to administrative regulations having the force of law. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303, 99 S.Ct. 1705, 1717-1718, 60 L.Ed.2d 208 (1979) (discussing what types of administrative regulations have "the force and effect of law").

7. I must point out, however, that the record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondents' federal subsidy. And, as a general

¹⁶³⁹ These are, however, arguments that should be addressed to Congress rather than to a court, cf. *Cannon*, 441 U.S., at 709-710, 99 S.Ct., at 1964-1965, since Congress has already implicitly authorized the Federal Judiciary to award appropriate relief to private parties injured by violations of Title VI. Whether these petitioners are within that special class is, of course, another question to which I now turn.

II

[3] In *University of California Regents v. Bakke*, 438 U.S., at 412-418, 98 S.Ct., at 2810-2813, four Justices expressed the opinion that Title VI's prohibition against racial discrimination is significantly broader than the protection provided by the Equal Protection Clause of the Fourteenth Amendment. That position was a dissenting one, however; five Members of the Court unequivocally rejected it.

In his opinion announcing the judgment of the Court, Justice POWELL reviewed the legislative history of Title VI and concluded:

"In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.*, at 287, 98 S.Ct., at 2746.

Justice BRENNAN, Justice WHITE, Justice MARSHALL, and Justice BLACK-

proposition, it is usually assumed that a cutoff of federal funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation. See *Cannon*, 441 U.S., at 705, and n. 38, 99 S.Ct., at 1962, and n. 38.

8. Accord, 438 U.S., at 332, 333, 334, n. 11, 336, 338, 98 S.Ct., at 2769, 2770, 2771, n. 11, 2771, 2772. Towards the end of their opinion, Justices BRENNAN, WHITE, MARSHALL, and BLACKMUN expressly considered and rejected the argument that the Court's earlier decision in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), foreclosed their reading of Title VI. See 438 U.S., at 352-353, 98 S.Ct., at 2779-2780.

9. Of course, in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Court held that the Fourteenth Amendment is

MUN reached the same conclusion. They wrote:

"In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies...." *Id.*, 438 U.S., at 328, 98 S.Ct., at 2767-2768.⁸

¹⁶⁴⁰ Later in their opinion, they summarized the reasoning that led them to that conclusion:

"Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution." *Id.*, at 340, 98 S.Ct., at 2773.⁹

The interpretation of Title VI adopted by a majority in *Bakke* was confirmed in two subsequent opinions of the Court. In *Steelworkers v. Weber*, 443 U.S. 193, 206, n. 6, 99 S.Ct. 2721, 2729, n. 6, 61 L.Ed.2d 480 (1979), the Court distinguished Title VII from Title VI on the basis that the former provision "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments."¹⁰ And in *Board of Education*,

violated only by *purposeful* state racial discrimination.

10. The Court explained:

"Title VI of the Civil Rights Act of 1964, considered in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), contains no provision comparable to § 703(j) [of Title VII]. This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed 'program[s] or activit[ies] receiving Federal financial assistance.' 42 U.S.C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the

New York City v. Harris, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), the Court first concluded that the 1972 Emergency School Aid Act (ESAA), 86 Stat. 354, contemplates funding cutoffs in response to forms of discrimination that are not "discrimination in the Fourteenth Amendment sense." 444 U.S., at 149, 100 S.Ct., at 374. The Court then went on, in considered dictum, to distinguish the ESAA from Title VI:

"A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found." *Id.*, at 150, 100 S.Ct., at 374.¹¹

The question to be decided today is not whether the Court has misread the actual intent of the Congress that enacted the Civil Rights Act of 1964. For when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. Compare *United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 140-150, 98 S.Ct. 965, 983-988, 55 L.Ed.2d 148 (1978) (STEVENS, J., dissenting), with *Dougherty County Board of Education v. White*, 439 U.S. 32, 47, 99 S.Ct. 368, 377, 58 L.Ed.2d 269 (1978)

Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*." 443 U.S., at 206, n. 6, 99 S.Ct., at 2729, n. 6.

11. In his dissenting opinion, Justice Stewart, joined by Justices POWELL and REHNQUIST, also noted that Title VI "has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination." 444 U.S., at 159-160, 100 S.Ct., at 379.

12. Like most, this proposition of law is not wholly without exceptions. Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition. One clear example of such a statute is the Sherman Act, 26 Stat. 209. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-688, 98 S.Ct. 1355, 1363-1364, 55 L.Ed.2d 637 (1978); *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 531-535, 103 S.Ct. 897, 905, 74 L.Ed.2d 723 (1983). For that reason, in *Continental T.V., Inc. v. GTE Sylvania*

(STEVENS, J., concurring), and *City of Rome v. United States*, 446 U.S. 156, 191, 100 S.Ct. 1548, 1568-1569, 64 L.Ed.2d 119 (1980) (STEVENS, J., concurring). See also *Runyon v. McCrary*, 427 U.S. 160, 189-192, 96 S.Ct. 2586, 2603-2605, 49 L.Ed.2d 415 (1976) (STEVENS, J., concurring). If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress.¹² Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke. Today, proof of invidious purpose is a necessary component of a valid Title VI claim.

III

[1] The respondent Police Department in this case sought, received, and expended federal grants to pay the salaries of policemen and to finance its recruitment programs. In order to obtain funds from the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development, see App. A123, it was required to promise not only that it would comply with Title VI, but also that it would abide by departmental regulations implementing that statute.¹³ Ever since

Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), the doctrine of *stare decisis* did not preclude the Court from overruling its prior decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), even though Congress had not acted during the intervening decade. Cf. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 695-701, 98 S.Ct. 2018, 2038-2041, 56 L.Ed.2d 611 (1978) (overruling an erroneous interpretation of § 1983 in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), despite the absence of congressional action). Title VI is different from those statutes, because Congress expected most interstitial lawmaking to be performed by administrative agencies, not courts.

13. One standard application form requires the following certification:

"The grantee hereby assures and certifies that it will comply with the regulations, policies, guidelines and requirements with respect to the acceptance and use of Federal funds for this federally-assisted program. Also, the grantee gives

1964, all three Departments have had virtually identical implementing regulations. Significantly, those regulations do more than merely prohibit grant recipients from administering the funds with a discriminatory purpose; they require recipients to administer the grants in a manner that has no racially discriminatory effects.¹⁴

¹⁴ This Court has repeatedly upheld the validity of those regulations and their "effects" standard. *Lau v. Nichols*, 414 U.S., at 568, 94 S.Ct., at 789; *id.*, at 571, 94 S.Ct., at 790-791 (Stewart, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 479, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980) (opinion of BURGER, C.J.). The reason is that Title VI explicitly authorizes "[e]ach Federal department and agency which is empowered to extend Federal financial assistance ... to effectuate the provisions of section 601 ... 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 ..." 78 Stat. 252, 42 U.S.C. § 2000d-1. Nothing in the regulations is inconsistent with any of the statutes authorizing the disbursement of the grants that the respondent Police Department received.¹⁵

It is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal statute that governs completely private conduct, those regulations have the force of law so long as they are "reasonably related to the purposes of the enabling legislation." *Mourning v.*

assurances and certifies with respect to the grant that:

14. For example, the regulations provide:

"A recipient, in determining the ... benefits which will be provided under any such program, ... may not, directly or through contractual or other arrangements, utilize criteria ... which ... have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect to persons of a particular race, color, or national origin." 24 CFR § 1.4(b)(2) (1982); 28 CFR § 42.104(b)(2) (1982); 29 CFR § 31.104(b)(2) (1982).

"(6) The grant will be conducted and administered in compliance with:

Family Publications Service, Inc., 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318 (1973). See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-306, 99 S.Ct. 1705, 1717-1720, 60 L.Ed.2d 208 (1979); *Batterton v. Francis*, 432 U.S. 416, 425, n. 9, 97 S.Ct. 2399, 2405, n. 9, 53 L.Ed.2d 448 (1977). See generally K. Davis, *Administrative Law Treatise* § 7.8 (2d ed. 1980 and Supp.1982). The presumption of validity must be at least as strong when a regulation does not seek to control the conduct of independent private parties, but merely defines the terms on which someone may seek federal money. By prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI.¹⁶

The reasonableness of the agencies' method of implementation is apparent from the Court's opinion in *City of Rome v. United States*, 446 U.S., at 173-178, 100 S.Ct., at 1559-1562, which held that even if § 1 of the Fifteenth Amendment only prohibits purposeful racial discrimination in voting, Congress may implement that prohibition by banning voting practices that are discriminatory in effect. At the dawn of this century, this Court unanimously held that an administrative regulation's conformity to statutory authority was to be measured by the same standard as a statute's conformity to constitutional authority. In *Boske v. Comingore*, 177 U.S. 459, 470, 20 S.Ct. 701, 706, 44 L.Ed. 846 (1900), we wrote:

"(a) Title VI of the Civil Rights Act of 1964 (Pub.L. 88-352) and implementing regulations ..." Form HUD 4124 (emphasis added).

15. Indeed, even in the absence of Title VI, one would expect the administrative agencies to distribute the grants in a way that will benefit all segments of the communities they seek to serve.

16. Those purposes are evident from the statutory language:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in [or] be denied the benefits of ... any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U.S.C. § 2000d.

"In determining whether the regulations promulgated by [the Secretary of the Treasury] are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

Since an "effects" standard is an appropriate means for Congress to implement a constitutional prohibition against discrimination, an "effects" regulation is an equally appropriate means for an administrative agency to implement a comparable statutory prohibition.¹⁷

Thus, although the petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of the statute, they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of valid federal law.

17. Earlier in the *Boske* opinion the Court had noted that there was "certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation." 177 U.S., at 469, 20 S.Ct., at 705. The same may be said of the regulations at issue in this case. For although the Court has determined that Title VI does not *compel* the application of an effects standard, see *supra*, at 3252-3253, I do not believe that Congress should be understood to have *prohibited* regulations adopting such a standard, especially given the passages from the legislative history of Title VI identified in *Bakke*, 438 U.S., at 413-418, nn. 11, 13, 15, 16, 19, 23, 98 S.Ct., at 2810-2813, nn. 11, 13, 15, 16, 19, 23 (STEVENS, J., dissenting), and Congress' acquiescence in those regulations since 1964.

IV

The District Court found that the respondent Police Department in this case was making entry-level appointments in a manner that had a discriminatory impact on blacks and Hispanics. That conduct violated the petitioners' rights under regulations promulgated by the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development. The petitioners were therefore entitled to the compensation they sought under 42 U.S.C. § 1983 and were awarded by the District Court.¹⁸ I would reverse the judgment of the Court of Appeals.



463 U.S. 646, 77 L.Ed.2d 911

Raymond L. DIRKS, Petitioner

v.

SECURITIES AND EXCHANGE
COMMISSION.

No. 82-276.

Argued March 21, 1983.

Decided July 1, 1983.

Petition for writ of certiorari was filed seeking review of a decision of the United

18. Because respondent Police Department acted under color of state law in making appointments, § 1983 authorizes a lawsuit against it, based on its violation of the governing administrative regulations. This does not mean, as Justice POWELL suggests, *ante*, at 3235, n. 1, that a similar action would be unavailable against a similarly situated private party. Whether a cause of action against private parties exists directly under the regulations and, if so, what the standard of liability in such an action would be, are questions that are not presented by this case.

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**LATINOS UNIDOS DE CHELSEA EN
ACCION (LUCHA), et al.,
Plaintiffs, Appellants,**

v.

**SECRETARY OF HOUSING AND
URBAN DEVELOPMENT, et al.,
Defendants, Appellees.**

No. 85-1573.

**United States Court of Appeals,
First Circuit.**

Argued May 7, 1986.

Decided Aug. 12, 1986.

Civil rights action was brought against city and officials of Department of Housing and Urban Development, alleging that defendants deprived city's minority population of equal opportunities in employment, housing and government contracts made available through several federally funded programs. The United States District Court for the District of Massachusetts, Walter Jay Skinner, J., entered judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Coffin, Circuit Judge, held that: (1) evidence was insufficient to establish prima facie case of either discriminatory intent or impact in employment in city, in violation of Title VI of Civil Rights Act of 1964; (2) evidence was insufficient to establish prima facie case of intentional discrimination in housing; (3) evidence was insufficient to establish prima facie case of discrimination in contracting; (4) HUD's alleged failure to comply with section of Civil Rights Act of 1968 directing HUD to "affirmatively" further purposes of the statute could be challenged only in action under Administrative Procedure Act; and (5) nondiscrimination provision of Housing and Community Development Act did not create private right of action.

Affirmed.

1. Civil Rights ⇐44(1)

Statistical evidence which showed that minority employment in city departments

receiving federal funds did not reflect city's minority population was insufficient to establish prima facie case of either discriminatory intent or impact in employment in city, in violation of Title VI of Civil Rights Act of 1964, in light of evidence that city was hiring significant numbers of minorities in relation to total number of hires and that city was losing residents and had quickly growing minority community. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

2. Civil Rights ⇐9.10

Use of disparate impact model to determine whether city had engaged in discriminatory hiring practices was inappropriate, absent specific practice, objective or subjective, that allegedly caused discriminatory impact on minorities. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

3. Civil Rights ⇐13.13(3)

Evidence that city's housing improvement program under community development block grant entitlement program primarily assisted homeowners, and that few of city's minority residents owned homes was insufficient to establish prima facie case of intentional discrimination in housing, in light of evidence that nearly ¼ of city's residents, including most whites, lived in rental households and were thus excluded from direct participation in the program. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Housing and Community Development Act of 1974, §§ 101-119, as amended, 42 U.S.C.A. §§ 5301-5318.

4. Civil Rights ⇐13.13(3)

Evidence that city chose housing improvement program for which basic criteria was home ownership, and that few minorities owned home was insufficient to establish prima facie case of discriminatory impact, in light of statistics showing that city provided housing assistance proportionately for all its residents. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Housing and Community Development

*looked
for intent
dismissed Title VI
p. 783 b/c no intent*

ment Act of 1974, §§ 101-119, as amended, 42 U.S.C.A. §§ 5301-5318.

5. Civil Rights ⇐13.13(3)

Evidence that city used urban development action grant to subsidize housing for elderly rather than family housing was insufficient to support finding of intentional racial discrimination. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Housing and Community Development Act of 1974, § 119, as amended, 42 U.S.C.A. § 5318.

6. Civil Rights ⇐13.13(3)

Evidence showing statistical disparity in city's award of Title I housing contracts to minority contractors was insufficient to establish prima facie case of discrimination in contracting, absent showing that there was disparity between number of minority businesses in city and involvement of such businesses in city contracts. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Housing and Community Development Act of 1974, §§ 101-119, as amended, 42 U.S.C.A. §§ 5301-5318.

7. Civil Rights ⇐11.5

City housing programs which did not violate Title VI of Civil Rights Act of 1964 also did not violate Title VIII of Civil Rights Act of 1968. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Civil Rights Act of 1968, §§ 801-901, 42 U.S.C.A. §§ 3601-3631.

8. Civil Rights ⇐12.4, 13.1

Department of Housing and Urban Development's alleged failure to comply with section of Civil Rights Act of 1968 directing HUD to "affirmatively" further purposes of the statute could be challenged only in action under Administrative Procedure Act; statute did not create private right of action. 5 U.S.C.A. §§ 701-706; Civil Rights Act of 1964, §§ 803-806, 808(e), 810(a-d), 812(a), 813, 42 U.S.C.A. §§ 3603-3606, 3608(d), 3610(a-d), 3612(a), 3613.

* Of the United States Court of International Trade, sitting by designation.

9. Civil Rights ⇐13.1

Nondiscrimination provision of Housing and Community Development Act did not create private right of action. Housing and Community Development Act of 1974, § 109(a), as amended, 42 U.S.C.A. § 5309(a).

Alan Jay Rom, Lawyers Committee for Civil Rights Under Laws of the Boston Bar Ass'n, with whom Stuart T. Rossman, Sheara F. Friend and Gaston Snow & Ely Bartlett were on brief for plaintiffs, appellants.

Marshall D. Stein, Sp. Counsel to the City of Chelsea, with whom Cherwin & Glickman was on brief for City of Chelsea and Mayor of Chelsea, Mass.

Howard S. Scher, Civ. Div., Dept. of Justice, with whom William F. Weld, U.S. Atty., Richard K. Willard, Asst. Atty. Gen., Michael Jay Singer, Civ. Div., Dept. of Justice, Gershon M. Ratner, Associate Gen. Counsel for Litigation, Howard M. Schmeltzer, Sp. Asst. to the Associate Gen. Counsel for Litigation, and Anthony J. Ciccone, Jr., Trial Atty., HUD Office of Litigation, were on brief for federal defendants, appellees.

Before COFFIN and TORRUELLA, Circuit Judges, and MALETZ,* Senior Judge.

COFFIN, Circuit Judge.

Plaintiffs brought this civil rights action alleging that the city of Chelsea, Massachusetts, and three officials of the United States Department of Housing and Urban Development (HUD),¹ deprived Chelsea's minority population of equal opportunities in employment, housing and government contracts made available through several federally funded programs. The plaintiffs, Latinos Unidos De Chelsea En Accion (LUCHA) and four individual members of LUCHA, appeal three orders of the district court, which denied class certification, granted the federal defendants' motion to

1. Plaintiffs sued the three individuals in their official capacities. For simplicity's sake, we shall refer to them collectively as HUD.

dismiss, granted summary judgment for the city defendants on all but one claim and, after trial, held that the city did not discriminate in its Housing Improvement Program. We have carefully reviewed the record and the legal precedents and have found no reversible error.

In an effort to simplify the many issues in this case, we begin with a description of the relevant funding programs. We then present factual background about the city of Chelsea, the nature of the community development activities for which it used federal funds, and the annual reviews of the city's projects. Finally, we discuss why we find no violations of antidiscrimination laws in the challenged areas of employment, housing and contracts.

I.

Chelsea received the federal grants at issue in this case between 1975 and 1980 under the Community Development Block Grant (CDBG) Entitlement Program, 42 U.S.C. §§ 5301-5317; the Small Cities Program (SCP), 42 U.S.C. § 5306(d), which is a subprogram of the CDBG; and the Urban Development Action Grant (UDAG) program, 42 U.S.C. § 5318. All three programs are part of Title I of the Housing and Community Development Act (HCDA) of 1974, whose primary objective "is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c).² See also 42 U.S.C. § 5304(b)(3) (current law) (maximum feasible priority should be given "to activities which will benefit low- and moderate-income families or aid in the prevention or elimination of slums or blight").

Both the CDBG and UDAG programs have nondiscrimination requirements. Recipients in both programs, under a specific provision of the HCDA, are prohibited from

discriminating on the basis of race, color, national origin or sex. 42 U.S.C. § 5309. CDBG grantees also are required to certify "that the program will be conducted and administered in conformity" with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631. 42 U.S.C. § 5304(a)(5). Title VI prohibits recipients of federal funds from discriminating on the basis of race, color or national origin in the use of those funds; Title VIII prohibits discrimination in the sale or rental of housing. The Secretary is charged with making an annual review of the CDBG recipient's programs to determine compliance with applicable laws, and may impose conditions on a present year's grants as a result of the review of a prior year's program. 24 C.F.R. § 570.910(b) (April 1979).

Under the UDAG program, nondiscrimination provisions are built into the eligibility requirements. Cities may receive UDAG grants only if they have "demonstrated results in providing housing for low- and moderate-income persons and in providing equal opportunity in housing and employment for low- and moderate-income persons and members of minority groups." 42 U.S.C.A. § 5318(b)(1) (West 1986). And in selecting one UDAG application over another, HUD must consider the "impact of the proposed urban development action program on the special problems of low- and moderate-income persons and minorities." 42 U.S.C. § 5318(e)(3).

Aside from these nondiscrimination limitations, CDBG and UDAG recipients have wide latitude in choosing specific programs that meet the statute's objectives. See 42 U.S.C. § 5305. Acceptable community development programs include the acquisition and rehabilitation of blighted or deteriorated property; construction of neighborhood facilities such as senior centers, utilities, streets, parks and fire protection

at issue here. Recent amendments have changed the language, if not the substance, of Title I.

2. Citations to statutory provisions and regulations, unless otherwise noted, generally refer to the laws as they existed in the mid- to late-1970s, when Chelsea received most of the funds

services; code enforcement in deteriorated areas; and provision of public services concerned with child care, health and drug abuse. 42 U.S.C. § 5305(a)(1)-(12).

II.

Chelsea is a densely populated city of 1.8 square miles. According to the 1960 census, Chelsea's population was 33,749, including about 1% minorities. The 1970 census showed that the city's population had dropped to 30,625, of which 1.6% were black and 3.5% were Hispanic. In the mid-1970s, Chelsea's population changed dramatically. By the time the city conducted a survey in February 1978, the Hispanic population had risen to 19.5% of the total, with other minorities representing an additional 2.6%. The survey showed that about half of the Hispanics had arrived in the preceding three years, and that less than one-fourth had lived in Chelsea for five years or more. Despite the rapid growth in the number of Hispanics, the overall population in Chelsea continued to decline, falling to approximately 25,000 in 1979. In a 1978 letter to HUD, Chelsea's mayor attributed the outmigration to "fires, general deterioration and abandonment, high taxes and few amenities and fewer services from a poor city to a dependent population". [App. at 469.]

The 1978 survey also revealed the following characteristics of Chelsea:

—85.6% of Hispanic households in the city were designated by HUD standards as low- or moderate-income, while 78.5% of the nonminority households also qualified for HUD assistance;

—rental households comprised 73.3% of all households in Chelsea (only 1% of black residents and 5.1% of Hispanic residents were homeowners);

—Chelsea is a city of multi-unit housing structures; 725 buildings contained a single unit; 1529 contained two units; 948 contained three units; and 455 contained four or more units; [App. at 248.]

—overcrowding was a problem for 17.8% of households surveyed, and a problem particularly for Hispanics;

—a significantly higher percentage of blacks and Hispanics (compared with non-minorities) reported housing problems such as sewage backup, leaky roof, cracked/broke interior walls or ceilings, peeling paint; rodents and insects;

—the elderly population, which is 98.6% non-minority, comprised about 20% of the total population.

Thus, when Chelsea began applying for federal community development funds in 1975, it was largely a city of renters, losing residents overall but with a growing Hispanic population that apparently was experiencing the city's housing problems more acutely than other residents. Many housing structures needed varying degrees of physical rehabilitation, although a large percentage of the population apparently was unable to make the personal investment in the needed improvements. In addition, a 1976 survey showed a 1% vacancy rate; thus, the city presumably needed additional housing, with the greatest need in all likelihood among low-income families.

III.

Over the course of the six years under consideration in this case, Chelsea received approximately \$20 million in federal funds for community development projects. We discuss below the nature of some of these projects, and the reaction toward them from agencies reviewing the city's compliance with nondiscrimination requirements.

A. *Community Development Block Grant Programs, 1975-1980.* Chelsea participated in the CDBG program for five years, conducting a variety of programs aimed at different aspects of community development, including fire prevention, housing code enforcement, playground development, street lighting, and road construction. Several of these programs were begun in the areas with the largest minority populations.³ In addition, in the early

the first-year programs, see 24 C.F.R. § 570.909

3. A summary prepared as part of the review of

years of the CDBG program, funds also were allocated to a bilingual day care center, a housing legal services program for low income families, minorities and the elderly, and health services directed toward lower income minority persons.

1. *The first two years (1975-1976; 1976-1977)*

A major project begun in the first year was the Mayor's Housing Improvement Program (HIP), which provided grants of 20 percent of the cost of repairs undertaken in owner-occupied homes. This program was expanded the second year to include repairs done by absentee landlords "because it was felt that many of the persons the program should be affecting live in units owned by absentee landlords." Most of the people benefiting from this particular program were not minorities because very few minorities owned their own homes.⁴

2. *The third year (1977-1978)*

In the third program year, 1977-1978, the city reported that, in addition to the continuing programs, Chelsea's Office of Community Development would hire a Community Services and Planning Officer "[t]o insure that the needs of the growing Spanish population are met". [App. at 125.] The city also reported that it was in the final stages of developing a comprehensive plan to respond to Hispanic needs, explaining that the city was focusing on

(April 1979), showed that housing code enforcement was to be concentrated in two census tracts with the highest percentage of low income and minority residents. The summary also stated that the major playground project was planned for the neighborhood with the highest percentage of lower income minority persons. That area also had a large number of children under 12. Although street improvements were planned for all four residential neighborhoods, "[t]he city has established a policy of focusing the highest proportion of local resources allocated for public facility improvements in areas inhabited by lower income and minority persons."

4. In fiscal year 1978, the HIP program accounted for \$5,000 of the \$1.9 million in CDBG funds that the city proposed to spend that year.

this group "because of the intense level of in-migration of Spanish speaking persons in Chelsea."

The Massachusetts Commission Against Discrimination (MCAD) and the North Suffolk Legal Assistance Association (NSLAA) reviewed Chelsea's first three applications,⁵ and found them to be unsatisfactory because they failed to adequately assure Chelsea's minority residents equal participation in the program's benefits. The NSLAA, which reviewed the third-year application, claimed that the city's Housing Assistance Plan failed to analyze the impact of the growing Hispanic community on future housing needs.⁶ It particularly objected to Chelsea's emphasis on rehabilitating homes through the provision of assistance to homeowners, rather than on expanding housing opportunities for low- and moderate-income persons through building new units of low- and moderate-income housing. NSLAA concluded that Chelsea's proposals violated Title I of HCDA because they did not meet "the primary objective of the Act by principally benefitting low- and moderate-income persons." See 24 C.F.R. § 570.304(a)(2) (April 1979) (requiring fund recipients to pinpoint special needs of minority community and to design programs to fulfill them). Moreover, NSLAA concluded, the failure to specially assist the minority community excluded minorities from meaningful participation in the benefits of Title I, thus violating Title VI of the Civil Rights Act of 1964

5. Under the Federal Office of Management and Budget, Circular No. A-95 (revised Jan. 2, 1976), recipients of funds under the Housing and Community Development Act must submit their applications to specified local agencies for review. These agencies submit comments to HUD. See 24 C.F.R. § 570.307(c) (April 1979).

6. The Housing Assistance Plan (HAP) is a comprehensive planning statement that contains data about the need for lower income housing and describes the city's plans for responding to that need. 42 U.S.C. § 5304(a)(4). A HAP must be submitted with each application for CDBG funds.

and the nondiscrimination provision of Title I, 42 U.S.C. § 5309.

NSLAA also pointed to the low percentage of minority persons employed in city agencies receiving federal funds and charged that "maintaining these discriminatory employment practices [violates] Title VI of the 1964 Civil Rights Act as well as the CDBG Act itself."⁷ As a result of NSLAA's concerns, HUD agreed to condition its third-year grant approval on the city's promise to conduct a survey in cooperation with NSLAA to determine the size and needs of the Hispanic community.⁸

3. *The fourth and fifth years (1978-1979; 1979-1980)*

The fourth and fifth years of CDBG funding transpired in similar fashion. Chelsea implemented some programs of apparently direct benefit to the Hispanic community, including initiation of a Hispanic Neighborhood Center Project that provided housing referrals, job information and other services to the Hispanic community. Nevertheless, both the MCAD and HUD's Fair Housing & Equal Opportunity Division (FH & EO Division) concluded that Chelsea's actions to prevent discrimination continued to be inadequate. The FH & EO Division found that minority employment remained low (2.1% of all full-time city employees in 1978-79), and that of 32 business contracts awarded thus far during the CDBG program, none had been awarded to a minority.⁹

In the fourth year, HUD responded to the persistent concerns about Chelsea's performance by requiring revisions in the

city's Housing Assistance Plan to provide for an increase in family housing goals. HUD also required that Chelsea submit a "special assurance" that its employment practices were in compliance with 24 C.F.R. § 570.601(b)(iv) (April 1979), which requires that recipients ensure that all residents have equal access to CDBG program benefits. [App. at 284.] The "special assurance" is a form of remedial action in which HUD requires grant recipients to specify performance goals and a specific timetable for achieving results within six months. See 24 C.F.R. § 570.910(b)(4) (April 1, 1979).

In October 1978, FH & EO Division staff conducted a monitoring visit to review Chelsea's performance under the CDBG program. They concluded that Chelsea had not taken the necessary "affirmative actions" to provide minority employment and that the city's "special assurance" was "woefully inadequate"; rather than setting goals and timetables for the hiring, training and promoting of minority employees, Chelsea's mayor had simply sent a letter assuring HUD that the city would not discriminate. The FH & EO Division also found Chelsea's actions to prevent housing discrimination to be unacceptable, and it recommended the following: (1) establishment of a goal of hiring at least 10 percent minority contractors; (2) establishment of a Mayor's Office of Fair Housing; (3) design of a Fair Housing Plan that would provide for family rather than elderly housing; (4) hiring a full time compliance officer who is bilingual. [App. at 298.]

7. In June 1978, NSLAA filed an administrative complaint on behalf of LUCHA, which led to the filing of the instant suit in that same year against HUD. After a decision on standing by this court, *NAACP, Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir.1979), which remanded the case, plaintiffs joined the City of Chelsea and its mayor as defendants.

8. HUD's Fair Housing and Equal Opportunity Division had found that, insofar as the city and NSLAA agreed that Chelsea's 1977 Housing Assistance Program understated the housing needs of Hispanics, because the plan was based on 1970 census data, the city's application was in

violation of 24 C.F.R. § 570.306(b)(20)(i) (April 1979) (requiring that applicant provide estimates of housing assistance needs of lower-income persons, including estimates for "any identifiable segment of the total group of lower-income households").

9. A discrepancy that does not affect our analysis exists with regard to the number of business contracts awarded to minorities. The district court found that, in Program Year 1, two contracts (as opposed to none) totalling 18.6% of the contracts awarded went to minority businesses.

Apparently in light of Chelsea's failure to improve, HUD attached "special conditions" to the fifth-year CDBG grant in the areas of employment, fair housing and minority entrepreneurship. These conditions restrict the use of funds in those areas and are a more serious sanction than the prior request for a "special assurance". See 24 C.F.R. § 570.910(b)(9) (April 1979). Specifically, in noting that Hispanics had not benefitted from the city's housing rehabilitation programs in proportion to their numbers in the community, HUD recommended changes in Chelsea's programs such as the establishment of a preference for Hispanic homeowners and for homeowners with Hispanic tenants; expansion of the rehabilitation programs to multi-family structures occupied by Hispanics and other minorities; and homeownership counseling for Hispanics and other minority residents of Chelsea. HUD also required development of an affirmative action plan that would establish a goal for hiring minorities at the rate of at least 51 percent in city agencies receiving CDBG funds, establishment of a compliance unit, and development of goals for awarding business contracts to minorities. [App. at 363.]

B. Small Cities Program, 1978-1981. Starting in 1978, Chelsea received SCP funds, as well as CDBG funds,¹⁰ for the same type of community programs. In its review of Chelsea's first SCP application in 1978, the FH & EO Division noted that Chelsea had failed to propose explicit activities to meet its obligations under Titles VI and VIII. Those obligations, according to the Division, arose from Title VI and HCDA regulations specifying that:

"Even in the absence of ... prior discrimination, a recipient in administering a program should take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, national origin[, or sex]." 24 C.F.R. § 1.4(b)(6)(ii) (April 1985) (sex included as

a status in HCDA regulation only). See 24 C.F.R. § 570.601(b)(4)(ii) (April 1979).

HUD approved the SCP grant without conditions, however, noting in its approval letter that the FH & EO concerns would be communicated to the city in a separate letter with the expectation that the city would give the comments immediate attention.

In awarding the second-year SCP funds, HUD imposed the same "special conditions" that it had attached to the fifth-year CDBG grant. The following year, 1980-1981, the FH & EO Division review report concluded that Chelsea had "minimally met the conditions imposed" during the previous year. In order to assure greater efforts to improve, the Division recommended that the city provide a series of special assurances, including continuation of the 51 percent hiring rate for minorities, continuation of a 10 percent minimum goal for awarding contracts to minority businesses, and continuation of funding and staffing of a fair housing program "designed to assure equal access to housing and other City services". HUD adopted the FH & EO Division recommendations.

In 1981, the third year of SCP participation (Program Year 6), the FH & EO Division again found Chelsea's housing activities inadequate to meet the needs of minorities, and HUD awarded that year's grant with the understanding that the special assurances in the areas of minority employment, fair housing and minority contracting would remain in effect at least during the next year.

C. Urban Development Action Grant. Chelsea applied in 1978 for \$6,794,000 in UDAG funds for development of the Chelsea Naval Hospital. Its proposal called for creation of a new residential area, rehabilitation of existing housing, restoration of an historic area, development of a 26-acre public park, the opening of the waterfront to commercial and recreational uses and the set aside of about 14 to 20 acres of land

received funding only under the SCP program.

10. Chelsea's participation in the two programs overlapped for two years, and the city then

for industrial development. The residential proposal included construction of 300 luxury apartments, 570 market rate apartments and 300 subsidized housing units for the elderly. Additional elderly housing would be constructed in other neighborhoods as part of the UDAG project. [App. at 1009.] In addition, 132 low-income family housing units would be rehabilitated in a nearby neighborhood.

The FH & EO Division rated Chelsea's proposal as fair, commenting that it "minimally reduces the magnitude of the special problems of minority persons". The Division noted that there was no provision for low-income jobs, and the only low-income family housing provided was the 132 rehabilitated units.

In recommending the project for approval, the Boston Area Office noted that the housing proposed was geared toward middle and upper income persons, but that revitalization of the surrounding neighborhoods would provide expanded housing opportunities for low and moderate-income persons. In addition, the Area Office memo noted that about 300 jobs would be created by the project, many of them for lower-income persons, and another 400 jobs would be saved.¹¹ Finally, the memo noted that the added tax revenue generated by the project would significantly help the city to provide services to the low income and minority population. [App. at 759.]

IV.

This factual background confirms appellants' contentions that Chelsea's actions did not always reflect a top priority concern for its minority residents. The city consist-

ently used a large portion of its federal funds for programs that were not specifically directed at minority housing needs. Despite repeated criticism from the local reviewing agencies and HUD's FH & EO Division, Chelsea did not refocus its community development program so as to emphasize new construction of low-income family housing. Similarly, the city's record on employment was largely the same at the end of the relevant grant years as it was when Chelsea began receiving federal funds in 1975. In 1975, in the six city departments receiving federal funds, Chelsea had 256 employees, only one of whom, a black, was a member of a minority group. In 1980, the city reported that ten of 389 permanent employees in all city departments were minorities. And in an affirmative action report submitted to HUD in April 1981, Chelsea stated that only six of its 375 fulltime employees were minorities. Reports to HUD, from the FH & EO Division and outside agencies, consistently complained of inadequacies in Chelsea's activities, prompting HUD to demand special assurances and impose conditions on the grant awards.

These facts, however, do not completely illumine the nature of Chelsea's assistance to its minority community. The *hiring* figures throughout the grant years, as opposed to the final employment figures in 1981, illustrate a more proportional relationship between the government's activities and Chelsea's minority population. Likewise, the amount of housing aid, other than through the Housing Improvement Program, reflects a similar proportionate relationship. We present two tables below, one showing city hiring between 1975 and 1981, and the other showing how Chelsea's total housing assistance was distributed.

11. Chelsea had attached to its UDAG application a letter from the president of Sweetheart Paper Products Co, which is located in Chelsea, indicating that it would relocate if the UDAG project did not go through, enabling the company to

expand. The letter stated that an expansion would likely result in 300 additional jobs for a workforce consisting of "mostly minority and low income persons". [App. at 751.]

Hiring in City Departments Receiving CDBG Funds ¹²						
Program and Year	Total Hired	Minorities	Minority Percentage	Program Year 3 (1977-1978)		
Program Year 1 (June 1975-Septem- ber 1976)	22	3	13.6%	37	6	16.2%
Program Year 2 (1976-1977)	11	4	36.4%	Program Year 4 (1978-1979)	18 ¹³	2 11.1%
				Program Year 5 (1979-1980)	4-5	1-3 20% to 75%
				Program Year 6 (1980-1981)	0	0 0

Housing Assistance ¹⁴			
Program and Year ¹⁵	Total Assisted	Minority-assisted (HOUSEHOLDS)	Minority Percentage
CDBG 1 (1975-1976)	211	7	3.3%
CDBG 2 (1976-1977)	529	25	4.7%
CDBG 3 (1977-1978)	478	91	19%
CDBG 4 (1978-1979)	588	98	16.7%
CDBG 5 (1979-1980)	488	134	27.5%
SCP 1 (1978-1979)	333	76	22.8%
SCP 2 (1979-1980)	781	213	27.3%
SCP 3 (1980-1981)	690	147	21.3%

These two tables illustrate that Chelsea was not ignoring its minority community. Plaintiffs' claims, therefore, must rest on the city's failure to do *enough* to meet its civil rights obligations, and not on the city's complete neglect of those obligations.

V.

The district court granted the city defendants' motion for summary judgment except as to plaintiffs' claim that the municipal defendants discriminated in the Housing Improvement Program. After trial, the court found that Chelsea and its officials had not violated any laws in operating that program. We are therefore gov-

erned on this appeal by two different standards. Considering the facts in the light most favorable to the plaintiffs, we must determine whether there exists a genuine issue as to any material fact relating to the alleged discrimination in employment, contracting and the general housing program, those claims dismissed on summary judgment. *Mutual Fire, Marine & Inland Insurance Co. v. Costa*, 789 F.2d 83, 85 (1st Cir.1986); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir.1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). And in reviewing the merits of the district court's judgment on the HIP program, we

well as that provided under the CDBG program. The term "Section 8 housing" derives from section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, authorizing HUD to provide housing assistance payments on behalf of eligible low-income tenants. *See also* 12 U.S.C. § 1701s (providing rent supplements for low-income families). In addition, our figures are for total "occupied" units assisted, rather than for total "committed" units, a separate figure in housing assistance reports filed by Chelsea.

12. These figures are drawn largely from the district court's Findings of Fact. We departed from its chart with regard to two figures for which we concluded that defendants had shown clear error on the part of the district court. Even without these differences, however, our disposition would be the same.

13. Defendants contend that this figure should be 10, rather than 18, to reflect only permanent employees, which they claim is the basis for the hiring figures in all other years. The record materials do not allow us to make our own determination of this issue, and so we adopt the number used by the district court as not clearly erroneous.

14. These figures represent the product of our own scrutiny of the pertinent documents rather than a wholesale adoption of the district court's figures. Nevertheless, our figures are identical in most cases to those in the district court's chart.

We note that these totals include housing assistance provided under HUD's Section 8 program and similar state housing programs, as

15. Beginning in CDBG Year 2, the figures for minority housing assistance include households receiving rental subsidies under the Section 8 housing program. In CDBG Year 2, such assistance went to 8 households; in CDBG 3, it went to 44 households; in CDBG 4, it went to 71 households; in CDBG 5, it went to 122 households; in SCP 1, it went to 71 households; in SCP 2, it went to 115 households; and in SCP 3, it went to 100 households. Most of the other assistance to minority households was in the form of homeowner block grants.

must determine whether that court either erred as a matter of law or reached clearly erroneous factual conclusions leading to the wrong result. Fed.R.Civ.P. 52(a); *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Sweeney v. Board of Trustees*, 604 F.2d 106, 109 n. 2 (1st Cir.1979), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980). We also must consider whether HUD properly was dismissed from the case.

We shall address each statute and constitutional provision in turn, considering separately the issues of employment, housing and contracting discrimination.¹⁶ Because of the number of issues and sub-issues, we think it helpful to furnish the following roadmap to our substantive discussion:

A. *Title VI Claims*

1. Employment
 - discriminatory intent
 - discriminatory impact
2. Housing
 - discriminatory intent
 - discriminatory impact
3. Contracts

B. *Title VIII Claims*

- substantive issues against Chelsea
- private right of action against HUD

C. *Title I of the Housing and Community Development Act*

- private right of action

D. *Constitutional Claims*

A. *Title VI*

Plaintiffs allege that the actions of Chelsea and HUD violated both Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,

et seq., and regulations promulgated under that statute, 24 C.F.R. § 1.4. They claim that Chelsea's actions in failing to provide sufficient opportunities for minorities in employment, housing and business contracting constituted prohibited discrimination. Plaintiffs' claim against HUD is that the agency continued unconditionally to provide federal funds to Chelsea despite the city's alleged discriminatory practices.

We conclude that the district court correctly rejected plaintiffs' claims against Chelsea under Title VI. As to HUD, it can not be found liable under Title VI for failing to take action against Chelsea if the city did not, in fact, discriminate against minorities in violation of the statute. Because we conclude that Chelsea did not violate Title VI, plaintiffs' claim against HUD also must fail.¹⁷

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

To prevail with a direct claim under the statute, plaintiffs must show that defendants acted with discriminatory intent.

Guardians Ass'n v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983).

Plaintiffs have not presented sufficient proof of such intent in any of the three areas of employment, housing or contracting.¹⁸

16. In light of our disposition of this case, we find it unnecessary to determine whether the district court erred in failing to certify it as a class action. Although we suspect that this case is appropriate for class action status, see 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.40[1], at 23-285 (2d ed. 1985) ("racial discrimination suits in the civil rights field have been recognized in the great majority of cases as appropriate for treatment as class actions"), the results here would be the same even if the case had been brought as a class action.

For similar reasons, we find it unnecessary to discuss whether plaintiffs carried their burden

of proof on standing as to the claims against HUD. See *NAACP v. Harris*, 607 F.2d 514, 526 (1st Cir.1979).

17. We therefore choose not to decide the more difficult question of whether a private cause of action exists under Title VI against a federal agency, and our discussion below focuses only on the city's Title VI liability.

18. We also address below the issue of discriminatory impact as a violation of Title VI regulations for each of these categories.

[1] 1. *Employment.* Plaintiffs do not significantly contest the hiring figures listed in the chart in Section IV.¹⁹ They apparently concede that, during the six grant years at issue in this case, Chelsea hired between 16 and 18 minority persons, ranging from 11 percent to possibly 75 percent of the city's annual hires. Nevertheless, they contend that the city's employment record permits a conclusion that it intentionally discriminated against minorities. They point out that, in 1981, the final grant year under consideration, Chelsea still had only six minority employees, concentrated in the community development department. Plaintiffs argue that many of those hired during the previous years were only temporary employees or were employees who left because of discriminatory practices on the part of the city. They claim that, under *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20, 97 S.Ct. 1843, 1856-57 n. 20, 52 L.Ed.2d 396 (1977) (*Teamsters*), gross statistical disparities between the racial composition of the work force and that of the population at large can demonstrate a prima facie case of intentional racial discrimination.

We find two problems with plaintiffs' argument. First, while statistical disparity may be sufficient to establish a prima facie case of employment discrimination, "statistics 'come in infinite variety' and their usefulness or weight 'depend[s] on all of the surrounding facts and circumstances,' *Teamsters v. United States*, 431 U.S. at 340, 97 S.Ct. at 1856, and on 'the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn'" therefrom, *White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir.1979)", *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 645 (4th Cir.1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). The context in which we view the statistics in this case is far different from that considered by the

Supreme Court in *Teamsters*, where plaintiffs had claimed discrimination against minorities in the hiring of so-called "line drivers" for a freight company. Of 1,828 line drivers, only 8 (0.4%) were black and 5 (0.3%) were Spanish-surnamed. 431 U.S. at 337, 97 S.Ct. at 1855. This statistical evidence was bolstered with testimony of more than 40 specific instances of discrimination, which "brought the cold numbers convincingly to life". *Id.* at 338-39, 97 S.Ct. at 1856.

In contrast, in this case, the evidence beyond the statistical disparity shows that the city was, in fact, hiring significant numbers of minorities in relation to the total number of hires, and in some years the percentage of minority hires exceeded the minority percentage in the workforce. It is true that, as an affirmative action policy, the city could have hired more minorities; for example, the city could have chosen to hire only minorities. And plaintiffs may be correct that the ultimate poor statistical showing as to the number of minority employees may reflect an inhospitable working environment for them. But Chelsea is not required to adopt an affirmative action policy in order to avoid a finding of intentional discrimination under Title VI. In fact, it may be prohibited from employing affirmative action practices in the absence of a *prior* finding of discrimination. See *Wygant v. Jackson Board of Education*, — U.S. —, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986) (Powell, J., plurality opinion) ("the Court has insisted upon some showing of prior discrimination by the governmental unit involved before *allowing* limited use of racial classifications in order to remedy such discrimination") (emphasis added). And poor working conditions for Chelsea's minority employees is a matter of pure speculation on this record.

Had plaintiffs produced evidence of discrimination from minorities who had been hired during the grant years and claimed either that they were fired improperly or

19. At oral argument, plaintiffs' counsel implied that the annual hiring figures were inaccurate,

but provided no basis for our rejecting the figures used by the district court.

left under duress, this would be a much different case. But when framed against the hiring percentages, the employment statistics by themselves simply do not add up to a case in which impact alone provides sufficient evidence of invidious intent. Cf., e.g., *Teamsters*, 431 U.S. at 337, 97 S.Ct. at 1855; *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S.Ct. 125, 127, 5 L.Ed.2d 110 (1960) (Alabama legislature changed shape of City of Tuskegee from a square into irregular twenty-eight-sided figure with effect of removing all but four or five of city's 400 black voters); *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073, 30 L.Ed.2d 220 (1886) (of 200 qualified Chinese applicants for running laundries, all rejected, while 80 non-Chinese permitted "to carry on the same business under similar conditions").

A second factor cautions against assuming that the statistical disparity in this case reflects discriminatory intent on the part of the city. Unlike cases where grossly disproportionate numbers logically reflect a longstanding policy of unequal treatment, see, e.g., *Teamsters*, 431 U.S. at 337, 97 S.Ct. at 1855, Chelsea's minority community first became a significant factor in the city during the years in which plaintiffs allege the city practiced intentional discrimination. In a city that is losing residents, and presumably not hiring large numbers of new employees, the fact that a quickly growing minority community is underrepresented in government employment is hardly surprising. In such a case, where hiring statistics are adequate, statistical disparity alone simply is insufficient to establish a prima facie case of intentional discrimination.

Plaintiffs also argue that they presented sufficient evidence to show that Chelsea's hiring practices had a discriminatory effect on minorities, a result that violates Title VI regulations.²⁰ The primary regulation effectuating the nondiscrimination provision of Title VI states:

20. Under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a dis-

"A recipient, in determining the types of housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any such program or activity, or the class of persons to whom, or the situations in which, such housing, accommodations, facilities, services, financial aid, or other benefits will be provided under any such program or activity, or the class of persons to be afforded an opportunity to participate in any such program or activity, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect to persons of a particular race, color, or national origin." 24 C.F.R. § 1.4(b)(2)(i) (April 1985) (emphasis added).

Plaintiffs argue that, even if we find that the employment statistics are insufficient to establish a prima facie case of intentional discrimination, the numbers at least show a prima facie case of disparate impact in Chelsea's hiring practices. They rely on *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), in which the Supreme Court held that Title VII, 42 U.S.C. § 2000e, bars "practices, procedures, or tests neutral on their face, and even neutral in terms of intent ... if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Plaintiffs' argument reflects a misapplication of disparate impact law. Claims of disparate impact usually involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters*, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15 (emphasis added). Plaintiffs, however, do

criminate impact. *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983).

not challenge a specific employment practice or policy, such as a height requirement or passing score on a test, but argue generally that the statistical evidence as to Chelsea's employment record establishes discriminatory impact because few minorities work for the city. In essence, their argument must be that subjective employment decisions led to the discriminatory result of disproportionately few minority city employees.

Whether disparate impact analysis is applicable when plaintiffs do not challenge specific, objective employment criteria is a subject of dispute both within and among the circuits. The Fourth, Fifth, Seventh, Eighth and Ninth Circuits have held that the disparate impact model should not be used to evaluate subjective decisionmaking procedures. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 639 (4th Cir.1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984); *Cunningham v. Housing Authority of the City of Opelousas*, 764 F.2d 1097, 1099 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 530, 88 L.Ed.2d 461 (1985); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 188 (5th Cir.1983); *Coates v. Johnson & Johnson*, 756 F.2d 524, 530-31 n. 4 (7th Cir.1985); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir.1981); *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1133 (9th Cir.1985).²¹ The Fifth and Ninth Circuits also have had panels decide the other way. *See Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1046 (5th Cir. 1984); *Atonio*, 768 F.2d at 1132-33 (describing Ninth Circuit conflict). Finally, the Sixth, Tenth, Eleventh and District of Columbia Circuits have found impact analysis applicable to subjective employee selection practices. *Lujan v. Franklin County Board of Education*, 766 F.2d 917, 930 n. 19 (6th Cir.1985); *Rowe v. Cleveland Pneu-*

matic Co., Numerical Control, Inc., 690 F.2d 88, 93 (6th Cir.1982) (*per curiam*); *Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir.1985); *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir.1985); *Segar v. Smith*, 738 F.2d 1249, 1288 n. 34 (D.C.Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

This court has not yet decided on the applicability of disparate impact analysis to claims focusing on subjective, rather than objective, employment practices. In *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir.1984), pointing to the conflict in the circuits, we noted that it was "by no means clear" that claims related to subjective decisionmaking "should not be analyzed exclusively under a discriminatory treatment rather than a discriminatory impact theory." We further noted that "it may well be that neither approach is fully applicable in conventional form." *Id.* We did not decide the issue in that case, however, because we found that plaintiffs failed to establish disparate impact. *Id.*

[2] We again find it unnecessary to decide whether the disparate impact model ever may be used in a case involving subjective job criteria. At least in this case, the disparate impact model is inappropriate because plaintiffs point to no specific practice—objective or subjective—that allegedly caused a discriminatory impact on minorities. They claim only that Chelsea employs a disproportionately low number of minorities. This is insufficient to establish a *prima facie* case of discrimination, even under a liberal application of the disparate impact model. *Castaneda v. Pickard*, 781 F.2d 456, 465 n. 11 (5th Cir.1986); *Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir.1982). Without the threshold of a specific, facially-neutral procedure (or possibly, a combination of procedures, *see Grif-*

21. In some of these cases, courts have either dismissed the disparate impact claims or transformed them into "pattern or practice" suits, *see, e.g., Carroll v. Sears*, 708 F.2d at 190; *EEOC v. Federal Reserve*, 698 F.2d at 639, which are disparate treatment cases brought under Title VII that focus on systemwide discrimination

rather than on discrimination against an individual job applicant, *see Teamsters*, 431 U.S. at 336 and n. 16, 97 S.Ct. at 1855 and n. 16. In effect, that is the type of claim plaintiffs made in this case when they alleged that Chelsea intentionally discriminated against minorities in its hiring.

fin v. Carlin, 755 F.2d at 1525), the disparate impact test is simply a stripped-down version of the discriminatory treatment test. We do not believe the Supreme Court in *Griggs* intended to set up an alternative test for finding discrimination that simply dropped the requirement of intent. Rather, the disparate impact model was created "to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove", *Atonio*, 768 F.2d at 1133. If plaintiffs' claims do not focus on a specific practice, it is impossible to apply the *Griggs* analysis, which envisions the employer rebutting a prima facie case of discrimination by showing that the practice leading to a disparate impact was justified as necessary to the employer's business, *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854.²²

Our analysis is also consistent with the language of 24 C.F.R. § 1.4, which contemplates a challenge to particular "criteria or methods of administration" that result in a discriminatory impact. As noted above, plaintiffs have not pointed to any such specific criterion or method. Moreover, following plaintiffs' argument to its logical conclusion leads to an untenable result. If Chelsea is guilty of discriminating simply because it has few minority employees, a city with no minority residents in 1970 and 22 percent minority residents in 1980, and no city hiring during that decade, would

be in violation of the law. In effect, discrimination law would embody a mandatory affirmative action component, including a requirement that white employees be fired to enable the hiring of minorities. We are certain that *Griggs* does not countenance such a scenario. See *Wygant*, 106 S.Ct. at 1847 (prior showing of discrimination is prerequisite for constitutional affirmative action plan).²³

Thus, if there is to be a finding of employment discrimination in this case, it must arise either from Chelsea's intentional exclusion of minorities from consideration for city jobs, or from a facially neutral employment practice that results in the exclusion of minority applicants. In the former case, Chelsea would be required to stop basing employment decisions on race or ethnic origin. In the latter case, Chelsea would be required to stop using the objectionable employment practice. We conclude that the numbers here do not add up to a prima facie case of intentional discrimination, and note that the plaintiffs do not challenge any specific employment practice as causing a discriminatory impact. We therefore hold that plaintiffs have failed to establish a prima facie case of either discriminatory intent or impact in employment in the city of Chelsea.

2. *Housing*. The district court, which rejected entirely plaintiffs' allegations of intentional discrimination in housing, con-

22. This is not to say that, for disparate impact analysis to be applicable, it must always be the plaintiffs who point to the specific employment practice causing adverse impact. It could be that, in defense to plaintiffs' prima facie case of disparate treatment, an employer points to a specific job qualification as the explanation for the disparity. It would then be appropriate to evaluate the practice that is offered as justification for the discrimination under the disparate impact model. See *Segar v. Smith*, 738 F.2d 1249, 1270-72 (D.C.Cir.1984), cert. denied, — U.S. —, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

23. A further complication of using a disparate impact analysis in this case would arise with regard to the conflicting statistics on hiring and employment. The chart in Section IV shows no disparate impact in hiring. Yet the ultimate employment record shows a disproportionately

low number of minorities as city employees at the end of the years under scrutiny here. Would a disparate impact analysis in this context ignore the hiring figures and focus on the employment ones? Or would the showing of disparate impact in employment be rebutted by the statistics on hiring? We doubt the latter, since the discriminatory practices could be taking place after the initial hiring decisions.

This statistical conflict between those hired and those employed would not present a puzzle if plaintiffs had alleged an appropriate disparate impact claim. Plaintiffs could be unsuccessful in arguing that a specific hiring practice produced a discriminatory impact, but also could be successful in establishing a case of discriminatory impact based on a supposedly neutral employment retention practice that had led to significantly more minority employees leaving their jobs.

cluded that the only housing program that prima facie showed evidence of discriminatory impact was the Mayor's Housing Improvement Program (HIP). At trial, however, the court concluded that defendants provided adequate justification for the HIP. Plaintiffs challenge all of the district court's findings with regard to Chelsea's housing programs.

[3] a. *Intentional Discrimination.* We agree with the district court that plaintiffs have failed to establish a prima facie case of intentional discrimination in housing. Although the housing chart that appears in Section IV of this opinion shows very low percentages for minority housing assistance for the first two years of CDBG funding, in 1975-76 and 1976-77, these were the very years in which the Hispanic community in Chelsea was growing to substantial size, and it was before the city confirmed that growth with its 1978 community survey. We think it significant that, beginning with the third CDBG program year in 1977-78, Chelsea provided housing assistance to minorities roughly in proportion to their representation in the city.

In challenging Chelsea's overall housing assistance, plaintiffs emphasize that the HIP, a centerpiece of the city's CDBG program, primarily assisted homeowners, and that few of Chelsea's minority residents owned homes. Although the HIP program thus offered little direct assistance to Chelsea's minority community, this fact alone does not establish a case of intentional discrimination in a city where rental households comprised 73.3% of all households—not just those of minorities. See *supra* at 777. Thus, nearly three-fourths of the city's residents, including most whites, were excluded from direct participation in the HIP program. Moreover, Chelsea has a high proportion of multi-family housing; in 1978, only 725 of its 3500 housing units were single-family structures. In Chelsea, therefore, the decision to assist owner-occupied units would, in all likelihood, have resulted in assistance to large numbers of renters. Finally, as noted above, minority

households received significant assistance from the city outside of the HIP program. Although some of this aid was in the form of Section 8 rental subsidies and state funded housing programs, and not through the CDBG funding, the funding source is not important for determining whether plaintiffs have made out a case of intentional discrimination. Rather, the fact that representative numbers of minorities received housing aid undermines the notion that Chelsea conducted its housing affairs so as to *intentionally* exclude minorities from benefits.

It is worth noting the difference between this case and most of those in which courts have found housing discrimination. Plaintiffs here do not allege that they were denied particular public housing because of their race or that they were concentrated in racially segregated housing, see *Young v. Pierce*, 544 F.Supp. 1010, 1012 (E.D.Tex. 1982); they do not argue that a low-income housing project was blocked on discriminatory grounds, see *United States v. City of Birmingham, Mich.*, 727 F.2d 560, 563 (6th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984); they do not argue that public housing for minorities was less well constructed and maintained than for white residents, see *Clients' Council v. Pierce*, 711 F.2d 1406, 1408 (8th Cir.1983); they do not argue that the city pushed minorities out of Chelsea by removing the low-income housing that was previously available, see *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1241 (6th Cir.1974) (urban renewal of low income housing and failure to replace with other low-income housing alleged as a program of "Negro removal"); and they do not claim that Chelsea spurned federal funds to avoid building low-income housing, see *United States v. City of Parma, Ohio*, 661 F.2d 562, 575 (6th Cir.1981), *cert. denied*, 456 U.S. 1012, 102 S.Ct. 2308, 73 L.Ed.2d 1309 (1982). In short, plaintiffs allege no direct discrimination, but rather claim harm primarily because one housing program disproportionately excluded them from participation. This disparity, without any evidence of actual discriminatory intent and in the face of

significant other housing assistance, is not enough to establish intentional discrimination in housing.

As in employment, we recognize that Chelsea could have done a better job to serve its minority residents' housing needs, and the city repeatedly was urged to do so by the local reviewing agencies and by HUD's FH & EO Division. Chelsea could have shown its commitment to the minority community by, for example, establishing a priority within the HIP program for homeowners with minority tenants; or it could have, as NLSAA recommended, sought funding for a "land bank" that would have enabled the city to set aside property for construction of low-income family housing. Such steps would have been consistent with the suggestion in a Title VI regulation that federal funding recipients "should take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . .," 24 C.F.R. § 1.4(b)(6)(ii). Nevertheless, the failure to take such steps is not a violation of the statute, and certainly is not equivalent, in this factual context, to an act of intentional discrimination.

[4] b. *Discriminatory Impact.* We thus turn to the question of the HIP program's discriminatory impact. To establish an impact claim, plaintiffs need to show that neutral "criteria or methods of administration", 24 C.F.R. § 1.4(b)(2)(i), resulted in the disproportionate exclusion of minorities from participation in the contested program. There are two potential discriminatory impact claims with regard to the HIP program. First, plaintiffs could argue that a neutral procedure *within* the HIP program disproportionately excluded minorities from participating in that particular program. There is no such allegation here; indeed, it appears that minority homeowners received their proportional, though small, share of HIP funds. Cf. *NAACP v. Harris*, 567 F.Supp. 637, 642 (D.Mass.1983) (allegation that Boston city programs designed to provide financial aid to homeowners administered in such a way as to

have discriminatory impact adverse to minorities).

The second impact claim, which plaintiffs did make, is that the choice of a program for which the basic criterion was homeownership disproportionately excluded minorities because few of them owned homes. In essence, this is a claim that minorities were largely closed off from housing assistance because their housing needs were not of the type addressed by the HIP program. It is true that the requirement of homeownership is the type of neutral criterion that often results in disparate impact on minorities. The flaw with this argument, however, is that the choice of the HIP program, with its homeownership requirement, did not disproportionately exclude minorities from all housing assistance. As shown by the chart in Section IV, other types of housing aid were provided, including rental assistance, for which most of Chelsea's minority residents were eligible. Although new construction of family rental units obviously would have helped minorities more than did the HIP program, Chelsea is not required to take only those actions that will be in the best interest of its minority residents; nor is it foreclosed from assisting homeowners simply because few of them are minorities. The city is simply required not to discriminate against its minority residents by intentionally excluding them from housing benefits or by offering assistance through a neutral procedure that has the effect of excluding them. In light of statistics showing that Chelsea provided housing assistance proportionately for all its residents, we conclude that plaintiffs have failed to establish a prima facie case of discriminatory impact with regard to the HIP program.

[5] c. *UDAG.* Chelsea's UDAG grant is another instance in which the city chose to assist other groups rather than to focus on the housing needs of minorities, proposing 300 units for the elderly and no family units. Again, however, there is no evidence that the decision to construct subsidized housing for the elderly rather than family housing was made "because of,"

not merely 'in spite of,' its [alleged] adverse effects upon an identifiable group", as required for a finding of intentional discrimination, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Moreover, the UDAG proposal did not entirely ignore the needs of minorities. Chelsea's UDAG application indicated that the project would enable an expansion of the Sweetheart Paper Products Co., retaining 400 jobs and adding about 300 more to the local economy, a large number likely to be filled by minorities and low-income persons. In addition, the application stated that 15% of the work hours on the project would be assigned to minority workers.

We also reject plaintiffs' assertions of discriminatory impact in UDAG for reasons similar to those discussed in our earlier section on the HIP program, i.e. plaintiffs make no claim that Chelsea used discriminatory "criteria or methods of administration" in awarding benefits under the grant.

[6] 3. *Contracting.* The third area of alleged discrimination is in the award of city contracts for work related to the federally funded programs. The district court found that in the first program year 1975-76, two contracts totalling \$53,000, or 18.6% of the total \$285,000 in contracts that year, were awarded to minority businesses. No other contracts were awarded to minorities during the relevant grant years. Plaintiffs point out that in the third program year, the City awarded nearly \$2.5 million in Title I contracts, none to a minority. In the fourth year, out of 22 contracts granted, none was to a minority. And in the fifth year, of 23 contracts totalling nearly \$1 million, again, none was to a minority.

24. We note that HUD's FH & EO Division recommended that Chelsea be advised to utilize, in its affirmative action program for minority business contracting, a list of minority contractors that HUD's Boston Area Office provided. [App. at 276.] Nevertheless, there is no indication that any eligible businesses were located in Chelsea. Thus, even if this case should have been certified as a class action, there is nothing

As a preliminary matter, defendants argue that plaintiffs have no standing to raise the contracts issue because neither LUCHA nor the individual plaintiffs alleged in the complaint or stated in depositions that they owned, worked for, or sought to be employed by a minority business that would have been eligible for Title I contracts. In their reply brief, plaintiffs virtually concede that they do not meet the usual requirements for standing to assert a contract claim, but argue that they should be entitled to assert that claim as ancillary to their employment and housing claims.

We find it unnecessary to decide whether plaintiffs technically have standing on this issue. Even if they do, they have failed to establish a prima facie case of discrimination in the award of contracts. Plaintiffs allege solely that, other than two small contracts in the first program year, "not a single contract was awarded by Chelsea to a minority." Plaintiffs point to special conditions imposed by HUD requiring that Chelsea undertake affirmative action in providing minority contracting opportunities, but they do not even allege that minority businesses eligible for Title I contracts exist in Chelsea.²⁴

Plaintiffs thus rely on statistical "disparity" as the basis for establishing a prima facie case of discrimination in contracting, but provide no information as to whether there is, in fact, a disparity between the number of minority businesses in Chelsea and the involvement of such businesses in city contracts. It is not sufficient to allege disparity between the number of minority residents and the number of contracts awarded to minority businesses. *See, e.g., Teamsters*, 431 U.S. at 337, 97 S.Ct. at 1855 (disparity between number of blacks working as low level truckers and "line drivers"); *Hazelwood School District v. Unit-*

to suggest that any minority businesses would be represented by these plaintiffs. For this reason, we do not reach the class action issue.

We also note that a 1979 FH & EO review found that Chelsea had taken acceptable affirmative action in minority entrepreneurship but that no substantial progress had been made. [App. at 531.]

ed States, 433 U.S. 299, 308 and n. 13, 97 S.Ct. 2736, 2741-42 and n. 13, 53 L.Ed.2d 768 (1977) ("a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market"); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 142 (1st Cir.1985) (without evidence on racial composition of union membership pool, significance of lack of black members could not be assessed). Plaintiffs, at least, must shoulder the minimal burden of demonstrating that circumstances exist in Chelsea such that discrimination is a possible explanation for the low rate of minority contracting. In light of their failure to do so, we find no error in the district court's rejection of this claim.

B. Title VIII

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631, makes it unlawful to discriminate in the sale or rental of housing because of race, color, religion, sex or national origin. In alleging housing discrimination against Chelsea, plaintiffs rely principally upon section 3604(a), which states that it shall be unlawful:

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." (Emphasis added.)

Plaintiffs' claims against HUD also rely on section 3608(d)(5), which directs the Secretary of Housing and Urban Development to

"(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."

[7] As a preliminary matter, plaintiffs and defendants disagree as to whether Title VIII embodies a standard of intent or

one of impact. We need not resolve that dispute, however. Plaintiffs do not allege that the City of Chelsea's nondiscrimination obligations with regard to housing under Title VIII are any different from the city's obligations under Title VI. Because we previously have found that plaintiffs failed to establish either discriminatory impact or discriminatory intent under Title VI with regard to the HIP and UDAG projects, we conclude that Chelsea did not violate Title VIII with those programs.

[8] Plaintiffs' Title VIII claim against HUD is not as easily resolved. Unlike Title VI, where HUD has no express separate obligation, Title VIII specifically charges the Secretary of Housing and Urban Development with "affirmatively" furthering the purposes of the statute. Some courts have interpreted this obligation as requiring affirmative action on the part of HUD to encourage fair housing practices or, at least, as prohibiting HUD from idly standing by while recipients engage in discriminatory practices. See, e.g., *Anderson v. City of Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir.1984); *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir.1983); *Garrett v. Hamtramck*, 503 F.2d at 1246-47; *Young v. Pierce*, 544 F.Supp. 1010, 1015 (E.D.Tex.1982). Plaintiffs argue here that HUD's failure to impose more serious sanctions against Chelsea, such as withholding funds until the city demonstrated results in assisting minorities, constitutes a violation of the federal agency's duty under 42 U.S.C. § 3608(d)(5).²⁵

Defendants respond, however, that there is no private right of action against HUD under Title VIII, and that plaintiffs may challenge HUD's compliance with section 3608(d)(5) only in an action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Plaintiffs have not asserted an APA cause of action.²⁶

whether HUD may be sued under section 3604(a).

26. At oral argument, apparently for the first time in this case, plaintiffs stated that, if we find no private right of action against HUD under

25. Even if a private right of action exists against HUD under section 3604(a), which formed the basis of plaintiffs' suit against Chelsea, there would be no violation in this case because there is no underlying violation by Chelsea. See *supra* at 783. We therefore do not consider

Although plaintiffs cite a number of cases in which courts have considered Title VIII challenges to HUD, these cases are at best ambiguous as to whether they found a private right of action directly under the statute, or whether their review was conducted pursuant to the APA. For example, in the leading case of *Shannon v. HUD*, 436 F.2d 809 (3rd Cir.1970), the court appears to consider the case as governed by the APA. See *id.* at 818-21. See also *Anderson v. City of Alpharetta, Ga.*, 737 F.2d at 1534 (noting that courts imposing affirmative duty on HUD to further fair housing goals "have considered whether HUD's decision could be sustained under the 'abuse of discretion' standard set forth in 5 U.S.C. § 706(2)(A)"); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 422, 429 (1st Cir. 1983) ("In essence, [plaintiffs] seek judicial review of a 'final agency action,' 5 U.S.C. § 704, the decision of the Department of Housing and Urban Development (HUD) to grant \$19 million to the City of Boston ..."); *Alschuler v. HUD*, 686 F.2d 472, 476, 477-78 (7th Cir.1982) (assumes claim arises under APA); *Little Earth of United Tribes, Inc. v. HUD*, 584 F.Supp. 1292, 1296 (D.Minn.1983) (same). But see *Young v. Pierce*, 544 F.Supp. at 1017-1019, 1020 (rejecting APA in favor of private right of action). At least one other court, while not mentioning the APA, also did not expressly analyze the question of a private right of action. *Clients' Council v. Pierce*, 711 F.2d at 1425 (but court cites to, *inter alia*, *Alschuler*, 686 F.2d at 481). See also *NAACP, Boston Chapter v. Pierce*, 624 F.Supp. 1083, 1086-87 (D.Mass.1985) (discussing cases on Title VIII private right of action).

Part of the ambiguity in this area can be attributed to decisions, such as *Shannon*,

Title VIII or the Housing and Community Development Act, see *infra*, we should analyze their claims as brought under the APA. We decline plaintiffs' invitation to consider an issue at this stage of the case that, for whatever reasons, plaintiffs chose not to raise earlier. *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979).

Our statement in *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 429 (1st Cir.1983), that "there is no

that predated *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), in which the Supreme Court stated that the existence of an implied private right of action must be strictly determined in accordance with the following test:

"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.* at 78, 95 S.Ct. at 2088 (emphasis in original) (citations omitted).

In *NAACP, Boston Chapter v. Pierce*, 624 F.Supp. at 1087-1089, the district court of Massachusetts discussed the application of these four factors to section 3608(d) of Title VIII. We find that court's analysis to be thorough and persuasive, and we agree with its conclusion that there is no private right of action under section 3608(d). Of particular significance to us is the multifaceted enforcement scheme expressly set out in the statute. First, Congress explicitly created a judicial remedy for discrimination in the sale, rental, financing or brokerage of housing as prohibited by sections 3603, 3604, 3605 and 3606 of Title VIII. 42 U.S.C. § 3612(a). Second, Title VIII pro-

need to locate a private right of action [against HUD] given the judicial review provisions of the APA" is not to the contrary. In that case, we decided only the issue of standing and were providing guidance for the district court and parties on remand. In this instance, we choose not to prolong a case already decided on the merits by the district court by allowing plaintiffs to make an argument they consistently have spurned.

s for the filing of complaints with the Secretary, which may lead to a civil suit by complainant against the fund recipient if voluntary compliance is not obtained within thirty days. *Id.* at §§ 3610(a)-(d). Finally, Title VIII also provides that the Attorney General may bring suit to challenge a "pattern or practice" of discrimination. *Id.* at § 3613. In view of these provisions, it is unlikely that "Congress absentedly forgot to mention an intended private action" against HUD under section 3608(d). *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979), quoted in *Cannon v. University of Chicago*, 441 U.S. 677, 742, 99 S.Ct. 1946, 1981, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting). We therefore hold that a remedy against HUD for failure to comply with section 3608(d) is available only pursuant to the APA. Because plaintiffs do not challenge HUD's actions under the APA, we do not discuss whether the agency violated its duty to "affirmatively" further the policies of Title VIII.²⁷

Title I of the Housing and Community Development Act

9] Plaintiffs' final statutory claim is sought under the nondiscrimination provision of the HCDA, 42 U.S.C. § 5309(a). As with the claim against HUD under Title II, we must decide, as a preliminary matter, whether plaintiffs have a private right of action under the HCDA. The nondiscrimination provisions of the HCDA and certain of its regulations are patterned after Title VI. Section 109(a) of the Act, 42 U.S.C. § 5309(a), states:

"No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter."

Our disposition makes it unnecessary for us to consider whether sovereign immunity stands

See also 24 C.F.R. § 570.601 (April 1979) (nondiscrimination regulations).

As noted above, in determining whether a federal statute that does not expressly provide for a private right of action nonetheless implicitly creates such a right, we must examine Congress' intent as evidenced through the four factors set out in *Cort v. Ash*, 422 U.S. at 78, 95 S.Ct. at 2088. The first of these is whether plaintiffs are a member of a class for whose "especial benefit" the statute was enacted, *id.* at 78, 80-82, 95 S.Ct. at 2088-90; *Cannon v. University of Chicago*, 441 U.S. at 689-94, 99 S.Ct. at 1953-56.

To answer this question we begin with the language and purpose of the statute. Like Title VI, which does provide for an implied private right of action, *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), the language of the HCDA's nondiscrimination provision focuses on the individuals to be protected. This can be a significant factor in finding a private right of action. See *Cannon*, 441 U.S. at 690 and n. 13, 99 S.Ct. at 1954 and n. 13. Nevertheless, we believe the language of section 5309 cannot be viewed in isolation and must be considered as part of the context in which it appears. In contrast to Title VI, and other civil rights statutes that employ language similar to that found in section 5309(a), see *Cannon*, 441 U.S. at 690 n. 13, 99 S.Ct. at 1954-55 n. 13. Title I of the HCDA does not have as its purpose the prevention of discrimination. The Act was passed in response to Congress' concern for the "critical social, economic and environmental" conditions existing in the nation's cities, 42 U.S.C. § 5301(a). The statute's primary objective was "the development of viable urban communities", 42 U.S.C. § 5301(c).

It could be argued that section 5309(a) stands apart from this larger scope of Title I, and that that section, at least, was intended especially to benefit persons dis-

as a bar to plaintiffs' suit under Title VII.

criminated against on the basis of race, color, national origin or sex, and to provide them with a private cause of action—just like other statutes using similar language. In addition, Congress stated its intention in Title I to revitalize the nation's cities through increased housing and economic opportunities, "principally for persons of low and moderate income", 42 U.S.C. § 5301(c). Arguably, this expressed goal, combined with the explicit nondiscrimination provision, puts the low-income minority community at the center of Title I's embrace.

Although we acknowledge the importance of plaintiffs' interests, we do not believe Title I was enacted for their "special benefit" in the sense required for finding a private right of action. Congress' goal was to create better cities for everyone, and improving conditions for those at the lower end of the economic scale was only one means, albeit a significant one, of achieving that goal. It is worth noting that the statute in its current form provides that maximum priority should be given "to activities which will benefit low- and moderate-income families or aid in the prevention or elimination of slums or blight," 42 U.S.C. § 5304(b)(3) (emphasis added), alternatives that reflect Congress' primary goal of viable cities and its recognition that this goal could be achieved in more than one way. There is no suggestion that the minority community stands in a special position with respect to this goal.

In light of the overall purpose of the Housing and Community Development Act, we think it likely that the language of section 5309(a) reflects generally the requirement that federal fund recipients not discriminate, rather than an intent to benefit a special class. By the time the HCDA was passed, the language adopted for section 5309(a) was, in effect, boilerplate nondiscrimination language, and we thus attribute little to the choice of form. Cf. *Cannon*, 441 U.S. at 693 n. 14, 99 S.Ct. at 1955-56 n. 14 (observing that Congress passed over a significantly different version of Title IX that was phrased as a simple directive to HEW). The central

question here is not simply who would benefit from the statute, "but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101 (1981). The language and purpose of Title I do not point to such an intention.

Moreover, in considering both the legislative history and the statutory enforcement scheme as a whole, see *Cort*, 422 U.S. at 78, 95 S.Ct. at 2088, the available evidence indicates that Congress did not intend to create a mini-Civil Rights law, with its own private right of action, within the HCDA. Section 5309(b) specifically provides for enforcement by the Secretary of Housing and Urban Development, who may work through the state governor, refer the matter to the Attorney General for civil action, or take other action including the termination or reduction of funding. In addition to this explicit enforcement procedure, Congress required CDBG applicants to certify compliance with Titles VI and VIII. 42 U.S.C. § 5304(a)(5). Moreover, section 5309 was not even a part of the original Senate bill; it arose from a House amendment. Conf.Rep. No. 1279, Joint Explanatory Statement, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad. News 4273, 4449, 4460. We have been directed to nothing suggesting that the House addition was meant to add a significant new right to the statute.

We thus suspect that Congress expected that Titles VI and VIII would provide the primary obligations with regard to nondiscrimination, and that the main purpose of section 5309(a) was the practical one of specifying HUD's role, under the HCDA, in enforcing the requirement that federal fund recipients not discriminate. We note, moreover, that denying a private right of action under HCDA's nondiscrimination provision does little to limit an individual's ability to challenge discriminatory practices; as in this case, Titles VI and VIII may still be used to challenge any action of discrimination by recipients of HCDA funds.

The fourth *Cort* factor, whether the cause of action is one "traditionally relegated to state law", 422 U.S. at 78, 95 S.Ct. at 2088, is not applicable with respect to a federal housing statute. In light of our conclusions as to the first three *Cort* factors, therefore, we hold that Congress did not intend to create a private right of action under the HCDA. *Cf. Montgomery Improvement Association v. HUD*, 645 F.2d 291, 295-97 (5th Cir.1981).

D. Fifth and Fourteenth Amendments

Plaintiffs must show purposeful discrimination in order to establish a constitutional violation. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). As we have discussed at length above, they have failed to do so. We therefore affirm the district court's grant of summary judgment on plaintiffs' claims under the Fifth and Fourteenth amendments.

In light of the foregoing discussion, the judgment of the district court is affirmed.



BOSTON AND MAINE CORPORATION,
Petitioner, Appellee,

v.

R.M. LENFEST, Jr., Individually and as
Chairman of the General Committee of
Adjustment, United Transportation Union (T), et al., Respondents, Appellants.

No. 86-1039.

United States Court of Appeals,
First Circuit.

Sept. 2, 1986.

Railroad sought injunction to prevent unionized employees from engaging in work refusal over alleged hazardous conditions on railroad. The United States Dis-

trict Court for the District of Massachusetts, 622 F.Supp. 942, Andrew A. Caffrey, Chief Judge, entered preliminary injunction, and union appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) union's activity was protected refusal to work under hazardous conditions; (2) district court was without jurisdiction to make findings of fact; but (3) district court had jurisdiction to issue preliminary injunction with modification that it require railroad to follow stated safety policies.

Ordered accordingly.

1. Labor Relations ⇐331

Work stoppage by unionized railroad employees, on direction of union officials asserting unsafe working conditions in railroad's insufficient flagging of railway construction sites, was protected refusal to work under hazardous conditions pursuant to Federal Railroad Safety Act. Railway Labor Act, §§ 3, 6, 45 U.S.C.A. §§ 153, 156; Federal Railroad Labor Safety Act of 1970, §§ 212, 212(b, c), (c)(1), as amended, 45 U.S.C.A. §§ 441, 441(b, c), (c)(1); Norris-LaGuardia Act, § 4, 29 U.S.C.A. § 104; 1 U.S.C.A. § 1.

2. Labor Relations ⇐416.6

District court lacked jurisdiction to make findings of fact as to adequacy of notice given to railroad by union officials concerning work stoppage for allegedly unsafe conditions, as dispute was properly to be submitted to National Railroad Adjustment Board. Labor Management Relations Act, 1947, § 502, 29 U.S.C.A. § 143; Federal Railroad Safety Act of 1970, §§ 212, 212(c), as amended, 45 U.S.C.A. §§ 441, 441(c); Railway Labor Act, § 3, 45 U.S.C.A. § 153.

3. Labor Relations ⇐862

Federal courts had jurisdiction to order preliminary injunction preventing refusal to work by railroad's entire work force under section 10 of the Federal Railroad Safety Act, thereby permitting resolution of dispute under statutory procedures, with requirement railroad follow stated

obligation to assist plaintiff in developing the record, it is clear that plaintiff was prejudiced due to his lack of counsel. This is sufficient cause for remanding this case to the Secretary for a new hearing. *Smith v. Secretary of HEW*, 587 F.2d at 860; *Jeralds v. Richardson*, 445 F.2d 36, 39 (7th Cir.1971).

CONCLUSION

Accordingly, cross-motions for summary judgment are denied. This case is remanded to the Secretary for further proceedings consistent with this opinion.

IT IS SO ORDERED.



intent not needed

**COALITION OF CONCERNED
CITIZENS AGAINST I-670, et
al., Plaintiff,**

v.

Aurel DAMIAN, et al., Defendants.

No. C-2-83-0817.

United States District Court,
S.D. Ohio, E.D.

Dec. 12, 1984.

Organization and individual Black members living near proposed construction brought action challenging proposed highway that would go through city. The District Court, Kinneary, J., held that: (1) actions and conduct of city, state and federal officials during systems planning phase of interstate highway project violated public involvement requirements of regulations promulgated under Federal-Aid Highway Act; however, injunction prohibiting beginning of construction would not issue, and (2) although plaintiffs made prima facie showing of disparate effect of proposed highway project upon racial minorities, the

officials met their burden of justifying location of proposed highway.

Judgment for defendants.

1. Federal Civil Procedure $\S$ 103.2

So long as plaintiffs have asserted actual injury resulting from allegedly illegal acts of defendants which can be redressed by favorable judicial action, they have requisite standing to prosecute.

2. Federal Civil Procedure $\S$ 103.4

Although generally parties to litigation must assert their own rights and not those of third persons, litigant asserting rights arising under statute or regulation intended to protect the public is in a different situation, and so long as threshold requirement of injury in fact is met, plaintiffs may assert public interest or interest of community in support of their claim.

3. Federal Civil Procedure $\S$ 103.4

Further consequence of principle that litigant asserting rights under statute intended to protect the public may assert public interest is that only one plaintiff need have requisite injury in fact.

4. Federal Civil Procedure $\S$ 103.4

Homeowner, whose house was located some 360 feet from proposed location for highway and who testified that construction and operation of highway would cause loss of valuation of his property and would cause a loss to him in terms of aesthetic value he placed upon his community, had standing to bring action against city, state and federal officials alleging that officials violated public involvement requirements of regulations promulgated under Federal-Aid Highway Act. 23 U.S.C.A. $\S$ 101 et seq.

5. Administrative Law and Procedure $\S$ 763

Unless district court can conclude, from whole record made in case, that administrative officials acted arbitrarily, capriciously or otherwise not in accordance with the law and that actions failed to meet statutory, procedural or constitutional re-

quirements, agency actions must be upheld.

6. Administrative Law and Procedure
 §744, 760

District court is not to conduct de novo review of agency actions nor is it to substitute its own judgment for that of administrative officials.

7. Administrative Law and Procedure
 §760

Although district court's inquiry in reviewing agency action is to be searching and careful, the court cannot examine merits or wisdom of administrative action.

8. Administrative Law and Procedure
 §751

Once district court reviewing agency action is satisfied that administrative officials have taken a hard look at impacts that law mandates be considered, its inquiry is over.

9. Highways §103
Injunction §79

Actions and conduct of city, state and federal officials during systems planning phase of interstate highway project violated public involvement requirements of regulations promulgated under Federal-Aid Highway Act where officials did not institute proceedings to solicit involvement of persons representing neighborhood groups in affected area, and citizens advisory group that was formed was heavily weighted in favor of business and governmental groups; however, injunction prohibiting beginning of construction would not issue since plaintiffs were not prejudiced. 23 U.S.C.A. § 101 et seq.

10. Injunction §79

If there has not been substantial compliance with requirements of Federal-Aid Highway Act section requiring holding of public hearings before submitting plans for federal aid highway project involving bypassing of or going through city, injunction will lie to block highway project until there is compliance with the law. 23 U.S.C.A. § 128.

11. Evidence §83(1)

Officials' actions in planning highway project which will bypass or go through city are entitled to a presumption of regularity, and burden is upon plaintiffs challenging the action to establish illegality. 23 U.S.C.A. § 128.

12. Highways §103

Sufficiency of hearings required to be held under Federal-Aid Highway Act before state highway department can submit plans for federal-aid highway project involving bypassing of or going through a city is a question of fact for district court to determine. 23 U.S.C.A. § 128(a).

13. Highways §103

Public hearings on interstate highway project did not have to be held before systems planning phase was closed. 23 U.S.C.A. § 128(a).

14. Highways §103

Plaintiffs challenging interstate highway project failed to demonstrate closed mindedness or bad faith on part of city, state and federal officials during systems planning phase of project.

15. Highways §103

City, state and federal officials were not prohibited from locating a highway where it would have differential impacts upon minorities. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

16. Civil Rights §13.13(1)

Under Title VI, plaintiffs must first establish that proposed federally-aided administrative action involves some definite, measurable disparate impact. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

17. Civil Rights §13.13(1)

If plaintiffs bringing Title VI action meet initial burden of establishing that proposed federally-aided administrative action involves indefinite, measurable disparate impact, defendants must present justification for their actions with ultimate burden of proving illegal discrimination on plain-

tiffs. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

18. Civil Rights ⇐13.13(3)

Plaintiffs made prima facie showing of disparate effect upon racial minorities arising out of interstate highway project which would travel through neighborhoods that ranged from over 50% to 90% racial minorities thereby displacing those minorities; however, city, state and federal officials met their burden of justifying location of interstate highway by articulating legitimate nondiscriminatory reasons for location and showing that proposed location of highway would have substantially less impact on racial minorities than would construction of major alternative location.

19. Highways ⇐103

Plaintiffs failed to show that there were any appropriate alternatives to proposed location of highway which city, state and federal officials were required to consider to avoid liability under Title VI because of alleged disparate impact of location of proposed highway. 23 U.S.C.A. § 101 et seq.; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

20. Injunction ⇐79

Violation of public involvement requirements of regulations promulgated under Federal-Aid Highway Act does not compel issuance of injunction until noncompliance is cured; rather, district court must balance equities of parties and the interest of the public. 23 U.S.C.A. § 101 et seq.

Louis A. Jacobs, Marya C. Kolman, The Ohio State University College of Law, Columbus, Ohio, for plaintiff.

James Rattan and John Kraybill, for defendant Elizabeth Dole, Secretary of Transp.

Gregory Lashutka and Curtis Gans, Columbus City Attys., for defendant Aurel Damian.

1. Plaintiffs at trial voluntarily dismissed with prejudice the first, third and sixth causes of action in the complaint. Tr. 5-6. Further, plaintiffs did not pursue their claims arising

Michael Igoe and Amy R. Goldstein, Ohio Asst. Attys. Gen., Columbus, Ohio, for defendant Warren Smith, Director of Ohio Dept. of Transp.

Robert Holland, Columbus, Ohio, for defendant Mid-Ohio Regional Planning Com'n.

OPINION AND ORDER

KINNEARY, District Judge.

This matter came on for trial before the Court on October 29, 1984. In addition to testimony presented at trial, the parties have submitted extensive agreed stipulations of fact and joint exhibits for consideration by the Court. The joint exhibits comprise the administrative record of planning and development. Plaintiffs, the Coalition of Concerned Citizens Against I-670 and a number of its individual Black members living in areas that would be affected by the construction, have brought this action seeking declaratory and injunctive relief with respect to construction of an extension of Interstate 670 ("I-670") from downtown Columbus to the Columbus Airport. The defendants are officials from the City of Columbus, State of Ohio and the federal government responsible for highway projects as well as the Mid-Ohio Regional Planning Commission, which is a federally designated planning organization.

Plaintiffs contend that defendants violated federal law in two respects in the planning and development of the I-670 Project.¹ First, they assert that defendants failed to involve the public in making the decision whether a freeway was needed to meet anticipated traffic demand. Plaintiffs argue that this narrowed scope of public input violates federal regulations promulgated under the Federal-Aid Highway Act, 23 U.S.C. §§ 101 et seq. Second, plaintiffs contend that defendants failed to take into account the disproportionate impact of I-670 upon minority citizens of Columbus in

under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., in their post-trial brief. The Court considers these claims to have been abandoned as well.

violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Plaintiffs seek declaratory relief and an injunction prohibiting the beginning of construction on I-670 until these alleged violations of federal law are corrected by holding further public hearings on the need for and impact of I-670 as it has been proposed. Defendants deny plaintiffs' allegations on the merits and, in addition, raise the affirmative defenses of lack of standing and laches.

Upon consideration of the record made in this case and the arguments of the parties, and for the reasons stated in the Opinion which follows, the Court concludes that one of plaintiffs' contentions is well-taken, and, therefore, declares that defendants failed to comply with federal regulations requiring public involvement during the early phases of the planning of I-670. With regard to all other contentions raised by plaintiffs, the Court concludes that judgment must be entered in favor of defendants. Upon the whole record made in this case, it is apparent to the Court that the injunction the plaintiffs seek cannot be issued.

In Part I of this Opinion, the Court will state the facts of this case. Because the facts are largely not disputed by the parties, the Court sees no need for formal findings of fact, but will instead state the facts narratively. The Court has no intention of writing the definitive history of the I-670 Project, but only of discussing certain material matters pertaining to the planning process. In Part II of this Opinion, the issue of standing that has been raised by defendants will be considered. The merits of plaintiffs' claims are addressed in Part III and, finally, the matter of relief is considered in Part IV.

I.

At the date of this Opinion, all planning and preliminary development for I-670 has been completed. Nearly all properties that must be taken for the purpose of freeway right of way have been acquired by the defendants, at an approximate cost of six

million dollars. Residential and commercial buildings in the right of way have been demolished in preparation for construction. With the exception of work on an interchange that is not integral to the I-670 Project, no construction contracts have been let, nor has any construction work begun. Further, approval of plans, specifications and estimates by the federal government, which is a prerequisite to the letting of contracts has not yet been given. The next bids are scheduled to be let in January, 1985, pending the resolution of the issues raised by plaintiffs in the instant case.

As finally planned, the proposed extension to I-670 would run approximately 5.7 miles to connect the Columbus Innerbelt, which circles downtown Columbus, and Interstate 71, which runs north and south through Columbus, with the Columbus Outbelt, Interstate 270. Special connectors to major streets serving downtown Columbus and the Ohio Center, a convention center complex on the north edge of downtown, and Port Columbus Airport would be provided. The proposed I-670 extension will be six lanes, with one lane in each direction reserved for transit and other high occupancy vehicles. In addition, a bikeway will be located generally within the project right of way.

As finally proposed, I-670 would originate in the northeast corner of downtown Columbus, linked to existing I-670 and I-71 in the general area of an existing interchange known as the Fort Hayes Interchange. A significant part of the proposed roadway would be located in what is presently railroad property. However, the greatest displacement of persons and residences occurs in this area. Sixty households and approximately 191 persons will be displaced. See Agreed Stipulations ¶ 121. This area of Columbus is 50 to 90 percent black, and is characterized by high population densities. See *Jt. Ex. 25: Final Joint Environmental Impact Statement*, Figure III-9. Approximately half of the households displaced in this area are renters, and about a third of the households

displaced are below the poverty line. Further, about three-quarters of the persons displaced in this area are black. See Agreed Stipulations ¶ 121. None of the individual plaintiffs reside in this area of Columbus.

From the Fort Hayes area, the proposed extension of I-670 runs to the east, following what is now Penn Central right of way which has been abandoned by the railroad. Although the area of Columbus to the immediate east of downtown is over ninety percent black, there is minimal displacement of persons and residences due to the availability of railroad right of way. Agreed Stipulations ¶ 121; Tr. 182. Several miles out of the downtown area, proposed I-670 turns to the north to follow Alum Creek. It then bears to the north-east following the present route of U.S. 62. I-670 will displace approximately 128 persons and 39 households in this area. Nearly 85% of persons displaced are members of racial minorities. Agreed Stipulations ¶ 121. Finally, I-670 would join I-270, the Columbus Outerbelt, at what is presently an interchange with U.S. 62. There is a major interchange proposed to provide access to the Columbus Airport in this area. The connection to the Airport will displace approximately 36 persons, about 20% of whom are minorities. Agreed Stipulation ¶ 121.

Plaintiffs' claims of illegality under federal law relate solely to the planning and location phases of the I-670 Project. These phases will be described in some detail in this part of this Opinion. First, however, it is of some importance to describe the institutional and regulatory context of the planning process in the case of the I-670 Project.

In September, 1972, regulations pertaining to the consideration of economic, social and environmental impacts of highway projects, which were codified in part 795 of Title 23 of the Code of Federal Regulations, were issued by the United States Department of Transportation. Each state was required to develop and implement an

"Action Plan" for federally funded transportation improvements. To comply with federal requirements, the Ohio Department of Transportation (ODOT) promulgated a document called Action Plan, which was approved by the Federal Highway Administration (FHWA) on February 19, 1974. The procedures of the Action Plan were subsequently revised and are contained in the Ohio Transportation Development Process, which was approved by the FHWA on July 29, 1977. These two documents set forth the process for consideration of social, economic and environmental factors in the development of transportation projects. These procedures applied to all transportation systems planning and highway projects under the jurisdiction of Ohio Department of Transportation during the various stages of development of the I-670 Project. Agreed Stipulations ¶ 9-11; Jt. Ex. 34, 39.

Under the procedures set forth in these documents, transportation development projects are divided into phases, where each successive phase involves planning at a more detailed level. In general, transportation projects proceed through four phases. The first stage—referred to in this Opinion as the systems planning phase—is one of initial planning, in which traffic projections and existing transportation capabilities are studied to determine whether transportation improvements are needed and, if so, what types of improvements are needed. In the I-670 Project, this phase began in June, 1974 and continued through March, 1976. The second stage—referred to in this Opinion as the location phase—is the initial design stage where alternative routes for improvements recommended during the systems analysis phase are considered, and one route chosen. This phase lasted from 1976 to 1981 in the I-670 Project. The third stage—referred to in this Opinion as the design phase—involves final design and specific planning for the route chosen in the location phase. At present, the I-670 Project is in this phase. The fourth and final phase—the construc-

tion phase—involves the actual building of the improvement.²

A central role in the planning process was played by defendant Mid-Ohio Regional Planning Commission (MORPC). MORPC was created by agreement among approximately 25 constituent government units, consisting of Franklin County, all cities, villages and townships within Franklin County, and some adjacent townships. Its members are appointed by the member governments; these appointed members may be public officials or ordinary citizens. MORPC has been, since the beginning of the I-670 Project, the federally designated Metropolitan Planning Organization for the Central Ohio area. See 23 U.S.C. § 134. MORPC had the primary responsibility for the systems planning phase of the I-670 project.

MORPC committees include: Executive, Policy, Transportation Advisory, Citizens' Advisory, Finance, Personnel, Nominating, the Franklin County Planning Area Subcommittee, and Community Development. Ultimate authority within MORPC resides in the Executive Committee. It consists of 10 members of the Commission elected by the membership. Fifty-one percent of the Executive Committee must consist of elected or appointed officials; one member must be appointed to represent minorities, disadvantaged and low income groups. The Policy Committee is an expansion of the Executive Committee, which includes in addition representatives from the Central Ohio Transit Authority, and state and federal highway departments. This Committee was created to conform to requirements of federal law in order to make decisions on transportation. Tr. 136; see C.F.R. § 795.10(b)(3) (1974).

Proposals that must ultimately be approved by the Policy and Executive Committees originate in the staff of MORPC. Staff proposals and reports are periodically presented to two additional committees before they are referred to the Policy and Executive Committees. One is the Citizens'

Transportation Advisory Committee (TAC), which consists of people who are technically involved in urban transportation. Its members are city engineers, representatives of governmental authorities, and representatives of private businesses and utilities. The other is the Citizens' Advisory Committee (CAC) which consists of individuals from governments, neighborhood organizations, civic groups, organized professional interest groups, and low income and minority groups.

As will be explained below, the nature of the CAC is of some importance to this case. At the times that the primary decisions concerning the development of I-670 were being considered, i.e., from 1974 to 1977, the CAC consisted of approximately 100 members. The membership is divided into several categories. First, a number of townships and cities within Franklin County are members. Second, a substantial number of governmental organizations and instrumentalities as well as professional associations are members. Third, a number of civic organizations appear on the membership roster. And finally, there are a number of individual members, a substantial number of whom appear to be associated with banks, mortgage companies, utilities and media. *Jt. Ex. 85, 86.* Membership in the CAC is open to all interested persons. There is, however, no formal process by which applicants are solicited. To become members, individuals or organizations must hear of the existence of the organization and its activities through the media, and take the initiative to join. Media regularly attend meetings, and individuals have requested to become members after hearing about CAC activities. Plaintiffs White and Banks testified at trial that they were unaware of any opportunity to express their views concerning I-670 prior to 1976. Tr. 38, 90.

Both the TAC and the CAC receive monthly reports from the staff of MORPC. In addition, the CAC receives reports re-

2. The two Ohio planning documents use different names for the various phases. To avoid confusion, the Court will use the terminology

suggested in federal regulations. See 23 C.F.R. § 795.2(e) (1974).

garding on-going projects. In the case of planning regarding I-670, MORPC staff appeared four times to report upon the state of the project, culminating with the presentation of a final report. The purpose of these presentations was to solicit comments from the members of the committee. The committee voted upon the proposals put to it. However, it was not in reality a decision maker; rather, its votes amounted to recommendations to the Policy Committee.

There is conflicting evidence in the record concerning whether plaintiffs participated in the CAC during the systems planning phase of the I-670 Project. At trial, individual plaintiffs Banks and White testified that they had not been involved in the CAC during the time of systems planning, that is, prior to 1976. This testimony was impeached with apparently conflicting testimony from the depositions of these plaintiffs. Tr. 53-56; 112-115. The Court has examined the depositions of the plaintiffs, and finds that each is vague about precise dates. Jt. Ex. 119 at 150; Jt. Ex. 120 at 58-59. Further, there is no indication of plaintiffs' membership in the membership lists of the CAC, Jt. Ex. 85, nor of attendance in the minutes of meetings submitted to the Court. Jt. Ex. 83, 85. Further, the director of transportation of MORPC, Mr. Mohamed Ismail, testified that plaintiffs were not members of the Committee. Tr. 31. Thus, the Court concludes that plaintiffs Bank and White did not participate in the CAC prior to 1976.

The Court now turns to consider the planning process in the I-670 Project. There is no dispute about the need for some sort of transportation improvements in the general area that I-670 will serve. Since the early 1950s, government officials have recognized that population pressures and expanding development indicated a need for improved transportation in the northeast quadrant of the City of Columbus and Franklin County. In 1957, the Columbus City Planning Commission proposed in its Annual Report that a six-lane freeway be built between the Fort Hayes Interchange and the Airport. This report

also proposed that an expressway be built between I-71 and the Airport along 17th Avenue. In 1961, the Franklin County Commissioners authorized the preparation of an engineering study of the feasibility of a freeway or arterial connection between the Airport and I-71. Substantial progress was made toward construction of this project. By 1967, a portion of the proposed 17th Avenue Freeway was ready for construction. Jt. Ex. 25: Final Joint Environmental Impact Statement, I-1 to I-3; Jt. Ex. 27: Leonard-Maryland-Sunbury/I-670/17th Avenue Systems Alternatives Study, Appendix 1.

By 1972, MORPC completed the Franklin County Regional Transportation Plan, which was adopted by the member governments in the following year. This Plan featured 17th Avenue as an expressway, and Leonard, Maryland and Sunbury Avenues as an artery to the northeast corridor. At the time, it was believed that these improvements would suffice to meet the transportation needs of the area to the year 1990. In August, 1973, representatives of FHWA, ODOT, the City of Columbus and MORPC met to discuss how "Action Plan" requirements would affect the 17th Avenue expressway. They concluded that a Corridor Location Alternatives Report should be prepared. Thus, the 17th Avenue expressway was entering the location stage.

However, several developments led to the abandonment of the 17th Avenue Expressway. First, due to increasing environmental concerns, local officials began to re-examine the impacts associated with constructing an expressway through residential neighborhoods. In addition, their examination of other possibilities revealed that the railroads had abandoned a number of tracks in their right of way between the Fort Hayes Interchange and Alum Creek. It appeared that a freeway could be located within existing railroad right of way and only minor additional right of way would need to be acquired. Finally, during the early 1960s, the City of Columbus was planning an improvement in the area of

Leonard Avenue to meet the improved section of U.S. 62.

In November, 1973, as a result of concern stemming from the 17th Avenue Project, MORPC held a meeting with various agencies and communities. A follow-up meeting was held in February, 1974. At these meetings, a number of governmental entities and local organizations discussed the status of the project and its impact upon other streets. In particular, there was concern about the impact of the project upon Lane Avenue and 17th Avenue. There was general agreement that more data was required to determine the full impact of the proposed Lane/17th Avenue Connector.

An extension of I-670 as an alternative to the 17th Avenue Project was first proposed publicly by the City of Columbus Service Director, Richard Jackson on March 12, 1974. The following day, the Technical Advisory Committee of MORPC was briefed on the I-670 proposal as an alternative to the 17th Avenue Project. At about the same time, MORPC was considering proposals for siting of the 17th Avenue Project. As a result of the city's initiative regarding I-670, further study of the transportation needs of the northeast quadrant was initiated.

In June of 1974, representatives from the City of Columbus, MORPC, ODOT and FHWA met to determine the procedures and methodologies for a systems analysis to compare I-670 and 17th Avenue as solutions for the northeast corridor. The result was the Leonard-Maryland-Sunbury-I-670-17th Avenue systems analysis conducted by MORPC. *Jt. Ex. 27*. In this study, five basic alternatives were considered, involving different combinations of arteries and freeways along 17th Avenue, I-670 and Leonard Avenue. One of the alternatives was so-called no-build alternative, which involved leaving the entire corridor as it was; consideration of a no-build alternative is required by federal law. *See* 23 C.F.R. § 795.3(b)(2) (1974). Three of these alternatives were studied in detail. One involved 17th Avenue as an artery, I-670 as

a freeway and no improvement to Leonard Avenue; another was 17th Avenue as a freeway, Leonard Avenue as an artery and no I-670; the third alternative was the no-build alternative. *Tr. 145*. The conclusion of the study was that I-670 should be built.

The alternatives study considered a number of factors in arriving at the recommendation that I-670 be built. The effect upon traffic flow of the various alternatives was considered at great length. In addition, compatibility with increased use of mass transit, accessibility of health facilities, impact upon air quality, and general costs and benefits were considered for each of the three alternatives studied in detail. Except for consideration of the number of businesses and residences displaced, there is minimal discussion of the social impacts of the alternatives studied. There is no discussion of the impact upon racial and other minorities of the various alternatives. *Jt. Ex. 27, passim*.

According to MORPC's report, the alternative which involved construction of I-670 was preferable to the other two alternatives in most of the respects studied. According to the testimony of Mohamed Ismail, several factors in particular were primary reasons for preferring I-670 to the 17th Avenue freeway. First, construction of I-670 would minimize the taking of homes as compared to 17th Avenue freeway. The latter would involve taking in excess of 500 homes, while the former, as finally planned, would displace 109 homes. Second, construction of I-670 would allow use to be made of abandoned railroad tracks, and would minimize acquisition of right of way. And finally, I-670 would create opportunities for industrial and commercial development in the area. *Tr. 147*.

Beginning in June, 1976, the I-670 Project entered the location stage. Primary responsibility for this phase of development resided in the I-670 Coordinating Committee, which consisted of representatives from FHWA, ODOT, the City of Columbus and project consultants. The purpose of this stage was to select a location

for the I-670 freeway, if a feasible location could be found in light of the social, economic and environmental impacts of various possible freeway locations. In order to evaluate impacts of various locations, the experts use a hypothetical "no-build" alternative as a point of comparison for the purpose of defining potential beneficial and adverse impacts. This process of comparison with a hypothetical "no-build" alternative was required by the procedures set forth in the Action Plan and the Transportation Development Process to comply with federal law. 23 C.F.R. § 795.3(b)(3) (1974). The "no-build" alternative used for this purpose included: 1) no improvements to streets in the Leonard Avenue corridor; 2) 17th Avenue improved as a major arterial street between I-71 and U.S. 62; (3) a limited access connector between Port Columbus Airport and U.S. 62; and (4) a limited access connector between the Ohio Center and I-71. In other words, the "no-build" alternative involved construction of the planned transportation projects in the region except for particular project under consideration.

During the location phase of the I-670 Project, the Draft Environmental Impact Statement and the Final Joint Environmental Impact Statement were prepared. The former was completed in July, 1980; the later was completed after a public hearing of October 1, 1980, and the solicitation of comments. As part of the process of preparation of the Environmental Impact Studies, sixteen different preliminary I-670 location alternatives—including the "no-build" alternative discussed above—were considered. In the argot of the highway engineer, these are known as "reasonable alternatives." These are possible freeway locations that appear, after preliminary study, to have some merit.

These reasonable alternatives were assessed according to four major categories of impacts: (1) socioeconomic and land use, (2) environmental, (3) transportation, and (4) cost. *See* Jt. Ex. 50: I-670 Extension: Assessment of Reasonable Alternatives. Within each of these categories, a number of variables were assessed, so that, in all,

37 variables were considered. Under the first category of socioeconomic and land use impact, the effect of different freeway locations upon community cohesion, accessibility and availability of services, and impact upon disadvantaged groups were considered. Of the alternatives studied, only the "no-build" alternative would have no impact upon the disadvantaged. The other 15 alternatives would have either high negative impact or moderate negative impact upon the disadvantaged. *See id.* at 16.

It is abundantly clear from the record made in this case that public involvement during the location stage was substantial. The main vehicle for public involvement was the Citizens Advisory Group (CAG), which was established by the City of Columbus in May, 1976 for the purpose of receiving public comments and providing information to the public. The CAG was composed of representatives of the civic associations in the project study area. It met at least sixteen times to discuss the project. There is no dispute that diverse groups of representatives, including both blacks and whites, participated in the CAG. There is also no dispute that persons opposed to the construction of I-670 were active in the CAG and expressed their views. In particular, plaintiffs Banks and White were members of the CAG as representatives of the Shepard Community Association. In that capacity, they were able to present their views on I-670 and alternatives to it.

In addition, defendants conducted a number of public informational meetings during this phase of the I-670 Project. Also, they published the I-670 Newsletter for the purpose of informing interested members of the public on the status of the project. Eventually, the mailing list of persons receiving the newsletter grew to about 2,000 people. Further, the I-670 program involved radio and talk show participation by public officials involved in the I-670 planning and development. Several of the plaintiffs in this action participated in these talk shows. There was uncontradicted testimony at trial from Lawrence Kastner,

District Engineer with the FHWA in Columbus, that public involvement in this phase of the project far exceeded what is required by federal law. Tr. 191; *see also* Jt. Ex. 26: I-670 History of Public Involvement.

It also appears that this public input was considered in the process of selecting a particular route for I-670. In the process of project development, the sixteen reasonable alternatives were reduced to a smaller number of "feasible alternatives." These represent possible locations that, upon further consideration, warrant extensive study to determine impacts on a more detailed level. In the case of I-670, there were five such feasible alternatives, including the "no-build" alternative. In eliminating the eleven other alternatives, the I-670 Coordinating Committee relied upon two bodies of information: data regarding probable impact, and public input from public meetings, reports from neighborhood meetings and information generated by the CAG. *See* Jt. Ex. 52: Assessment of Reasonable Alternatives Leading to a Set of Feasible Alternatives, at 17.

Due to significant public opposition to the I-670 proposal, and in response to lobbying by plaintiff Coalition, in 1977 the Columbus City Council authorized funds for the study of mass transit alternatives to the construction of I-670. This study was made by MORPC under a special contract with the city. The resulting study, entitled "Northeast Corridor Transit Alternative Study To I-670," was completed on June 30, 1978. Jt. Ex. 30. Plaintiff Coalition worked closely with MORPC in conducting this study and had some input in it. A draft of the study was submitted to the Coalition and the CAG for their comments. In addition, two general public involvement meetings were held in the spring of 1978 to hear public comment upon the proposed report.

The study recommended an alternative to I-670 that consisted of a new arterial roadway connecting downtown Columbus with existing U.S. 62, a new busway transit facility connecting downtown Columbus with

a park-n-ride lot near Port Columbus, and a number of companion street improvements. The executive summary to the report states: "Taken together, these elements can serve travel demand in the northeast corridor, and are a feasible alternative to the I-670 freeway." *See* Jt. Ex. 30: Northeast Corridor Transit Alternative Study to I-670, at ii.

There is no dispute that one of the alternatives considered in the City Council funded restudy was that put forth by the Coalition. Tr. 110. The Coalition's alternative involved a combination of improvements to streets and underpasses in the northeast quadrant and development of light rail transit. Tr. 110. The restudy ruled out light rail as an alternative to a freeway on the ground that the northeast quadrant would not provide sufficient ridership. Agreed Stipulation ¶ 92. The Court concludes from the record that the Coalition's alternative solution to the acknowledged transportation problem in the northeast quadrant of the city was considered in good faith and rejected as inadequate.

As noted above, extensive public involvement was incorporated into the process of restudy of transportation needs in the northeast corridor. Although public reaction was mixed, a majority of citizens attending the second citizen involvement meeting disliked the recommendation, particularly the Alum Creek arterial. The plaintiffs also rejected the recommendations of the restudy. The report commented:

The technical analysis, however, proved conclusively that additional roadway capacity, beyond that achievable through improvements to the existing street system, was needed to reduce congestion and adequately serve travel demand within the corridor.

Jt. Ex. 30, at 24.

The results of the City Council funded restudy were unique and were not directly comparable to the results of the other I-670 studies. This noncomparability was due to the use of different assumptions regarding population growth, development

patterns, and travel demand. Apparently, the data used in the original study that recommended the construction of I-670 had overestimated population growth and development. Tr. 149-151; 156-7. No formal restudy was done to make the results of the restudy comparable to those of the original studies recommending the construction of I-670.

The relative merits of the non-freeway alternative selected by the restudy and I-670 as proposed were discussed in the Final Joint Environmental Impact Statement, Jt. Ex. 25, that was prepared in connection with the I-670 Project. The authors of that statement concluded:

The comparison of the selected alternative from the MORPC study (non-freeway) with the proposed I-670 Extension reinforces the need for a freeway in the northeast corridor and confirms the results of the previous studies which led to the present location/environmental analysis study. Even if both a new four-lane arterial and a new two-lane busway are provided in the place of a freeway, projected future traffic volumes on the major surface streets in the corridor will, for about 80% of those streets, exceed the available capacity.

Jt. Ex. 25, at I-24. It appears to the satisfaction of the Court that this conclusion is adequately grounded in a fair consideration of the results of the mass transit alternative restudy. Compare Jt. Ex. 25 at I-24, with Jt. Ex. 30: Northeast Corridor Transit Alternative Study to I-670, at App. 2, table 4. Although the two studies are not comparable in a formal sense, the Court cannot say, on the basis of the record before it, that the conclusion reached in the Final Joint Environmental Impact Statement is a clear error of judgment. Thus, the Court finds that a mass transit alternative to I-670 was considered and reasonably rejected during the process of development of I-670.

II.

Defendants have raised the issue whether plaintiffs have standing to bring this

suit. Specifically, defendants contend that plaintiffs are asserting only a generalized public interest of the community in which they reside. Thus, defendants reason, plaintiffs lack the particularized injury that is a prerequisite to maintenance of federal litigation challenging official action.

[1,2] So long as plaintiffs have asserted an actual injury resulting from the allegedly illegal acts of the defendants which can be redressed by favorable judicial action, they will have the requisite standing to prosecute this action. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). Although generally parties to litigation must assert their own rights and not those of third persons, *Warth v. Selidin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205-2206, 45 L.Ed.2d 343 (1975), a litigant asserting rights arising under a statute or regulation intended to protect the public is in a different situation. So long as the threshold requirement of an injury in fact is met, plaintiffs may assert the public interest or the interest of a community in support of their claim. *Sierra Club v. Morton*, 405 U.S. 727, 737, 92 S.Ct. 1361, 1367, 31 L.Ed.2d 636 (1972); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164, 1171-2 (6th Cir. 1972); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F.Supp. 496, 522-4 (S.D.Oh.1982).

[3] A further consequence of the principle that a litigant asserting rights under a statute intended to protect the public may assert the public interest is that only one plaintiff need have the requisite injury in fact. For, this one plaintiff will be able to assert all the deficiencies about which the others might complain. Thus, so long as one plaintiff has suffered the requisite injury in fact, it becomes "of no more than academic interest" whether the other plaintiffs have also suffered a similar injury. *Citizens Committee Against Interstate Route 675 v. Lewis*, *supra*, at 525.

[4] At trial, plaintiff White, whose house is located some 360 feet from the proposed location for I-670, testified that the construction of I-670 would affect him adversely in several ways. First, he testified that construction and operation of I-670 would cause a loss of valuation of his property. Tr. 41. This likelihood was corroborated by the testimony of James Gabriel, former Columbus freeway engineer. Tr. 23. Second, plaintiff White testified that construction of I-670 would cause a loss to him in terms of the aesthetic value he places upon his community. "The deprivation of the use of an aesthetic resource is not merely an abstract injury ..." *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 24 (6th Cir.1980).

Based upon this evidence, the Court concludes that plaintiff White has standing to bring this action. For the reasons stated above, it is academic to inquire whether other plaintiffs have standing as well. Thus, the Court concludes that the issue of standing must be resolved in favor of the plaintiffs. The Court emphasizes that this conclusion does not depend upon balancing of the injury to plaintiffs if I-670 were built against injury to defendants or the public if I-670 were not built. It is merely a question whether plaintiffs have met a threshold requirement.

III.

In this part of this Opinion, the Court will address the merits of plaintiffs' claims in light of the facts, as found in part I. On the merits, plaintiffs contend that the defendants violated regulations promulgated under the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Before addressing the merits, however, the Court will first discuss the standard of review that must be applied in this case.

[5-8] This case involves judicial review of administrative actions. Because of this, there are well-settled limitations upon the scope of review that must be observed by

this Court. Unless the Court can conclude, from the whole record made in this case, that the defendants acted arbitrarily, capriciously or otherwise not in accordance with the law, or that defendants' actions failed to meet statutory, procedural or constitutional requirements, the agency actions must be upheld. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-7, 91 S.Ct. 814, 822-24, 28 L.Ed.2d 136 (1971); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F.Supp. 496, 521 (S.D. Oh. 1982); *Nashvillians Against I-440 v. Lewis*, 524 F.Supp. 962, 980 (M.D. Tenn. 1981). The Court is not to conduct a *de novo* review, *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973), nor is it to substitute its own judgment for that of the administrative officials. *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 823. Although the Court's inquiry is to be "searching and careful," the Court cannot examine the merits or wisdom of the administrative action. *Id.* at 416, 91 S.Ct. at 824. Once the Court is satisfied that the defendants have taken a "hard look" at the impacts that the law mandates be considered, its inquiry is over. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976).

A.

Title 23 of the United States Code imposes a number of procedural requirements upon projects that receive federal funding. 23 U.S.C. § 102. In the case of transportation planning in urban areas, special organizational and planning requirements are imposed by federal law. 23 U.S.C. § 134. In addition, in the case of a highway bypassing or going through any town or city, hearings must be held to allow affected persons to express any objections they may have to the proposed location of the highway. 23 U.S.C. § 128. And, federal law also imposes requirements that economic, social and environmental effects of any proposed project be fully considered in development of that project. 23 U.S.C. § 109. See generally *Township of Springfield v.*

Lewis, 702 F.2d 426, 430-1 (3rd Cir.1983). In the instant case, plaintiffs challenge compliance with regulations promulgated under §§ 128 and 109.

In 23 U.S.C. § 109(h), Congress directed the Secretary of Transportation to promulgate regulations "designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project ... have been fully considered in developing such project." This provision has been interpreted as manifesting "Congress' clear intent to incorporate new values into the highway decision making process." *National Wildlife Federation v. Snow*, 561 F.2d 227, 234 (D.C.Cir.1976). To implement this Congressional directive, the Secretary of Transportation promulgated regulations, which are codified at 23 C.F.R. Part 795. Although these specific regulations have been repealed and are currently superseded by 23 C.F.R. Part 771, the parties agree that these regulations were required to be followed in the I-670 Project. Agreed Stipulations ¶ 10.

The general intent of these regulations is to state guidelines that are to be applied to the process by which highway agencies plan and develop federally aided projects. 23 C.F.R. § 795.4(a) (1974). Under the regulatory scheme, state highway agencies develop an Action Plan, which must be approved by the Secretary of Transportation, and must operate under that Plan. The regulations themselves impose certain requirements regarding the contents of Action Plans. 23 C.F.R. §§ 795.8-.17 (1979). These regulations at several places impose requirements of public involvement in the process of planning and development of highway projects. Plaintiffs allege that these requirements of public involvement have been violated.

The policy underlying public involvement in highway project planning and development is stated as follows:

The process by which decisions are reached should be such as to merit public confidence in the highway agency. To achieve this objective, it is the FHWA's policy that other agencies and the public

be involved in the system planning and project development early enough to influence technical studies and final decisions.

23 C.F.R. § 795.3(b)(2) (1974). In addition, the regulations declare that federal policy is that

full consideration be given to social, economic, and environmental effects throughout the planning of highway projects, including system planning, location, and design ...

23 C.F.R. § 795.3(a) (1974). The regulations define the "system planning stage" as "(r)egional analysis of transportation needs and the identification of transportation corridors." 23 C.F.R. § 795.2(e)(1) (1974). Construing the statements of policy above in light of this definition, it appears to be federal policy that there be both public involvement and full consideration of social, economic and environmental impacts beginning with the systems planning phase of a highway project, as that term has been defined earlier in this Opinion. The regulations contemplate public involvement as a means to ensure that the statutory mandate of full consideration of possible adverse economic, social and environmental is observed.

To implement this policy, the regulations state that an Action Plan should identify the assignment of responsibility and the procedures to be followed

to ensure that interested parties, including local governments and metropolitan, regional, State, and Federal agencies, and the public have an opportunity to participate in an open exchange of views throughout the system planning, location, and design stages.

23 C.F.R. § 795.10(b)(3) (1974). In addition, the Action Plan should contain procedures to ensure adequate opportunity for public hearing(s) on the need for the proposed project; alternative courses of action; alternative project locations and major design features; social, economic, environmental and other effects of the alternatives; and the consistency of the

project with local planning goals and objectives.

23 C.F.R. § 795.10(b)(7) (1974).

These requirements of public involvement are reflected in the Ohio Action Plan. The Ohio Action Plan requires that during the systems planning phase

Alternative set of plans and programs must be presented to Citizens and Public Officials in the District so that they have the opportunity to suggest modifications to what is presented, or to suggest additional alternatives.

Jt. Ex. 39 at III-39. The Ohio Action Plan further requires that administrative staff will show in the records of the Systems Planning Phase that the affected Citizens and Public Officials had opportunity (sic), through awareness of the process and how to participate in it, to contribute to the identification of its own needs.

Jt. Ex. 39 at III-24.

The Court can only conclude that both federal regulations and the Action Plan require that there be some reasonably formalized procedure by which interested and affected citizens could present their views throughout the development process. There is no basis in the regulations or the Action Plan for any suggestion that the systems planning phase is exempt from this requirement: indeed, the express language of both is plainly to the contrary. It is clear to the Court that the Citizens Advisory Committee of MORPC was created to comply with these requirements of the regulations and the Action Plan. The Court must now consider whether this attempt has succeeded.

[9] Upon the record made in this case and for the following reasons, the Court concludes that the Citizens Advisory Committee, as implemented by MORPC, was not sufficient to comply with the public involvement requirements of Part 795. First, the defendants made no systematic attempt to solicit involvement in the CAC by persons in the general area where the highway would be built. The Court interprets "interested parties" in 23 C.F.R.

§ 795.10(b)(3) to include such persons. Defendants violated this regulation because they did not institute procedures to solicit the involvement of persons representing neighborhood groups in the affected area. Rather, as the record in this case makes clear, involvement in the CAC was left to informal contacts.

Second, the membership of the CAC was heavily weighted in favor of business and governmental groups. Although there was some involvement by civic groups, there appear to be no groups specifically representing the interests of neighborhoods in the affected area. *See* Jt. Ex. 86. Thus, as the Court construes the term, "the public" was inadequately represented.

Third, the Court considers it relevant that the Leonard-Maryland-Sunbury-I-670-17th Avenue Systems Analysis, Jt. Ex. 27, was narrowly conceived in that it focused relatively little upon social impacts and impacts upon racial minorities. This is significant because, as the Court construes the regulations, a main purpose of public involvement is to ensure that broader values are brought to bear on the highway planning process. The narrowness of the major study documenting the need for I-670 suggests that, to some extent, the objective of Congress in § 109(h) has not been realized.

Thus, the Court concludes that plaintiffs have carried their burden with respect to their claim that defendants provision for public input during the systems planning phase of the I-670 Project was inadequate to meet the requirements of the regulations promulgated under § 109(h).

The second error under the Federal Highway Act alleged by the plaintiffs is a violation of 23 U.S.C. § 128(a). In relevant part, this provides:

Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village ... shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social

effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.... Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

When this section was amended in 1968 to require consideration of social and environmental as well as economic impacts, the accompanying legislative history stated:

It is important that those who participate in the hearings believe that the views they express will be considered and weighed in decisions relating to highway location and design. These hearings are intended to produce more than a public presentation by the highway department of its plans and decisions.

Senate Public Works Comm., Federal-Aid Highway Act of 1968, Sen.Rep. No. 1340, 90th Cong., 2d Sess. reprinted in 1968 *U.S. Code Cong. & Ad.News* 3482, 3492 (1968).

Still, Congress did not intend that final decisions as to location or design of highways be made by participants at public meetings. Rather, these decisions "can only be made by governmental agencies designated by Congress and the respective State Legislatures to execute and implement the highway program." House Public Works Comm., Federal-Aid Highway Act of 1970, H.Rep. No. 91-1554, 91st Cong., 2d Sess., reprinted in 1970 *U.S. Code Cong. & Ad.News* 5392, 5396 (1970). It appears that Congress' intent is that highway planners should be publicly confronted with opposing views, to ensure they take account during the planning process of the desires and objections of citizens affected by proposed projects. *D.C. Federation of Civic Ass'ns, Inc. v. Volpe*, 434 F.2d 436, 441 (D.C.Cir.1970). Consequently, hearings are to be conducted as town-hall type meetings in which people are free to express their views. H.Rep. No. 91-1554,

supra, U.S.Code Cong. & Admin.News 1970, at 5396. In addition, "(t)he major focus must be on the total impact of the project as a whole, including whether it should be built at all ..." *Lathan v. Brinegar*, 506 F.2d 677, 690 (9th Cir.1974).

Plaintiffs refer the Court to FHWA regulations implementing § 128(a) for the proposition that hearings must be held before the State highway department is committed to a specific proposal ... [to] ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway ...

23 C.F.R. § 790.3(a)(1), (2). Plaintiffs argue that defendants violated these provisions because they waited until the systems planning phase was closed before holding public meetings. By this time, plaintiffs contend, the defendants were already committed to a specific proposal, viz., building I-670.

The plaintiffs have focused upon a problematic aspect of federal highway regulations. As the Court noted in *National Wildlife Federation v. Snow*, 561 F.2d 227 (D.C.Cir.1976):

FHWA hearing regulations recite that the "need" for the highway is for comment at a corridor public hearing. But by the time of this location phase, need has already been established to the satisfaction of those planning the highways. By the time a proposed route reaches the location phase—when a NEPA statement and the first public hearing are normally required—the route has already been put on a federal-aid system by the FHWA and has been included in the construction program submitted annually by the state. And prior to the time of submission of the construction program, the state will have made a determination as to the need for the highway projects included in the program, established project priorities, and coordinated these proposals with state and local planning. "Thus, although the need for [a highway] might be disputed, the determination

that it should be built has already been made by planners and politicians alike."

Id. at 233-4, footnotes omitted.

The Court considers that the proper issue is whether public hearings are conducted "to assure consideration [of social, economic and environmental impacts] at a point that is meaningful." *Id.* at 234. That is, the planners are permitted to have a specific proposal and even to be promoting it. Unless there is a specific proposal to be discussed, it is difficult to see how meaningful public meetings could be held, for there would be no focus. However, planners are not permitted to have closed their minds to the social, economic and environmental impacts of their proposal. If these impacts are excessive, they must be willing to reconsider their project. In sum, the law requires good faith objectivity, not subjective impartiality. *Nashvillians Against I-440 v. Lewis*, 524 F.Supp. 962, 987 (M.D. Tenn.1981). As this Court understands the law, the purpose of public hearings to bring the planners face-to-face with public reaction to their proposals and projects.

[10-12] If there has not been substantial compliance with the requirements of § 128, an injunction will lie to block the highway project until there is compliance with the law. *Ward v. Ackroyd*, 344 F.Supp. 1202 (D.Md.1972); *City of Rye, New York v. Schuler*, 355 F.Supp. 17 (S.D. N.Y.1973). However, the defendants' actions are entitled to a presumption of regularity, and the burden is upon the plaintiffs to establish illegality. *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 415, 91 S.Ct. at 823 (1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613, 619 (3d Cir.1971). The sufficiency of the hearings that were in fact held is a question of fact for the Court to determine. *Joseph v. Adams*, 467 F.Supp. 141, 161 (E.D.Mich.1978).

As noted above, public involvement during the location phase was accomplished through the activities of the Citizens Advisory Group and I-670 Public Information Center, dissemination of newsletters and reports to the public, public meetings with

civic groups and groups within the I-670 corridor, and a formal public hearing that was held on October 1, 1980. *See* Jt. Ex. 25; Final Joint Environmental Impact Statement, Appendix A. Plaintiffs have stipulated that they were members of the Citizens Advisory Group, and presented their views on I-670 and alternatives to it. Agreed Stipulations, ¶ 71, 73. They have further stipulated that they were adequately notified of the public meetings conducted by the I-670 Coordinating Committee and the October 1, 1981 meeting, and that these meetings were fairly conducted and afforded them an opportunity to present their views. Agreed Stipulations, 79-84. The sole complaint raised by the plaintiffs is that, by the time public hearings were conducted, defendants were already committed to the I-670 Project. Specifically plaintiffs contend that by the time of the first public hearing on March, 1976, the defendants assumed that I-670 would be built and restricted public input to route locations and not the need for a freeway.

[13] Insofar as plaintiffs are contending that public hearings must be held before the systems planning phase is closed, their contention is without merit, for the reasons explained *supra* in this subpart of this Opinion. *See also Nashvillians Against I-440 v. Lewis*, *supra*, at 986-7.

[14] Alternatively, plaintiffs may be contending that defendants had so closed their minds to public input that, come what may, they would build I-670. Such conduct on the part of the defendants would, if proven, violate § 128(a) and its implementing regulations, as this Court construes these provisions. However, plaintiffs have failed to demonstrate such closed-mindedness or bad faith on the part of the defendants. Because the plaintiffs carry the burden of proof on this issue, their contention must fail.

The record in this case shows that the plaintiffs presented their criticisms of I-670 and proposed alternatives to it on many occasions in public meetings. The fact that the defendants did not adopt these alterna-

tives is not dispositive of the issue. The Court cannot conclude that it was a clear error of judgment for the defendants to prefer I-670 to the mass transit alternative put forth by the plaintiffs. The City Council funded restudy instituted at plaintiffs' urging concluded that mass transit was not a viable solution unless it was accompanied by construction of a major arterial street through the area. The plaintiffs have presented no expert testimony that tends to show the unreasonableness of this view. In light of this record, the Court can only conclude that plaintiffs have failed to demonstrate that the public hearings failed to meet the requirements of § 128.

Unlike the situation in *Joseph v. Adams*, 467 F.Supp. 141 (E.D.Mich.1978), upon which plaintiffs rely, the meetings held in the I-670 Project do not appear to have been merely informational meetings. In *Joseph v. Adams*, defendants did not hold public meetings until final construction plans were being formulated. It was clear that public comments were not considered for the purpose of altering the project. *Id.* at 161. The Court cannot reach similar conclusions from the record in the instant case. The main basis for plaintiffs' claim—that the defendants proposed and planned the highway prior to holding hearings—simply is not sufficient to show a violation of § 128. See *Nashvillians Against I-440 v. Lewis*, *supra*, at 986. Thus, the plaintiffs have failed to carry their burden regarding their § 128 claim.

B.

Plaintiffs' second major contention before the Court is that the defendants have violated Title VI of the Civil Rights Act of 1964. This provides, in relevant part:

No person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. In *Guardian's Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), a majority of a sharply

divided Supreme Court held that a private party could bring suit for prospective relief to enforce regulations under Title VI embodying a disparate impact standard without having to prove discriminatory intent on the part of the defendants. See fn. 27 to the Opinion of White, J. Thus, the Court reaffirmed the holding the *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) that discriminatory effect even in the absence of discriminatory purpose can violate Title VI.

Regulations promulgated by FHWA pursuant to mandate of Title VI provide:

In determining the site or location of facilities, a recipient [of federal funds] may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this directive applies, on the grounds of race, color, sex or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of Title VI of the Civil Rights Act of 1964 or this directive.

23 C.F.R. § 710.405(c)(3). This provision plainly contemplates that discriminatory effect can be a violation, even where there is no discriminatory purpose. Compare 49 C.F.R. § 21.5(d). Therefore, under *Guardian's Ass'n*, *supra*, if the construction of I-670 at the proposed location would have a discriminatory effect, Title VI will be violated, even though no discriminatory intent or purpose underlies the selection of that location.

Plaintiffs advance two alternative contentions to support their request that defendants be enjoined under Title VI from constructing I-670 as presently planned. First, they submit that defendants are precluded by 23 C.F.R. § 710.405(c)(3) from building a highway where the route selected would have a disproportionate impact upon minority citizens. Upon this contention, the cited regulation amounts to a *per se* prohibition against taking actions that have a disparate impact. Alternatively, plaintiffs contend, even though highways

can be built through predominantly minority neighborhoods, defendants have a duty to consider carefully alternatives with less discriminatory impact. Plaintiffs urge that defendants have failed to do so in the I-670 Project.

[15] Plaintiffs' first contention—that the highway cannot be located where it will have a disparate impact upon minorities—must fail. Defendants are not *per se* prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification.

[16, 17] Under Title VI, plaintiffs must first establish that the proposed federally-aided administrative action involves "some definite, measurable disparate impact." *N.A.A.C.P. v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3rd Cir.1981). If plaintiffs meet this initial burden, defendants must present a justification for their actions. The ultimate burden of proving illegal discrimination remains with plaintiffs. *Id.* at 1333; *accord, Bryan v. Koch*, 627 F.2d 612, 616-8 (2d Cir.1980); *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508, 516-7 (5th Cir.1976). The approach taken by the Court in *N.A.A.C.P. v. Medical Center, Inc.*, *supra*, was cited with approval by the Sixth Circuit in *Jennings v. Alexander*, 715 F.2d 1036, 1045 n. 9 (6th Cir.1983). Thus, to determine whether locating I-670 as presently planned would violate Title VI, this Court must inquire whether plaintiffs have made a *prima facie* case, and, if so, whether defendants have offered sufficient justification for their actions.

[18] Upon consideration of the record made in this case, the Court concludes that plaintiffs have made a *prima facie* showing of disparate effect upon racial minorities. There is no dispute that parts of I-670 would travel through neighborhoods that range from 50% to over 90% racial minorities. Agreed Stipulation ¶ 123. Further, of the 355 persons displaced by the construction of I-670, 260 or nearly 75%

are members of racial minorities. Agreed Stipulations ¶ 121. There is also ample evidence to support a finding that the disruptions and negative impacts of highway construction and after the highway is operating will fall primarily upon neighborhoods that are mostly comprised of minorities. Tr. 21-3. The Court finds defendant Damian's attempt to portray the benefits of I-670 to plaintiffs to be speculative and unsupported by the record. *See* Defendant Damian's Post Hearing Brief, at 67-8.

However, upon consideration of the record, the Court further concludes that the defendants have met their burden of justifying the location of I-670 by articulating legitimate nondiscriminatory reasons for the location. In the first place, it is plain from the record that construction of I-670 would have substantially less impact upon racial minorities than would the construction of a freeway along 17th Avenue, the major alternative location for a freeway. Tr. 179. In addition, defendants have selected a final location for the highway so as to minimize impacts upon minority neighborhoods. The selected alternative was aligned along Alum Creek and an existing railroad right of way to avoid dividing neighborhoods and to minimize displacement of persons and businesses. Jt. Ex. 25: Final Joint Environmental Impact Statement, at III-25; Tr. 179-182. Thus, the final location avoids most of the neighborhoods that are 90% racial minorities. Tr. 182.

There is an alternative reason why the Court concludes that defendants have carried their burden. In *Jennings v. Alexander*, *supra*, at 1045, the Sixth Circuit wrote that one way in which the defendants could rebut a *prima facie* case of discrimination was to demonstrate that the alternative method offered by plaintiffs would not accomplish the objective sought. In the instant case, plaintiffs put forth an alternative solution to the acknowledged transportation problems of the northeast corridor. This alternative involved a combination of light rail transport and improvements to streets in the area. In the restudy funded by the City Council, this alternative was

considered and found wanting. Although that restudy did conclude that the construction of a freeway was not the only feasible solution to the transportation problems of the area, it appears clearly in the record that plaintiffs' alternative was considered to be inadequate.

Plaintiffs' alternative contention is that defendants were under a duty imposed by Title VI to formulate and inquire into alternatives with less disparate impact upon racial minorities, if the alternatives they are considering have any disparate impact at all upon minorities. This, plaintiffs contend, the defendants have failed to do. It is true that all of the reasonable alternatives for the location of I-670 had moderate or high negative impact upon racial minorities. *Jt. Ex. 50* at 16. In addition, James Gabriel, Columbus expressway engineer during the location and design phases of the I-670 Project, testified that a "very indirect route" could have gone around "some" of the affected neighborhoods, and that the City did not investigate or prepare cost estimates for these indirect routes. *Tr. 17-8*. From these facts, the plaintiffs would have the Court conclude that the defendants failed to comply with the mandates of Title VI.

If plaintiffs' alternative contention arose under Title VI alone, there would be some question whether defendants were required by federal law to consider alternatives with less disparate impact. *See Bryan v. Koch, supra*, at 618-9; *N.A.A.C.P. v. Medical Center, Inc., supra*, at 1336-7. However, the Court need not decide this issue, for regulations promulgated by the FHWA impose such a duty. These provide:

Appropriate alternatives which might minimize or avoid adverse social, economic, or environmental effects should be studied and described, particularly in terms of impacts upon specific groups and in relationship to 42 U.S.C. § 2000d-2000d-4 (Title VI of the Civil Rights Act of 1964) and 42 U.S.C. 3601-3619 (Title VIII of the Civil Rights Act of 1968).

23 C.F.R. § 795.9(a) (1974). Thus, federal law at the time of the location phase of the I-670 Project imposed the requirement that defendants consider "appropriate" alternatives that might minimize adverse impact upon racial minorities.

[19] Upon consideration of the record, the Court concludes that the plaintiffs have failed to show that there were any *appropriate* alternatives to be considered. The "very indirect route" elicited at trial remains wholly speculative. The Court has no conception of its location, and there is no indication whatsoever of the economic cost, or social or environmental impacts of such a location. This Court considers the comments of Judge Rice regarding a plaintiff's burden in challenging the sufficiency of an environmental impact statement to be applicable in the present context:

To prevail on the merits, Plaintiffs are required to establish that an Environmental Impact Statement is inadequate and that alternatives they propose are reasonable and feasible; more than a *prima facie* showing of deficiencies is necessary.

Citizens Committee Against Interstate Route 675 v. Lewis, 542 F.Supp. 496, 522 (S.D.Oh.1982). Furthermore, plaintiffs did not present this "very indirect route" to the defendants in the first instance for their consideration. *Tr. 107-109*. It is doubtful that plaintiffs can present an alternative in this Court in the first instance. *See Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 553-555, 98 S.Ct. 1197, 1216-1217, 55 L.Ed.2d 460 (1978); *Crosby v. Young*, 512 F.Supp. 1363, 1375 (E.D.Mich.1981).

In addition, the Court considers it relevant that the defendants did in fact consider the possibility of mass transit alternatives to I-670 in the City Council funded restudy in 1978, and did so at plaintiffs' urging. This alternative was designed to minimize impact upon neighborhoods in the northeast corridor, and, the Court assumes, would have minimized impact on racial minorities. Plaintiffs' proposed alternative

was considered in detail in the 1978 restudy. Tr. 110. In light of this, the Court can only conclude that alternatives with less impact upon minorities were in fact considered.

It follows that plaintiffs have failed to prove a violation of Title VI under either of their alternative theories.

IV.

The Court has determined that defendants violated regulations under 23 U.S.C. § 109(h), but that, in all other respects, plaintiffs have not shown that the defendants have violated the law. Accordingly, the Court must now consider the issue of what relief, if any, should be granted to plaintiffs. In their complaint, plaintiffs seek both declaratory and injunctive relief.

Because plaintiffs have shown that the actions and conduct of the defendants during the systems planning stage of the I-670 Project violated the public involvement requirements imposed by Part 795 of Title 23 of C.F.R., it appears that declaratory relief is appropriate. 28 U.S.C. § 2201.

[20] However, in light of the record and the governing law, the Court concludes that an injunction prohibiting the beginning of construction of I-670 cannot issue. It is clear that a violation of § 109(h) by itself does not compel the issuance of an injunction until the noncompliance is cured; rather, the Court must balance the equities of the parties and the interest of the public. See *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 962-3 (1st Cir. 1976); compare *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179, 182-4 (6th Cir. 1967), cert. denied 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968). Plaintiffs must show not only that a violation occurred, but also that they were prejudiced by this violation. *Orange County v. North Carolina Dept. of Transportation*, 46 N.C.App. 350, 265 S.E.2d 890, 911 (1980). Upon the record of this case, it is plain to the Court that plaintiffs were not prejudiced. Plaintiffs' preferred alternative was considered in detail in the 1978 City Council funded restudy. The Court

considers that any error committed by the defendants must be considered to be technical in nature in light of this.

WHEREUPON, upon consideration and being duly advised, this Court determines and hereby **DECLARES** that the actions and conduct of defendants during the systems planning phase of the I-670 Project violated the public involvement requirements of 23 C.F.R. Part 795; the Court further determines that upon all other claims, the Clerk shall enter **JUDGMENT FOR DEFENDANTS**.

IT IS SO ORDERED.



**INFOREX CORPORATION,
N.V., Plaintiff,**

v.

**MGM/UA ENTERTAINMENT
COMPANY, et al.,
Defendants.**

No. CV 84-4584 KN (Kx).

United States District Court,
C.D. California.

Dec. 28, 1984.

Representative of actor who portrayed lead role in several "James Bond" films, brought suit against film distributors alleging, inter alia, violations of the federal securities laws in regard to compensation paid the actor. On defense motions to dismiss various counts of the complaint, the District Court, Kenyon, J., held that percentage-of-the-profits clauses in compensation packages executed between the actor or his representatives and the defendants were not securities within the meaning of the Securities Exchange Act of 1934 and the Securities Act of 1933, since plaintiff failed to satisfy the third element of the