

Statement of BRENNAN and MARSHALL, JJ. 441 U.S.

federal forum without justification in the language or history of the law.

I respectfully dissent.

Mr. JUSTICE BRENNAN and Mr. JUSTICE MARSHALL believe that the issue discussed in footnote 2 of this dissenting opinion need not be addressed in this case. They therefore express no view of the merits of that particular question.

Syllabus

CANNON v. UNIVERSITY OF CHICAGO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-926. Argued January 9, 1979—Decided May 14, 1979

Section 901 (a) of Title IX of the Education Amendments of 1972 (Title IX) provides in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Petitioner instituted litigation in Federal District Court, alleging that she had been excluded from participation in the medical education programs of respondent private universities on the basis of her gender and that these programs were receiving federal financial assistance at the time of her exclusion. The District Court granted respondents' motions to dismiss the complaints since Title IX does not expressly authorize a private right of action by a person injured by a violation of § 901, and since the court concluded that no private remedy should be inferred. The Court of Appeals agreed that the statute did not contain an implied private remedy. It concluded, *inter alia*, that Congress intended the remedy in § 902 of Title IX, establishing a procedure for the termination of federal financial support for institutions that violated § 901, to be the exclusive means of enforcement, and that Title VI of the Civil Rights Act of 1964, upon which Title IX was patterned, did not include an implied private cause of action.

Held: Petitioner may maintain her lawsuit, despite the absence of any express authorization for it in Title IX. Pp. 688-717.

(a) Before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the following four factors that *Cort v. Ash*, 422 U. S. 66, identifies as indicative of such an intent: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) whether there is any indication of legislative intent to create a private remedy, (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. P. 688.

(b) The first factor is satisfied here since Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and peti-

688, 690, 692
P. 696 of case
698, 702, 704
707

is there a private
remedy?

tioner is clearly a member of that class for whose special benefit the statute was enacted. Pp. 689-694.

(c) As to the second factor, the legislative history of Title IX rather plainly indicates that Congress intended to create a private cause of action. Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which had already been construed by lower federal courts as creating a private remedy when Title IX was enacted. Pp. 694-703.

(d) The third factor is satisfied, since implication of a private remedy will not frustrate the underlying purposes of the legislative scheme but, instead, will assist in achieving the statutory purpose of providing individual citizens effective protection against discriminatory practices. Pp. 703-708.

(e) As to the fourth factor, since the Civil War, the Federal Government and the federal courts have been the primary and powerful reliances in protecting citizens against invidious discrimination of any sort, including that on the basis of sex. Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. Pp. 708-709.

(f) Respondents' principal argument against implying a cause of action under Title IX—that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis because this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees—is without merit. The congressional majorities that passed Title VI of the Civil Rights Act of 1964 and Title IX rejected the same argument when advanced by the congressional opponents of the two statutes, and there is nothing to demonstrate that private Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened, or that university administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner. Pp. 709-710.

(g) Nor is there any merit to respondents' arguments, starting from the premise that Title IX and Title VI should receive the same construction, that a comparison of Title VI with other titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable, and that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy. The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient

reason, by itself, for refusing to imply an otherwise appropriate remedy under a separate section, and none of the excerpts from the legislative history cited by respondents evidences any hostility toward an implied private remedy for terminating the offending discrimination. Pp. 710-716.

559 F.2d 1063, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, in which STEWART, J., joined, *post*, p. 717. BURGER, C. J., concurred in the judgment. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 718. POWELL, J., filed a dissenting opinion, *post*, p. 730.

John M. Cannon argued the cause and filed briefs for petitioner.

Solicitor General McCree argued the cause for the federal respondents. With him on the briefs were *Assistant Attorney General Days*, *Deputy Solicitor General Wallace*, *Jessica Dunsay Silver*, and *Miriam R. Eisenstein*.

Stuart Bernstein argued the cause for respondents University of Chicago et al. With him on the brief were *Susan S. Sher* and *Thomas H. Morsch*.*

* Briefs of *amici curiae* urging reversal were filed by *Nancy Duff Campbell* and *Margaret A. Kohn* for the Federation of Organizations for Professional Women et al.; by *Carla A. Hills*, *William C. Kelly, Jr.*, *Charles A. Bane*, *Thomas D. Barr*, *Norman Redlich*, *Robert A. Murphy*, and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law; by *Kent Hull* for the National Center for Law and the Handicapped, Inc., et al.; and by *Howard C. Westwood*, *Peter J. Nickles*, *Arnold Forster*, *Jeffrey P. Sinensky*, *Samuel Rabinove*, *Peter D. Roos*, *Richard A. Weisz*, *Roger S. Kuhn*, *William L. Taylor*, *Ronald B. Brown*, *Robert Hermann*, and *Nathaniel Jones* for the National Urban League et al.

Briefs of *amici curiae* urging affirmance were filed by *Laura Christian Ford* and *Joseph Anthony Keyes, Jr.*, for the American Council on Education et al.; by *Susan A. Cahoon*, *William A. Wright*, and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *John W. Barnett* and *Noel E. Hanf* for Yale University.

MR. JUSTICE STEVENS delivered the opinion of the Court.

Petitioner's complaints allege that her applications for admission to medical school were denied by the respondents because she is a woman.¹ Accepting the truth of those allegations for the purpose of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in a federal court. 559 F. 2d 1063. We granted certiorari to review that holding. 438 U. S. 914.

Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from participation in the respondents' medical education programs because of her sex. Second, these education programs were receiving federal financial assistance at the time of her exclusion. These facts, admitted *arguendo* by respondents' motion to dismiss the complaints, establish a violation of § 901 (a) of Title IX of the Education Amendments of 1972 (hereinafter Title IX).²

¹ Each of petitioner's two complaints names as defendant a private university—the University of Chicago and Northwestern University—and various officials of the medical school operated by that university. In addition, both complaints name the Secretary, and the Region V Director of the Office for Civil Rights, of the Department of Health, Education, and Welfare. Although all of these defendants prevailed below, and are respondents here, the federal defendants have taken a position that basically accords with the position advanced by petitioner. See Brief for Federal Respondents. Unless otherwise clear in context, all references to respondents in this opinion will refer to the private defendants named in petitioner's complaints.

² Petitioner's complaints allege violations of various federal statutes including Title IX. Although the District Court and Court of Appeals ruled adversely on all of these theories, petitioner confined her petition for a writ of certiorari to the Title IX question. Pet. for Cert. 3. On that question, the District Court and Court of Appeals ruled favorably on respondents' motion to dismiss the complaints for failure to state a cause of action. See App. 22. Although respondents sought summary judgment simultaneously with their motion to dismiss, and submitted supporting affidavits, the courts below did not purport to rule on summary judgment or to make factual findings. Accordingly, all of the facts alleged

That section, in relevant part, provides:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

in petitioner's complaints must be taken as true for purposes of review.

According to her complaints, petitioner was qualified to attend both of the respondent medical schools based on both objective (*i. e.*, grade-point average and test scores) and subjective criteria. In fact, both schools admitted some persons to the classes to which she applied despite the fact that those persons had less impressive objective qualifications than she did. *Id.*, at 6–7, 12–13.

Both medical schools receive federal aid, *id.*, at 15–16, and both have policies against admitting applicants who are more than 30 years old (petitioner was 39 years old at the time she applied), at least if they do not have advanced degrees. *Id.*, at 7. Northwestern Medical School absolutely disqualifies applicants over 35. *Id.*, at 7 n. 3. These policies, it is alleged, prevented petitioner from being asked to an interview at the medical schools, so that she was denied even the opportunity to convince the schools that her personal qualifications warranted her admission in place of persons whose objective qualifications were better than hers. *Id.*, at 10, and n. 4, 11–12. Because the incidence of interrupted higher education is higher among women than among men, it is further claimed, the age and advanced-degree criteria operate to exclude women from consideration even though the criteria are not valid predictors of success in medical schools or in medical practice. *Id.*, at 7–11. As such, the existence of the criteria either makes out or evidences a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex. *Id.*, at 13. Petitioner also claimed that the schools accepted a far smaller percentage of women than their percentage in the general population and in the class of persons with bachelor's degrees. *Id.*, at 9. But cf. 559 F. 2d 1063, 1067, referring to statistics submitted by the University of Chicago in its affidavit accompanying its summary judgment motion indicating that the percentage of women admitted to classes from 1972 to 1975, 18.3%, was virtually identical to the percentage of women applicants. Of course, the dampening impact of a discriminatory rule may undermine the relevance of figures relating to *actual* applicants. See *Dothard v. Rawlinson*, 433 U. S. 321, 330.

Upon her rejection by both schools, petitioner sought reconsideration of the decisions by way of written and telephonic communications with admissions officials. Finding these avenues of no avail, she filed a complaint with the local office of HEW in April 1975, alleging, *inter alia*,

benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”³

violations of Title IX. App. 16. Three months later, having received only an acknowledgment of receipt of her letter from HEW, petitioner filed suit in the District Court for the Northern District of Illinois against the private defendants. After she amended her complaints to include the federal defendants and requested injunctive relief ordering them to complete their investigation, she was informed that HEW would not begin its investigation of her complaint until early 1976. 559 F. 2d, at 1068, and n. 3; App. 49. In June 1976, HEW informed petitioner that the local stages of its investigation had been completed but that its national headquarters planned to conduct a further “in-depth study of the issues raised” because those issues were “of first impression and national in scope.” App. to Pet. for Cert. A-35. As far as the record indicates, HEW has announced no further action in this case. See 559 F. 2d, at 1077.

³ In relevant part, § 901, 86 Stat. 373, as amended, as set forth in 20 U. S. C. § 1681, provides:

“(a) . . . No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

“(1) . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

“(2) . . . in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

“(3) . . . this section shall not apply to an educational institution which

The statute does not, however, expressly authorize a private right of action by a person injured by a violation of § 901. For that reason, and because it concluded that no private remedy should be inferred, the District Court granted the respondents’ motions to dismiss. 406 F. Supp. 1257, 1259.

The Court of Appeals agreed that the statute did not contain an implied private remedy. Noting that § 902 of Title IX establishes a procedure for the termination of federal financial support for institutions violating § 901, the Court of Appeals concluded that Congress intended that remedy to

is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

“(4) . . . this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; [and]

“(5) . . . in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

“(b) . . . Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

“(c) . . . For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.”

be the exclusive means of enforcement.⁴ It recognized that the statute was patterned after Title VI of the Civil Rights

⁴ Section 902, 86 Stat. 374, as set forth in 20 U. S. C. § 1682, provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Section 903 of Title IX, 86 Stat. 374, as set forth in 20 U. S. C. § 1683, provides for judicial review of actions taken under § 902:

"Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a

Act of 1964 (hereinafter Title VI),⁵ but rejected petitioner's argument that Title VI included an implied private cause of action. 559 F. 2d, at 1071-1075.

After the Court of Appeals' decision was announced, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, which authorizes an award of fees to prevailing private parties in actions to enforce Title IX.⁶ The

finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title."

⁵ Section 601 of Title VI of the Civil Rights Act of 1964, 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."

⁶ The Civil Rights Attorney's Fees Awards Act of 1976 amended 42 U. S. C. § 1988. That section, in relevant part, provides:

"... In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX [of the Education Amendments of 1972], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Respondents have argued that the amendment to § 1988 was merely intended to allow attorney's fees to the prevailing party in actions brought under the express provision in Title IX, 20 U. S. C. § 1683, quoted in n. 4, *supra*, authorizing alleged discriminators to obtain judicial review of Government decisions to cut off federal funds. See 559 F. 2d, at 1078. The legislative history of § 1988, as amended, belies this argument. The provision was clearly intended, *inter alia*, to allow awards of fees on behalf of "private" victims of discrimination who have successfully brought suit in court where authorized by the enumerated statutes:

"All of these civil rights laws [referred to in § 1988] depend heavily upon

court therefore granted a petition for rehearing to consider whether, in the light of that statute, its original interpretation of Title IX had been correct. After receiving additional briefs, the court concluded that the 1976 Act was not intended to create a remedy that did not previously exist.⁷ The court

private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94-1011, p. 2 (1976) (emphasis added).

Furthermore, the attorney's fee amendment passed in 1976 was designed to expand the availability of § 718 of the Education Amendments of 1972, 20 U. S. C. § 1617, quoted in n. 25, *infra*, which unequivocally provides fees to litigants "other than the United States" who secure judicial relief against certain defendants for discrimination in violation of Title VI. Hence, although the language in §§ 718 and 1988 is not parallel, it appears that both authorize attorney's fees to certain private plaintiffs where the specified statute itself authorizes the relief sought by that plaintiff and the plaintiff proves his entitlement to such relief.

⁷ We find nothing objectionable in this conclusion, as far as it goes. The legislative history quoted in the opinion of the Court of Appeals makes clear that the supporters of the legislation did not intend it to amend Title IX to include an express cause of action where none existed before. Instead, they clearly only meant to provide attorney's fees in the event that that statute as it had always existed implicitly created a cause of action. 559 F. 2d, at 1079-1080.

On the other hand, the language added to § 1988 by the 1976 amendment, and the legislative history surrounding it, do indicate that many "members of Congress may have assumed that private suits were authorized under" Title IX, 559 F. 2d, at 1079, and, more importantly, that many Members felt that private enforcement of Title IX was entirely consistent with, and even necessary to, the enforcement of Title IX and the other statutes listed in § 1988. In addition to reflecting this sentiment in the Senate Report on the 1976 amendment, see n. 6, *supra*, numerous legislators said as much on the floor of the two Houses:

"It is Congress['] obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988]. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing

also noted that the Department of Health, Education, and Welfare had taken the position that a private cause of action under Title IX should be implied,⁸ but the court disagreed

attorneys' fees in this essential area of the law." 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy).

See also *id.*, at 31471 (Sen. Scott); *id.*, at 31482 (Sen. Allen); *id.*, at 31832 (Sen. Hathaway); *id.*, at 33313 (Sen. Tunney); *id.*, at 33314 (Sen. Abourezk); *id.*, at 35122 (Rep. Drinan); *id.*, at 35125-35126 (Rep. Kas-tenmeier); *id.*, at 35127 (Rep. Holtzman); *id.*, at 35128 (Rep. Seiberling).

Although we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

⁸ At least since September 17, 1974, HEW has taken the position that an implied cause of action does exist under Title IX in certain circumstances. Letter from HEW Assistant General Counsel Theodore A. Miles to Dr. Bernice Sandler (Sept. 17, 1974), reproduced in App. to Pet. for Cert. A-36 to A-38. See also Memorandum for United States as *Amicus Curiae* in *Lau v. Nichols*, O. T. 1973, No. 72-6520, p. 13 n. 5, in which the Justice Department on behalf of HEW took the position that an implied cause of action exists under Title VI; n. 31, *infra*. It is represented that "communication lapses between national and regional HEW offices" accounted for HEW's taking the contrary position throughout the early stages of this suit and until petitioner asked for rehearing before the Seventh Circuit. Brief for Federal Respondents 6 n. 9.

HEW's position on the interaction between the private cause of action that it recognizes and the administrative remedy provided by 20 U. S. C. § 1682 and HEW regulations was less clear until recently. In the Assistant General Counsel's 1974 letter mentioned above, the question of exhaustion of administrative remedies was raised but not answered. Since 1974, HEW has apparently never taken the position that exhaustion is required in every case. In submissions made to the Court in *Terry v. Methodist Hospital*, Civ. No. 76-373 (ND Ind.), however, the Department apparently took the position that it should always have the *opportunity* (*i. e.*, "primary jurisdiction") to exercise its expertise through the § 1682 process in advance of judicial consideration of a private suit. Statement in Support of HEW's Motion for Reconsideration, Oct. 13, 1977, pp. 6, 10. It was apparently contemplated that the administrative results would be due some amount of deference in subsequent private litigation. Later, HEW

with that agency's interpretation of the Act. In sum, it adhered to its original view, 559 F. 2d, at 1077-1080.

The Court of Appeals quite properly devoted careful attention to this question of statutory construction. As our recent cases—particularly *Cort v. Ash*, 422 U. S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent.⁹ Our review of those factors persuades us, however,

advanced the position that the choice lay with the alleged victim of discrimination, but that if that person initiated administrative proceedings prior to suit (as petitioner did here), the only judicial remedy would be through judicial review of the agency action. See *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280, 300 (Del. 1978). Now, however, HEW, in conjunction with the Department of Justice, has rejected any strict-exhaustion, primary-jurisdiction, or election-of-remedies position in favor of a more flexible approach. In its view, a district court might choose to defer to the decision of the relevant administrative agency, if, unlike here, one has been reached in advance of trial, and it may wish to stay its hand upon request of HEW if an administrative investigation or informal negotiations are in progress and might be hampered by judicial action. See Brief for Federal Respondents 58-60, n. 36.

⁹ "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,' *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—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? See, e. g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e. g., *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law,

that the Court of Appeals reached the wrong conclusion and that petitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex. After commenting on each of the four factors, we shall explain why they are not overcome by respondents' countervailing arguments.

I

First, the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. That question is answered by looking to the language of the statute itself. Thus, the statutory reference to "any employee of any such common carrier" in the 1893 legislation requiring railroads to equip their cars with secure "grab irons or handholds," see 27 Stat. 532, 531, made "irresistible" the Court's earliest "inference of a private right of action"—in that case in favor of a railway employee who was injured when a grab iron gave way. *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 40.¹⁰

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? See *Wheeldin v. Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co. v. Borak*, 377 U. S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment). 422 U. S., at 78.

¹⁰ In that case the Court stated:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., tit. Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (Per Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Black. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125." 241 U. S., at 39-40.

Similarly, it was statutory language describing the special class to be benefited by § 5 of the Voting Rights Act of 1965¹¹ that persuaded the Court that private parties within that class were implicitly authorized to seek a declaratory judgment against a covered State. *Allen v. State Board of Elections*, 393 U. S. 544, 554–555.¹² The dispositive language in that statute—“no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]”—is remarkably similar to the language used by Congress in Title IX. See n. 3, *supra*.

The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort*, *supra*, and other laws enacted for the protection of the general public.¹³ There would be far

¹¹ 42 U. S. C. § 1973c.

¹² The Court's entire explanation for inferring a private remedy was as follows:

“The Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act. However, § 5 does provide that ‘no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5].’ Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5.” 393 U. S., at 554–555 (footnotes omitted).

¹³ Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. See *Sullivan v. Little Hunting Park*, 396 U. S. 229, 238 (42 U. S. C. § 1982: “All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof . . .”); *Allen v. State Board of Elections*, 393 U. S. 544 (42 U. S. C. § 1973c: “no person shall be denied the right to vote . . .”); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 414–415, and n. 13 (same as in

less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply

Sullivan, *supra*); *Tunstall v. Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (§ 2 Fourth of the Railway Labor Act: “Employees shall have the right to organize and bargain collectively through representatives . . .”); *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 199 (same); *Virginian R. Co. v. Railway Employees*, 300 U. S. 515, 545 (§ 2 Ninth of the Railway Labor Act: “the carrier shall treat with the representative so certified” (emphasis added)); *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 567–570 (§ 2 Third of the Railway Labor Act: “Representatives . . . shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party . . .” (emphasis added)); *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 40 (27 Stat. 552: “any employee of any such common carrier”). Analogously, the Court has implied causes of action in favor of the United States in cases where the statute creates a duty in favor of the public at large. See *Wyandotte Transportation Co. v. United States*, 389 U. S. 191, 200–202 (33 U. S. C. § 409: “It shall not be lawful [to obstruct navigable waterways]”); *United States v. Republic Steel Corp.*, 362 U. S. 482 (same).

The only case that deviates from this pattern is *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, which involved Title I of the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302 (8): “No Indian tribe . . . shall deny to any person within its jurisdiction the equal protection of its laws.” *Martinez*, however, involved an attempt to imply a cause of action in a virtually unique situation—i. e., against an Indian tribe, protected by a strong presumption of autonomy and self-government, as well as by a special duty on the part of the Federal Government to deal fairly and openly, and by a legislative history indicative of an intent to limit severely judicial interference in tribal affairs. 436 U. S., at 55, 58–59, 63–64, 67–70, and n. 30. In this situation, the fourth *Cort* factor was brought into special play. The *Martinez* Court determined that the strong presumption against implication of federal remedies where they might interfere with matters “traditionally relegated to state law,” *Cort*, 422 U. S., at 78, was equally applicable in circumstances where the federal remedies would interfere with matters traditionally relegated to the control of semisovereign Indian tribes.

Even *Martinez*, however, “recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms.” 436 U. S., at 61; see *Sullivan v.*

as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public

Little Hunting Park, *supra*, at 238; *Allen v. State Board of Elections*, *supra*; *Jones v. Alfred H. Mayer Co.*, *supra*, at 414 n. 13. This principle, which is directly applicable in the present Title IX context, is but a manifestation of the pattern noted above because a statute declarative of a civil right will almost have to be stated in terms of the benefited class. Put somewhat differently, because the right to be free of discrimination is a "personal" one, see, e. g., *Teamsters v. United States*, 431 U. S. 324, 361-372; *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 772, a statute conferring such a right will almost have to be phrased in terms of the persons benefited.

Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries*, 430 U. S. 1 ("unlawful" conduct); *Cort v. Ash*, *supra* ("unlawful" conduct); *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412 (duty of SIPC to "discharge its obligations"); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453 (forbidding "action, practice, or policy inconsistent" with the Amtrak Act); *Wheeldin v. Wheeler*, 373 U. S. 647 (setting procedure for procuring congressional subpoena); *T. I. M. E. Inc. v. United States*, 359 U. S. 464 ("duty of every common carrier . . . to establish . . . just and reasonable rates . . ."); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (similar duty of gas pipeline companies). The Court has deviated from this pattern on occasion. See *J. I. Case Co. v. Borak*, 377 U. S. 426 (implying a cause of action under a securities provision describing "unlawful" conduct); *Superintendent of Insurance v. Bankers Life & Cos. Co.*, 404 U. S. 6, 13 n. 9 (implying a cause of action under Securities and Exchange Commission Rule 10b-5, which describes certain unlawful manipulative conduct in the securities area); *Machinists v. Central Airlines*, 372 U. S. 682 (implied cause of action under section of the Railway Labor Act creating a "duty" on the part of common carriers to establish boards of adjustment). At least the latter two cases can be explained historically, however. In *Superintendent of Insurance*, the Court explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b-5 cause of action. See also *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 196; *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 730. In *Machinists*, the Court explicitly followed the lead of various earlier cases in which it had implied causes of actions under various sections of the Railway Labor Act, albeit where the statutory provisions more explicitly

funds to educational institutions engaged in discriminatory practices.¹⁴

Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of

identified a class of benefited persons. See *Tunstall*, *supra*; *Steele*, *supra*; *Virginian R. Co.*, *supra*; *Texas & N. O. R. Co.*, *supra*.

¹⁴ In adopting Title IX in its present form, in fact, Congress passed over an alternative proposal, offered by Senator McGovern as an amendment to the Higher Education Act of 1965, that was phrased quite differently—as a simple directive to the Secretary of HEW:

"PROHIBITION AGAINST SEX DISCRIMINATION

"Sec. 1206. (a) The Secretary shall not make any grant, loan guarantee, or interest subsidy payment, nor shall the Secretary enter into any contract with any institution of higher education, or any other postsecondary institution, center, training center, or agencies representing such institutions unless the application, contract, or other arrangement for the grant, loan guarantee, interest subsidy payment, or other financial assistance contains assurances satisfactory to the Secretary that any such institution, center, or agency will not discriminate on the basis of sex in the admission of individuals to any program to which the application, contract, or other arrangement is applicable." 117 Cong. Rec. 30411 (1971).

In this connection, it is also interesting to note that as originally introduced Title VI of the Civil Rights Act of 1964, after which Title IX was explicitly patterned, see n. 16, *infra*, was also phrased as a directive to federal agencies engaged in the disbursement of public funds:

"TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

"Sec. 601. Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any

action. Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.

Second, the *Cort* analysis requires consideration of legislative history. We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Cort*, 422 U. S., at 82 (emphasis in original).¹⁵ But this is not the typical case. Far from evidencing any purpose to *deny* a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy.

Title IX was patterned after Title VI of the Civil Rights Act of 1964.¹⁶ Except for the substitution of the word "sex"

contractor or subcontractor on the ground of race, color, religion, or national origin." S. 1731, 88th Cong., 1st Sess. (1963).

After Senators Keating and Ribicoff raised objections to the bill on the ground that it did not expressly authorize a private remedy for a person against whom discrimination had been practiced, the Department of Justice submitted a revised bill which contained the language now found in § 601. See Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 334-335, 349-352 (1963); *infra*, at 713-716.

¹⁵ See also *Santa Clara Pueblo v. Martinez*, 436 U. S., at 79 (WHITE, J., dissenting).

¹⁶ "This is identical language, specifically taken from title VI of the 1964 Civil Rights Act . . ." 117 Cong. Rec. 30407 (1971) (Sen. Bayh—Senate sponsor). Accord, *id.*, at 30408 ("We are only adding the 3-letter word 'sex' to existing law") (Sen. Bayh); *id.*, at 39256 (Rep. Green—House sponsor); 118 Cong. Rec. 5803, 5807, 18437 (1972) (Sen. Bayh).

The genesis of Title IX also bears out its kinship with Title VI. In

in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to "describe the benefited class."¹⁷ Both statutes provide the

the summer of 1970, Representative Edith Green of Oregon, who later sponsored Title IX on the floor of the House during the debates in 1971 and 1972, chaired a set of hearings on "Discrimination Against Women." Hearings before the Special Subcommittee on Education of the House Committee on Education and Labor on § 805 of H. R. 16098, 91st Cong., 2d Sess. (1970). Under consideration was a section of a pending bill, H. R. 16098, that would simply have added the word "sex" to the list of discriminations prohibited by § 601 of Title VI. See Hearings, *supra*, at 1. During the course of the hearings, which were repeatedly relied upon in both Houses during the subsequent debates on Title IX, it became clear that educational institutions were the primary focus of complaints concerning sex discrimination. See, e. g., *id.*, at 5, 237, 584. In order to conform to that focus, and in order to respond to criticism that certain federally funded programs were properly operating on a single-sex basis (for example, undergraduate colleges and homes for disturbed children), witnesses at the hearings, including representatives of the Justice Department and of the United States Commission on Civil Rights, proposed that a special provision be drawn up that was parallel to, but somewhat more limited than, Title VI. *Id.*, at 664-666, 677-678, 690-691.

Although H. R. 16098 never made it through the House, its sex discrimination provision was lifted from it, modified along the lines suggested in the 1970 hearings, and included in the House Resolution that was amended and adopted by the House as its version of what became the Education Amendments of 1972. H. R. 32, 92d Cong., 1st Sess., Title X. Of note here, this House proposal was originally phrased as an amendment to Title VI that would have made § 601 of that Title into § 601 (a), and would have added the gist of what is now Title IX as § 601 (b). H. R. 32, *supra*. After further modifications not relevant here, this proposal was removed from its Title VI moorings, passed by the House, and further modified, and then passed, by the Senate in a form that was adopted by the Conference Committee. See S. Conf. Rep. No. 92-798, pp. 221-222 (1972).

¹⁷ The pertinent provisions of Titles IX and VI are quoted in nn. 3 and 5, *supra*. Although Title IX is applicable only to certain educational institutions receiving federal financial assistance, Title VI is applicable to additional institutions such as hospitals, highway departments, and housing authorities.

same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.¹⁸ Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.¹⁹

In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. Most particularly, in 1967, a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years.²⁰ In addition, at least a dozen other federal courts reached similar conclusions in the same or related contexts during those years.²¹ It is always appropriate to assume that our

¹⁸ See n. 4, *supra*.

¹⁹ "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]." 117 Cong. Rec. 30408 (1971) (Sen. Bayh). Accord, 118 Cong. Rec. 5807 (1972) (Sen. Bayh); *id.*, at 18437 (Sen. Bayh) ("[E]nforcement of [Title IX] will draw heavily on these precedents" under the Civil Rights Act of 1964).

²⁰ *Bossier Parish School Board v. Lemon*, 370 F. 2d 847, 852 (CA5 1967), cert. denied, 388 U. S. 911. The panel included Judge Wisdom, who wrote the opinion, and then Judge (now CHIEF JUSTICE) Burger, sitting by designation, and then Judge (now Chief Judge) Brown. *Bossier* was relied on in, e. g., *Southern Christian Leadership Conference, Inc. v. Connolly*, 331 F. Supp. 940 (ED Mich. 1971); *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (ND Ill. 1967).

²¹ In addition to the Fifth Circuit in *Bossier*, at least four other federal courts explicitly relied on Title VI as the basis for a cause of action on the part of a private victim of discrimination against the alleged discriminator. See *Blackshear Residents Org. v. Housing Authority of Austin*, 347 F. Supp. 1138, 1146 (WD Tex. 1972); *Hawthorne v. Kenbridge Recreation Assn.*, 341 F. Supp. 1382, 1383-1384 (ED Va. 1972); *Gautreaux v. Chicago*

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elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the

Housing Authority, *supra*; *Lemon v. Bossier Parish School Board*, 240 F. Supp. 709, 713 (WD La. 1965), *aff'd*, 370 F. 2d 847 (CA5 1967).

Although 42 U. S. C. § 1983 might have provided an alternative and express cause of action in some of these cases—had it been relied upon—see generally *Chapman v. Houston Welfare Rights Org.*, *ante*, p. 600, that section was certainly not available in *Kenbridge*, *supra*, involving a private defendant. Moreover, § 1983 was clearly unavailable (and no other express cause of action such as is provided in the Administrative Procedure Act was relied upon) in four other pre-1972 cases that either expressly or impliedly found causes of action under Title VI in a somewhat different context than is involved in this case. Thus, private plaintiffs successfully sued officials of the Federal Government under Title VI, and secured orders requiring those officials either to aid recipients of federal funds in devising nondiscriminatory alternatives to presently discriminatory programs, or to cut off funds to those recipients. See *Gautreaux v. Romney*, 448 F. 2d 731, 737-740 (CA7 1971), later appeal, *Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930 (CA7 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U. S. 284; *Shannon v. HUD*, 436 F. 2d 809, 820 (CA3 1970) (explicit discussion of cause of action); *Southern Christian Leadership Conference, Inc. v. Connolly*, *supra*, at 943-945 (explicit discussion of cause of action); *Hicks v. Weaver*, 302 F. Supp. 619, 622-623 (ED La. 1969).

Finally, several other pre-1972 decisions relied on Title VI as a basis for relief in favor of private litigants, although with language suggesting that § 1983 may have provided the cause of action. See *Alvarado v. El Paso Independent School Dist.*, 445 F. 2d 1011 (CA5 1971); *Nashville I-40 Steering Committee v. Ellington*, 387 F. 2d 179, 181 (CA6 1967), cert. denied, 390 U. S. 921; *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (ND Cal. 1972); *McGhee v. Nashville Special School Dist. No. 1*, 11 Race Rel. L. Rep. 698 (WD Ark. 1966).

See also *Gautreaux v. Chicago Housing Authority*, 436 F. 2d 306 (CA7 1970) (dicta), cert. denied, 402 U. S. 922; *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (ND Ill. 1969) (dicta); *Rolfe v. County Board of Education*, 282 F. Supp. 192 (ED Tenn. 1966) (dicta), *aff'd*, 391 F. 2d 77 (CA6 1968).

prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Moreover, in 1969, in *Allen v. State Board of Elections*, 393 U. S. 544, this Court had interpreted the comparable language in § 5 of the Voting Rights Act as sufficient to authorize a private remedy.²² Indeed, during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies— often in cases much less clear than this.²³ It was after 1972 that this Court decided *Cort v. Ash* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute.²⁴ We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into

²² In fact, Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found. See *Sullivan v. Little Hunting Park*, 396 U. S. 229; *Allen*; *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409. See generally n. 13, *supra*.

²³ In the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them a cause of action was found. *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U. S. 6; *Sullivan v. Little Hunting Park*, *supra*; *Allen*; *Jones v. Alfred H. Mayer Co.*, *supra*; *Wyandotte Transportation Co. v. United States*, 389 U. S. 191; *J. I. Case Co. v. Borak*, 377 U. S. 426. See generally n. 13, *supra*.

²⁴ The Court of Appeals relied on *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453; *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412; and *Cort v. Ash*. In subsequent cases, the Court has continued to give careful attention to claims that a private remedy should be implied in statutes which omit any express remedy. See *Santa Clara Pueblo v. Martinez*, 436 U. S. 49; *Piper v. Chris-Craft Industries*, 430 U. S. 1. The Court's decidedly different approach since 1972 to cause of action by implication has not gone without scholarly notice. *E. g.*, Pitt, Standing to Sue Under the Williams Act After *Chris-Craft*: A Leaky Ship on Troubled Waters, 34 Bus. Law. 117, 120, 162 (1978).

account its contemporary legal context. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

It is not, however, necessary to rely on these presumptions. The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy. [Section 718 of the Education Amendments authorizes federal courts to award attorney's fees to the prevailing parties, other than the United States, in private actions brought against public educational agencies to enforce Title VI in the context of elementary and secondary education.²⁵] The language of this provision explicitly presumes the availability of private suits to enforce Title VI in the education context.²⁶ For many such

²⁵ Section 718, 86 Stat. 369, is codified in 20 U. S. C. § 1617:

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This section was a portion of Title VII of the Education Amendments of 1972, also known as the Emergency School Aid Act. Under this Act federal funds are made available to elementary and secondary schools that are going through the process of court-ordered or voluntary desegregation. See § 702 of the Act, 20 U. S. C. § 1601.

²⁶ See S. Conf. Rep. No. 92-798, p. 218 (1972): "Attorney fees.—The Senate amendment, but not the House amendment, authorized the payment of attorneys fees to successful plaintiffs in suits brought for violation of . . . Title VI of the Civil Rights Act The conference substitute contains this provision." See also n. 6, *supra*.

suits, no express cause of action was then available; hence Congress must have assumed that one could be implied under Title VI itself.²⁷ That assumption was made explicit during the debates on § 718.²⁸ It was also aired during the debates

²⁷ Although there is nothing in the statute or legislative history that says as much, it may be that Congress expected 42 U. S. C. § 1983 to provide an explicit cause of action for some of the suits contemplated by § 718. But § 1983 is assuredly not available for suits against the United States, nor at the time § 718 was passed was it available for suits against "a State (or any agency thereof)," nor even perhaps for suits against a "local educational agency." See *Mt. Healthy City Board of Education v. Doyle*, 429 U. S. 274, 277-278; *Monroe v. Pape*, 365 U. S. 167. Cf. *Monell v. New York City Dept. of Social Services*, 436 U. S. 658. Section 718 has been interpreted liberally by the federal courts. *E. g.*, *Norwood v. Harrison*, 410 F. Supp. 133 (ND Miss. 1976), appeal dismissed, 563 F.2d 722 (CA5 1977).

²⁸ "Mr. President, it is said that [§ 718] will encourage litigation in the South

"I can only say that what [§ 718] does, in essence, is that it says a party is entitled to pursue his remedy if there is a violation [of Title VII of the Education Amendments of 1972], if there is a violation of the 1964 Civil Rights Act, if there is a violation of the 14th amendment to the Constitution of the United States. It says that, in the discretion of the court, if a mandate comes down, if a judgment is rendered, and if it was necessary to bring the action to see to it that the act was enforced, [the court] could allow the cost and a reasonable fee for time expended. That is the extent of it." 117 Cong. Rec. 11725-11726 (1971) (Sen. Cook).

In light of the language of § 718, see n. 25, *supra*, it is, of course, clear that Senator Cook's reference to "the 1964 Civil Rights Act" means Title VI of the Act. Accord, 117 Cong. Rec. 11338 (1971) (Sen. Dominick); *id.*, at 11340 (Sen. Mondale); *id.*, at 11524 (Sen. Allen); *id.*, at 11527-11528 (Sen. Cook).

These same debates provide another important indication that Congress presumed that, wherever necessary, private causes of action must exist in order to justify the suits contemplated by § 718. Section 718 provides attorney's fees in suits seeking compliance with three separate provisions—the Constitution, Title VI, and § 718's sister provisions in Title VII of the Education Amendments of 1972. None of the last-mentioned sister provisions contains an express cause of action. Section 718 also contemplates three types of defendants in those suits—local educational agencies, States and state agencies, and the Federal Government. In exploring the mean-

on other provisions in the Education Amendments of 1972²⁹ and on Title IX itself,³⁰ and is consistent with the Executive Branch's apparent understanding of Title VI at the time.³¹

ing of the provision, the question arose as to what might occur if a private litigant attempted to sue the Federal Government to force compliance with Title VII of the Education Amendments of 1972. The following colloquy took place:

"Mr. COOK. [I]f the Federal Government is defendant, and if the Federal Government is found guilty of violation of this act [Title VII of the Education Amendments of 1972], and it is in fact discriminating, then it is conceivable that the attorney's fees and the costs could go against the Federal Government.

"Mr. PELL. But can an individual sue the Federal Government?

"Mr. COOK. Under this title?

"Mr. PELL. Yes.

"Mr. COOK. Oh yes."

²⁹ The question of busing to achieve racial balance caused considerable debate during consideration of the Education Amendments of 1972. During those debates, it was proposed that the jurisdiction of the federal courts be limited to prevent them from ordering such busing. In defending federal jurisdiction in this area, the opponents of the proposal described the courts as an important, even the most important, reliance in the enforcement of Title VI. For example, Senator Javits stated: "We cannot simply strike down these [judicial] enforcement powers without effectively striking down title VI of the Civil Rights Act of 1964." 118 Cong. Rec. 5483 (1972). See also *id.*, at 7558-7559; *id.*, at 7561 (Rep. Stokes) ("The busing furor is a symptom, like pain, of the effort which has been made to carry out the mandate of Brown against Board of Education and Title VI of the Civil Rights Act. Busing has been used successfully in many communities. The courts have required it because it works").

³⁰ Senator Bayh, for example, explained that the time limits provided in Title IX for undergraduate institutions that chose to become coeducational after previously being single sex, § 901 (a)(2)(A), 20 U. S. C. § 1681 (a)(2)(A), are "consistent with the type of timetable that has been set in the past by court decisions under Title VI of the 1964 Civil Rights Act in other areas of discrimination." 117 Cong. Rec. 30409 (1971) (emphasis added). See also *id.*, at 30404 (Sen. Bayh); *id.*, at 30407 (Sen. Javits).

³¹ In 1965, the Justice Department intervened on behalf of the private litigants in the *Bossier* litigation, which resulted in the first two judicial

Finally, the very persistence—before 1972 and since, among judges and executive officials, as well as among litigants and their counsel,³² and even implicit in decisions of this Court³³—

opinions implying a cause of action under Title VI. See nn. 20 and 21, *supra*. As far as those opinions indicate, the Government fully supported the private plaintiffs' position. See *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (CA5 1967); *Lemon v. Bossier Parish School Board*, 240 F. Supp. 709 (WD La. 1965).

³² See nn. 8, 21, *supra*; n. 39, *infra*.

³³ Since 1972, the Court has twice reached the merits in suits brought by private litigants to enforce Title VI. In both cases it determined that Title VI justified at least some of the relief sought by the private litigants. *Lau v. Nichols*, 414 U. S. 563, 566-569; *Hills v. Gautreaux*, 425 U. S., at 286. Although in neither case did the Court in terms address the question of whether Title VI provides a cause of action, in both the issue had been explicitly raised by the parties at one level of the litigation or another. These cases are accordingly consistent, at least, with the widely accepted assumption that Title VI creates a private cause of action.

In *Lau*, the respondents (the defendants below) argued "that the Fourteenth Amendment and the Civil Rights Act do not give a party a federal cause of action every time a School District fails to resolve a problem—not of its making—presented to it by a student." Brief in Opposition, O. T. 1973, No. 72-6520, p. 7. On the other hand, the Federal Government and at least one other *amicus curiae* explicitly took the opposite position—that Title VI was itself sufficient to create a cause of action. Memorandum for United States as *Amicus Curiae*, O. T. 1973, No. 72-6520, p. 13, and n. 5, citing *Bossier Parish School Board v. Lemon*, *supra*; Brief for Puerto Rican Legal Defense & Education Fund, Inc., as *Amicus Curiae*, O. T. 1973, No. 72-6520, p. 2. But cf. Brief for National Education Assn. et al. as *Amici Curiae*, O. T. 1973, No. 72-6520, p. 5 (42 U. S. C. § 1983 provided the cause of action for the relevant breach of Title VI).

In the lengthy litigation culminating in the Court's decision in *Hills v. Gautreaux*, *supra*, a private litigant who claimed that public housing in Chicago was being located in a racially discriminatory fashion, had filed two separate complaints relying in part on Title VI—one against the Chicago Housing Authority (CHA) and one against the Department of Housing and Urban Development (HUD), which was the agency providing federal funds to CHA. Although the two cases proceeded separately for years, they were consolidated before they reached this Court. In the early stages of the CHA suit, the District Court, over CHA's objection, explicitly

*private
litigant*

of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption. See n. 7, *supra*. We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.³⁴

Third, under *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.³⁵

determined that there is a cause of action under Title VI even where § 1983 is not relied upon. *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (ND Ill. 1967). In an unreported opinion, that court apparently also found that the Title VI complaint against HUD stated a cause of action. See *Gautreaux v. Romney*, 448 F. 2d, at 737-740 (on appeal from the unreported decision; cause-of-action issue not raised). The complaint in that suit, which is reprinted in the appendix filed by the parties in *Hills v. Gautreaux*, derives the cause of action directly from Title VI. App., O. T. 1975, No. 74-1047, p. 35. Section 1983 was not available in this suit against federal officials, and the Administrative Procedure Act was nowhere mentioned. Although by the time the consolidated cases reached this Court the primary contested issue was the propriety of the relief ordered by the District Court against HUD, the Court did note that the agency had "been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 . . ." 425 U. S., at 286. The Government did not raise the cause-of-action question.

³⁴ "In sum, we conclude that Congress clearly understood that it was conferring power upon the courts to [grant relief] . . . under the statute." See *Dalia v. United States*, *ante*, at 254. Indeed, the evidence of legislative intent is so compelling that we have no hesitation in concluding that even the test now espoused by Mr. Justice Powell, *post*, at 749, is satisfied in this case.

³⁵ See *Allen v. State Board of Elections*, 393 U. S., at 556; *Wyandotte*

Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.³⁶

The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices.³⁷ That rem-

Transportation Co. v. United States, 389 U. S., at 202; *J. I. Case Co. v. Borak*, 377 U. S., at 432; *Machinists v. Central Airlines*, 372 U. S., at 690.

³⁶ With respect to Title VI, for example, the comments of Senator Pastore:

"[T]he purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination," 110 Cong. Rec. 7062 (1964), should be compared with the comments of Representative Lindsay:

"Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual . . ." *Id.*, at 1540.

With respect to Title IX, the comments of Representative Mink:

"Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access," 117 Cong. Rec. 39252 (1971),

should be compared with the comments of Senator Bayh:

"[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . ." 118 Cong. Rec. 5806-5807 (1972).

³⁷ See § 902 of Title IX, 20 U. S. C. § 1682. There are some occasions, however, when even this purpose cannot be served unless a private remedy

edy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely "an isolated violation has occurred."³⁸ In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded.³⁹ Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only

is available. For a recipient of a one-shot grant of federal money, for example, the temptation to use the fruits of that money in furtherance of a discriminatory policy adopted several years later would not be dampened by any powers given the federal donor agency under Title IX.

³⁸ Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort, all else—including "lawsuits"—failing. See, e. g., 110 Cong. Rec. 7067 (1964) (Sen. Ribicoff):

"Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy. If a Negro child were kept out of a school receiving Federal funds, I think it would be better to get the Negro child into school than to cut off funds and impair the education of the white children."

See also *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

³⁹ This insight is not of recent vintage. In *Cumming v. Richmond County Board of Education*, 175 U. S. 528, several black taxpayers sued a school board that provided free high school education to white children, but not to black children. The remedy they sought under the separate-but-equal doctrine then in force under the Fourteenth Amendment, see *Plessy v. Ferguson*, 163 U. S. 537, was closure of the white high school rather than appropriation of funds for a black high school. Mr. Justice Harlan for the Court rejected this claim, noting that "the result would only be to take from white children . . . without giving to colored children . . ." 175 U. S., at 544. He suggested that the result might be different if "the plaintiffs had sought to compel the Board of Education . . . to establish and maintain a high school for colored children . . ." *Id.*, at 545.

sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.⁴⁰

The Department of Health, Education, and Welfare, which is charged with the responsibility for administering Title IX, perceives no inconsistency between the private remedy and the public remedy.⁴¹ On the contrary, the agency takes the

⁴⁰ In the context of noting the kinship of Title VI and Title IX, Senator Bayh lauded the enforcement procedures available under the former for their “great success” and “their effectiveness and flexibility.” 117 Cong. Rec. 30408 (1971); 118 Cong. Rec. 5807 (1972). As noted earlier, private suits had become an important and especially flexible part of those procedures by 1972, and were almost assuredly known to Congress. See also 117 Cong. Rec. 11339 (1971) (Sen. Mondale) (noting that attorney’s fees for successful Title VI litigants under § 718 were necessary to forestall a “law enforcement crisis in the field of civil rights”).

A further indication of the consistency of Title IX’s purposes and the existence of a private remedy is the fact that, until the District Court and Court of Appeals decisions in this case, the federal courts had consistently recognized such a remedy under that Title and under Title VI before it. *E. g.*, *Uzzell v. Friday*, 547 F. 2d 801, aff’d en banc, 558 F. 2d 727 (CA4 1977), vacated on other grounds, 438 U. S. 912; *Gilliam v. Omaha*, 524 F. 2d 1013 (CA8 1975); *Garrett v. Hamtramck*, 503 F. 2d 1236 (CA6 1974); *Serna v. Portales Municipal Schools*, 499 F. 2d 1147 (CA10 1974); *Otero v. New York City Housing Authority*, 484 F. 2d 1122, 1138 (CA2 1973); *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (ND Ohio 1976); cases cited in n. 21, *supra*. This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication. *E. g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S., at 730; *Machinists v. Central Airlines*, *supra*, at 690; *Texas & Pacific R. Co. v. Rigsby*, 241 U. S., at 39.

⁴¹ It has been suggested that, at least in the absence of an exhaustion requirement, private litigation will interfere with HEW’s enforcement procedures under § 902 of Title IX. The simple answer to this suggestion is that the Government itself perceives no such interference under the circumstances of this case, and argues that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time. See n. 8, *supra*.

In addition, Congress itself was apparently not worried about such interference when it passed Title IX. As discussed *supra*, at 699–700, the statute of which Title IX is a part also contains a provision, § 718, allow-

unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes. See

~~ing attorney’s fees under Title VI. No matter how narrowly that provision is read, it certainly envisions private enforcement suits apart from the administrative procedures that Title VI, like Title IX, expressly creates. If such suits would not hamper administrative enforcement of Title VI against local and state school officials, it is hard to see how they would do so with respect to other recipients of federal funds.~~

True, this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available. *E. g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453; *T. I. M. E. Inc. v. United States*, 359 U. S. 464. But see *Cort v. Ash*, 422 U. S., at 79; *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U. S. 6; *Wyandotte Transportation Co. v. United States*, 389 U. S. 191; *J. I. Case Co. v. Borak*, 377 U. S. 426. But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute. See *Rosado v. Wyman*, 397 U. S. 397, 406 n. 8; cf. *Cort v. Ash*, *supra*, at 74–75; *Calhoon v. Harvey*, 379 U. S. 134. As the Government itself points out in this case, Title IX not only does not provide such a mechanism, but the complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant. Brief for Federal Respondents 59 n. 36. Furthermore, the agency may simply decide not to investigate—a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint. See n. 42, *infra*. In that case, if no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. *E. g.*, *Adams v. Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973). But surely this alternative is far more disruptive of HEW’s efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be.

For these same reasons, we are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies. Because the individual complainants cannot assure themselves that the

n. 8, *supra*. The agency's position is unquestionably correct.⁴²

Fourth, the final inquiry suggested by *Cort* is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.

No such problem is raised by a prohibition against invidious discrimination of any sort, including that on the basis of sex. Since the Civil War, the Federal Government and the federal courts have been the "primary and powerful reliances" in protecting citizens against such discrimination. *Steffel v. Thompson*, 415 U. S. 452, 464 (emphasis in original), quoting *F. Frankfurter & J. Landis, The Business of the Supreme Court* 65 (1928). Moreover, it is the expenditure of federal funds

administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion. See 3 K. Davis, *Administrative Law Treatise* § 20.01, p. 57 (1958).

⁴² In its submissions to this Court, as well as in other public statements, HEW has candidly admitted that it does not have the resources necessary to enforce Title IX in a substantial number of circumstances:

"As a practical matter, HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries. An implied private right of action is necessary to ensure that the fundamental purpose of Title IX, the elimination of sex discrimination in federally funded education programs, is achieved." Reply Brief for Federal Respondents 6. See also 40 Fed. Reg. 24148-24159 (1975).

In the notice of proposed rulemaking just cited, in fact, HEW proposed to employ its enforcement resources under both Title VI and Title IX *solely* to remedy "systemic discrimination rather than [to use] a reactive or complaint-oriented approach geared toward securing individual relief for persons claiming discrimination." *Id.*, at 24148. The agency explained this approach as necessary to allow it to manage its workload—a workload primarily made up of "complaints involving sex discrimination in higher education academic employment." *Ibid.* Adverse commentary on this proposal led HEW to abandon it, although the result has been a steadily increasing backlog of unprocessed complaints. Nonetheless, its explanation of the proposal supports the conclusion that HEW's enforcement capabilities under Title IX are especially limited in precisely those areas where private suits can be most effective.

that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy.

In sum, there is no need in this case to weigh the four *Cort* factors; all of them support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.

II

Respondents' principal argument against implying a cause of action under Title IX is that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis. They argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.

This argument is not original to this litigation. It was forcefully advanced in both 1964 and 1972 by the congressional opponents of Title VI and Title IX,⁴³ and squarely rejected by the congressional majorities that passed the two statutes. In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.

History has borne out the judgment of Congress. Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965, see n. 21, *supra*, respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university

⁴³ *E. g.*, 117 Cong. Rec. 39254 (1971) (Rep. Wyman); 110 Cong. Rec. 5253 (1964) (Sen. Talmadge).

administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner.⁴⁴

III

Respondents advance two other arguments that deserve brief mention. Starting from the premise that Title IX and Title VI should receive the same construction, respondents argue (1) that a comparison of Title VI with other Titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable;⁴⁵ and (2) that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy.⁴⁶

Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI

⁴⁴ Furthermore, unless respondents are arguing that Title IX (and, by implication, Title VI) is itself unconstitutional, this argument is entirely misconceived. Whatever disruption of the academic community may accompany an occasional individual suit seeking admission is dwarfed by the relief expressly contemplated by the statute—a cutoff of all federal funds. For this reason, in fact, the opponents of Title VI argued that the provision should be rejected in favor of reliance on judicial remedies available under the Fourteenth Amendment. For example, in reply to Senator Humphrey's advocacy of the administrative remedy, Senator Talmadge asked:

"Why does not the Senator rely on the court's authority [under the Fourteenth Amendment], instead of giving arbitrary, capricious, wholesale punitive power to some Federal bureaucrat to starve entire cities, towns, States, and regions at one fell swoop?" 110 Cong. Rec. 5254 (1964).

⁴⁵ See 42 U. S. C. § 2000a-3 (Title II); 42 U. S. C. §§ 2000e-5 (f) (1), (3) (Title VII).

⁴⁶ See 110 Cong. Rec. 1519 (1964) (Rep. Celler); *id.*, at 2467 (Rep. Gill); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore); *id.*, at 7065 (Sen. Keating); *id.*, at 8345 (Sen. Proxmire).

could be enforced by a private action and that Title IX would be similarly enforceable. See *supra*, at 696-699. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown v. GSA*, 425 U. S. 820, 828. But each of respondents' arguments is, in any event, unpersuasive.

The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. See, e. g., *J. I. Case Co. v. Borak*, 377 U. S. 426; *Wyandotte Transportation Co. v. United States*, 389 U. S. 191. Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent," *Cort v. Ash*, 422 U. S., at 83 n. 14, unless there is other, more convincing, evidence that Congress meant to exclude the remedy. See *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S., at 458-461.

With one set of exceptions, the excerpts from the legislative history cited by respondents as contrary to implication of a private remedy under Title VI, were all concerned with a procedure for terminating federal funding.⁴⁷ None of them evidences any hostility toward an implied private remedy to terminate the offending discrimination. They are consistent with the assumption expressed frequently during the debates that such a judicial remedy—either through the kind of broad construction of state action under § 1983 adopted by the Court of Appeals for the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963),⁴⁸

⁴⁷ As discussed earlier, that type of procedure is far more severe than individual suits, and was already the subject of express administrative provisions in Title VI.

⁴⁸ Consider the following comment by Senator Humphrey:

"The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which Title VI seeks to end, are

or through an implied remedy⁴⁹—would be available to private litigants regardless of how the fund-cutoff issue was resolved.

unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963), [cert. denied, 376 U. S. 938]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964). See also *ibid.* (Sen. Humphrey); *id.*, at 7062 (Sen. Pastore); *id.*, at 7065 (Sen. Ribicoff); *id.*, at 12677 (Sen. Allott); *id.*, at 12719 (Sen. Javits).

Although it has been suggested that the state-action doctrine in *Simkins* is overbroad, e. g., *Greco v. Orange Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), there is no denying that the Title VI Congress assumed and approved the availability of private suits against many private recipients of federal funds.

⁴⁹ Various statements made during the debates suggest an assumption that Title VI would be judicially enforceable apart from the administrative procedures contained in § 602. In addition to Senator Ribicoff's reference to "lawsuits" as the principal and preferable "alternative" to cutting off funds under the administrative remedy, n. 38, *supra*, see, for example, Senator Humphrey's statement:

"Title VI would have a substantial and eminently desirable impact on programs of assistance to education. Title VI would require elimination of racial discrimination and segregation in all 'impacted area' schools receiving Federal grants under Public Laws 815 and 874. Racial segregation at such schools is now prohibited by the Constitution. The Commissioner of Education would be warranted in relying on any existing plans of desegregation which appeared adequate and effective, and on *litigation by private parties* or by the Attorney General under title IV [of the 1964 Civil Rights Act], as the *primary means of securing compliance with this nondiscriminatory requirement*. It is not expected that funds would be cut off so long as reasonable steps were being taken in good faith to end unconstitutional segregation." 110 Cong. Rec. 6545 (1964) (emphasis added).

Also interesting is a debate on the Senate floor on March 13, 1964. *Id.*, at 5253-5256. Senator Talmadge began the relevant discussion by characterizing the "broad" powers delegated federal agencies under

The only excerpt relied upon by respondents that deals precisely with the question whether the victim of discrimination has a private remedy under Title VI was a comment by

§ 602 as "barbarous." *Id.*, at 5253. When Senator Humphrey responded that the "right" against discrimination embodied in § 601 justified those broad enforcement powers, the following exchange ensued:

"Mr. TALMADGE. That right is enforceable in every court of the land, and the Senator from Minnesota knows it.

"Mr. HUMPHREY. That is correct. The existing law of the land is stated in section 601. Sections 602 and 603 . . . do not represent an extension of *that* law. . . . They represent a procedural limitation on the power of an affected *agency* to enforce existing powers." *Id.*, at 5254 (emphasis added).

At this point, the debate began to focus on an argument repeatedly made by the opponents of Title VI until it was subsequently amended. See also *id.*, at 13435-13436 (Sen. Long). Although recipients of federal aid in the form of "a contract of insurance or guaranty" were exempted from the administrative enforcement procedure in § 602, the opponents felt that the exemption should be included in the statement of rights in § 601 as well. Otherwise, they argued, the exemption would not be effective—apparently because of the possibility, mentioned by Senator Talmadge and quoted above, of judicial enforcement outside of § 602. In the midst of discussing this point, Senator Stennis asked if "section 602 is a method by which section 601 will be enforced," to which Senator Humphrey replied: "Yes, it is the method for those governmental *agencies* and activities covered by Title VI." 110 Cong. Rec. 5255 (1964) (emphasis added).

At this point, Senator Case entered the fray:

" . . . I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602. Section 602 says that when a department or agency of the Government—and I think the Senator was correct, earlier, when he made this careful distinction—in dealing with the kinds of programs which are referred to in section 602, attempts to prevent the discrimination, or what-not, the department must follow this procedure. I agree. My only point is that I do not want my embracement of this bill to be construed as indicating that I believe that the substantive rights of an individual, as they may exist under the Constitution, or as they may be stated in section 601, are limited in any degree whatsoever." *Ibid.*

In his effort to mollify the opponents of Title VI on the issue of federal guarantees, Senator Humphrey at first appeared to disagree with Senator

Senator Keating. In it, he expressed disappointment at the administration's failure to include his suggestion for an express remedy in its final proposed bill.⁵⁰ Our analysis of the

Case's interpretation. However, when the latter reiterated the point that § 602 "is not intended to limit the rights of individuals, if they have any way of enforcing their rights apart from the provisions of the bill, by way of suit or any other procedure," Senator Humphrey agreed—and apparently went further:

"I thoroughly agree with the Senator insofar as an *individual* is concerned. As a *citizen* of the United States, he has his full constitutional rights. He has his right to go to court and institute suit and whatever may be provided in the *law* and in the Constitution. There would be no limitation on the *individual*. The limitation would be on the qualification of Federal agencies." *Id.*, at 5256 (emphasis added).

Senator Keating's conclusion of this debate is discussed in n. 52, *infra*.

Two points need be made about this exchange. First, the controversy over how to treat federal guarantees was later resolved by removing the reference to those guarantees from § 602 and adding a new provision, § 605, which simply exempted them from the effect of the title. This solved the complaints of the Title's opponents, without diluting the declaration of rights in § 601. Second, although this debate may evidence some confusion over the law existing prior to the enactment of Title VI insofar as that law would not reach many of the *private* discriminators affected by § 601, but cf. n. 48, *supra*, it demonstrates a congressional assumption that whatever rights existed under the law were automatically enforceable by private litigants. The administrative provisions in §§ 602 and 603 were simply means by which additional—and far more controversial—procedures were established and then limited.

⁵⁰ "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill." 110 Cong. Rec. 7065 (1964).

Although not cited by respondents, two other passages in the legislative history are of similar effect. See *id.*, at 5266 (Sen. Keating); Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 335 (1963) (Sen. Keating).

In August 1963, the Justice Department agreed to redraft its original proposal for Title VI in light of congressional criticism. At that time, Senator Keating, along with Senator Ribicoff, submitted the following

legislative history convinces us, however, that neither the administration's decision not to incorporate that suggestion expressly in its bill, nor Senator Keating's response to that decision, is indicative of a rejection of a private right of action against recipients of federal funds. Instead, the former appears to have been a compromise aimed at protecting individual rights without subjecting the Government to suits,⁵¹

suggested provision to the Department for its consideration in the redrafting process.

"(a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by the nondiscrimination requirement of section 601 of the Civil Rights Act of 1963, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted (1) *by the person aggrieved*, or (2) by the Attorney General for or in the name of the United States. In any proceeding hereunder, the United States shall be liable for costs the same as a private person.

"(b) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedy that may be provided by law." 109 Cong. Rec. 15375 (1963) (emphasis added).

Senator Keating explained that this section would have allowed private suits to terminate funding or to require "specific performance of the nondiscrimination requirement" in Title VI. *Id.*, at 15376. See generally Hearings, *supra*, at 349–352.

⁵¹ The Keating suggestion was made in the context of broader complaints that the original version of Title VI, which is quoted in n. 14, *supra*, was too weak and too dependent on the fund-cutoff remedy. See, e. g., 109 Cong. Rec. 14833–14835 (1963) (Sens. Ribicoff and Keating). That version, it should be noted, was not explicitly declarative of any individual right against discrimination. Instead, it merely allowed federal agencies to withhold funds from discriminatory recipients.

The result of the administration's reconsideration of Title VI was a compromise. Although its redraft, which in major part was enacted as Title VI, did not include an express private cause of action either to cut off funds or to end discrimination, it did rephrase § 601 as a declaration

while the latter is merely one Senator's isolated expression of a preference for an express private remedy.⁵² In short, neither is inconsistent with the implication of such a remedy. Nor is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy.

of an absolute individual right not to have federal funds spent in aid of discrimination.

There is a plausible reason for this compromise. In its final form, § 601 was far more conducive to implication of a private remedy against a discriminatory recipient than was the original language, but at the same time was arguably less conducive to implication of a private remedy against the Government (as well as the recipient) to compel the cutoff of funds. Although willing to extend private rights against discriminatory recipients, the Government may not have been anxious to encourage suits against itself.

In this context, it is also understandable that some Members of Congress, as noted earlier, evidenced dissatisfaction at the unavailability under Title VI of private suits to cut off funds. See remarks cited in n. 46, *supra*. Even the Keating remark relied on by respondents, n. 50, *supra*, can be understood in this light.

⁵² As noted earlier, some of Senator Keating's colleagues came to the view that the absence of an express private remedy would not foreclose the implication of one under the right-declarative language in the administration's final proposal. See n. 49, *supra*. Even Senator Keating, after listening to this view expressed by Senator Case in the March 13, 1964, debate quoted *ibid.*, appeared to agree—although he still wished the remedy were express:

"I wish to associate myself with the very careful analysis made by the Senator from New Jersey and say that I agree with him thoroughly. *If the bill does not mean what he has indicated it means, it ought to be made to mean so.* I think the limitation of powers set forth in title VI is too extensive. . . Under section 603 a State, or political subdivision of a State, or an agency of either, which is denied funds because discrimination is taking place, is given the right of action in court. But there is no correlative right in the citizen. If funds are granted to discriminatory projects by public officials, the citizen who is denied the benefits of the project has no correlative right to bring a suit in court, and he should have." 110 Cong. Rec. 5256 (1964) (emphasis added).

IV

When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, concurring.

Having joined the Court's opinion in this case, my only purpose in writing separately is to make explicit what seems to me already implicit in that opinion. I think the approach of the Court, reflected in its analysis of the problem in this case and cases such as *Santa Clara Pueblo v. Martinez*, 436 U. S. 49 (1978), *Cort v. Ash*, 422 U. S. 66 (1975), and *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453 (1974), is quite different from the analysis in earlier cases such as *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964). The question of the existence of a private right of action is basically one of statutory construction. See *ante*, at 688. And while state courts of general jurisdiction still enforcing the common law as well as statu-

tory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them.

We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself. Cases such as *J. I. Case Co. v. Borak*, *supra*, and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.

I fully agree with the Court's statement that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Ante*, at 717. It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

In avowedly seeking to provide an additional means to effectuate the broad purpose of § 901 of the Education Amendments of 1972, 20 U. S. C. § 1681, to end sex discrimination in federally funded educational programs, the Court fails to heed the concomitant legislative purpose not to create a new private remedy to implement this objective. Because in my view the legislative history and statutory scheme show that Congress intended not to provide a new private cause of action, and

because under our previous decisions such intent is controlling,¹ I dissent.

I

The Court recognizes that because Title IX was explicitly patterned after Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, it is difficult to infer a private cause of action in the former but not in the latter. I have set out once before my reasons for concluding that a new private cause of action to enforce Title VI should not be implied, *University of California Regents v. Bakke*, 438 U. S. 265, 379 (1978) (separate opinion of WHITE, J.), and I find nothing in the legislative materials reviewed by the Court that convinces me to the contrary. Rather, the legislative history, like the terms of Title VI itself, makes it abundantly clear that the Act was and is a mandate to federal agencies to eliminate discrimination in federally funded programs. Although there was no intention to cut back on private remedies existing under 42 U. S. C. § 1983 to challenge discrimination occurring under color of state law, there is no basis for concluding that Congress contemplated the creation of private remedies either against private parties who previously had been subject to no constitutional or statutory obligation not to discriminate, or against federal officials or agencies involved in funding allegedly discriminatory programs.

The Court argues that because funding termination, authorized by § 602, 42 U. S. C. § 2000d-1, is a drastic remedy, Congress must have contemplated private suits in order directly and less intrusively to terminate the discrimination allegedly being practiced by the recipient institutions. But the Court's conclusion does not follow from its premise because funding termination was not contemplated as the only—or even the primary—agency action to end discrimination. Rather, Con-

¹ *Cort v. Ash*, 422 U. S. 66, 78 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412 (1975); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453 (1974).

gress considered termination of financial assistance to be a remedy of last resort, and expressly obligated federal agencies to take measures to terminate discrimination without resorting to termination of funding.

Title VI was enacted on the proposition that it was contrary at least to the "moral sense of the Nation"² to expend federal funds in a racially discriminatory manner. This proposition was not new, for every President since President Franklin Roosevelt had, by Executive Order, prohibited racial discrimination in hiring in certain federally assisted programs.³ Further, Congress was aware that most agencies dispensing federal funds already had "authority to refuse or terminate assistance for failure to comply with a variety of requirements imposed by statute or by administrative action."⁴ But Congress was plainly dissatisfied with agency efforts to ensure the nondiscriminatory use of federal funds;⁵ and the predicate for

² 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). Senator Humphrey noted President Kennedy's message of June 19, 1963:

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Id.*, at 6543.

³ See, e. g., Exec. Order No. 8802, 3 CFR 957 (1938-1943 Comp.) (Pres. Roosevelt); Exec. Order No. 10210, 3 CFR 390 (1949-1953 Comp.) (Pres. Truman); Exec. Order No. 10479, 3 CFR 961 (1949-1953 Comp.) (Pres. Eisenhower); Exec. Order No. 10925, 3 CFR 448 (1959-1963 Comp.) (Pres. Kennedy).

⁴ 110 Cong. Rec. 6546 (1964) (Sen. Humphrey).

⁵ Thus, Senator Humphrey noted:

"Much has been done by the executive branch to eliminate racial discrimination from federally assisted programs. President Kennedy, by Executive order, prohibited such discrimination in federally assisted housing, and in employment on federally assisted construction. Individual agencies have taken effective action for the programs they administer." *Id.*, at 6544.

Nonetheless,

"President after President has announced that national policy is to end discrimination in Federal programs and Federal assistance. But, regrettably, there has been open violation of these policies." *Id.*, at 6543.

Title VI was the belief that "the time [had] come . . . to declare a broad principle that is right and necessary, and to make it effective for every Federal program involving financial assistance by grant, loan or contract."⁶

Far from conferring new private authority to enforce the federal policy of nondiscrimination, Title VI contemplated agency action to be the principal mechanism for achieving this end. The proponents of Title VI stressed that it did not "confer sweeping new authority, of undefined scope, to Federal departments and agencies," but instead was intended to require the exercise of existing authority to end discrimination by fund recipients, and to furnish the procedure for this purpose.⁷ Thus, § 601 states the federal policy of nondiscrimination, and § 602 mandates that the agencies achieve compliance by refusing to grant or continue assistance or by "any other means authorized by law." Under § 602, cutting off funds is forbidden unless the agency determines "that compliance cannot be secured by voluntary means." As Senator Humphrey explained:

"[Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief,

⁶ *Id.*, at 6544. Enactment of Title VI would remove "any conceivable doubts" as to the authority of agencies to eliminate discrimination in the programs they funded and "give express legislative support to the agency's actions. . . . [S]ome federal agencies appear to have been reluctant to act in this area. Title VI will require them to act." *Ibid.* Senator Humphrey further explained that "[i]n connection with various Federal programs of aid to higher education, language institutes, research grants to colleges, and the like, Title VI would . . . authorize requirements of nondiscrimination. In a number of programs, such action has already been taken." *Id.*, at 6546.

⁷ *Ibid.* Senator Humphrey noted that "existing statutory authority is, however, not surrounded by the procedural safeguards which Title VI provides." *Ibid.*

WHITE, J., dissenting

441 U. S.

and other urgent programs. Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination." 110 Cong. Rec. 6546 (1964).⁸

To be sure, Congress contemplated that there would be litigation brought to enforce Title VI. The "other means" provisions of § 602 include agency suits to enforce contractual antidiscrimination provisions and compliance with agency regulations, as well as suits brought by the Department of Justice under Title IV of the 1964 Act, where the recipient is a public entity.⁹ Congress also knew that there would be private suits

⁸ See also *id.*, at 6544:

"Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination. . . . In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination. And section 602, by authorizing the agency to achieve compliance 'by any other means authorized by law' encourages agencies to find ways to end racial discrimination without refusing or terminating assistance."

⁹ See *id.*, at 7066 (Sen. Ribicoff):

"[An] agency could, for example, ask the Attorney General to initiate a lawsuit under title IV, if the recipient were a school district or public college; or the agency could use any of the remedies available to it by virtue of its own 'rule, regulation, or order of general applicability.' For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient . . . or . . . the agency would have authority to sue to enforce compliance with its own regulations."

The mention of "lawsuits," *id.*, at 7067, by Senator Ribicoff, on which the Court relies, see *ante*, at 705 n. 38, 712 n. 49, was in reference to the foregoing. As the Senator pointed out: "All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance." 110 Cong. Rec. 7066 (1964).

By regulation, see 45 CFR §§ 80.8 (a), 86.71 (1978), HEW has provided that "other means" in § 602 include referral to the Department of Justice for enforcement of rights of the United States under any statute or contractual undertaking.

WHITE, J., dissenting

677

to enforce § 601; but these suits were not authorized by § 601 itself but by 42 U. S. C. § 1983.¹⁰ Every excerpt from the legislative history cited by the Court shows full awareness that private suits could redress discrimination contrary to the Constitution and Title VI, if the discrimination were imposed by public agencies; not one statement suggests contemplation of lawsuits against recipients not acting under color of state law.¹¹ Senator Humphrey was quite correct in asserting that the individual's "right to go to court and institute suit" for violation of the Fourteenth Amendment or § 601, see *ante*, at 712-714, n. 49, was not limited by the presence of alternative enforcement mechanisms in § 602. Section 1983 provides a private remedy for deprivations under color of state law of any rights "secured by the Constitution and laws," and nothing in Title VI suggests an intent to create an exception to this historic remedy for vindication of federal rights as against

¹⁰ For instance, the Court quotes Senator Humphrey's statement that "litigation by private parties [would be among] the primary means of securing compliance" with § 601, *ante*, at 712 n. 49. But reference to the Senator's entire remarks shows he was contemplating suits under § 1983. The "[r]acial segregation . . . prohibited by the Constitution" and "litigation . . . under Title IV of the 1964 Civil Rights Act," 110 Cong. Rec. 6545 (1964), were limited to discrimination under color of law and did not reach discrimination by private parties. Congress was well aware of § 1983 suits against public agencies brought to enforce this prohibition. See *id.*, at 5247-5256.

¹¹ The Court, *ante*, at 711-712, n. 48, appears to rely on a statement by Senator Humphrey citing *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963), cert. denied, 376 U. S. 938 (1964), as support for the proposition that Title VI created a new private remedy. But *Simkins* was brought under 42 U. S. C. § 1983. See *University of California Regents v. Bakke*, 438 U. S. 265, 383-385 (1978) (separate opinion of WHITE, J.). In any event, although there is no doubt that in enacting Title VI Congress intended to proscribe private discrimination, the excerpt quoted by the Court does not suggest that Congress contemplated a private individual remedy against all discrimination thus prohibited. To the contrary, Senator Humphrey recognized the uncertain status of *Simkins* as authoritative exposition of § 1983 and the Fourteenth Amendment.

contrary state action.¹² The legislative history shows, however, that Congress did not intend to add to this already existing private remedy. Particularly, Congress did not intend to create a private remedy for discrimination practiced not under color of state law but by private parties or institutions.¹³

¹² Indeed, 42 U. S. C. § 2000c-8, enacted as part of the 1964 Act, expressly preserves pre-existing private remedies against discrimination "in public education," which would include the remedies provided by § 1983.

Although concluding that Title IX and Title VI confer private causes of action, the Court refrains from addressing the permissible remedies available under such a cause of action. Thus, the Court focuses on suits requesting, as injunctive relief, that individuals allegedly discriminated against be admitted to federally assisted educational programs, but does not explicitly foreclose the possibility of a suit against either a recipient institution or a federal funding agency to require termination of funding of the allegedly discriminatory program. In at least two cases apparently brought directly under § 601, both of which are approvingly cited by the Court, the recipient of funds was enjoined from continuing the federally assisted project, and HUD was enjoined to terminate funding. *Blackshear Residents Org. v. Housing Authority of Austin*, 347 F. Supp. 1138, 1150 (WD Tex. 1972); *Hicks v. Weaver*, 302 F. Supp. 619, 628 (ED La. 1969). Such intervention by federal courts at the behest of private parties cannot be reconciled with the numerous procedural safeguards provided in § 602, see *University of California Regents v. Bakke*, *supra*, at 381-383 (separate opinion of WHITE, J.). The § 1983 cause of action does not encompass the remedy of funding termination, for it permits only such legal or equitable relief as is appropriate to "redress" the "deprivation" of the right. Cf. *Cumming v. Richmond County Board of Ed.*, 175 U. S. 528 (1899).

¹³ In addition to citations in my separate opinion in *University of California Regents v. Bakke*, *supra*, at 385-386, and n. 4, see, e. g., 110 Cong. Rec. 5256 (1964):

"Mr. CASE. [Section 602] is not intended to limit the rights of individuals, if they have any way of enforcing their rights apart from the provisions of the bill, by way of suit or any other procedure. The provision of the bill is not intended to cut down any rights that exist."

"Mr. HUMPHREY. I thoroughly agree with the Senator insofar as an individual is concerned. . . ."

The remainder of this colloquy is excerpted in the Court's opinion, *ante*, at 714 n. 49.

II

The Court further concludes that even if it cannot be persuasively demonstrated that Title VI created a private right of action, nonetheless this remedy should be inferred in Title IX because prior to its enactment several lower courts had entertained private suits to enforce the prohibition on racial discrimination in Title VI. Once again, however, there is confusion between the existing § 1983 right of action to remedy denial of federal rights under color of state law—which, as Congress recognized,¹⁴ would encompass suits to enforce the nondiscrimination mandate of § 601—and the creation of a new right of action against private discrimination. In the case the Court relies upon most heavily, *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (CA5), cert. denied, 388 U. S. 911 (1967), the plaintiff class had alleged racial discrimination in violation of both Title VI and the Fourteenth Amendment, and, accordingly, the Attorney General was allowed to intervene under Title IV of the 1964 Act. In concluding that plaintiffs could sue to enforce § 601, the Court of Appeals expressed its view that this prohibition merely repeated "the law as laid down in hundreds of decisions, independent of the statute." 370 F. 2d, at 852. Clearly, the defendant was in violation of "the law . . . independent of the statute" only because it was a state entity, and the court was correct in concluding that § 602 did not withdraw the already existing right to sue to enforce this prohibition. However, to the extent the court based its holding on the proposition that an individual protected by a statute always has a right to enforce that statute,¹⁵ it was in error;¹⁶ and an

¹⁴ See § 718 of the Education Amendments of 1972, 20 U. S. C. § 1617; *infra*, at 727.

¹⁵ See 370 F. 2d, at 852 ("In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts").

¹⁶ Prior to enactment of Title IX, two District Courts directly or indirectly relied on *Bossier* in holding that aggrieved individuals could sue

erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent. There is not one statement in the legislative history indicating that the Congress that enacted Title IX was aware of the *Bossier* litigation, much less that it adopted the particular theory relied on to uphold plaintiffs' standing in that case.¹⁷

to enforce § 601, but in both of these cases the defendant was acting under color of state law. *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582, 583-584 (ND Ill. 1967), followed what it believed to be the holding of *Bossier* that individuals had "standing" to enforce § 601 even though the Seventh Circuit in *Green Street Assn. v. Daley*, 373 F. 2d 1, 8-9, cert. denied, 387 U. S. 932 (1967), had previously declined to express its agreement with this aspect of *Bossier*. *Blackshear Residents Org. v. Housing Authority of Austin*, *supra*, at 1140, in turn relied on *Gautreaux*. Subsequent decisions in the *Gautreaux v. Chicago Housing Authority* litigation expressly noted that plaintiffs sought relief under § 1983 in every count of their complaint, see 296 F. Supp. 907, 908 (ND Ill. 1969), and 436 F. 2d 306, 307 (CA7 1970) (aff'g 296 F. Supp. 907), cert. denied, 402 U. S. 922 (1971). The one case cited by the Court that was a suit against a private organization did not mention the cause-of-action issue. *Hawthorne v. Kenbridge Recreation Assn., Inc.*, 341 F. Supp. 1382 (ED Va. 1972).

¹⁷ In addition to *Bossier*, the cases discussed in n. 16, *supra*, and cases explicitly holding that the cause of action was provided by § 1983, see the Court's opinion, *ante*, at 696-697, n. 21, the Court relies on cases involving suits against federal officials. Contrary to the Court's assertion, see *ibid.*, none of these cases held that there is a direct cause of action to enforce § 601. In *Shannon v. Department of Housing and Urban Development*, 436 F. 2d 809, 818-819, 820 (CA3 1970), the court concluded that allegations of failure to act with respect to specific instances of discrimination were reviewable under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Similarly, *Southern Christian Leadership Conference, Inc. v. Connelly*, 331 F. Supp. 940, 943 (ED Mich. 1971), cited *ante*, at 696 n. 20, 697 n. 21, explicitly held that standing was based on § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, and cited *Bossier* only in a discussion of exhaustion of administrative remedies. Neither *Gautreaux v. Romney*, 448 F. 2d 731 (CA7 1971), later appeal, *Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930 (CA7 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U. S. 284 (1976), nor *Hicks v. Weaver*, 302 F. Supp. 619

The Court's reliance on § 718 of the 1972 Act, 20 U. S. C. § 1617, is likewise misplaced. That provision authorizes attorney's fees to the prevailing party other than the United States upon the entry of a final order by a federal court "against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter"—which deals with emergency school aid, 20 U. S. C. §§ 1601-1619—"or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education." Based on this provision, it is argued that Title VI itself must have authorized private actions. However, whatever may be the value of the opinion of Congress in 1972 as to the meaning of the 1964 Civil Rights Act, the attorney's fees provision—far from intimating the existence of a remedy against private discrimination—refers only to suits against public institutions. Insofar as the provision refers to "discrimination . . . in violation of Title VI," one must strain to conclude that this was meant to encompass private suits against federal agencies whose mandate under Title VI was to enforce § 601's nondiscrimination provision applicable to all recipients of federal funds. Rather, in referring to Title VI and the Fourteenth Amendment, § 718 did no more than provide for fees in § 1983 suits brought to end discrimination under color of state law.¹⁸

(ED La. 1969), contains any discussion of the cause-of-action issue or even suggests that the question of the appropriate standard for reviewing such federal funding decisions had been raised.

¹⁸ There is no basis for the Court's suggestion that at the time § 718 was enacted § 1983 was not available for suits against state or local educational agencies, see *ante*, at 700 n. 27. As described last Term in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 663 nn. 5, 6 (1978), we had never indicated that suits such as *Brown v. Board of Education*, 347 U. S. 483 (1954), or *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), might not be appropriate despite the holding in *Monroe v. Pape*, 365 U. S. 167 (1961), that local governments were not

III

The legislative intent not to create a new private remedy for enforcement of Title VI or Title IX cannot be ignored simply because in other cases involving analogous language the Court has recognized private remedies. The recent cases inferring a private right of action to enforce various civil rights statutes relied not merely upon the statutory language granting the right sought to be enforced, but also upon the clear compatibility, despite the absence of an explicit legislative mandate, between private enforcement and the legislative purpose demonstrated in the statute itself. Having concluded that 42 U. S. C. § 1982 prohibited private as well as public racial discrimination in the sale or lease of property, the Court had little choice but to hold that aggrieved individuals could enforce this prohibition, for there existed no other remedy to redress such violations of the statute.¹⁹ The Court's reliance on *Allen v. State Board of Elections*, 393 U. S. 544 (1969), is equally unwarranted. The cause of action there recognized—for declaratory relief that a voting change is subject to the authorization requirements of § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c—served to trigger the enforcement mechanism provided in the statute itself. The Court pointedly declined to infer a private cause of action to enforce the suspension requirement of § 4 of the Act, 393 U. S., at 552—

"persons" within the meaning of § 1983. It was not until 1973, after passage of both Title IX and § 718, that the principle of municipal immunity established in *Monroe* was extended to suits for injunctive relief. See *Kenosha v. Bruno*, 412 U. S. 507 (1973). Even as the Court unpersuasively suggests that Congress might not have thought that private suits to remedy segregation in violation of the Fourteenth Amendment were available in 1972, it notes the furor in Congress at this time over busing as a desegregation remedy, see *ante*, at 701 n. 29.

¹⁹ See *Sullivan v. Little Hunting Park*, 396 U. S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Cf. *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975) (implied cause of action under 42 U. S. C. § 1981).

554; nor may those allegedly discriminated against bring suit to test voting changes in covered units against the substantive standard of § 5, either directly or through judicial review of the Attorney General's preclearance decision, *Morris v. Gressette*, 432 U. S. 491 (1977). The cause of action granted today is of a very different nature. It does not trigger the enforcement scheme provided in §§ 902 and 903, 20 U. S. C. §§ 1682, 1683, but entirely displaces that scheme in favor of a different approach.²⁰

Congress decided in Title IX, as it had in Title VI, to prohibit certain forms of discrimination by recipients of federal funds. Where those recipients were acting under color of state law, individuals could obtain redress in the federal courts for violation of these prohibitions. But, excepting post-Civil War enactments dealing with racial discrimination in specified situations, these forms of discrimination by private entities had not previously been subject to individual redress under federal law, and Congress decided to reach such discrimination not by creating a new remedy for individuals, but by relying on the authority of the Federal Government to enforce the terms under which federal assistance would be provided.

²⁰ At the time *Allen* was decided, the Department of Justice in enforcing the Voting Rights Act had not provided any formal means by which an individual could initiate review by the Department of a change affecting voting in an area covered by § 5. Since 1971, the Department has officially urged private parties to inform it of voting law changes in covered areas. 28 CFR §§ 51.12–51.15 (1978); 36 Fed. Reg. 18186 (1971). The Department of Health, Education, and Welfare has provided by regulation that any person may file a written complaint alleging discrimination in violation of Titles VI or IX within 180 days of the occurrence of the discrimination, and that after investigation HEW shall seek compliance, formally or informally, or shall inform the complainant in writing that further agency action is unwarranted. 45 CFR §§ 80.7 (b), (c), 86.71 (1978). The federal respondents have represented to the Court that they would, "of course, fulfill their responsibility under applicable regulations to conduct an administrative investigation of petitioner's charges" should this Court affirm the decision below. Brief for Federal Respondents 54 n. 33.

Whatever may be the wisdom of this approach to the problem of private discrimination, it was Congress' choice, not to be overridden by this Court.

MR. JUSTICE POWELL, dissenting.

I agree with MR. JUSTICE WHITE that even under the standards articulated in our prior decisions, it is clear that no private action should be implied here. It is evident from the legislative history reviewed in his dissenting opinion that Congress did not intend to create a private action through Title IX of the Education Amendments of 1972. It also is clear that Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights. But as mounting evidence from the courts below suggests, and the decision of the Court today demonstrates, the mode of analysis we have applied in the recent past cannot be squared with the doctrine of the separation of powers. The time has come to reappraise our standards for the judicial implication of private causes of action.¹

Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964,² Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should

¹ The phrase "private cause of action" may not have a completely clear meaning. As the term is used herein, I refer to the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty.

² See 42 U. S. C. § 2000a-3 (Title II; limited to preventive relief); §§ 2000e-5 (f), (g) (Title VII; administrative preclearance required).

not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.

The facts of this case illustrate the undesirability of this assumption by the Judicial Branch of the legislative function. Whether every disappointed applicant for admission to a college or university receiving federal funds has the right to a civil-court remedy under Title IX is likely to be a matter of interest to many of the thousands of rejected applicants. It certainly is a question of vast importance to the entire higher educational community of this country. But quite apart from the interests of the persons and institutions affected, respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process.

In recent history, the Court has tended to stray from the Art. III and separation-of-powers principle of limited jurisdiction. This, I believe, is evident from a review of the more or less haphazard line of cases that led to our decision in *Cort v. Ash*, 422 U. S. 66 (1975). The "four factor" analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.

I

The implying of a private action from a federal regulatory statute has been an exceptional occurrence in the past history of this Court. A review of those few decisions where such a step has been taken reveals in almost every case special historical circumstances that explain the result, if not the Court's analysis. These decisions suggest that the doctrine of

implication applied by the Court today not only represents judicial assumption of the legislative function, but also lacks a principled precedential basis.

A

The origin of implied private causes of actions in the federal courts is said to date back to *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33 (1916). A close look at the facts of that case and the contemporary state of the law indicates, however, that *Rigsby*'s reference to the "inference of a private right of action," *id.*, at 40, carried a far different connotation than the isolated passage quoted by the Court, *ante*, at 689 n. 10, might suggest. The narrow question presented for decision was whether the standards of care defined by the Federal Safety Appliance Act's penal provisions applied to a tort action brought against an interstate railroad by an employee not engaged in interstate commerce at the time of his injury. The jurisdiction of the federal courts was not in dispute, the action having been removed from state court on the ground that the defendant was a federal corporation. See *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 215 n. 6 (1934). Under the regime of *Swift v. Tyson*, 16 Pet. 1 (1842), then in force, the Court was free to create the substantive standards of liability applicable to a common-law negligence claim brought in federal court. The practice of judicial reference to legislatively determined standards of care was a common expedient to establish the existence of negligence. See Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317 (1914). *Rigsby* did nothing more than follow this practice, and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress. *Moore v. Chesapeake & O. R. Co.*, *supra*, at 215-216; *Jacobson v. New York, N. H. & H. R. Co.*, 206 F. 2d 153, 157-158 (CA1 1953) (Magruder, C. J.), *aff'd per curiam*, 347 U. S. 909 (1954).

For almost 50 years after *Rigsby*, this Court recognized an implied private cause of action in only one other statutory context.³ Four decisions held that various provisions of the Railway Labor Act of 1926 could be enforced in a federal court. The case for implication of judicial remedies was especially strong with respect to this Act, as Congress had repealed its predecessor, Title III of the Transportation Act of 1920, after *Pennsylvania R. Co. v. Railroad Labor Board*, 261 U. S. 72 (1923), and *Pennsylvania Federation v. Pennsylvania R. Co.*, 267 U. S. 203 (1925), had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative or judicial enforcement mechanism, the Court in *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548 (1930), upheld an injunction enforcing the Act's prohibition of employer interference in employees' organizational activities. But-tressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginian R.*

³ During this period, the Court did uphold the implication of civil remedies in favor of the Government, see *Wyandotte Transportation Co. v. United States*, 389 U. S. 191 (1967); *United States v. Republic Steel Corp.*, 362 U. S. 482 (1960), and strongly suggested that private actions could be implied directly from particular provisions of the Constitution, *Bell v. Hood*, 327 U. S. 678, 684 (1946). See also *Jacobs v. United States*, 290 U. S. 13 (1933). Both of these issues are significantly different from the implication of a private remedy from a federal statute. In *Wyandotte* and *Republic Steel*, the Government already had a "cause of action" in the form of its power to bring criminal proceedings under the pertinent statutes. Thus, the Court was confronted only with the question whether the Government could exact less drastic civil penalties as an alternative means of enforcing the same obligations. And this Court's traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action. Moreover, the implication of remedies to enforce constitutional provisions does not interfere with the legislative process in the way that the implication of remedies from statutes can. See Part III, *infra*.

Co. v. Railway Employees, 300 U. S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192 (1944), and *Tunstall v. Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944), the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts.⁴ In each of these cases enforcement of the Act's various requirements could have been restricted to actions brought by the Board of Mediation (later the Mediation Board), rather than by private parties. But whatever the scope of the judicial remedy, the implication of some kind of remedial mechanism was necessary to provide the enforcement authority Congress clearly intended.⁵

⁴ The Act did not refer expressly to an obligation not to discriminate, but in light of its structure, especially its vesting in an authorized union the power to exclude all others from representing employees, the Court felt compelled to imply this duty. This construction of the Act was necessary to avoid a difficult constitutional question, namely, the applicability of the Constitution's prohibition of racial discrimination to a private party enjoying a statutorily created status as an exclusive bargaining agent. See *Steele v. Louisville & N. R. Co.*, 323 U. S., at 202-203; *id.*, at 208-209 (Murphy, J., concurring).

⁵ The Court states that a private cause of action also was implied in *Machinists v. Central Airlines*, 372 U. S. 682 (1963), a case involving an amendment of the Railway Labor Act applicable to airlines. *Ante*, at 692-693, n. 13. A careful reading of that case suggests that it presented a somewhat different question. Under § 204 of the 1936 amendments to the Act, boards of adjustment were established to resolve labor grievances. The Court held that a claim based on a collective-bargaining agreement that had been interpreted by such a board presented a federal question under 28 U. S. C. § 1331. The cause of action came directly from the agreement, not from any provision of the Act, and the only issue was whether this already existing private cause of action could be brought in a federal court. See Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 166 (1953). Cf. *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). Although as a practical matter this result entails many of the same problems involved in the implication

During this same period, the Court frequently turned back private plaintiffs seeking to imply causes of action from federal statutes. See, e. g., *Wheeldin v. Wheeler*, 373 U. S. 647 (1963); *T. I. M. E. Inc. v. United States*, 359 U. S. 464 (1959); *General Committee v. Southern Pacific Co.*, 320 U. S. 338 (1943); *General Committee v. Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943); *Switchmen v. National Mediation Board*, 320 U. S. 297 (1943). Throughout these cases, the focus of the Court's inquiry generally was on the availability of means other than a private action to enforce the statutory duty at issue. Even in cases where the statute might be said to have been enacted for the benefit of a special class comprising the plaintiff, the factor to which the Court today attaches so much importance, *ante*, at 689-693, and n. 13, the Court refused to create a private action if Congress had provided some other means of enforcing such duties. See, e. g., *Switchmen v. National Mediation Board*, *supra*, at 300-301.

A break in this pattern occurred in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964). There the Court held that a private party could maintain a cause of action under § 14 (a) of the Securities Exchange Act of 1934, in spite of Congress' express creation of an administrative mechanism for enforcing that statute. I find this decision both unprecedented⁶ and

of a private cause of action, see n. 17, *infra*, at least analytically the problems are quite different.

⁶ None of the authorities cited in the opinion supports the result. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173 (1942), and *Deitrick v. Greaney*, 309 U. S. 190 (1940), held that federal law could limit a state-law defense to a state-law cause of action. *Deckert v. Independence Shares Corp.*, 311 U. S. 282 (1940), held that a federal judge could devise equitable remedies to supplement an expressly created private action for damages. Similarly, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U. S. 288 (1960); *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948); and *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), upheld various equitable remedies devised under an express equitable cause of action. As already noted, *Bell v. Hood* involved the implication of a private action from a constitutional provision, and *Tunstall v. Locomotive*

incomprehensible as a matter of public policy. The decision's rationale, which lies ultimately in the judgment that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," 377 U. S., at 432, ignores the fact that Congress, in determining the degree of regulation to be imposed on companies covered by the Securities Exchange Act, already had decided that private enforcement was unnecessary. More significant for present purposes, however, is the fact that *Borak*, rather than signaling the start of a trend in this Court, constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute.

Since *Borak*, this Court has upheld the implication of private causes of actions derived from federal statutes in only three extremely limited sets of circumstances. First, the Court in *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229 (1969); and *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975), recognized the right of private parties to seek relief for violations of 42 U. S. C. §§ 1981 and 1982. But to say these cases "implied" rights of action is somewhat misleading, as Congress at the time these statutes were enacted expressly referred to private enforcement actions.⁷ Furthermore, as in

Firemen & Enginemen, 323 U. S. 210 (1944), was grounded on a statute that provided no express means of enforcement. None of these cases condoned the implication of a private action in circumstances where alternative means of enforcement were available. Although I do not suggest that we should consider overruling *Borak* at this late date, cf. *Flood v. Kuhn*, 407 U. S. 258 (1972), the lack of precedential support for this decision militates strongly against its extension beyond the facts of the case. Cf. *Santa Fe Industries v. Green*, 430 U. S. 462, 477 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 737 (1975).

⁷ Both § 1981 and § 1982 are derived from § 1 of the Civil Rights Act of 1866, which was re-enacted in pertinent part in §§ 16 and 18 of the Civil Rights Act of 1870. Section 3 of the 1866 Act provided:

"[T]he district courts of the United States . . . shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this

the Railway Labor Act cases, Congress had provided no alternative means of asserting these rights. Thus, the Court was presented with the choice between regarding these statutes as precatory or recognizing some kind of judicial proceeding.

Second, the Court in *Allen v. State Board of Elections*, 393 U. S. 544 (1969), permitted private litigants to sue to enforce the preclearance provisions of § 5 of the Voting Rights Act of 1965. As the Court seems to concede, this decision was reached without substantial analysis, *ante*, at 690, and n. 12, and in my view can be explained only in terms of this Court's special and traditional concern for safeguarding the electoral process.⁸ In addition, as MR. JUSTICE WHITE notes, the

act The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause" 14 Stat. 27.

Section 18 of the 1870 Act made this section applicable to § 16 of the later Act. Subsequently Congress, through § 1 of the Civil Rights Act of 1871, indicated in even more explicit terms that private actions would be available to prevent official interference with the rights guaranteed by § 1 of the 1866 Act. See *Chapman v. Houston Welfare Rights Org.*, *ante*, at 627-628 (POWELL, J., concurring). Although one might conclude, in light of the 1871 Act, that the 1866 and 1870 Acts did not provide for private actions but merely permitted federal courts to entertain state-law actions affecting the denial of civil rights, an equally plausible reading of those statutes is that Congress created a federal cause of action to enforce § 1 of the 1866 Act.

⁸ See, e. g., *Williams v. Rhodes*, 393 U. S. 23 (1968); *Reynolds v. Sims*, 377 U. S. 533 (1964); *Baker v. Carr*, 369 U. S. 186 (1962); *Wilkinson v. The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 956-976 (1975). Cf. *United*

remedy implied was very limited, thereby reducing the chances that States would be exposed to frivolous or harassing suits.⁹

Finally, the Court in *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U. S. 6 (1971), ratified 25 years of lower-court precedent that had held a private cause of action available under the Securities and Exchange Commission's Rule 10b-5. As the Court concedes, *ante*, at 692 n. 13, this decision reflects the unique history of Rule 10b-5, and did not articulate any standards of general applicability.

These few cases applying *Borak* must be contrasted with the subsequent decisions where the Court refused to imply private actions. In *Calhoon v. Harvey*, 379 U. S. 134 (1964), the Court refused to permit private suits in derogation of administrative remedies to enforce Title IV of the Labor-Management Reporting and Disclosure Act of 1959, in spite of that statute's command, *inter alia*, that "every member in good standing . . . shall have the right to vote for or otherwise support the candidate or candidates of his choice . . ." 29 U. S. C. § 481 (e).¹⁰ In *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453 (1974), the Court reversed a lower court's implication of a private action to challenge violations of the Rail Passenger Service Act of 1970, in light of the Attorney General's express enforcement authority. And in *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412 (1975), we refused to allow private actions under the Securities Investor Protection Act

States v. Carolene Products Co., 304 U. S. 144, 152-153 n. 4 (1938) (Stone, J., concurring). See also *United States v. Richardson*, 418 U. S. 166, 195 n. 17 (1974) (POWELL, J., concurring).

⁹ See *ante*, at 728-729.

¹⁰ Section 402 of the Act created an administrative procedure for investigating violations of Title IV and permitted the Secretary of Labor to sue in federal court to obtain relief. Section 403 of the Act stated that the administrative remedy was the exclusive means of challenging "an election already conducted" but did not limit attempts to obtain prospective relief, the object of the suit in *Calhoon*.

of 1970, which also was enforceable by administrative proceedings and Government suits.¹¹

B

It was against this background of almost invariable refusal to imply private actions, absent a complete failure of alternative enforcement mechanisms and a clear expression of legislative intent to create such a remedy, that *Cort v. Ash*, 422 U. S. 66 (1975), was decided. In holding that no private action could be brought to enforce 18 U. S. C. § 610 (1970 ed. and Supp. III), a criminal statute, the Court referred to four factors said to be relevant to determining generally whether private actions could be implied. 422 U. S., at 78.¹² As MR.

¹¹ Since *Borak*, the Court also has entertained several cases involving challenges to various state welfare programs based in part on the Social Security Act. See, e. g., *Rosado v. Wyman*, 397 U. S. 397 (1970); *King v. Smith*, 392 U. S. 309 (1968). Most of these decisions did not confront the cause-of-action issue at all; none of them addressed the question whether a private cause of action could be implied. In some instances there were conclusory, and in my view incorrect, statements to the effect that 42 U. S. C. § 1983 might provide a basis for asserting these claims. See *Chapman v. Houston Welfare Rights Org.*, *ante*, at 644-646. (POWELL, J., concurring.) The silence of these decisions with respect to inferring a private cause of action cannot be taken as authority for the implication of one.

¹² The Court stated its analysis as follows:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—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? See, e. g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e. g., *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U. S. 134 (1964). 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

JUSTICE WHITE suggests, *ante*, at 718-719, and n. 1, these factors were meant only as guideposts for answering a single question, namely, whether Congress intended to provide a private cause of action. The conclusion in that particular case was obvious. But, as the opinion of the Court today demonstrates, the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement.

Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking. Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right.¹³ See n. 1, *supra*. Determining whether a private action would be consistent with the "underlying purposes" of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced. See Note, 43 Ford. L. Rev. 441, 454-455, 458 (1974). Finally, looking to state law for parallels to the federal right simply focuses inquiry on a particular policy consideration that Congress already may have weighed in deciding not to create a private action.

That the *Cort* analysis too readily permits courts to over-

based solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); cf. *J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment). 422 U.S., at 78.

¹³ The Court attempts to avoid the question-begging nature of this inquiry by emphasizing the precise phrasing of the statute at issue. *Ante*, at 689-693, and n. 13. Aside from its failure to contend with relevant decisions that do not conform to the perceived pattern, see, e.g., *Calhoon v. Harvey*, 379 U.S. 134 (1964); *Switchmen v. National Mediation Board*, 320 U.S. 297 (1943), the Court's approach gives undue significance to essentially stylistic differences in legislative draftsmanship.

ride the decision of Congress not to create a private action is demonstrated conclusively by the flood of lower-court decisions applying it. Although from the time *Cort* was decided until today this Court consistently has turned back attempts to create private actions, see *Chrysler Corp. v. Brown*, *ante*, p. 281; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977), other federal courts have tended to proceed in exactly the opposite direction. In the four years since we decided *Cort*, no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes. *Local 714, Amalgamated Transit Union v. Greater Portland Transit Dist.*, 589 F.2d 1 (CA1 1978) (§ 13 (c) of Urban Mass Transportation Act of 1964); *Bratton v. Shiffrin*, 585 F.2d 223 (CA7 1978) (§ 1007 (a) of Federal Aviation Act of 1958), cert. pending, No. 78-1398; *Redington v. Touche Ross & Co.*, 592 F.2d 617 (CA2) (§ 17 (a) of Securities Exchange Act of 1934), cert. granted, 439 U.S. 979 (1978); *Lodge 1858, AFGE v. Webb*, 188 U.S. App. D.C. 233, 580 F.2d 496 (§ 203 of National Aeronautics and Space Act of 1958), cert. denied *sub nom. Government Employees v. Frosch*, 439 U.S. 927 (1978); *Riggle v. California*, 577 F.2d 579 (CA9 1978) (Rivers and Harbors Appropriation Act); *Lewis v. Transamerica Corp.*, 575 F.2d 237 (CA9) (§ 206 of Investment Advisers Act of 1940), cert. granted, 439 U.S. 952 (1978); *Davis v. Southeastern Community College*, 574 F.2d 1158 (CA4 1978) (§ 504 of Rehabilitation Act of 1973), cert. granted, 439 U.S. 1065 (1979); *Benjamins v. British European Airways*, 572 F.2d 913 (CA2 1978) (Art. 28 (1) of Warsaw Convention), cert. denied, 439 U.S. 1114 (1979); *Abrahamson v. Fleschner*, 568 F.2d 862 (CA2 1977) (§ 206 of Investment Advisers Act of 1940), cert. denied, 436 U.S. 913 (1978); *Association of Data Processing Service Orgs. v. Federal Home Loan Bank Board*, 568 F.2d 478 (CA6 1977) (§ 11 (e) of Federal Home Loan Bank Act); *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (CA5 1978) (§ 206 of Invest-

ment Advisers Act of 1940), cert. pending, No. 77-1717; *New York Stock Exchange, Inc. v. Bloom*, 183 U. S. App. D. C. 217, 562 F. 2d 736 (1977) (§§ 16 and 21 of Glass-Steagall Act), cert. denied, 435 U. S. 942 (1978); *Daniel v. International Brotherhood of Teamsters*, 561 F. 2d 1223 (CA7 1977) (§ 17 (a) of Securities Act of 1933), rev'd on other grounds, 439 U. S. 551 (1979); *United Handicapped Federation v. Andre*, 558 F. 2d 413 (CA8 1977) (§ 504 of Rehabilitation Act of 1973); *Nedd v. United Mine Workers*, 556 F. 2d 190 (CA3 1977) (§ 302 of Labor Management Relations Act, 1947), cert. denied, 434 U. S. 1013 (1978); *Kipperman v. Academy Life Ins. Co.*, 554 F. 2d 377 (CA9 1977) (39 U. S. C. § 3009); *Kampmeier v. Nyquist*, 553 F. 2d 296 (CA2 1977) (§ 504 of Rehabilitation Act of 1973); *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (CA7 1977) (same); *McDaniel v. University of Chicago and Argonne*, 548 F. 2d 689 (CA7 1977) (§ 1 of Davis-Bacon Act), cert. denied, 434 U. S. 1033 (1978); *Hughes v. Dempsey-Tegeler & Co.*, 534 F. 2d 156 (CA9) (§ 6 of Securities Exchange Act of 1934), cert. denied, 429 U. S. 896 (1976). It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action. Indeed, the accelerating trend evidenced by these decisions attests to the need to re-examine the *Cort* analysis.

II

In my view, the implication doctrine articulated in *Cort* and applied by the Court today engenders incomparably greater problems than the possibility of occasionally failing to divine an unexpressed congressional intent. If only a matter of statutory construction were involved, our obligation might be to develop more refined criteria which more accurately reflect congressional intent. "But the unconstitutionality of the course pursued has now been made clear" and compels us to abandon the implication doctrine of *Cort*. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 77-78 (1938).

As the above-cited 20 decisions of the Courts of Appeals illustrate, *Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch. It also invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide.¹⁴ When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned. Because the courts are free to reach a result different from that which the normal play of political forces would have produced, the intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant. For the same reason, those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation. Moreover, the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process.

The Court's implication doctrine encourages, as a corollary to the political default by Congress, an increase in the govern-

¹⁴ MR. JUSTICE REHNQUIST, perhaps considering himself temporarily bound by his position in *University of California Regents v. Bakke*, 438 U. S. 265, 418-421 (1978) (opinion of STEVENS, J.), concurs in the Court's decision today. But writing briefly, he correctly observes "that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself," *ante*, at 718. It does not follow, however, that this Court is obliged to indulge Congress in its refusal to confront these hard questions. In my view, the very reasons advanced by MR. JUSTICE REHNQUIST why "this Court in the future should be extremely reluctant to imply a cause of action" absent specific direction by Congress, *ibid.*, apply to this case with special force.

mental power exercised by the federal judiciary. The dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history. See *Schlesinger v. Reservists to Stop the War*, 418 U. S. 208, 222 (1974); *United States v. Richardson*, 418 U. S. 166, 188–197 (1974) (POWELL, J., concurring); *Eccles v. Peoples Bank*, 333 U. S. 426, 432 (1948); *Ashwander v. TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring); *Muskrat v. United States*, 219 U. S. 346, 362 (1911); *Sinking-Fund Cases*, 99 U. S. 700, 718 (1879) (“One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule”); *Hayburn’s Case*, 2 Dall. 409 (1792). As the Court observed only last Term:

“Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While ‘[i]t is emphatically the province and duty of the judicial department to say what the law is,’ *Marbury v. Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

“Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process

comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.” *TVA v. Hill*, 437 U. S. 153, 194–195 (1978).

See also *United States v. New York Telephone Co.*, 434 U. S. 159, 179 (1977) (STEVENS, J., dissenting) (“The principle of limited federal jurisdiction is fundamental . . .”).¹⁵

It is true that the federal judiciary necessarily exercises substantial powers to construe legislation, including, when appropriate, the power to prescribe substantive standards of conduct that supplement federal legislation. But this power normally is exercised with respect to disputes over which a court already has jurisdiction, and in which the existence of

¹⁵ Mr. Justice Frankfurter described these dangers with characteristic eloquence:

“Disregard of inherent limits in the effective exercise of the Court’s ‘judicial Power’ . . . may well impair the Court’s position as the ultimate organ of ‘the supreme Law of the Land’ in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” *Baker v. Carr*, 369 U. S., at 267 (dissenting opinion).

Alexander Bickel identified the practical difficulties in judicial exercise of governmental power:

“The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.” *The Supreme Court and the Idea of Progress* 175 (1970).

the asserted cause of action is established.¹⁶ Implication of a private cause of action, in contrast, involves a significant additional step. By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. Cf. *Jacobson v. New York, N. H. & H. R. Co.*, 206 F. 2d 153 (CA1 1953) (Magruder, C. J.), aff'd per curiam, 347 U. S. 909 (1954); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 286-287 (1963).¹⁷ This

¹⁶ See, e. g., *United States v. Kimbell Foods, Inc.*, 440 U. S. 715 (1979); *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957); *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's *The Federal Courts and the Federal System* 756-832 (1973); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N. Y. U. L. Rev. 383 (1964).

¹⁷ Because a private action implied from a federal statute has as an element the violation of that statute, see n. 1, *supra*, the action universally has been considered to present a federal question over which a federal court has jurisdiction under 28 U. S. C. § 1331. Thus, when a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction.

It is instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331. E. g., *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). Where a court decides both that federal-law elements are present in a state-law cause of action, and that these elements predominate to the point that the action can be said to present a "federal question" cognizable in federal court, the net effect is the same as implication of a private action directly from the constitutional or statutory source of the federal-law elements. Compare *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority*, 582 F. 2d 444 (CA8 1978), cert. denied, 439 U. S. 1090 (1979); *Local 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (CA7 1978), with *Local 519, Amalgamated Transit Union v. Greater Portland Transit Dist.*, 589 F. 2d 1 (CA1 1978). To the extent an expansive interpretation of § 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process, it is subject to the same criticisms of judicial implication of private actions discussed in the text.

runs contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .," *American Fire & Cas. Co. v. Finn*, 341 U. S. 6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction. *Lockerty v. Phillips*, 319 U. S. 182 (1943); *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922); *Sheldon v. Sill*, 8 How. 441 (1850); *United States v. Nourse*, 6 Pet. 470 (1832); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1004-1008 (1965).

The facts of this case illustrate how the implication of a right of action not authorized by Congress denigrates the democratic process. Title IX embodies a national commitment to the elimination of discrimination based on sex, a goal the importance of which has been recognized repeatedly by our decisions. See, e. g., *Caban v. Mohammed*, ante, p. 380; *Orr v. Orr*, 440 U. S. 268 (1979); *Califano v. Goldfarb*, 430 U. S. 199 (1977); *Frontiero v. Richardson*, 411 U. S. 677 (1973); *Reed v. Reed*, 404 U. S. 71 (1971). But Because Title IX applies to most of our Nation's institutions of higher learning, it also trenches on the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society. See *University of California Regents v. Bakke*, 438 U. S. 265, 311 (1978) (opinion of POWELL, J.); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in result); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law & Contemp. Prob. 447 (1963); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 Harv. L. Rev. 879 (1979). Arming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs. The burden of expensive, vexatious litigation upon institutions whose resources often are severely limited may well compel an emphasis on objectively measured academic qualifications

at the expense of more flexible admissions criteria that bring richness and diversity to academic life.¹⁸ If such a significant incursion into the arena of academic polity is to be made, it is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment.¹⁹

Congress already has created a mechanism for enforcing the mandate found in Title IX against gender-based discrimination. At least in the view of Congress, the fund-termination power conferred on HEW is adequate to ensure that dis-

¹⁸ Although the burdens of administrative regulation applied to colleges and universities through Title IX are not insubstantial, that process is at least under the control of Government officials whose personal interests are not directly implicated and whose actions are subject to congressional oversight. Private litigation, by contrast, is subject to no such checks.

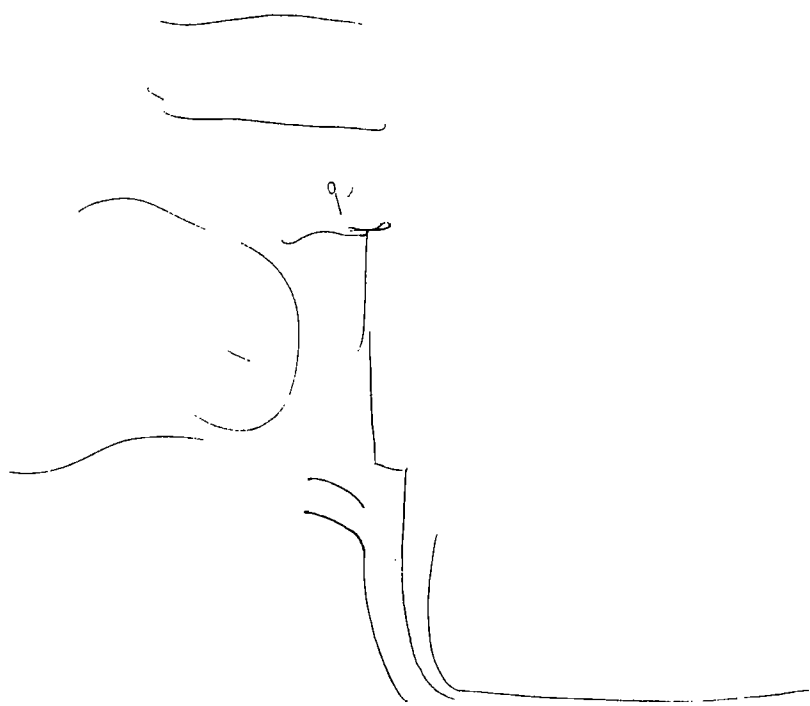
¹⁹ We have recognized in other contexts that implication of a private cause of action can frustrate those alternative processes that exist to resolve such disputes and, given the costs of federal litigation today, may dramatically revise the balance of interests struck by the legislation. See *Santa Fe Industries v. Green*, 430 U. S., at 478-479; *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S., at 739-744. That this concern applies fully to litigation under Title IX is borne out by the facts of this case. Petitioner's undergraduate grade-point average in basic sciences was 3.17, far below the 3.70 overall average of the University of Chicago's entering class, and her medical college admission test scores were in the bottom half of the applicant group. More than 2,000 applicants for the 104 positions at Chicago had better academic qualifications than petitioner. Furthermore, petitioner's age exceeded restrictions at both Chicago and Northwestern. If Title IX prohibits only purposeful discrimination such as would violate the Constitution were state action involved, a conclusion that seems forgone in light of our holding with respect to Title VI of the Civil Rights Act of 1964 in *University of California Regents v. Bakke*, 438 U. S., at 284-287 (opinion of POWELL, J.); *id.*, at 328-350 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), then the chances of petitioner's proving that the neutral age requirements used by Chicago and Northwestern are unlawful seem infinitesimal. Yet these schools have been forced to use their scarce resources to defend against this suit at three levels of our federal judicial system, and in light of the Court's holding today they must contend with at least one more round of proceedings.

crimination in federally funded colleges and universities will not be countenanced. The current position of the Government notwithstanding,²⁰ overlapping judicial and administrative enforcement of these policies inevitably will lead to conflicts and confusion; our national goal of equal opportunity for men and women, as well as the academic community, may suffer. A federal court should resolve all doubts against this kind of self-aggrandizement, regardless of the temptation to lend its assistance to the furtherance of some remedial end deemed attractive.

III

In sum, I believe the need both to restrain courts that too readily have created private causes of action, and to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling. Because the analysis suggested by *Cort* has proved inadequate to meet these problems, I would start afresh. Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. 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. Because the Court today is enlisting the federal judiciary in just such an enterprise, I dissent.

²⁰ See Brief for Federal Respondents 58-60, n. 36.



v

No. 88-3450.

July 27, 1989.

Individuals and association consisting of residents of section of city brought Title VI action against city. The United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, dismissed, and plaintiffs appealed. The Court of Appeals, Woods, District Judge, sitting by designation, held that: (1) plaintiffs were not required to exhaust administrative remedies before bringing Title VI action; (2) organization had standing to seek injunctive relief but did not have standing to seek damages; and (3) it is a violation of the Fourteenth Amendment for police department to fail to respond to calls from a neighborhood because of the racial makeup of the neighborhood.

Affirmed in part and reversed and re-
manded in part.

1. Federal Civil Procedure ⚡1829

For purposes of motion to dismiss, allegations of the complaint are taken to be true.

erty interest burdened with the obligation but incurs no personal liability. See, e.g., *H.E.P. Development Corporation v. Mouton*, 256 So.2d 744 (La.App.1971), cert. denied, 258 La. 1126, 260 So.2d 377 (1972).

Furthermore, we reject the suggestion that by exercising its rights under the security agreement that MBank automatically became a co-owner of the property. Article 3179 of the Louisiana Civil Code specifically provides otherwise:

The creditor does not become owner of the pledged immovable by failure of payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him, and to cause the objects which have been put in his hands in pledge to be seized and sold.

The district court erred in dismissing Grace-Cajun's claims. Summary judgment dismissal was inappropriate. The judgment of the district court is **REVERSED** and the matter is **REMANDED** for further proceedings.



3. Ordinarily, third parties are not bound by an unrecorded agreement, but that rule is not absolute; it admits of an exception. The unrecorded instrument may bind if the third party knows of it and knows that his transferor intends that he be bound by it. *Chevron U.S.A. v. Martin Exploration Co.*, 447 So.2d 469 (La.1984); *Stanley v. Orkin*, 360 So.2d 225 (La.App.1978). The evidence shows that MBank was aware of the operating agreement; in fact, it expressly took its security interest subject to its terms.
4. We do not hold, nor do we suggest that MBank assumed personal liability for Delta's drilling costs. There has long been a distinction under Louisiana law between property transactions made "subject to" obligations and those "assuming" such obligations. One assuming an obligation becomes personally liable. One acquiring subject to an obligation acquires a prop-

1015 private cause of action
1015 don't have to exhaust
Admin. process
1015 remedy
1015 - who can bring
(I) suit

2. Administrative Law and Procedure
 ⇨229

Civil Rights ⇨12.3

Title VI litigants need not exhaust their administrative remedies before pursuing their private cause of action in federal court. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

3. Civil Rights ⇨13.12(3)

Even if Title VI complaint did seek monetary damages, since it sought both equitable and monetary relief, it was sufficient to withstand motions to dismiss. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

4. Civil Rights ⇨13.7

City is a "person" for purposes of § 1983. 42 U.S.C.A. § 1983.

5. Civil Rights ⇨13.6

Residents who alleged city received federal funds, that their area of the city had received inferior municipal services as a result of discriminatory animus, and that, as a result, they had experienced little or no police response to their calls, deterioration of their neighborhood and property values, and existence in the neighborhood of a business that openly sold alcohol to minors had standing to sue under Title VI in their own right. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

6. Associations ⇨20(1)

For purposes of determining associational standing, organization which was formed for the purpose of fostering open housing was seeking to protect interests germane to its purpose in lawsuit in which it complained that city had discriminatorily spent federal funds on municipal services. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

7. Associations ⇨20(1)

Organization lacked standing to obtain compensatory relief on behalf of each of its individual members who complained that city's discriminatory actions in providing

municipal services had resulted in diminished value of their property, but did have standing to seek injunctive relief, a claim which would not require participation by each individual member. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

8. Constitutional Law ⇨215.2

Fourteenth Amendment is violated when police department fails to respond to calls from a neighborhood because of the racial makeup of the neighborhood. U.S. C.A. Const.Amend. 14.

Edward L. Gilbert (argued), Edward L. Gilbert Co., LPA, Canton, Ohio, for plaintiffs-appellants.

Mariella Mestel, Safety Forces Adv., Office of the Canton Law Dept., William J. Hamann (argued), Office of the City Atty., Canton Law Dept., Canton, Ohio, for defendant-appellee City of Canton.

Lemuel R. Green, William S. Heichel, Canton, Ohio, for defendant-appellee The Store.

Lemuel R. Green, Canton, Ohio, for defendant-appellee Basim Rashid.

Before ENGEL, Chief Judge, JONES, Circuit Judge, and WOODS, District Judge.*

WOODS, District Judge:

On this appeal we review a district court's Order of Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

I.

The Neighborhood Action Coalition (NAC) is an unincorporated association consisting of residents of the northeast section of Canton, Ohio, and organized for the purpose of fostering open housing. L.Q. Ellis, Mary Ellis, Carmine Altieri, and Myrna Jo Johnson are also residents of northeast

gan, sitting by designation.

* The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan.

Canton. Together, with the NAC, they represent a class of at least twenty-five residents of northeast Canton who filed a complaint in the Northern District of Ohio against the City of Canton; The Store, a grocery store in the city; and Basim Rashid, lessee and owner of The Store.

In their complaint, appellants assert that the City of Canton receives federal funds from the Department of Housing and Urban Development and from United States Department of Treasury Block Grants. Appellants allege that the City has refused to invest these funds in the northeast region of the City (NAC area) in the same proportion it invests funds in other regions of the City. The complaint also asserts that the NAC area has been targeted as a transitional area and that the City of Canton purposefully allows the area to be taken over by disadvantaged minorities. To that end, the City has told white residents, including appellants, to move; has provided little or no police protection; has allowed a city park plagued by drug trafficking to remain open continuously without patrol or supervision; and has encouraged Basim Rashid to operate The Store, a business that allegedly sells or allows the sale of alcohol to minors and known alcoholics and allows them to consume the alcohol on the premises.

[1] The appellants allege that they are injured by the defendants' acts; the neighborhood has become unsafe for themselves and their children, and the use and value of their real property has been substantially reduced. They allege that these injuries entitle them to relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.; and the Civil Rights Act of 1866, 1870 and 1871, 42 U.S.C. §§ 1981, 1982, 1983. The complaint seeks injunctive relief in the form of a Court Order that prohibits the municipality from providing services in a racially discriminatory manner, requires the municipality to provide police protection to the NAC area that is equal to the protection provided other Canton neighborhoods; and obligates the City to revoke The Store's liquor li-

cense. The complaint also seeks compensatory and punitive damages.

All three defendants, the City of Canton, Rashid, and The Store, filed motions to dismiss. On April 14, 1988, the district court granted the motions and dismissed all three defendants. The appellants appeal only the district court's dismissal of the City of Canton. Accordingly, only those portions of the district court's order of dismissal that affect the City will be addressed. In reviewing those portions of the district court's order, we must decide if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). For the purposes of a motion to dismiss, the allegations in the complaint are taken to be true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

II.

A.

Appellants first challenge the trial court's dismissal of their Title VI claim. Title VI prohibits discrimination in any program receiving federal financial assistance:

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.

42 U.S.C. § 2000d. Title VI was intended to "halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Regents of the University of California v. Bakke*, 438 U.S. 265, 284, 98 S.Ct. 2733, 2745, 57 L.Ed.2d 750 (1978) (Powell, J.). To achieve these ends, Congress explicitly provided for an administrative enforcement mechanism, which allows the federal funding agency to attempt to secure compliance and, failing that, to terminate the violator's federal funding. 42 U.S.C. § 2000c-2.

facts similar
to *Ans. v. Justice*
Case

In the present case, the appellants did not invoke the elaborate enforcement mechanism of § 2000d-1 prior to pursuing their private cause of action in federal court. The district court found this failure to exhaust administrative remedies to be a procedural bar to the Title VI cause of action and dismissed it from the suit. The court based its ruling on *Santiago v. Philadelphia*, 435 F.Supp. 136 (E.D.Pa.1977), and *Dupree v. Chattanooga*, 362 F.Supp. 1136 (E.D.Tenn.1973). Both cases require plaintiffs to exhaust their administrative remedies prior to bringing a Title VI claim before a federal court.

Since these cases were decided, however, the Supreme Court rendered its decision in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), which, after acknowledging that Title IX "was patterned after Title VI", held that Title IX, like Title VI, affords a private cause of action. *Id.* at 694, 717, 99 S.Ct. at 1956, 1968. The Court also noted, although in dicta, that "we are not persuaded that individual suits are inappropriate in advance of exhaustion of remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion." *Id.* at 706-08 n. 41, 99 S.Ct. at 1962-64 n. 41.

[2] Courts interpreting the *Cannon* decision have explicitly applied it to Title VI claims and squarely hold that litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court. *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 426 (7th Cir.1986); *Chowdhury v. Reading Hospital and Medical Center*, 677 F.2d 317, 320-22 (3d Cir.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1411 (1983); *Crest Street Community Council v. North Carolina Department of Transportation*, 598 F.Supp. 258, 265-66 (M.D.N.C.1984), *rev'd on other grounds*, 769 F.2d 1025 (4th Cir.1985), *rev'd*, 479 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986); *Concerned Tenants Association v. Indian Trails Apartments*, 496 F.Supp. 522, 527

(N.D.Ill.1980). We agree with the reasoning of these courts.

Like Title IX, Title VI does not provide a mechanism by which the class protected by the statute can actively participate in the administrative process. Under such circumstances, requiring litigants to exhaust their administrative remedies would impose an undue hardship and delay upon their attempts to vindicate their rights. *Rosado v. Wyman*, 397 U.S. 397, 405-07, 90 S.Ct. 1207, 1214-15, 25 L.Ed.2d 442 (1970). Moreover, as the Supreme Court noted in *Cannon*, an administrative finding of a Title VI violation may not include relief for the claimant. 441 U.S. at 706 n. 40, 99 S.Ct. at 1962 n. 40. Accordingly, we hold that Title VI litigants need not exhaust their administrative remedies before pursuing their private cause of action in federal court. Thus, the district court's dismissal of the appellant's Title VI claim must be reversed.

Appellee contends that the district court's ruling should nevertheless be affirmed because Title VI claims do not permit a private cause of action for monetary damages and plaintiff's complaint, although requesting equitable relief in broad generalities, is really seeking monetary damages.

[3] Whether Title VI remedies are limited to equitable relief is not as clearly established as appellee contends. In *Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), Justice White concluded that "compensatory relief, or other relief based on past violations of the conditions attached to the use of the federal funds, is not available as a private remedy for Title VI actions not involving intentional discrimination." *Id.* at 602-03, 103 S.Ct. at 3232-33 (White, J.). This statement, however, earned the concurrence of only one other justice. See 463 U.S. at 612, 103 S.Ct. at 3237 (Rehnquist, J., concurring). Several lower courts have addressed the issue since the Supreme Court's decision in *Guardians Association* and have agreed with Justice White's opinion. See, e.g., *Davis v. Spanish Coalition for Jobs, Inc.*,

type of remedy

676 F.Supp. 171 (N.D.Ill.1988); *Storey v. Board of Regents of University of Wisconsin System*, 604 F.Supp. 1200 (W.D.Wis. 1985). The Supreme Court, however, has not yet resolved the issue, *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-31 n. 9, 104 S.Ct. 1248, 1252-53 n. 9, 79 L.Ed.2d 568 (1984), and we need not address it. Appellants' claim seeks both equitable and monetary relief and, as such, it is sufficient to withstand a motion to dismiss.

B.

The district court dismissed appellants' claim under the Civil Rights Act of 1870, 42 U.S.C. § 1981, because the appellants had failed to allege a colorable claim under the Fair Housing Act, Title VI, or any other law of the United States. Because the appellants did allege a viable claim under Title VI, their claim under 42 U.S.C. § 1981 is also reinstated.

C.

[4] Finally, appellants challenge the district court's dismissal of their cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The district court dismissed this claim on the basis that § 1983 claims can be brought only against a "person" and a municipality is not a "person" within the terms of the statute. The trial court relied upon *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), which, as to the issue of municipal liability, has been expressly overruled by the Supreme Court in *Monell v. New York Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In *Monell*, the Supreme Court stated: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690, 98 S.Ct. at 2035 (emphasis in original). Accordingly, the lower court's decision must be reversed on this issue.

The City asserts that the trial court's ruling should be upheld nevertheless be-

cause the error was harmless. The City contends that the dismissal of the § 1983 claim was proper because the NAC lacks associational standing and failed to assert the violation of a constitutional right.

As to the claim that the NAC lacks associational standing, the Supreme Court recapitulated its test for association standing in *International Union, United Automobile, Aerospace and Agricultural Implementation Workers of America v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986):

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 282, 106 S.Ct. at 2529.

[5] The City contends that the appellants lack standing to sue in their own right because they do not state with any particularity the injury they sustained. In *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), the Court held that standing to sue requires a showing of personal injury which is fairly traceable to the defendant's illegal conduct and which is likely to be addressed by judicial relief. Moreover, this Circuit requires that plaintiffs who represent a class "allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086, 1093 (6th Cir.1985). In the present case, appellants allege that the City, as a result of a discriminatory animus, provides municipal services and federal funds to racially identifiable neighborhoods in a substantially inferior quality and quantity than the services provided to other areas of Canton. As a result of such actions, appellants claim that they have been injured by experiencing little or no police response to their calls, the deterioration of the neighborhood

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suit

and their property values, the existence of a business in their neighborhood that openly sells alcohol to minors, and the presence of unsavory individuals around their homes. Such injuries, if proven, are personal injuries affecting their property rights, are arguably traceable to the City's alleged racial policy, and could be addressed by a judicial order enjoining any racially disparate spending of funds or providing of services. Therefore, the appellants have standing to sue in their own right.

[6] Moreover, the second aspect of the test for associational standing is met. The NAC was organized for the purpose of fostering open housing in the City of Canton. Thus, the interests it seeks to protect in this lawsuit are germane to its purpose.

[7] As to the third requirement, that neither the claim asserted nor the relief requested require participation in the lawsuit by individual members, appellee contends that the appellants' claims for compensatory damages would require evaluating separately the individual circumstances of each member of the NAC. Appellee is correct. In *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 348 (1975), the Supreme Court held that an organization of construction firms could not seek damages for profits lost because the injuries were particular to each individual and would require individualized proof. *Id.* at 515-16, 95 S.Ct. at 2213-14. Like *Warth*, the diminished value of each plaintiff's property as a result of the City's alleged conduct would require individualized proof. Accordingly, the NAC lacks standing to obtain compensatory relief on behalf of each of the individual plaintiffs. The complaint, however, also seeks injunctive relief, which would not require participation by the individual members because any injunctive relief granted would inure to the benefit of all members of the association actually injured. *Brock*, 477 U.S. at 288, 106 S.Ct. at 2531 (quoting *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213). Therefore, the NAC does have standing to obtain injunctive relief.

[8] The City's second reason for asserting that the district court's dismissal of the

§ 1983 claim was harmless error is that the appellants failed to express which federally protected right is violated by the City when its police respond slowly to calls from the NAC area. In paragraph thirty-six of their amended complaint, appellants allege violations of the Fourteenth Amendment. This constitutional amendment is violated when a police department fails to respond to calls from a neighborhood because of the racial make-up of the neighborhood. As this circuit has previously held, "an officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denied equal protection to persons legitimately exercising rights guaranteed them under state or federal law." *Smith v. Ross*, 482 F.2d 33, 36-37 (6th Cir.1973). Therefore, the trial court's dismissal of the appellants' § 1983 claim against the City was an error that was not harmless.

III.

In conclusion, we AFFIRM the district court's dismissal of the appellants' claims under the Fair Housing Act, 42 U.S.C. § 3601, and under the Civil Rights Act of 1866, 42 U.S.C. § 1982. We REVERSE the district court's dismissal of the appellants' claims under Title VI, 42 U.S.C. § 2000d; the Civil Rights Act of 1870, 42 U.S.C. § 1981; and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Finally, we hold that the NAC has associational standing to pursue claims for injunctive relief but does not have associational standing to obtain compensatory damages on behalf of its individual members.



**The FREEDOM REPUBLICANS,
INC., et al.**

v.

**FEDERAL ELECTION COMMISSION,
Appellant.**

No. 92-5214.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 10, 1993.

Decided Jan. 18, 1994.

As Amended Jan. 21, 1994.

Group representing minority members of political party brought Title VI action challenging as discriminatory delegate-allocation scheme used by party, on ground that it gave rise to inadequate representation of minority members of party. The United States District Court for the District of Columbia, Charles R. Richey, J., 788 F.Supp. 600, ordered Federal Election Commission (FEC) to promulgate regulations under Title VI governing selection of delegates to publicly funded national party nominating conventions. FEC appealed. The Court of Appeals, Wald, Circuit Judge, held that group representing minority members of party failed to satisfy either causation or redressability elements of Article III standing.

Vacated and remanded.

1. Civil Rights ⇨201

Group representing minority members of political party did not have standing to challenge party's delegate-allocation scheme for national convention on ground that inadequate representation of certain states translated into inadequate representations of minority members of party, in violation of Title VI, which prohibits discrimination by programs receiving federal financial assistance; there was neither sufficient causal nexus between actions of Federal Election Commission in authorizing convention funding and delegate-selection practices of party, nor adequate likelihood that party would choose to change its time-tested delegate selecting

mechanism rather than forego convention funding. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Civil Procedure ⇨103.2

Individual members of organization had to independently meet requirements of Article III for organization to have standing. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Civil Procedure ⇨103.2, 103.3, 103.4

At bottom, Article III standing requires: concrete injury to legally protected interest; causal connection between asserted injury and challenged conduct, such that injury is fairly traceable to challenged conduct and not result of independent action by third party not before court; and likelihood that injury will be redressed by favorable decision on merits. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Constitutional Law ⇨20

Ordinary deference to legislative fact-finding does not translate into deference to congressional constructions of the demands of Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Civil Rights ⇨201

Plaintiff in Title VI suit, claiming discrimination on basis of race, color, or national origin by program or activity receiving federal financial assistance, is not excused of requirement that it demonstrate particularized causation or redressability necessary for Article III standing. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A. Const. Art. 3, § 1 et seq.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 92cv00153).

Richard B. Bader, Associate Gen. Counsel, Federal Election Com'n, Washington, DC, argued the cause for appellant. With him on the briefs were Lawrence M. Noble, Gen. Counsel and Vivien Clair, Atty., Federal Election Com'n.

*organization
bring appeal
4/15*

Frederic R. Kellogg, Washington, DC, argued the cause for appellees. With him on the brief was George M. Chuzi.

Mark D. Hopson, Peter D. Keisler and Michael A. Hess, Washington, DC, were on the brief for amicus curiae Republican Nat. Committee.

Before: WALD, BUCKLEY and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

The Freedom Republicans, Inc., "a black-led, multiracial, independent organization of Republicans," see *Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY* (1991), reprinted in Joint Appendix ("J.A.") at 30, filed a complaint in district court against the Federal Election Commission ("FEC" or "Commission") to enjoin the Commission's funding of the Republican National Convention under the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. §§ 9001-9013. Freedom Republicans alleged that the Republican Party's delegate-selection processes and system of minority "auxiliaries" combine to discriminate against minority groups, and that the FEC's continued funding of party activities therefore violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The district court granted partial summary judgment for Freedom Republicans, ordering the FEC to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." *Freedom Republicans*,

Inc. v. Federal Election Commission, 788 F.Supp. 600 (D.D.C.1992) (as amended May 4, 1992). The FEC appealed. Because we conclude that Freedom Republicans lacked standing to advance its claims below, we vacate that order and remand with instructions to dismiss Freedom Republicans' complaint.

I. BACKGROUND

Since 1916, the Republican Party has employed variations of a "bonus delegate" system for allocating the number of delegates each state sends to the national nominating convention. Under the current bonus system, each state receives a base number of delegates equal to three times its electoral college vote. See J.A. at 56. Then, regardless of population, states electing Republican presidents, senators, or governors or sending a predominantly Republican delegation to the House of Representatives receive bonus delegates. See *id.*¹ As a result of this system, traditional Republican stronghold states that are more likely to support Republicans in the general election are given a greater say in the nomination of the President than are states that consistently fall in the Democratic camp. See Brief of Amicus Curiae Republican National Committee at 10; *Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY* (1991), reprinted in J.A. 29-92, at 55.

Freedom Republicans, Inc. is a nonprofit organization founded in 1979 for the purpose of "maintaining the historic commitment of the Republican Party to the advancement of Americans of African descent, and . . . developing a genuinely representative organization for the Party without regard to race,

1. The Republican bonus delegate scheme, as set forth in its 1980 National Convention Rules, provides as follows:

From each State casting its electoral vote, or a majority thereof for the Republican nominee for President in the last preceding election: Four and one-half (4½) delegates at large plus the number of the delegates at large equal to 60% of the electoral vote from each such State. In addition, one delegate at large shall be awarded to a State for any and each of the following public officials elected by such State in the year of the last preceding presidential election or at any subsequent election held prior to January 1, 1980:

- (a) A Republican United States Senator . . .
- (b) A Republican Governor . . .
- (c) A Republican membership of at least half of the State's delegation to the United States House of Representatives . . .

THOMAS M. DURBIN & MICHAEL V. SEITZINGER, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 162 (U.S. Govt. Printing Office 1980).

The parties have neither supplied us with a later version of the rule nor suggested that there have been substantive changes to it in the interim.

color, or national origin...." See Admin. Complaint, Dec. 12, 1991, *reprinted in* J.A. at 22. In connection with this mission, Freedom Republicans has approached the Republican National Committee on several occasions with proposals to change the "bonus delegate" system to a system based strictly on the electoral college. See, e.g., *id.* at 22; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 36. Freedom Republicans contends that the "bonus delegate" system results in decreased representation for the states in which minority groups are disproportionately settled, and that the provision of nonvoting minority "auxiliaries" at the convention provides cold comfort, stigmatizing the groups involved. See J.A. at 38, 52. Although the Republican National Committee responded to Freedom Republicans' 1984 presentation by creating a subcommittee to assess the impact of the delegate-allocation mechanism on minority participation, the subcommittee ultimately rejected the proposed electoral college formula in its June 1986 Final Report. See J.A. at 23; Brief of *Amicus Curiae* Republican National Committee at 11. The Republican National Committee has since rebuffed later initiatives on similar lines by Freedom Republicans. See, e.g., Letter from Michael W. Grebe, Chairman of Standing Committee on Rules of the Republican National Committee, to Freedom Republicans (June 14, 1991), *reprinted in* J.A. at 28.

Frustrated in its effort to achieve change from within, Freedom Republicans pursued other channels. On December 12, 1991, Freedom Republicans sent an administrative complaint to the FEC urging the Commission to terminate funding of the Republican National Convention in view of the party's allegedly discriminatory practices of selecting delegates and maintaining nonvoting minority "auxiliaries." Freedom Republicans staked its claim on § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color, or national origin by any programs or activities receiving federal financial assistance. The FEC is charged with admin-

istering convention funding under § 9008 of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-13.² Freedom Republicans contended that the Commission provides federal financial assistance, and that the convention was therefore a "program[] or activit[y] receiving federal financial assistance," within the meaning of Title VI. Observing that "[a]t the very least, operation of Title VI would require that the FEC adopt implementing regulations," J.A. at 24, Freedom Republicans requested that the FEC "withdraw, suspend and terminate, and refuse to grant and continue, Federal financial assistance to the Committee on Arrangements for the 1992 Republican National Convention." J.A. at 27.

The FEC dismissed Freedom Republicans' complaint on the grounds that it did "not state any acts which appear to constitute a violation under our jurisdiction." Letter from Lawrence M. Noble, General Counsel, FEC, to Freedom Republicans (Dec. 23, 1991), *reprinted in* J.A. at 93. The FEC apparently premised its decision on the perception that its jurisdiction did not extend beyond consideration of compliance with the federal election laws. The Commission did, however, forward Freedom Republicans' complaint to the U.S. Department of Justice, which took no action.

In January 1992, Freedom Republicans and its President, Lugenia Gordon, brought their cause to the courts, filing a two-count complaint in district court against the FEC. See J.A. at 94-106. Count one alleged that the FEC was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for failure to adopt implementing regulations and to accept jurisdiction over Freedom Republicans' administrative complaint. Count two averred that the Republican Party, by employing its delegate-selection process and maintaining auxiliaries drawn on racial lines, was in violation of Title VI for providing disparate treatment to blacks and other minorities. Freedom Republicans sought an injunction ordering the FEC to promulgate regulations implementing Title VI, to accept

2. Under the terms of the statute, the FEC accepts applications for convention funding, verifies the statements included in the applications accord-

ing to its regulations, and certifies the applications to the Secretary of the Treasury for disbursement of funds. See 26 U.S.C. § 9008(g).

jurisdiction over its complaint, and to terminate convention funding to the Republican Party until such time as the Party complied with the anti-discrimination imperative of Title VI.

On February 18, 1992, Freedom Republicans moved for partial summary judgment on count one of its complaint, asking the court to remand to the Commission for rulemaking under Title VI. The court granted this motion on April 7, 1992, directing the FEC to "begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI" and dismissing the case from its docket. J.A. at 19. On April 17, 1992, the FEC filed a motion to amend the district court's judgment, seeking clarification of "whether the Commission is directed specifically to promulgate Title VI regulations governing political parties' selection of delegates to their convention." Memorandum in Support of Motion to Alter or Amend, Apr. 17, 1992, at 1. The district court granted this motion on May 4, 1992, ordering the FEC specifically to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." J.A. at 20. The FEC filed a timely appeal with this court.

II. ANALYSIS

[1] Compliance with the mandates of Article III is an essential prerequisite to the exercise of federal jurisdiction. We need not venture beyond the threshold question of standing in order to decide this case. As an organization, Freedom Republicans has standing to bring suit in its members' stead only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); see also *Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 111 (D.C.Cir.1990).

We find Freedom Republicans to be deficient on the first score.

[2, 3] To satisfy *Hunt*, the members of Freedom Republicans must independently meet the requirements of Article III. The formula for Article III standing has been much rehearsed. At bottom, standing requires (a) concrete injury to a legally-protected interest; (b) a causal connection between the asserted injury and the challenged conduct, such that the injury is fairly traceable to the challenged conduct and not the result of independent action by a third party not before the court; and (c) likelihood that the injury will be redressed by a favorable decision on the merits. See, e.g., *Lujan v. Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) ("*Defenders of Wildlife*"); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Branton v. FCC*, 993 F.2d 906, 908 (D.C.Cir.1993); *Fulani v. Brady*, 935 F.2d 1324, 1326 (D.C.Cir.1991), cert. denied, — U.S. —, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992). Because we find that the claims advanced below fail to comport with the causation and redressability requirements, we conclude that the individual Freedom Republicans, and hence, the organization itself, lack standing.

We note at the outset that, although the district court ordered the FEC to promulgate regulations rather than to terminate funding, the "procedural" aspect of the order is not dispositive for purposes of our standing analysis. The district court held in effect that Title VI required the FEC to provide an administrative mechanism through which Freedom Republicans could pursue its complaint. Our justiciability inquiry, however, must focus on Freedom Republicans' standing to bring its core substantive challenge to the FEC's failure to enforce Title VI vis-a-vis the Republican Party. The Supreme Court has instructed that we may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law, but must instead focus on concrete and particularized injuries. See, e.g., *Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2143 (1992); *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937); *Frothingham v.*

violation plus

Mellon, 262 U.S. 447, 488-89, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). In order to make out constitutionally cognizable injury, plaintiffs must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied. See *Defenders of Wildlife*, — U.S. at — & n. 7, 112 S.Ct. at 2142 & n. 7; *Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C.Cir.1983). To this task we now turn.

A. The Injury-in-Fact Requirement

Because we hold that Freedom Republicans is unable to satisfy the redressability and causation requirements of standing, we need not decide whether it makes out a judicially cognizable injury. Nonetheless, adequate examination of the causation and redressability questions requires that we at least identify the components of Freedom Republicans' alleged harm. Freedom Republicans contends that the current delegate-allocation scheme employed by the Republican Party dilutes its members' voting power at the Republican National Convention. Cf. *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 572 (D.C.Cir.1975) (en banc), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). In *Ripon Society*, citizens of individual states that did not reap victory bonuses challenged the Republican Party's delegate-allocation scheme on the grounds that their states were insufficiently represented at the national convention. Drawing an analogy to the interest in representation in a state or national legislature, this court found the diminution in plaintiffs' voting power to be a sufficient injury to confer standing. Although we do not decide the issue of injury in the instant case, we note that this case presents an alleged injury that is a step removed from *Ripon Society*. Here, a group representing minority members of the party challenges the same delegate-allocation scheme on the grounds that, given numerical disparities in minority populations across the nation, inadequate representation of certain states translates into inadequate representation of minority Republicans.

We view the auxiliaries claim as a facet of the basic discriminatory allocation charge, rather than as a distinct injury unto itself. The provision of racially-drawn, nonvoting auxiliaries, according to Freedom Republicans, fails to cure any injury that may stem from the underrepresentation of these minority groups in the ranks of delegates; the auxiliaries are part and parcel of the principal discrimination charge. See *Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY* (1991), reprinted in J.A. 29-92, at 35-36.

B. Causation/Redressability

In contrast to the plaintiffs in *Ripon Society*, Freedom Republicans brought suit not against the Republican Party, which is the direct source of its alleged injury, but against the FEC. When plaintiffs' asserted injury stems from "the government's allegedly unlawful regulation (or lack of regulation) of someone else," *Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2137 (1992) (emphasis in original), the "fairly traceable" and redressability prongs of standing analysis require more exacting scrutiny. "[W]hile not necessarily fatal to standing," the indirectness of injury "may make it substantially more difficult to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975)).

Because this court has ruled previously on the issues of causation and redressability in the Title VI context, see *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 (D.C.Cir.1989) ("WEAL I"), we face as an initial matter the question whether the remaining two prongs of our standing inquiry have already been resolved in Freedom Republicans' favor. We conclude that they have not. In *WEAL I*, which presented a challenge to federal funding of racially segregated public schools, we stated that

We have heretofore determined . . . that federal funding of facilities that engage in proscribed discrimination is in part causative of the perpetuation of such discrimination, and that "initiating federal fund termination proceedings [is] highly effective in gaining compliance with federal antidiscrimination laws." . . . Furthermore, due respect for the legislative branch requires us to recognize that vigorous enforcement of laws Congress designed for plaintiffs' benefit has the potential to redress in meaningful measure plaintiffs' injury.

Id. at 885-86 (quoting *Committee for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C.Cir.1979); other citations omitted). Although couched in general terms, *WEAL I* did reference precedents suggesting that funding termination proceedings had been effective in the past in eradicating school segregation—and thus in redressing plaintiffs' specific injuries. See, e.g., *National Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 n. 32 (D.C.Cir.1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984); *Adams v. Richardson*, 480 F.2d 1159, 1163 n. 4 (D.C.Cir.1973). *WEAL I* bolstered its reasoning with the notion that due deference to congressional judgments required a finding of redressability.

[4] Despite its broad language, we do not believe that *WEAL I* obviates our duty to scrutinize closely the relationship between convention funding and the alleged discrimination at issue in this case. As an initial matter, we note that the legislative deference rationale, relied on as partial, though not exclusive, support for the redressability holding, has been undercut substantially by *Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2145 (1992). In *Defenders of Wildlife*, the Supreme Court determined in the course of its discussion of procedural injuries that Article III bound Congress as well as the courts, and implied that congressional findings with respect to causation and redressability to which we might have given deference in the past must now themselves independently satisfy Article III. Because of the express separation-of-powers concerns that animated the Court's justiciability inquiry in that case, *see id.*, it now seems clear

that ordinary deference to legislative fact-finding does not translate into deference to congressional constructions of the demands of Article III.

Apart from deference, however, we believe that *Defenders of Wildlife* calls into question the *WEAL I* holding with respect to causation. Although the *WEAL I* court referenced cases containing statistical evidence on the effectiveness of termination proceedings, the court cited no similar precedent or independent evidence to support its conclusion as to causation, *i.e.*, the link between the inception or continuation of the alleged discrimination and federal funding. See *WEAL I*, 879 F.2d at 885-86. At the very least, *Defenders of Wildlife* stands for the proposition that it is "the burden of the plaintiff to adduce facts showing that [the unfettered choices made by independent actors] have been or will be made in such manner as to produce causation and permit redressability of injury." — U.S. at —, 112 S.Ct. at 2137. Because *WEAL I* cited no factual basis for causation, it appears not to have satisfied the more exacting scrutiny subsequently required by *Defenders of Wildlife*.

[5] Moreover, *Defenders of Wildlife* makes clear that, even if the *WEAL I* redressability standard as applied to the facts of that case were justifiable, the opinion's precedential effect in other factual contexts is considerably more narrow than a broad reading of its language might suggest. *Defenders of Wildlife* stresses the importance of immediate factual context in establishing causation and redressability, to the exclusion of broader, statutory technique-oriented rationales. As the Supreme Court made emphatically clear in *Defenders of Wildlife*, "[t]he party invoking federal jurisdiction bears the burden of establishing" the elements of standing. — U.S. at —, 112 S.Ct. at 2136. A blanket presumption that in Title VI suits, a plaintiff need not demonstrate particularized causation or redressability would severely undercut the separation-of-powers concerns underlying Article III. Accordingly, we view the *WEAL I* redressability holding as circumscribed by the *WEAL I* facts, rather than as a conclusive presump-

tion of standing for Title VI plaintiffs. We note in this regard that the cases cited by *WEAL I* in support of redressability provided formidable evidence of the successful impact of funding termination proceedings initiated by the Department of Health, Education and Welfare against racially segregated schools—precisely the issue in *WEAL I*.

Our task then remains to ascertain whether Freedom Republicans has satisfied its burden of demonstrating both a causal connection between the FEC and its asserted injury and the likelihood of redress by judicial means. We conclude that it has not. We find neither sufficient causal nexus between the actions of the FEC authorizing convention funding and the delegate-selection practices of the Republican Party nor adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding.

When plaintiffs' claim hinges on the failure of government to prevent another party's injurious behavior, the "fairly traceable" and redressability inquiries appear to merge. See *Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C.Cir.1990). In such cases, both prongs of standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief. See *Allen v. Wright*, 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 3325 n. 19, 82 L.Ed.2d 556 (1984). Despite these similarities, however, each inquiry has its own emphasis. Causation remains inherently historical; redressability quintessentially predictive. See *id.*

Upon careful review, we conclude that Freedom Republicans has not adduced sufficient evidence to demonstrate the requisite causal connection between the FEC and its

asserted injury. By all accounts, the delegate-selection scheme currently employed by the Republican Party has been in place since early in this century. See, e.g., Brief for Appellant at 14; Freedom Republicans, *TOWARD A PARTY OF EQUAL OPPORTUNITY* (1991), reprinted in J.A. 29-92, at 51. The system of bonus delegates was introduced in the aftermath of the convention of 1912, which was characterized as "the most tumultuous ever." CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 64 (1975). During the 1912 convention, the Party adhered to its traditional policy of allocating delegates on the basis of a state's electoral college votes. Southern states, which possessed convention voting strength that exceeded their propensity to elect Republicans, successfully boosted President William Howard Taft to the nomination over former President Theodore Roosevelt. Roosevelt bolted to the Progressive Party in protest, garnering 27.39% of the popular vote in the general election (88 electoral votes) in comparison with Taft's 23.18% (8 electoral votes). *Id.* at 245, 284. The chief beneficiary of the internecine strife, and the victor in the general election with a southern sweep and 435 electoral votes, was the Democratic candidate, Woodrow Wilson. See *id.* Shortly after this stunning defeat, the Republican Party reformed its delegate-allocation scheme. See *id.* at 68. Under the new formula, which considered a state's Republican voting strength in addition to its electoral vote, the southern states lost over a third of their delegates. See *id.*³

The FEC's role in the funding of presidential nominating conventions began in 1974 with the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. The Republican Party's practice of allocating delegates in accordance with Republican voting strength thus preceded public convention funding by fifty-eight years. Moreover, historical data strongly suggest the Party's par-

native formulas for state delegate allocation, each of which takes into account the strength of the state democratic vote by measuring votes in the most recent presidential or gubernatorial elections. See THOMAS M. DURBIN & MICHAEL V. SEITZINGER, *NOMINATION AND ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT OF THE UNITED STATES* 147-48 (U.S. Govt. Printing Office 1980).

3. We note that the Republican Party is not alone in according voting preferences to states that elect the party's candidates. The Democratic Party first adopted rules to take account of states' Democratic voting strength in determining the convention vote allocation in 1944. See CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 83 (1975). The Democratic Party offers four alter-

ticularized and nonmonetary motives in developing the bonus delegate system. In the aftermath of devastating defeat in the 1912 elections, the Republican Party pursued reforms that remedied a specific problem, the overrepresentation of states whose preferences did not translate into popular votes. This is basically the same rationale for preserving the delegate-selection scheme that has been proffered by the Party ever since,⁴ see Brief of *Amicus Curiae* Republican National Committee at 7,⁵ and plaintiff has adduced no evidence to suggest the contrary. In light of this, it would take a leap of logic to find causation for the bonus delegate system in public funding. As in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976), the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications. See also *Allen v. Wright*, 468 U.S. 737, 759, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

Nor can we confidently predict any causal connection between a possible judicial response and the redress of appellee's injury. For fifty-eight years, the Republican Party maintained a bonus delegate scheme when

One commentator has, however, depicted continued conflict over the delegate-allocation scheme as a battle between the conservative Republicans predominating in western and sunbelt states and the more moderate Republicans populating urban states. See Ronald Brownstein, *Conservatives' Victory on Republican Party's Delegates Rules May Give Them the 1988 Presidential Nomination*, NAT. J., Sept. 1, 1984, at 1610.

Freedom Republicans moved to strike portions of the Brief of *Amicus Curiae*, the Republican National Committee, containing background material on the history of the delegate selection rule at issue. We rely on the Brief only for its assertion of the Party's motivation for the delegate-allocation scheme, and so deny this motion. See *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors*, 647 F.2d 200, 201 (D.C.Cir. 1981).

the Party itself was responsible for drumming up the funds necessary to provide a convention. In the absence of any evidence that the perpetuation of the scheme is founded on other than pragmatic political considerations, we would be venturing into the realm of pure speculation were we to attempt to foretell the Party's response to termination of its present funding. Although current levels of public funding are substantial,⁶ and the Republican Party would inevitably face a problem if its funding, but not that of the Democrats, were to be withdrawn,⁷ we cannot begin to predict on this record what impact withdrawal might have on Party decisionmaking as to so vital a political decision as delegate-allocation. We must conclude, under the instruction of *Defenders of Wildlife*, that Freedom Republicans has not borne its burden of adducing evidence to demonstrate that it is "likely," as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'" — U.S. —, —, 112 S.Ct. 2130, 2136 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976)).

III. CONCLUSION

We hold that Freedom Republicans did not meet the causation and redressability requirements necessary for standing under Article III of the Constitution. So far as the record before us shows, the current delegate-

6. Section 9008(b)(1) of the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. §§ 9001-9013, provides that "the national committee of a major party shall be entitled to payments ... with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed \$4,000,000." The statute also provides for annual adjustments in this cap based on increases in the price index. See 26 U.S.C. § 9008(b)(5) (referencing 2 U.S.C. § 441a(c)(1)). According to Freedom Republicans' complaint, the Committee on Arrangements for the 1992 Republican National Convention received in excess of \$10,000,000 in convention funding. See J.A. at 98.

7. But see note 3, *supra*.

allocation scheme of the Republican Party appears to be the product of complex political considerations that emerged and are sustained independently of any concern for funding. Nor can we with any confidence predict that action on our or the FEC's part would redress Freedom Republicans' assert-

ed injury. Accordingly, the judgment of the district court is

Vacated and Remanded.



affirmed the decision of the Interior of September. No appeal was taken from the order. The first complaint, No. 2139-ND sought a restraining order and injunction against the defendants to refrain from affecting the status of the land, adjudging that the rejections of the plaintiffs' applications, and the actions were arbitrary and capricious, discriminatory and unlawful, and that the exercise of the statutory powers of the Department was asked that the rejection be set aside and that the action be reinstated.

The action was pending and the order of March 8, 1963, dated November 6, 1962, the second complaint filed in Cause No. 2347-ND. The same defendants, in the same applications under the Act and the Desert Land Act, alleging the same real property, the same complaint has certain grounds which are identical to those in the first complaint. In the prayer of the second complaint the plaintiffs ask the same as in the first, that the defendants be enjoined from doing any further administrative action respecting the plaintiffs' applications, that they be required to re-examine the applications of the plaintiffs and to permit plaintiffs to enter the land within the applica-

plaintiffs refused to dismiss the action on appellant's motion. The action was res judicata.¹ The motion to dismiss was later renewed.² A pretrial conference was held on January 27, 1964, and the case was submitted to the court for decision on an agreed statement of facts. On May 5, 1964, a memorandum decision was entered holding that the plaintiffs had not shown that the defendants' actions were arbitrary and capricious, and that the evidence at the time of their applications.

2, 1964 (R. 94).

The order appealed from here remanded the proceeding to the appellant for the purpose of setting aside the rejections of the applications and directing the conduct of further hearings consistent with the findings of the court.³

In both complaints the parties and the subject matter are the same. The first complaint stated that the action was brought under the Administrative Procedure Act. The second stated that it arose under the Fifth Amendment to the United States Constitution. The first complaint alleged that the rejection of the applications was arbitrary, capricious, discriminatory and unlawful. The relief asked for in both actions is the same, namely, reversal of the departmental decision. The only new element in the second complaint is the legal theory urged by the appellees that they were not accorded procedural due process under the Fifth Amendment to the United States Constitution.

The appellees could have urged that ground for recovery in the first case or on appeal from the adverse decision. The denial of procedural due process would come within the allegation of arbitrary and capricious action. The assertion of a different legal theory in the second complaint is not the same as the urging of a separate and distinct cause of action. The first decision was res judicata and this case must be reversed.

In *Stark v. Starr*, 94 U.S. 477, 485, 24 L.Ed. 276 (1876), the court stated:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which a special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litiga-

tion if such a practice were permissible."

To the same effect are the following: *Northern Pacific Railway Company v. Slaght*, 205 U.S. 122, 130-132, 27 S.Ct. 442, 445, 51 L.Ed. 738; *Hatchitt v. United States*, 158 F.2d 754, 755 (9 Cir. 1946); *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 469-470 (3 Cir. 1950); *Annat v. United States*, 277 F.2d 554 (5 Cir. 1960); *Myers v. Gardner*, 361 F.2d 343 (9th Cir. 1966).

This case is reversed and remanded to the District Court with direction to dismiss the complaint.



BOSSIER PARISH SCHOOL BOARD
et al., Appellants,

v.

Ura Bernard LEMON et al., Appellees.
No. 22675.

United States District Court
Fifth Circuit.
Jan. 5, 1967.

Rehearing Denied Feb. 6, 1967.

Class action by parents of Negro children of Air Force base personnel against parish school board for relief from board's refusal to permit the children to attend integrated public schools. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, J., 240 F.Supp. 709, denied defendants' motion to dismiss, granted plaintiffs' motion for summary judgment and issued injunction ordering school authorities to submit a desegregation plan, and defendants appealed. The Court of Appeals, Wisdom, Circuit Judge, held that where board had received and

3. Order of September 17, 1965 (R. 155).

accepted federal funds for maintenance and operation of their schools after passage of Civil Rights Act of 1964 and had made assurances to the United States that children of base personnel would be admitted to school on same terms as resident children, Negro children of base personnel were entitled to bring class action representing all Negroes residing in the parish in which base was located to enforce constitutional right to desegregated education.

Affirmed.

See also, D.C., 240 F.Supp. 743.

1. Contracts ⚡187(1)

Parish school board and superintendent of schools, by their contractual assurances with the United States to provide education for federal children from Air Force base on same terms as provision for other children in parish, have afforded rights to federal children as third-party beneficiaries. U.S.C.A. Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

2. Estoppel ⚡62(6)

Parish school board and superintendent of schools were estopped by their contractual agreement with the United States to provide education for federal children from Air Force base on same terms as that provided for other children in parish and their acceptance of federal funds paid pursuant to agreement, to deny that federal children were entitled to same rights to school attendance as were resident children. U.S.C.A. Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

3. Schools and School Districts ⚡13

Parish school board's acceptance of federal funds for maintenance and operation of school showed an intention to abide by and ratification of prior contract by which board was to provide education for federal children from Air Force base on same terms as that provided for other children in parish. U.S.

C.A. Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

4. Schools and School Districts ⚡13

Parish school board and superintendent of schools, in accepting federal funds for maintenance and operation of their schools under federal act after passage of Civil Rights Act of 1964, became bound by provision in that Act prohibiting discrimination in program receiving federal financial assistance and were obligated to provide education without racial discrimination. 20 U.S.C.A. § 636(b) (1) (F).

5. Federal Civil Procedure ⚡181

Where school board received and accepted federal school funds after the passage of the Civil Rights Act of 1964 and gave assurances to the United States that children of personnel stationed at local Air Force base would be admitted to schools on same terms as resident children, Negro children of base personnel were entitled to bring class action representing all Negroes residing in local parish either under provision of Civil Rights Act expressly prohibiting racial discrimination in any program receiving federal financial assistance or under contractual assurances by which school board was estopped to deny them same rights to attend desegregated schools as were possessed by children of Negro residents of the parish. U.S.C.A. Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

6. Schools and School Districts ⚡13

Even if school board was under no legal obligation to provide public education to children of military personnel on nearby Air Force base, board could not provide that education subject to an unconstitutional condition. U.S.C.A. Const. Amend. 14.

7. Schools and School Districts ⚡13, 153

Once Negro children of military personnel on federal Air Force base had been admitted to public school system, they had a constitutional right to a desegregated education and had standing

to enforce that right free of any unconstitutional condition precedent. U.S. C.A.Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

8. Constitutional Law ⇐42

Once Negro children of Air Force base personnel have established their right to attend public school in parish in which base is located, their standing to assert their constitutional right to equal protection follows automatically. U.S. C.A.Const. Amend. 14; 20 U.S.C.A. §§ 631-645, 636(b) (1) (F).

9. Civil Rights ⇐2

Provision of the Civil Rights Act of 1964 stating that no person shall, on ground of race, color, or natural origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance states a reasonable condition which the United States may attach to a grant of financial assistance and may enforce by refusal or withdrawal of federal assistance and is a prohibition, not an admonition, so that violations of the law are cognizable by the courts in absence of other remedy. Civil Rights Act of 1964, §§ 401 et seq., 601, 42 U.S.C.A. §§ 2000c et seq., 2000d.

10. Schools and School Districts ⇐13

Parish school board which accepted federal financial assistance thereby brought its school system within class of programs subject to prohibition in Civil Rights Act of 1964 against discrimination on ground of race, color or national origin. Civil Rights Act of 1964, §§ 401 et seq., 601, 42 U.S.C.A. §§ 2000c et seq., 2000d.

11. Schools and School Districts ⇐13

Negro children in the public schools have a constitutional right to have the public school system administered free from segregation. U.S.C.A.Const. Amend. 14.

J. Bennett Johnston, Jr., Shreveport, La., Jack P. F. Gremillion, Atty. Gen., State of Louisiana, Baton Rouge, La., William P. Schuler, Asst. Atty. Gen., State of Louisiana, Louis H. Padgett, Jr., Dist. Atty., Bossier Parish, La., for appellants.

Norman C. Amaker, New York City, St. John Barrett, Albert S. Pergam, Attys., Dept. of Justice, Washington, D. C., Jesse N. Stone, Jr., Shreveport, La., Jack Greenberg, Sheila Rush, New York City, for appellees.

Ford E. Stinson, Benton, La., amicus curiae.

John Doar, Asst. Atty. Gen., Edward L. Shaheen, U. S. Atty., Harold H. Greene, David Rubin, Joel M. Finkelstein, Attorneys, Department of Justice, Washington, D. C., for appellee-intervenor.

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge:

This Court has had to deal with a variety of reasons that school boards have managed to dredge up to rationalize their denial of the constitutional right of Negro school children to equal educational opportunities with white children. This case presents a new and bizarre excuse. Here the alleged reason for the admitted discrimination is that the Negro children are "federal children"; they are children of parents in uniform who are stationed at Barksdale Air Force Base. Barksdale is a United States defense base in Bossier Parish—a federal enclave. The hair-splitting argument the Board has to live with is that the Fourteenth Amendment provides that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws" (emphasis added); since the children live at Barksdale, they are not persons within the jurisdiction of the state. As a corollary, Negro children of fathers stationed at Barksdale have no

argues

* Of the District of Columbia Circuit, sitting by designation.

right to attend Bossier schools; they are merely permitted to attend schools (Negro schools) by sufferance, permission that may be withdrawn at any time. The Board contends also that since the plaintiffs do not reside in Bossier Parish, they cannot file a class action representing all Negroes who reside in Bossier Parish.

The district court denied the defendant's motion to dismiss. The court granted the plaintiff's motion for a summary judgment and issued an injunction ordering the school authorities to submit a desegregation plan for Bossier public schools. We affirm.

I.

The district court found that the United States Department of Health, Education and Welfare provided financial aid to the Bossier Parish school system to the amount of nearly two million dollars between 1951 and 1964 under the provisions of 20 U.S.C. §§ 631-645. In return the school board gave various "assurances" to the United States that children of personnel stationed at Barksdale would be admitted to the schools "on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district. * * *" (Emphasis added.) 20 U.S.C. § 636(b) (1) (F). The court found also that subsequent to the passage of the Civil Rights Act of 1964, the school board accepted payments from the United States amounting to half a million dollars for operation of its schools during the year 1964-65.

[1-3] The able trial judge, in an opinion we adopt as part of the opinion of this Court, held that the plaintiffs have standing to sue:

"[Although] these assurances do constitute a contractual agreement * * * [a]ll Louisiana laws providing for segregation in public schools were declared unconstitutional in Orleans Parish School Board v. Bush, 242

F.2d 156, (5 Cir. 1957) cert. denied, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed. 2d 1436 (see also Bush v. Orleans Parish School Board, 188 F.Supp. 916 (E.D.La.1960), aff'd per curiam 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806). These Louisiana laws subsequently were repealed. See La. Acts 1960, 1st Ex. Sess., Nos. 39 and La. Acts 1962, No. 128, § 1. We find no Louisiana law presently in effect which requires the school boards of this State to maintain segregated schools * * *. Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools. Such rights are identical in weight and effect to those rights possessed by children who are entitled to attend Bossier Parish schools simply because of residence instead of by contract. ¶ Having thus obligated themselves defendants are now estopped by their contractual agreement, and their acceptance of federal funds paid pursuant thereto, to deny that plaintiffs are entitled to the same rights to school attendance as are resident children. * * * ¶ We must further find that the board's acceptance of funds for maintenance and operation of schools during the 1964-65 school year shows that defendants intended to abide by that contract by continuing to provide education for federal children. This acceptance constituted a further ratification of the contract by which defendants agreed to provide such education, and, therefore, it acted as a ratification of the assurances given when the construction funds were received."

[4, 5] The court distinguished United States v. Bossier Parish School Board, W.D.La.1963, 220 F.Supp. 243, aff'd per curiam, 5 Cir. 1964, 336 F.2d 197 and United States v. Madison, 5 Cir. 1964, 326 F.2d 237 holding that the United States could not force desegregation of a school system by specifically enforcing the assurances extracted under 20 U.S.C.

district ct's findings

what Title VI does

Cite as 370 F.2d 847 (1967)

§ 636(b) (1) (F) from school boards receiving federal funds: free of any unconstitutional condition precedent.

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applies to action of recipient of Title VI
 "Both bases for these decisions were changed by the Civil Rights Act of 1964. By Section 601 of that Act Congress expressly prohibited racial discrimination in any program receiving federal financial assistance, thus negating its original intention to provide funds without disturbing racial classifications. When defendants received and accepted federal funds for maintenance and operation of their schools under 20 U.S.C.A. §§ 236-244 after the passage of the Civil Rights Act of 1964, they became bound by Section 601 and now are *obligated* to provide the education for which the payments were received, without racial discrimination. (Emphasis by the Court) * * * Consequently, plaintiffs are entitled to bring this class action either under Section 601 of the Civil Rights Act of 1964 or under the contractual assurances by which defendants are estopped to deny them the same rights to attend desegregated schools as are possessed by children of Negro residents of Bossier Parish."

II.

For good measure, we add a few observations to the district court's opinion.

[6,7] A. Even if the school board were under no legal obligation to provide public education to children of military personnel on the air base, it could not provide that education subject to an unconstitutional condition. See *Hanover Fire Ins. Co. v. Harding*, 1926, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372; *Wheeling Steel Corporation v. Glander*, 1949, 337 U.S. 562, 69 S.Ct. 1291, 93 L.Ed. 1544. The plaintiffs here had been admitted to the school system, but had been denied the opportunity to transfer from a Negro to a white school. Once the plaintiffs had been admitted to the school system, they had a constitutional right to a desegregated education, and have standing to enforce that right—

[8] B. *United States v. Madison County Board of Education* has a narrow scope. Here the plaintiffs rely on the "assurances" only to establish their right to attend the Bossier Parish school system. They do not rely on this frail reed to establish their right to a desegregated education. To establish *that* right, they rely on the Constitution. We think it clear that once the parish has accepted funds under these federal programs, it may not then deny the plaintiffs' right to attend school. *Simkins v. Moses H. Cone Memorial Hospital*, 4 Cir. 1963, 323 F.2d 959, cert. denied 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659; cf. *Flagler Hospital, Inc. v. Hayling*, 5 Cir. 1965, 344 F.2d 950; *Smith v. Holiday Inns of America, Inc.*, 6 Cir. 1964, 336 F.2d 630; *United States v. Sumter County School Dist. No. 2*, E.D.S.C. 1964, 232 F.Supp. 945. And once the plaintiffs have established their right to attend school in the system, their standing to assert their constitutional right to equal protection follows automatically. The key point is that here individuals are suing to enforce a national constitutional right. In the *Madison County* case, on the other hand, the United States sued to desegregate the schools. The United States was either 1) attempting specifically to enforce the assurance demanded by 20 U.S.C. § 636 (b) (1) (F), or 2) attempting to protect the constitutional rights of persons not parties to the suit. The suit was brought before Title IV of the Civil Rights Act of 1964 provided the necessary statutory foundation for the Attorney General to sue to assure individuals of the constitutional right to a desegregated education. The Court's ruling therefore was limited in scope to the proper method for the assertion of contractual, not constitutional, rights. Contract rights are not involved in this case.

C. Finally, section 601 of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or nation-

al 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.

[9,10] The defendants argue that this section is a mere statement of policy, and that section 602's administrative remedies are the only means by which it may be enforced. Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. But it also states the law as laid down in hundreds of decisions, independent of the statute. In this sense, the section is a prohibition, not an admonition. In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts. See Texas & Pacific Ry. v. Rigsby, 1916, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874, Steele v. Louisville & N.R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. The Bossier Parish School Board accepted federal financial assistance in November 1964, and thereby brought its school system within the class of programs subject to the section 601 prohibition against discrimination. The Negro school children, as beneficiaries of the Act, have standing to assert their section 601 rights.

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[11] For the reasons given by the district court and for additional reasons, any one of which is sufficient to dispose of the Board's opera bouffe motion, we hold that these plaintiffs have standing to assert their right to equal educational opportunities with white children. "Negro children in the public schools have a constitutional right to have the public school system administered free from * * segregation." Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499.

The judgment of the district court is affirmed.

James MIXON, (H. B. Edwards, Jr., as Temporary Administrator upon the estate of James Mixon substituted as party-appellant for James Mixon, deceased), Appellant,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

No. 22965.

United States Court of Appeals
Fifth Circuit.
Dec. 30, 1966.

Action for personal injuries sustained by plaintiff when he was struck by railroad's train while walking along a spur track. The United States District Court for the Middle District of Georgia, William A. Bootle, Chief Judge, granted railroad's motions for directed verdict and judgment notwithstanding the verdict, and denied railroad's motion for new trial, and plaintiff appealed. The Court of Appeals, Godbold, Circuit Judge, held that submission of charge on last clear chance was prejudicially erroneous where railroad's crew was not at any time before the accident aware of pedestrian's position upon the track.

Reversed and remanded.

1. Federal Civil Procedure § 2127, 2155

In considering a motion for directed verdict for defendant in a negligence action, court was bound to view the evidence most favorable to plaintiff, giving to plaintiff every reasonable inference to be deduced therefrom, and unless the court could properly determine that no reasonable man could reach a verdict in favor of plaintiff, it was bound to submit the case to the jury.

2. Railroads § 357

Under Georgia law, whether a pedestrian injured upon a railroad's track was a trespasser or a licensee, the railroad was bound to use ordinary care and diligence in approaching and traversing the track if it had reason to anticipate that persons might be there-

Statement of STEWART and REHNQUIST, JJ. 426 U.S.

all point sources discharging into the navigable waters subject to the State's program, it may legislate to make that intention manifest.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST dissent. They agree substantially with the reasoning of the Court of Appeals for the Ninth Circuit in this case, 511 F. 2d 963, and they would, accordingly, affirm its judgment.

*Prima facie case
Proof in case
involving disproportionate impact*

WASHINGTON v. DAVIS

Syllabus

WASHINGTON, MAYOR OF WASHINGTON, D. C.,
ET AL. v. DAVIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1492. Argued March 1, 1976—Decided June 7, 1976

Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 4 U. S. C. § 1981, and D. C. Code § 1-320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment, in view of the facts that 44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on

Syllabus

426 U. S.

appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs v. Duke Power Co.*, 401 U. S. 424, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. *Held*:

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases. Pp. 238-248.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Pp. 239-245.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed. Pp. 245-246.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted. P. 246.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is

Syllabus

229

appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription. Pp. 246-248.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate. Pp. 248-252.

168 U. S. App. D. C. 42; 512 F. 2d 956, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and II of which STEWART, J., joined. STEVENS, J., filed a concurring opinion, *post*, p. 252. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 256.

David P. Sutton argued the cause for petitioners. With him on the briefs were C. Francis Murphy, Louis P. Robbins, and Richard W. Barton.

Richard B. Sobol argued the cause for respondents Harley et al. With him on the briefs were George Cooper, Richard T. Seymour, Marian Wright Edelman, Michael B. Trister, and Ralph J. Temple. Marl L. Evans argued the cause for the Commissioners of the United States Civil Service Commission as respondents under this Court's Rule 21 (4). With him on the brief were Solicitor General Bork, Assistant Attorney General Lee, Ronald R. Glancz, and Harry R. Silver.*

*R. Lawrence Ashe, Jr., and Susan A. Cahoon filed a brief for the Executive Committee of the Division of Industrial-Organizational Psychology (Div. 14) of the American Psychological Assn. as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston,

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

I

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission.¹ An amended complaint, filed December 10, alleged that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. The respondents Harley and Sellers were permitted to intervene, their amended complaint assert-

Barry L. Goldstein, Deborah M. Greenberg, Eric Schnapper, and O. Peter Sherwood filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by Thaddeus Holt for the American Society for Personnel Administration; and by Howard P. Willens, Deanne C. Siemer, and John S. Kramer for the Educational Testing Service.

¹ Under § 4-103 of the District of Columbia Code, appointments to the Metropolitan Police force were to be made by the Commissioner subject to the provisions of Title 5 of the United States Code relating to the classified civil service. The District of Columbia Council and the Office of Commissioner of the District of Columbia, established by Reorganization Plan No. 37 of 1967, were abolished as of January 2, 1975, and replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia.

ing that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U. S. C. § 1981 and under D. C. Code § 1-320."² Defendants answered, and discovery and

² Title 42 U. S. C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1-320 of the District of Columbia Code (1973) provides:

"In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin."

One of the provisions expressly made applicable to the Metropolitan Police force by § 4-103 is 5 U. S. C. § 3304 (a), which provides:

"§ 3304. Competitive service; examinations.

"(a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for—

"(1) open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought; and

"(2) noncompetitive examinations when competent applicants do

various other proceedings followed.³ Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment" No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds.⁴ The District Court granted petitioners' and denied respondents' motions. 348 F. Supp. 15 (DC 1972).

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police De-

not compete after notice has been given of the existence of the vacancy."

The complaint asserted no claim under § 3304.

³ Those proceedings included a hearing on respondents' motion for an order designating the case as a class action. A ruling on the motion was held in abeyance and was never granted insofar as the record before us reveals.

⁴ In support of the motion, petitioners and the federal parties urged that they were in compliance with all applicable constitutional, statutory, and regulatory provisions, including the provisions of the Civil Service Act which since 1883 were said to have established a "job relatedness" standard for employment.

partment," and which was "designed to test verbal ability, vocabulary, reading and comprehension." *Id.*, at 16.

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." *Ibid.* Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." *Ibid.* This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates [*sic*] to discriminate

against otherwise qualified blacks." *Id.*, at 17. It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance—"The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process." *Ibid.* The District Court ultimately concluded that "[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence."⁵ *Id.*, at 18.

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one.⁶ 168 U. S. App. D. C. 42,

⁵ When summary judgment was granted, the case with respect to discriminatory promotions was still pending. The District Court, however, made the determination and direction authorized by Fed. Rule Civ. Proc. 54(b). The promotion issue was subsequently decided adversely to the original plaintiffs. *Davis v. Washington*, 352 F. Supp. 187 (DC 1972).

⁶ "Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inappli-

512 F. 2d 956 (1975). The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks—four times as many—failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison [not] material to this appeal." *Id.*, at 46 n. 24, 512 F. 2d, at 960 n. 24. The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorari, 423 U. S. 820 (1975), filed by the District of Columbia officials.

cable to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." 168 U. S. App. D. C. 42, 44 n. 2, 512 F. 2d 956, 958 n. 2 (1975).

The Civil Service Commissioners, defendants in the District Court, did not petition for writ of certiorari but have filed a brief as respondents. See our Rule 21(4). We shall at times refer to them as the "federal parties."

II

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal,⁸ our Rule 40 (1)(d)(2) provides that we "may notice a plain error not presented";⁹ and this is an appropriate occasion to invoke the Rule.

As the Court of Appeals understood Title VII,¹⁰ employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion

⁸ Apparently not disputing the applicability of the *Griggs* and Title VII standards in resolving this case, petitioners presented issues going only to whether *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), had been misapplied by the Court of Appeals.

⁹ See, e. g., *Silber v. United States*, 370 U. S. 717 (1962); *Carpenters v. United States*, 330 U. S. 395, 412 (1947); *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16 (1941); *Mahler v. Eby*, 264 U. S. 32, 45 (1924); *Weems v. United States*, 217 U. S. 349, 362 (1910).

¹⁰ Although Title VII standards have dominated this case, the statute was not applicable to federal employees when the complaint was filed; and although the 1972 amendments extending the Title to reach Government employees were adopted prior to the District Court's judgment, the complaint was not amended to state a claim under that Title, nor did the case thereafter proceed as a Title VII case. Respondents' motion for partial summary judgment, filed after the 1972 amendments, rested solely on constitutional grounds; and the Court of Appeals ruled that the motion should have been granted.

At the oral argument before this Court, when respondents' counsel was asked whether "this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional overtones," counsel responded: "My trouble honestly with that proposition is the procedural requirements to get into court under Title VII, and this case has not met them." Tr. of Oral Arg. 66.

practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U. S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Almost 100 years ago, *Strauder v. West Virginia*, 100 U. S. 303 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas*, 325 U. S. 398, 403-404 (1945). A defendant in a criminal case is entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." *Alexander v. Louisiana*, 405 U. S. 625, 628-629 (1972). See also *Carter v. Jury Comm'n*, 396 U. S. 320, 335-

337, 339 (1970); *Cassell v. Texas*, 339 U. S. 282, 287-290 (1950); *Patton v. Mississippi*, 332 U. S. 463, 468-469 (1947).

The rule is the same in other contexts. *Wright v. Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.*, at 56, 58. The dissenters were in agreement that the issue was whether the "boundaries . . . were purposefully drawn on racial lines." *Id.*, at 67.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action." *Keyes v. School Dist. No. 1*, 413 U. S. 189, 205 (1973). "The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." *Id.*, at 208. See also *id.*, at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "[t]he acceptance of appl-

lants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Jefferson v. Hackney*, 406 U. S. 535, 548 (1972). And compare *Hunter v. Erickson*, 393 U. S. 385 (1969), with *James v. Valtierra*, 402 U. S. 137 (1971).

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins v. Texas*, *supra*, at 404. *Smith v. Texas*, 311 U. S. 128 (1940); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Neal v. Delaware*, 103 U. S. 370 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, *Hill v. Texas*, 316 U. S. 400, 404 (1942), or with racially non-neutral selection procedures, *Alexander v. Louisiana*, *supra*; *Avery v. Georgia*, 345 U. S. 559 (1953); *Whitus v. Georgia*, 385 U. S. 545 (1967). With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander*, *supra*, at 632. See also *Turner v. Fouche*, 396 U. S. 346, 361 (1970); *Eubanks v. Louisiana*, 356 U. S. 584, 587 (1958).

racial discrimination
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Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant; but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida*, 379 U. S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In *Palmer v. Thompson*, 403 U. S. 217 (1971), the city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated. Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that

proof of disproportionate impacts

racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

Wright v. Council of City of Emporia, 407 U. S. 451 (1972), also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." *Id.*, at 459. There was thus no need to find "an independent constitutional violation." *Ibid.* Citing *Palmer v. Thompson*, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither *Palmer* nor *Wright* was understood to have changed the prevailing rule is apparent from *Keyes v. School Dist. No. 1, supra*, where the principal issue

in litigation was whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, *Alexander v. Louisiana*, *supra*, and *Jefferson v. Hackney*, *supra*, indicate that either *Palmer* or *Wright* had worked a fundamental change in equal protection law.¹¹

Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.¹² The

¹¹ To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary; and very shortly after *Palmer*, all Members of the Court majority in that case joined the Court's opinion in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

¹² Cases dealing with public employment include: *Chance v. Board of Examiners*, 458 F. 2d 1167, 1176–1177 (CA2 1972); *Castro v. Beecher*, 459 F. 2d 725, 732–733 (CA1 1972); *Bridgeport Guardians v. Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1337 (CA2 1973); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1200 (Md.), *aff'd* in pertinent part *sub nom. Harper v. Kloster*, 486 F. 2d 1134 (CA4 1973); *Douglas v. Hampton*, 168 U. S. App. D. C. 62, 67, 512 F. 2d 976, 981 (1975); but cf. *Tyler v. Vickery*, 517 F. 2d 1089, 1096–1097 (CA5 1975), cert. pending, No. 75–1026. There are also District Court cases: *Wade v. Mississippi Cooperative Extension Serv.*, 372 F. Supp. 126, 143 (ND Miss. 1974); *Arnold v. Ballard*, 390 F. Supp. 723, 736, 737 (ND Ohio 1975);

cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that

United States v. City of Chicago, 385 F. Supp. 543, 553 (ND Ill. 1974); *Fowler v. Schwarzwald*, 351 F. Supp. 721, 724 (Minn. 1972), *rev'd* on other grounds, 498 F. 2d 143 (CA8 1974).

In other contexts there are *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (CA2 1968) (urban renewal); *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F. 2d 108, 114 (CA2 1970), cert. denied, 401 U. S. 1010 (1971) (zoning); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F. 2d 291 (CA9 1970) (dictum) (zoning); *Metropolitan H. D. Corp. v. Village of Arlington Heights*, 517 F. 2d 409 (CA7), cert. granted, 423 U. S. 1030 (1975) (zoning); *Gautreaux v. Romney*, 448 F. 2d 731, 738 (CA7 1971) (dictum) (public housing); *Crow v. Brown*, 332 F. Supp. 382, 391 (ND Ga. 1971), *aff'd*, 457 F. 2d 788 (CA5 1972) (public housing); *Hawkins v. Town of Shaw*, 437 F. 2d 1286 (CA5 1971), *aff'd* on rehearing en banc, 461 F. 2d 1171 (1972) (municipal services).

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the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F. Supp., at 18.

Under Title VII, Congress provided that when hiring

and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.¹³ However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes

¹³ It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation: "empirical" or "criterion" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "content" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the Equal Employment Opportunity Commission in fashioning its Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue. See, e. g., *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 431 (1975); *Douglas v. Hampton*, 168 U. S. App. D. C., at 70, 512 F. 2d, at 984; *Vulcan Society v. Civil Service Comm'n*, 490 F. 2d 387, 394 (CA2 1973).

of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.¹⁴

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

III

We also hold that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds.

¹⁴ Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Calif. L. Rev. 275, 300 (1972), suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 Vand. L. Rev. 1183 (1972). See also Demsetz, *Minorities in the Market Place*, 43 N. C. L. Rev. 271 (1965).

The submission of the defendants in the District Court was that Test 21 complied with all applicable statutory as well as constitutional requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied.¹⁵ The District Court also assumed that Title VII standards were to control the case, identified the determinative issue as whether Test 21 was sufficiently job related and proceeded to uphold use of the test because it was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy." 348 F. Supp., at 17. The Court of Appeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement

¹⁵ In their memorandum supporting their motion for summary judgment, the federal parties argued:

"In *Griggs, supra*, the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883. In that act Congress has mandated that the federal government must use ' . . . examinations for testing applicants for appointment . . . which . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought.' 5 U. S. C. § 3304 (a) (1). Defendants contend that they have been following the job-related standards of *Griggs, supra*, for the past eighty-eight years by virtue of the enactment of the Civil Service Act which guaranteed open and fair competition for jobs."

They went on to argue that the *Griggs* standard had been satisfied. In granting the motions for summary judgment filed by petitioners and the federal parties, the District Court necessarily decided adversely to respondents the statutory issues expressly or tacitly tendered by the parties.

of a direct relationship between performance on Test 21 and performance on the policeman's job.

We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties to the case.¹⁶ Nor is the

¹⁶ See n. 17, *infra*. Current instructions of the Civil Service Commission on "Examining, Testing, Standards, and Employment Practices" provide in pertinent part:

"S2-2—Use of applicant appraisal procedures

"a. Policy. The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.

"(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.

"(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:

"(a) Effective job performance;

conclusion foreclosed by either *Griggs* or *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement.

The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record;¹⁷

"(b) Capability;

"(c) Success in training;

"(d) Reduced turnover; or

"(e) Job satisfaction." 37 Fed. Reg. 21557 (1972).

See also Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR § 1607.5 (b) (3) (1975), discussed in *Albemarle Paper Co. v. Moody*, 422 U. S., at 430-435.

¹⁷ The record includes a validation study of Test 21's relationship to performance in the recruit training program. The study was made by D. L. Futransky of the Standards Division, Bureau of Policies and Standards, United States Civil Service Commission, App. 99-109. Findings of the study included data "support[ing] the conclusion that T[est] 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School." *Id.*, at 103. Opinion evidence, submitted by qualified experts examining the Futransky study and/or conducting their own research, affirmed the correlation between scores on Test 21 and success in the training program. *E. g.*, Affidavit of Dr. Donald J. Schwartz (personnel research psychologist, United States Civil Service Commission), App. 178, 183 ("It is my opinion . . . that Test 21 has a significant positive correlation with success in the MPD Recruit School for both Blacks and whites and is therefore shown to be job related . . ."); affidavit of Diane E. Wilson (personnel research psychologist, United States Civil Service Commission), App. 185, 186 ("It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training").

The Court of Appeals was "willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive of fur-

and we are not convinced that this conclusion was erroneous.

The federal parties, whose views have somewhat changed since the decision of the Court of Appeals and who still insist that training-program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training-program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastery of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that Title.

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

MR. JUSTICE STEWART joins Parts I and II of the Court's opinion.

MR. JUSTICE STEVENS, concurring.

While I agree with the Court's disposition of this case, I add these comments on the constitutional issue dis-

ther progress in Recruit School." 168 U. S. App. D. C., at 48, 512 F. 2d, at 962.

cussed in Part II and the statutory issue discussed in Part III of the Court's opinion.

The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion v. Lightfoot*, 364 U. S. 339, or *Yick Wo v. Hopkins*, 118 U. S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.*

My agreement with the conclusion reached in Part II of the Court's opinion rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second,

*Specifically, I express no opinion on the merits of the cases listed in n. 12 of the Court's opinion.

the same test is used throughout the federal service. The applicants for employment in the District of Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purpose" as that term is used in constitutional adjudication.

My study of the statutory issue leads me to the same conclusion reached by the Court in Part III of its opinion. Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though, as the Court makes clear, *ante*, at 238 n. 10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 U. S. C. § 1981 and § 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application.

The parties argued the case as though Title VII standards were applicable. In a general way those standards shed light on the issues, but there is sufficient individuality and complexity to that statute, and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history. Moreover, the subject matter of this case—the validity of qualifications for the law enforcement profession—is one in which federal district judges have a greater expertise than in many others. I therefore do not regard this as a case in which the District Court was required to apply Title VII standards as strictly as would

be necessary either in other contexts or in litigation actually arising under that statute.

The Court's specific holding on the job-relatedness question contains, I believe, two components. First, as a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job. I regard this as a reasonable proposition and not inconsistent with the Court's prior holdings, although some of its prior language obviously did not contemplate this precise problem. Second, as a matter of fact, the District Court's finding that there was a correlation between success on the test and success in the training program has sufficient evidentiary support to withstand attack under the "clearly erroneous" standard mandated by Fed. Rule Civ. Proc. 52 (a). Whether or not we would have made the same finding of fact, the opinion evidence identified in n. 17 of the Court's opinion—and indeed the assumption made by the Court of Appeals quoted therein—is surely adequate to support the finding under the proper standard of appellate review.

On the understanding that nothing which I have said is inconsistent with the Court's reasoning, I join the opinion of the Court except to the extent that it expresses an opinion on the merits of the cases cited *ante*, at 244–245, n. 12.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court holds that the job qualification examination (Test 21) given by the District of Columbia Metropolitan Police Department does not unlawfully discriminate on the basis of race under either constitutional or statutory standards.

Initially, it seems to me that the Court should not pass on the statutory questions, because they are not presented by this case. The Court says that respondents' summary judgment motion "rested on purely constitutional grounds," *ante*, at 236, and that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it," *ante*, at 238. There is a suggestion, however, that petitioners are entitled to prevail because they met the burden of proof imposed by 5 U. S. C. § 3304. *Ante*, at 249 n. 15. As I understand the opinion, the Court therefore holds that Test 21 is job related under § 3304, but not necessarily under Title VII. But that provision, by the Court's own analysis, is no more in the case than Title VII; respondents' "complaint asserted no claim under § 3304." *Ante*, at 234 n. 2. Cf. *ante*, at 238 n. 10. If it was "plain error" for the Court of Appeals to apply a statutory standard to this case, as the Court asserts, *ante*, at 238–239, then it is unfortunate that the Court does not recognize that it is also plain error to address the statutory issues in Part III of its opinion.

Nevertheless, although it appears unnecessary to reach the statutory questions, I will accept the Court's conclusion that respondents were entitled to summary judgment if they were correct in their statutory arguments, and I would affirm the Court of Appeals because petitioners have failed to prove that Test 21 satisfies the applicable statutory standards.¹ All parties' arguments and

¹ Although I do not intend to address the constitutional questions considered by the Court in Part II of its opinion, I feel constrained to comment upon the propriety of footnote 12, *ante*, at 244–245. One of the cases "disapproved" therein is presently scheduled for plenary consideration by the Court in the 1976 Term, *Metropolitan*

both lower court decisions were based on Title VII standards. In this context, I think it wrong to focus on § 3304 to the exclusion of the Title VII standards, particularly because the Civil Service Commission views the job-relatedness standards of Title VII and § 3304 as identical.² See also *infra*, at 263.

In applying a Title VII test,³ both the District Court and the Court of Appeals held that respondents had offered sufficient evidence of discriminatory impact to shift to petitioners the burden of proving job relatedness. 348 F. Supp. 15, 16; 168 U. S. App. D. C. 42, 45-47, 512 F. 2d 956, 959-961. The Court does not question these rulings, and the only issue before us is what petitioners were required to show and whether they carried their burden. The Court agrees with the District Court's conclusion that Test 21 was validated by a positive relationship between Test 21 scores and performance in police training courses. This result is based upon the Court's reading of the record, its interpretation of in-

Housing Development Corp. v. Village of Arlington Heights, 517 F. 2d 409 (CA7), cert. granted, 423 U. S. 1030 (1975). If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.

² The only administrative authority relied on by the Court in support of its result is a regulation of the Civil Service Commission construing the civil service employment standards in Title 5 of the United States Code. *Ante*, at 250-251, n. 16. I note, however, that 5 U. S. C. § 3304 was brought into this case by the CSC, not by respondents, and the CSC's only reason for referring to that provision was to establish that petitioners had been "following the job-related standards of *Griggs* [*v. Duke Power Co.*, 401 U. S. 424 (1971).] for the past eighty-eight years." *Ante*, at 249 n. 15.

³ The provision in Title VII on which petitioners place principal reliance is 42 U. S. C. § 2000e-2 (h). See *Griggs v. Duke Power Co.*, *supra*, at 433-436.

structions governing testing practices issued by the Civil Service Commission (CSC), and "the current views of the Civil Service Commissioners who were parties to the case." We are also assured that today's result is not foreclosed by *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975). Finally, the Court asserts that its conclusion is "the much more sensible construction of the job-relatedness requirement." *Ante*, at 251.

But the CSC instructions cited by the Court do not support the District Court's conclusion. More importantly, the brief filed in this Court by the CSC takes the position that petitioners did not satisfy the burden of proof imposed by the CSC guidelines. It also appears that longstanding regulations of the Equal Employment Opportunity Commission (EEOC)—previously endorsed by this Court—require a result contrary to that reached by the Court. Furthermore, the Court's conclusion is inconsistent with my understanding of the interpretation of Title VII in *Griggs* and *Albemarle*. I do not find this conclusion "much more sensible," and with all respect I suggest that today's decision has the potential of significantly weakening statutory safeguards against discrimination in employment.

I

On October 12, 1972, the CSC issued a supplement to the Federal Personnel Manual containing instructions for compliance with its general regulations concerning employment practices.⁴ The provision cited by the Court

⁴ See 5 CFR § 300.101 *et seq.* (1976). These instructions contain the "regulations" that the Court finds supportive of the District Court's conclusion, which was reached under Title VII, but neither the instructions nor the general regulations are an interpretation of

requires that Test 21 "have a demonstrable and rational relationship to important job-related performance objectives identified by management." "Success in training" is one example of a possible objective. The statistical correlation established by the Futransky validity study, *ante*, at 251 n. 17, was between applicants' scores on Test 21 and recruits' average scores on final examinations given during the police training course.

It is hornbook law that the Court accord deference to the construction of an administrative regulation when that construction is made by the administrative authority responsible for the regulation. *E. g.*, *Udall v. Tallman*, 380 U. S. 1, 16 (1965). It is worthy of note, therefore, that the brief filed by the CSC in this case interprets the instructions in a manner directly contrary to the Court, despite the Court's claim that its result is supported by the Commissioners' "current views."

"Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).

"The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There

Title VII. The instructions were issued "under authority of sections 3301 and 3302 of title 5, United States Code, and E. O. 10577, 3 CFR 1954-58 Comp., p. 218." 37 Fed. Reg. 21552 (1972). The pertinent regulations of the CSC in 5 CFR § 300.101 *et seq.* were promulgated pursuant to the same authorities, as well as 5 U. S. C. §§ 7151, 7154 and Exec. Order No. 11478, 3 CFR 803 (1966-1970 Comp.).

is little evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. *It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant.*"

Brief for CSC 14-15 (emphasis added).

The CSC maintains that a positive correlation between scores on entrance examinations and the criterion of success in training may establish the job relatedness of an entrance test—thus relieving an employer from the burden of providing a relationship to job performance after training—but only subject to certain limitations.

"Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the entrance examination. There must also be evidence—the nature of which will depend on the particular circumstances of the case—showing that the achievement test scores are an appropriate measure of the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job." *Id.*, at 24-25.

Applying its standards⁵ the CSC concludes that none of

⁵ The CSC asserts that certain of its guidelines have some bearing on Test 21's job relatedness. Under the CSC instructions, "criterion-related validity," see *Douglas v. Hampton*, 168 U. S. App. D. C. 62, 70 n. 60, 512 F. 2d 976, 984 n. 60 (1975), can be established by

the evidence presented in the District Court established "the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer." *Id.*, at 30.⁶

The CSC's standards thus recognize that Test 21 can be validated by a correlation between Test 21 scores and recruits' averages on training examinations only if (1) the training averages predict job performance or (2) the averages are proved to measure performance in job-related training. There is no proof that the recruits' average is correlated with job performance after completion of training. See n. 10, *infra*. And although a positive relationship to the recruits' average might be sufficient to validate Test 21 if the average were proved to reflect mastery of material on the training curriculum that was in turn demonstrated to be relevant to job performance, the record is devoid of proof in this regard. First, there is no demonstration by petitioners that the training-course examinations measure comprehension of the training curriculum; indeed, these examinations do not even appear in the record. Furthermore, the Futransky study simply designated an average of 85 on the

demonstrating a correlation between entrance examination scores and "a criterion which is legitimately based on the needs of the Federal Government." ¶S3-2 (a) (2), 37 Fed. Reg. 21558 (1972). Further, to prove validity, statistical studies must demonstrate that Test 21, "to a significant degree, measures performance or qualifications requirements which are relevant to the job or jobs for which candidates are being evaluated." ¶S3-3 (a), 37 Fed. Reg. 21558 (1972). These provisions are ignored in the Court's opinion.

⁶ On this basis, the CSC argues that the case ought to be remanded to enable petitioners to try to make such a demonstration, but this resolution seems to me inappropriate. Both lower courts recognized that petitioners had the burden of proof, and as this burden is yet unsatisfied, respondents are entitled to prevail.

examination as a "good" performance and assumed that a recruit with such an average learned the material taught in the training course.⁷ Without any further proof of the significance of a score of 85, and there is none in the record, I cannot agree that Test 21 is predictive of "success in training."

II

Today's decision is also at odds with EEOC regulations issued pursuant to explicit authorization in Title VII, 42 U. S. C. § 2000e-12 (a). Although the dispute in this case is not within the EEOC's jurisdiction, as I noted above, the proper construction of Title VII nevertheless is relevant. Moreover, the 1972 extension of Title VII to public employees gave the same substantive protection to those employees as had previously been accorded in the private sector, *Morton v. Mancari*, 417 U. S. 535, 546-547 (1974), and it is therefore improper to maintain different standards in the public and private sectors. *Chandler v. Roudebush*, 425 U. S. 829, 864 (1976). See n. 2, *supra*.

As with an agency's regulations, the construction of a statute by the agency charged with its administration is entitled to great deference. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 210 (1972); *Udall v. Tallman*, 380 U. S., at 16; *Power Reactor Co. v. Electricians*, 367 U. S. 396, 408 (1961). The defer-

⁷ The finding in the Futransky study on which the Court relies, *ante*, at 251 n. 17, was that Test 21 "is effective in selecting trainees who can learn the material that is taught at the Recruit School," because it predicts averages over 85. On its face, this would appear to be an important finding, but the fact is that *everyone* learns the material included in the training course. The study noted that all recruits pass the training examinations; if a particular recruit has any difficulty, he is given assistance until he passes.

ence due the pertinent EEOC regulations is enhanced by the fact that they were neither altered nor disapproved when Congress extensively amended Title VII in 1972.⁸ *Chemehuevi Tribe of Indians v. FPC*, 420 U. S. 395, 410 (1975); *Cammarano v. United States*, 358 U. S. 498, 510 (1959); *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 547 (1954); *Massachusetts Mut. Life Ins. Co. v. United States*, 288 U. S. 269, 273 (1933). These principles were followed in *Albemarle*—where the Court explicitly endorsed various regulations no fewer than eight times in its opinion, 422 U. S., at 431–436⁹—and *Griggs*, 401 U. S., at 433–434.

The EEOC regulations require that the validity of a job qualification test be proved by “empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.” 29 CFR § 1607.4 (c) (1975). This construction of Title VII was approved in *Albemarle*, where we quoted this provision and remarked that “[t]he message of these Guidelines is the same as that of the *Griggs* case.” 422 U. S., at 431. The regulations also set forth minimum standards for

⁸ Still another factor mandates deference to the EEOC regulations. The House and Senate committees considering the 1972 amendments to Title VII recognized that discrimination in employment, including the use of testing devices, is a “complex and pervasive phenomenon.” S. Rep. No. 92–415, p. 5 (1971); H. R. Rep. No. 92–238, p. 8 (1971). As a result, both committees noted the need to obtain “expert assistance” in this area. S. Rep. No. 92–415, *supra*, at 5; H. R. Rep. No. 92–238, *supra*, at 8.

⁹ Indeed, two Justices asserted that the Court relied too heavily on the EEOC guidelines. 422 U. S., at 449 (BLACKMUN, J., concurring in judgment); *id.*, at 451 (BURGER, C. J., concurring in part and dissenting in part).

validation and delineate the criteria that may be used for this purpose.

“The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.” 29 CFR § 1607.5 (b)(3) (1975).

This provision was also approved in *Albemarle*. 422 U. S., at 432, and n. 30.

If we measure the validity of Test 21 by this standard, which I submit we are bound to do, petitioners' proof is deficient in a number of ways similar to those noted above. First, the criterion of final training examination averages does not appear to be “fully described.” Although the record contains some general discussion of the training curriculum, the examinations are not in the record, and there is no other evidence completely elucidating the subject matter tested by the training examinations. Without this required description we cannot determine whether the correlation with training examination averages is sufficiently related to petitioners' need to ascertain “job-specific ability.” See *Albemarle*, 422 U. S., at 433. Second, the EEOC regulations do not expressly permit validation by correlation to training performance, unlike the CSC instructions. Among the specified criteria the closest to training performance is “training time.” All recruits to the Metropolitan Police Department, however, go through the

same training course in the same amount of time, including those who experience some difficulty. See n. 7, *supra*. Third, the final requirement of § 1607.5 (b)(3) has not been met. There has been no job analysis establishing the significance of scores on training examinations, nor is there any other type of evidence showing that these scores are of "major or critical" importance.

Accordingly, EEOC regulations that have previously been approved by the Court set forth a construction of Title VII that is distinctly opposed to today's statutory result.

III

The Court also says that its conclusion is not foreclosed by *Griggs* and *Albemarle*, but today's result plainly conflicts with those cases. *Griggs* held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited." 401 U. S., at 431 (emphasis added). Once a discriminatory impact is shown, the employer carries the burden of proving that the challenged practice "bear[s] a *demonstrable relationship to successful performance of the jobs* for which it was used." *Ibid.* (emphasis added). We observed further:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*, at 436.

Albemarle read *Griggs* to require that a discriminatory test be validated through proof "by professionally acceptable methods" that it is "predictive of or signifi-

cantly correlated with *important* elements of work behavior *which comprise or are relevant to the job or jobs* for which candidates are being evaluated.'" 422 U. S., at 431 (emphasis added), quoting 29 CFR § 1607.4(c) (1975). Further, we rejected the employer's attempt to validate a written test by proving that it was related to supervisors' job performance ratings, because there was no demonstration that the ratings accurately reflected job performance. We were unable "to determine whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." 422 U. S., at 433 (emphasis in original). To me, therefore, these cases read Title VII as requiring proof of a significant relationship to job performance to establish the validity of a discriminatory test. See also *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802, and n. 14 (1973). Petitioners do not maintain that there is a demonstrated correlation between Test 21 scores and job performance. Moreover, their validity study was unable to discern a significant positive relationship between training averages and job performance.¹⁰ Thus, there is no proof of a correlation—either direct or indirect—between Test 21 and performance of the job of being a police officer.

It may well be that in some circumstances, proof of a relationship between a discriminatory qualification test and training performance is an acceptable substitute for establishing a relationship to job performance. But this question is not settled, and it should not be re-

¹⁰ Although the validity study found that Test 21 predicted job performance for white officers, but see *Albemarle*, 422 U. S., at 433, no similar relationship existed for black officers. The same finding was made as to the relationship between training examination averages and job performance. See *id.*, at 435.

solved by the minimal analysis in the Court's opinion.¹¹ Moreover, it is particularly inappropriate to decide the question on this record. "Professionally acceptable methods" apparently recognize validation by proof of a correlation with training performance, rather than job performance, if (1) the training curriculum includes information proved to be important to job performance and (2) the standard used as a measure of training performance is shown to reflect the trainees' mastery of the material included in the training curriculum. See Brief for CSC 24-29; Brief for the Executive Committee of Division 14 of the American Psychological Assn. as *Amicus Curiae* 37-43. But no authority, whether professional, administrative, or judicial, has accepted the sufficiency of a correlation with training performance in the absence of such proof. For reasons that I have stated above, the record does not adequately establish either factor. As a result, the Court's conclusion cannot be squared with the focus on job performance in *Griggs* and *Albemarle*, even if this substitute showing is reconcilable with the holdings in those cases.

Today's reduced emphasis on a relationship to job performance is also inconsistent with clearly expressed congressional intent. A section-by-section analysis of the 1972 amendments to Title VII states as follows:

"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would

¹¹ The Court of Appeals recognized that deciding whether 42 U.S.C. § 2000e-2 (h) permitted such proof "is not a simple or insignificant endeavor." 168 U.S. App. D. C. 42, 50 n. 59, 512 F.2d 956, 964 n. 59. The court declined to express any view on this issue on the ground that petitioners had not satisfied this standard even if it were acceptable, which seems to me the proper treatment of the question.

continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972).

The pre-1972 judicial decisions dealing with standardized tests used as job qualification requirements uniformly follow the EEOC regulations discussed above and insist upon proof of a relationship to job performance to prove that a test is job related.¹² Furthermore, the Court ignores Congress' explicit hostility toward the use of written tests as job-qualification requirements; Congress disapproved the CSC's "use of general ability tests which are not aimed at any direct relationship to specific jobs." H. R. Rep. No. 92-238, p. 24 (1971). See S. Rep. No. 92-415, pp. 14-15 (1971). Petitioners concede that Test 21 was devised by the CSC for general use and was not designed to be used by police departments.

Finally, it should be observed that every federal court, except the District Court in this case, presented with proof identical to that offered to validate Test 21 has reached a conclusion directly opposite to that of the

¹² *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 456-457 (CA5 1971), cert. denied, 406 U.S. 906 (1972); *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314, 319-321 (ED La. 1970) (issuing preliminary injunction), 321 F. Supp. 1241, 1244 (1971) (issuing permanent injunction). See also *Castro v. Beecher*, 334 F. Supp. 930 (Mass. 1971), aff'd in part and rev'd in part on other grounds, 459 F.2d 725 (CA1 1972); *Western Addition Community Org. v. Alioto*, 330 F. Supp. 536, 539-540 (ND Cal. 1971), 340 F. Supp. 1351, 1354-1356 (1972) (issuing preliminary injunction), 360 F. Supp. 733 (1973) (issuing permanent injunction); *Chance v. Board of Examiners*, 330 F. Supp. 203 (SDNY 1971), aff'd, 458 F.2d 1167 (CA2 1972); *Baker v. Columbus Mun. Sep. School Dist.*, 329 F. Supp. 706, 721-722 (ND Miss. 1971), aff'd, 462 F.2d 1112 (CA5 1972); *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (Mass. 1969).

Court today.¹³ Sound policy considerations support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition. Today's result will prove particularly unfortunate if it is extended to govern Title VII cases.

Accordingly, accepting the Court's assertion that it is necessary to reach the statutory issue, I would hold that petitioners have not met their burden of proof and affirm the judgment of the Court of Appeals.

¹³ *United States v. City of Chicago*, 385 F. Supp. 543, 555-556 (ND Ill. 1974) (police department); *Officers for Justice v. CSC*, 371 F. Supp. 1328, 1337 (ND Cal. 1973) (police department); *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1148-1149 (ND Ohio 1973) (police department), aff'd in part and rev'd in part on other grounds, 520 F. 2d 492 (CA6 1975); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1202-1203 (Md.) (fire department), modified and aff'd, 486 F. 2d 1134 (CA4 1973); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1090-1091 (ED Pa. 1972) (police department), aff'd in pertinent part and vacated in part, 473 F. 2d 1029 (CA3 1973).

FEDERAL POWER COMMISSION v. CONWAY
CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-342. Argued April 21, 1976—Decided June 7, 1976

An Arkansas public utility company (hereinafter Company) that makes wholesale interstate electricity sales, as well as retail industrial sales in competition with some of its wholesale customers (including respondents, seven municipally owned electric systems and two cooperatives, operating within Arkansas) filed a wholesale rate increase with the Federal Power Commission (FPC). Respondents sought to intervene before the FPC, urging that the increase be rejected on the ground that it was "an attempt to squeeze [respondents] . . . out of competition and make them more susceptible to the persistent efforts of the Company to take over the publicly owned systems in the State." The FPC allowed only limited intervention, excluding the alleged anticompetitive activities as outside the FPC's jurisdiction, which does not reach retail sales. The Court of Appeals on review took a contrary position, holding that the Company's retail rates "in a market in which it is competing with its own customers are part of the factual context in which the proposed wholesale rate will function . . ." and should be considered in determining whether or not the rate increase was just and reasonable. *Held*: The FPC's jurisdiction to review a petition to set aside or reduce a public utility's wholesale electric rate increase permits consideration of the utility's alleged purpose to forestall its customers from competing with it at retail. Pp. 276-282.

(a) Though the Federal Power Act confers jurisdiction on the FPC with respect to the sale of electric energy at wholesale in interstate commerce, and the FPC has no authority to correct an alleged discriminatory relationship between wholesale and retail rates by regulating the nonjurisdictional, retail price, § 205 (b) of the Act forbids the maintenance of any "unreasonable difference in rates" or service "with respect to any . . . sale" subject to the FPC's jurisdiction, and a jurisdictional sale is necessarily implicated in respondents' charge that the difference between the Company's wholesale and retail rates is unreason-

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wounding which would otherwise be considered batteries under state law as distinguished from simple "assault" defined in 18 U.S.C. 113(e) and therefore, the ACA was not properly used in this instance.³

The Sixth Circuit in *Griffith* examined the cases arising after *Williams* and grouped them into four principal categories:

- 1) cases in which all actions criminal under federal law are criminal under state law, but under state law additional acts are criminal as well⁴;
- 2) cases in which the federal law encompasses a broader area than the state law and in which the state law usually carries greater penalties or ease of proof⁵;
- 3) cases in which the state and federal laws overlap to a degree, but each occupies an area not covered by the other⁶; and
- 4) cases which involve the same pattern of laws as the preceding group, namely overlapping state and federal laws, but these acts fall into a disjunctive area where the acts constitute a crime under state law, but not under federal law⁷.

The crux of the government's argument in the case at bar is that it is proceeding under the ACA because the state statute provides a theory essentially different from that in the federal statute, as in the third category of cases discussed above. The state statute embodies the compelling state interest in the protection of children under the age of twelve and in providing a deterrent against child abuse. The federal homicide statutes are silent in this regard.

3. The court stated that it was an established rule in the Seventh Circuit that "[w]here the government wrongly secures a conviction under the Assimilated Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not a reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing." *Id.* at p. 645, citing *U.S. v. Word*, 519 F.2d 612, 618 (8th Cir. 1975).

4. *U.S. v. Williams*, supra.

5. *Shirley v. U.S.*, 554 F.2d 767, 768-769 (6th Cir.1977); (state law charge of armed robbery was a more specific and more harshly punished form of the federal crime of robbery; court held that where the federal crime "already occupied the field", the ACA could be used simply to enhance punishment or to facilitate conviction);

The government insists that Louisiana, by enacting R.S. 14:30(A)(5), has established a specially protected class of citizens, i.e. children under the age of twelve. Further, Louisiana has determined that if an individual, with specific intent to kill or to inflict bodily harm upon a victim less than twelve years of age, does so, then that action is egregious enough to classify it as first degree murder.

In support of its position, the government cited *United States v. Fesler*, 781 F.2d 384 (5th Cir.1986), cert. den. 476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d 661, in which the Fifth Circuit upheld the conviction of defendants charged with violating the Texas child abuse statute. The court reasoned that "it is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." 781 F.2d at 391.

Although the defendants' memoranda in support of their motions to dismiss seem to posit that the government would be required to prosecute the defendants for first degree murder under the federal statute if they are prosecuting for first degree murder under the state statute, this is not the case. 18 U.S.C. § 1111 requires specific intent to kill or malice aforethought for a conviction of first degree murder. The statute also lists certain aggravating factors which would classify certain other murders as "first degree". The statute states that all other murders are murders in the second degree. LSA R.S. 14:30(A)(1) requires specific intent to kill or to inflict great bodily harm. The state stat-

U.S. v. Big Crow, 523 F.2d 955, 958 (8th Cir. 1975) (state law prohibited assault resulting in serious bodily injury; court held that federal assault statute applied even if less severe penalty attaches).

6. *Fields v. U.S.*, 438 F.2d 205 (2d Cir.1971), cert. den. 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971) (the acts committed would have been a crime under the state malicious shooting statute or the federal assault statute, but the prosecution proceeded under state law through the ACA; court held use of ACA proper because the two statutes involved completely different theories of criminal conduct); See also *U.S. v. Brown*, 608 F.2d 551 (5th Cir.1979) (state child abuse statute better fit the facts of the case even though the case could have been prosecuted under the federal assault statute).

7. *U.S. v. Griffith*, supra.

ute in R.S. 14:30(A)(5) also def first degree murder, however, as the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

Considering that the state statute seeks to punish child abuse, a particular offense at which the federal statute is not aimed, and that the "precise act" constituting first degree murder under the state statute is different from the federal definition of first degree murder, this court holds that the use of the ACA is proper and the defendants' motions to dismiss will be denied.



Kenya HILL, Feneisha Hill, Minor Children, By and Through Their Parents and Guardians, William M. HILL and Sherry A. Hill, Brandon Turner, Daniel Turner, Heather Turner, Minor Children, By and Through Their Parents and Guardians, Danny B. Turner and Kathy V. Turner, Danielle Jones, Jeremy Lee Jones, Minor Children, By and Through Their Parents and Guardians, Anthony Jones and Rosetta Jones, Leterrence Darnell Johnson, Minor Child, By and Through His Parent and Guardian, Hope Denise Lancaster and Tracey Lancaster, Greene County Branch of the National Association for the Advancement of Colored People

v.

GREENE COUNTY SCHOOL DISTRICT; Greene County Board of Trustees; Wilma Leverette; Marvin Welford; Gerald Denmark; Lavell Henderson; George Perkins.

Civ. A. No. 2:89-cv-151WS.

United States District Court,
S.D. Mississippi,
Hattiesburg Division.

Feb. 2, 1994.

Parents, students and civil rights organization brought suit against school district

and school officials seeking injunctive relief requiring reopening of predominately black school that had been closed due to presence of friable asbestos. The District Court, Wingate, J., held that preliminary injunctive relief would not issue requiring school district to reopen building after renovation, given district's financial problems, presence of valid nonracial reason for closure of school, failure to show any constitutional deprivation sufficient for issuance of preliminary injunction, and public interest that was best served by transferring students away from facility where they would be exposed to friable asbestos.

Motion for injunctive relief denied.

1. Injunction ⇨132

Preliminary injunction is extraordinary remedy; accordingly decision to grant preliminary injunction is to be treated as exception rather than rule.

2. Injunction ⇨147

Federal district court should use balancing-type approach in reviewing application for injunctive relief; heavy burden of proof in justifying injunction is wholly on movant; nonmoving party bears no burden to defeat motion for injunctive relief.

3. Injunction ⇨138.54

Parents and students who attended predominantly black elementary school were not entitled to preliminary injunction requiring school district to reopen school, which had been closed because of presence of friable asbestos, which presented health hazard to students, given evidence of school district's financial inability to fund removal of asbestos from building, unavailability of federal or state funds to cover removal, inability to seal off those portions of school building which were affected by asbestos, and failure of bond issue that would have increased taxes to pay for removal of asbestos; there was no showing of any constitutional deprivation sufficient for issuance of preliminary relief, and

public interest was best served by transferring students away from facility where they would be exposed to asbestos, even if they would be exposed to longer bus rides.

Michael Adelman, Hattiesburg, MS, for plaintiffs.

James A. Keith, Jackson, MS, for defendants.

MEMORANDUM OPINION

WINGATE, District Judge.

Before the court is plaintiffs' motion for an injunction pursuant to Rule 65, Federal Rules of Civil Procedure, to require the defendant Greene County School District to reopen the State Line Elementary School located in State Line, Mississippi. Plaintiffs here are students who attended State Line Elementary School, their parents, and the Greene County Branch of the National Association for the Advancement of Colored People (hereinafter "NAACP"). Defendants are the Greene County School District, Greene County Board of Trustees, Wilma Leverette, Marvin Welford, Gerald Denmark, Lavell Henderson, and George Perkins. State Line Elementary School programmed to neighborhood children in grades K to 8. In 1988, State Line Elementary was closed by the Greene County School District (hereinafter "School District") after School District authorities learned that the physical plant of the elementary school contained friable asbestos,¹ which, all agree, poses a serious health hazard. Aggrieved over the closure, plaintiffs have charged in their complaint that defendants' action violates the Fourteenth Amendment² of the Constitution of the United States, as well as Title 42 U.S.C. § 2000d.³ In a nutshell, plaintiffs charge

1. Friable asbestos is material easily crumbled or reduced to powder.

2. The Fourteenth Amendment provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

that the defendants' motives in closing State Line, a predominantly black school, were rooted in racial animus. Plaintiffs thus ask the court to find racial discrimination here and order the defendants to reopen the school, after it has been renovated in accordance with the criteria imposed by the Mississippi Department of Education to provide a clean and safe environment. Defendants oppose plaintiffs' request for injunctive relief, vigorously denying any racial animus, while asserting dilemmas of the pocketbook as the sole cause of the school's closing.

This court has held a lengthy hearing on the matter, having heard from a number of live witnesses and having received into evidence voluminous documentary material relating to the demographics of Greene County, the School District's transportation program, the physical condition of the elementary school, and the proceedings conducted by the official bodies entrusted with the operation and maintenance of the Greene County Schools. Fully educated by the pointed and, in some cases, passionate testimony of the witnesses for both sides and the mass of relevant documentary material, this court is persuaded to deny plaintiffs' request for an injunction.

PROLONGED ATTEMPTS TO SETTLE THIS DISPUTE

Several times since the evidentiary hearing in this dispute, the court and the parties wrongfully concluded that this lawsuit was on the verge of settlement. As always, this court encourages parties to reach a harmonious compromise if such is attainable. Settlements conserve judicial resources, obviate appeals, foster goodwill, and allow both sides to claim a measure of victory. The efforts at

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

3. Title 42 U.S.C. § 2000d provides as follows:

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.

HILL v. GREENE COUNTY SCHOOL DIST.

Cite as 848 F.Supp. 697 (S.D.Miss. 1994)

resolving this dispute were remarkable in that the efforts spanned over two years and contemplated some original solutions. Generally, where the court probes at settlement but finds no bedrock basis in a short time, the matter is reactivated on the judicial calendar and resolved juridically. However, this case was an atypical one, in that both sides expressed keen interest in reopening the school and both sides were willing to exhaust amicable, unified efforts towards resolving the matter before requesting a ruling on plaintiffs' motion for an injunction. Both sides favored a school in the State Line area and neither side wanted in its midst an asbestos-laden, abandoned, unusable school complex containing classrooms, a gymnasium, a cafeteria, and a band room. While plaintiffs sought to compel defendants to renovate the school and clean out the asbestos, plaintiffs were sharply aware of defendants' statements that the School District not only was financially unable to remove the asbestos, but also was financially unable to acquire the requisite Environmental Protection Agency (hereinafter "EPA") demolition certificate and personnel to tear down the structure. So, in good faith, the parties conferred and collaborated on efforts to resolve this lawsuit short of a court resolution.

First, the parties explored the prospect of gaining the approval of the School District electorate for the issuance of school bonds. After the initial hearing in this action, the parties entered into an agreed Provisional Consent Judgment, which in part provided for a bond issue election to fund the asbestos removal and also to make the necessary capital improvements at State Line to bring the school into compliance with the State Department of Education standards of accreditation. However, the June 5, 1990, bond election failed by a vote of 325 (15%) for and 2,033 (85%) against. The State Line precinct voted against the bond issue by a margin of 137 (43%) for and 157 (57%) against. Under state law, the bond issue required a 60% margin to pass. See Miss.Code Ann. § 37-59-17 (1972) (effective March 3, 1987).

Notwithstanding the failed bond issue, the parties pressed on with additional efforts to find a non-judicial solution. The plaintiffs

investigated measures of raising the needed monies themselves. The defendants sought grants from the State and various organizations. These attempts failed.

Then, the court and parties hit on the idea of seeking the services of experts who, free of charge, would remove the asbestos. When personnel with the requisite expertise assigned to the United States Keesler Air Force Base in Biloxi, Mississippi, agreed to remove the asbestos at State Line Elementary at no cost to the School District, all counsel deemed this to be a miraculous solution.

In October of 1990, the Keesler personnel began the removal process, but the friable material was worse than originally expected. Keesler personnel reported that they would need special air filtration machinery to complete the job. This machinery was not immediately available at Keesler Air Force Base, but was on back order. Consequently, the clean up project at State Line Elementary School was delayed while the new machinery made its way to the Air Force base. After the machinery's arrival, more delay was encountered. The Air Force experts had to obtain special permission through military channels in order to use the machinery on a volunteer project such as the asbestos clean-up project at State Line Elementary.

Eventually, permission was obtained to use the new machinery, but another development stopped the asbestos removal project in early 1991. Although the Keesler Air Force Base personnel were federally certified to conduct asbestos removal operations, these experts were not licensed in accordance with the higher standards imposed by Mississippi Commission on Environmental Quality regulations which became effective in November of 1990. Accordingly, Keesler personnel could not proceed without obtaining either state certification or a special exemption from the state authorities. Martha Sartor, coordinator of community projects at Keesler Air Force Base, enlisted the assistance of defendants' counsel to expedite this matter.

In their attempt to surmount this hurdle, defendants' counsel contacted the Attorney General's Office of the State of Mississippi. Defendants were directed first to chief counsel for the Natural Resources Division, then

to counsel for the Mississippi Department of Environmental Quality. However, the Department of Environmental Quality eventually determined that only one of the Air Force personnel was qualified to conduct the project under Mississippi's regulatory requirements. In order to gain certificates under these regulatory requirements, the non-qualified Keesler personnel would be required to participate in a refresher course approved by the EPA.

Defendants contacted Martha Sartor and informed her of the state's requirements. She responded that while Keesler personnel would be happy to become certified pursuant to Mississippi's regulations, Keesler Air Force Base could not justify the expense of doing so for just one project. Ms. Sartor suggested that the defendants contact Ben Rosenkrans, Director of Continuing Education at Mississippi State University. When contacted, Mr. Rosenkrans stated that six Keesler personnel could be trained, one as a supervisor and the rest as asbestos workers at a cost of \$2,350.00. Defendants' counsel then recommended to the School District that this be done. However, according to the defendants, the School District continues to

suffer cuts in funding and has been barely able to meet its normal operating expenses. Hence, say defendants, the School District has been unable to allocate funds for training the Keesler personnel.

Frustrated by these constant hurdles and pessimistic about finding a non-judicial solution, the plaintiffs have asked the court to place the case back on its active docket and to move it along the judicial pathways to a resolution. Accordingly, the court now stands ready to rule on plaintiffs' request for injunctive relief, based upon the evidence presented at the earlier evidentiary hearing.

PERTINENT FACTS

The School District operates three elementary schools, one junior high school and one high school. Prior to July 10, 1989, the School District operated a fourth elementary school at State Line, Mississippi. According to defendants' Exhibit 1, the racial breakdown of the student enrollment at each of the schools in the district immediately before and after the closure of State Line Elementary School was as follows:

LEAKESVILLE ELEMENTARY

1988		TOTAL	1989		TOTAL
B	W		B	W	
62 (17.5%)	292 (82.5%)	354	130 (26.3%)	364 (73.7%)	494

McLAIN ELEMENTARY

1988		TOTAL	1989		TOTAL
B	W		B	W	
122 (44.4%)	153 (55.6%)	275	114 (42.7%)	153 (57.3%)	267

SAND HILL ELEMENTARY

1988		TOTAL	1989		TOTAL
B	W		B	W	
21 (6.7%)	292 (93.3%)	313	6 (2.1%)	287 (97.9%)	293

STATE LINE ELEMENTARY

1988		TOTAL	1989		TOTAL
B	W		B	W	
197 (74.6%)	67 (25.4%)	264	—	—	—

From these statistics, one immediately notes that of the four elementary schools, only State Line had a predominantly black student population in 1988. Upon State Line's closure, no elementary school was predominantly black.

Plaintiffs contend that defendants historically have ignored State Line Elementary, while reserving all of the perks for the majority-white elementary schools. Pursuant to this discriminatory attitude, according to plaintiffs, the defendants have permitted

HILL v. GREENE COUNTY SCHOOL DIST.

Cite as 848 F.Supp. 697 (S.D.Miss. 1994)

701

State Line Elementary to fall into a deplorable state of repair since 1969 when State Line Elementary became a predominantly African American school. As an example of the School District's discriminatory treatment, plaintiffs cite the variant circumstances relative to the defendants' installation of new heating units at Sand Hill and State Line elementary schools. While Sand Hill's needs were met quickly in January of 1988, say plaintiffs, State Line Elementary had to wait until the fall of 1988, and only then was awarded the new heating unit after parents complained to the Department of Education's Office of Civil Rights (hereinafter "OCR").

Relative to the closure of State Line Elementary, plaintiffs contend that asbestos was found not only at State Line Elementary, but also at McLain and Sand Hill. No attempts were made to close these schools, charge plaintiffs.

Additionally, charge plaintiffs, the consequences of defendants' choice to close State Line Elementary in the long run will prove a more costly decision than one to remove the asbestos. According to the plaintiffs, a feasibility study conducted by the School District revealed that the friable asbestos could be removed from State Line Elementary at a cost of approximately \$44,000.00. Contrariwise, the cost of closing State Line Elementary includes the added expenses incurred by the School District in bussing former State Line Elementary students to their newly-assigned schools. The increased financial cost, say plaintiffs, at a minimum amounts to \$67,000.00 per year. And, continues the plaintiffs, even the defendants' experts project additional transportation costs of approximately \$20,000.00 per year.

Plaintiffs aver that in the aftermath of State Line Elementary School's closure, they

have been subjected to yet another cost, the psychological strain imposed upon students of tender years who must endure bussing over great distances and upon parents who fret over the safety of their children constantly exposed to the possibility of highway accidents.

In summary, plaintiffs claim that the School District's decision to close State Line Elementary was predicated on racially discriminatory reasons and that the unsoundness of the decision is manifest by the consequential, adverse unbalanced costs, both financial and psychological. Plaintiffs are convinced that a neighborhood school⁴ would better serve their educational needs and would be a needed, accessible magnet for community projects. Accordingly, plaintiffs campaign for an injunction from this court which would order the reopening of the school.

The defendants take umbrage at plaintiffs' charge of racial discrimination. Taking the offensive, defendants point out that since 1975 the School District has operated under a voluntary desegregation plan administered by the OCR. On several occasions since 1985, say defendants, the OCR has investigated complaints that the School District violated the desegregation plan, but found such complaints unsubstantiated. In support of this statement, defendants hold up defendants' Exhibit 5, a letter from the OCR to the Superintendent of the School District. This letter reflects that on February 17, 1988, the OCR summarized its investigation regarding complaints of race discrimination in the administration of discipline and handicap discrimination in violation of federal law. According to Exhibit D-5, the OCR found that, "the District's discipline practices appear to comply with the requirements of Title VI, 42 U.S.C. § 2000d, *et seq.*, and the District did not violate Section 504."⁵

4. Audrey Fisher Brown, NAACP representative from Washington, D.C., testified that neighborhood schools were preferred and served the best interest of the children. This view marks a departure from the NAACP's previous position that neighborhood schools hinder the attainment of a unitary school system. The NAACP now prefers the neighborhood school concept, despite its tendency to foster single-race schools.

5. Title 29 U.S.C. § 794 (section 504) provides: No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal

Next, the defendants submit defendants' Exhibit 6, another letter from the OCR to the School District. This correspondence shows that on January 6, 1989, the OCR responded to complaints of racial discrimination in: (1) the comparability of services and courses among the schools in the district; (2) the certification of principals; (3) the disbursement of funds to schools; and (4) the assignment of teachers. Defendants proudly point out that according to Exhibit D-6, the OCR found that, "the District is in compliance with Title VI regarding comparability, certification of principals and the disbursement of funds." Furthermore, the letter concluded that based on "the assurance provided by the District to resolve the [violation concerning assignment of teachers], we consider the District to be presently fulfilling its compliance with respect to Title VI."

Then, defendants offer defendants Exhibit 7, another in a series of letters reporting the OCR's findings to the School District. In this letter dated January 30, 1989, the OCR found the School District to be in compliance with Title VI regarding the employment of black principals and placement of the educationally retarded.

On March 7, 1990, the OCR concluded its review of complaints concerning race discrimination in (1) assignment of teachers and (2) transportation of black students to State Line. The OCR found that "teachers have now been assigned in accordance with the District's desegregation plan" and that the "closing of State Line Elementary School furthers desegregation of the Leakesville Elementary and Leakesville Junior High Schools and resolves a health factor due to the concentration of friable asbestos present in State Line School." (See defendants' Exhibits 8 and 9).

Defendants conclude that these OCR findings show that the School District over the years has been subjected to close observation

Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such

by the OCR and that in every occasion, even after the School District voted to close State Line Elementary School, the OCR has determined that the School District was in compliance with its desegregation plan.

Relative to plaintiffs' contention that the School District accorded State Line Elementary inequitable treatment, the defendants deny the charge and assert that they have fairly distributed the few, precious funds it had.

Addressing the dispute surrounding the installation of heating units at Sand Hill and State Line Elementary, the defendants say that they had to install the heating unit at Sand Hill first for an understandable reason: the Mississippi State Fire Marshal had threatened to close the school in December of 1987 unless the heating system was repaired immediately.

The defendants acknowledge plaintiffs' next allegation that while asbestos was found also at McLain and Sand Hill, that only State Line Elementary was closed. But, defendants point out that only State Line Elementary had friable asbestos,⁶ the most dangerous type as it is material easily crumbled or reduced to powder.

While the plaintiffs contend that the defendants have not been forthcoming with the funds required to overcome the asbestos health hazard, defendants respond that the absence of more significant monetary support by the School District to the elementary school at State Line resulted from the School District's precarious financial condition, rather than from any invidious racial discrimination. The defendants offer several examples to support their statements that they were monetarily unable to remove the asbestos health hazard. For example, in December of 1988, say the defendants, the State Department of Education placed the Greene County School District on probation for deficit financing in violation of state law (Miss.Code

regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees

6. The other types of asbestos are non-friable and stable and do not present an immediate health hazard.

Ann. § 37-19-61) and State Department of Education Regulations. This probationary status was still in effect when the School District voted to close State Line in July 1989 and when this court initially heard this dispute in October 1989.

Notwithstanding the School District's probationary status, the defendants contend that after the discovery of the asbestos, they took a number of steps, without success, to comply with federal law regarding removal of asbestos pursuant to 15 U.S.C. § 2641.⁷ Defendants say the school board considered enclosing or sealing the area containing the asbestos, but could not be assured that this alternative was safe. According to the defendants, no federal or state agency had funds available for removal of asbestos. So, after advertising, the defendants say on June 8, 1989, the School District received a bid of approximately \$51,000.00 from a private contractor to remove the asbestos from State Line Elementary. However, the School District had a budgetary deficit of \$750,000.00 at the time this bid was received. Therefore, continue the defendants, believing there was no other alternative, on July 10, 1989, the School Board voted to close State Line Elementary pending receipt of funds to cover removal of asbestos. According to the defendants, the Board took this action rather than incur an additional debt to remove the asbestos and further increase the deficit.

The defendants give additional examples of the financial straits they have navigated while remaining unable to address the asbestos problem at State Line Elementary School. For instance, say defendants, during the summer of 1989, the School District re-

ceived \$216,776.00 from the Greene County Board of Supervisors pursuant to the "short-fall" statute, Miss.Code Ann. § 27-39-333. This statute provides that a school district may borrow money in anticipation of ad valorem taxes it may receive. The school district used these funds to meet payroll and operating expenses. By law, this money could not be used to remove asbestos.

In order to raise cash for regular operating expenses, defendants note that the School District borrowed money in mid-1989 pursuant to Miss.Code Ann. §§ 37-59-101 to 111.⁸ Defendants say this money is to be repaid over three years by an assessment of one mill per year. Under this procedure, a school district adopts a resolution specifying how the money will be spent. See Miss.Code Ann. § 37-59-103. A resolution was adopted on February 19, 1989, to pay off the heating units at State Line Elementary and Sand Hill Elementary schools. The School District paid off prior obligations arising from the construction of Greene County High School, renovated the heating unit at Leakesville Junior High School, made repairs at McLain Elementary School, and purchased replacement school buses. According to the defendants, the "3-mill" money is to be repaid through an increase in ad valorem taxes, but could not be applied to remove asbestos.

Defendants explain that the School District also received money from the sale of sixteenth section timber. However, a State Forestry Commission mandate required that the proceeds be applied to the School District's deficit.

In conclusion, say the defendants, the State Line Elementary School is in poor

The school board of any school district in the county is authorized and empowered, in its discretion, to borrow money under the terms and conditions specified in this article for the purpose of making repairs, alterations and additions to school buildings of such school districts, for the purpose of erecting school buildings and other buildings used for school purposes, for the purpose of purchasing heating plants, fixtures and equipment for such buildings, for the purpose of purchasing land for school purposes, school buses and transportation equipment, and for the purpose of improving and equipping such lands for school recreational and athletic purposes.

7. Title 15 U.S.C. § 2641(b) provides as follows:

The purpose of this subchapter is—

(1) to provide for the establishment of Federal regulations which require inspection for asbestos-containing material and implementation of appropriate response actions with respect to asbestos-containing material in the Nation's schools in a safe and complete manner.

(2) to mandate safe and complete periodic reinspection of school buildings following response actions, where appropriate; ...

8. Miss.Code Ann. § 37-59-101 provides as follows:

physical condition; the asbestos-infected buildings pose a significant health hazard to faculty and students who would attend the facility and breathe its atmosphere; the School District would surely lose state funding even if it callously ignored this danger and sought to operate the school in this condition; and presently, the School District's pocketbook is simply not large enough to fund removal of the asbestos. Accordingly, conclude defendants, they had no option available to them except to close the school and bus its students elsewhere.

APPLICABLE LAW

Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir.1974), is the case most often cited for the four factors this court must consider when determining whether to issue a temporary restraining order or preliminary injunction. Those factors are as follows:

- (1) a substantial likelihood that plaintiff will prevail on the merits,
- (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
- (3) that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant, and
- (4) that granting the preliminary injunction will not disserve the public interest.

Id. at 572; see also *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993); *Black Fire Fighters Ass'n v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir.1990); *Allied Mktg. Group, Inc. v. CDL Mktg. Group, Inc.*, 878 F.2d 806, 809 (5th Cir.1989); *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989); *Plains Cotton Coop. Ass'n v. Goodpasture Computer Servs., Inc.*, 807 F.2d 1256, 1259 (5th Cir.1987); *Mississippi Power & Light v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir.1985).

[1] A preliminary injunction is an extraordinary remedy. *Black Fire Fighters Ass'n*, 905 F.2d at 65; *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985); *Callaway*, 489 F.2d at 573 (5th Cir.1974). Accordingly, the decision to grant a preliminary

injunction is to be treated as the exception rather than the rule. *State of Texas v. Seatrains Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975).

Furthermore, injunctive relief should only be granted if the movant has clearly carried the burden of persuasion on all four prerequisites. *Black Fire Fighters Ass'n*, 905 F.2d at 65; *Enterprise Int'l*, 762 F.2d 464, 472 (5th Cir.1985); *United Gas Pipe Line*, 760 F.2d at 621; *Apple Barrel Prods. v. Beard*, 730 F.2d 384 (5th Cir.1984); and *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir.1982). See 7 James W. Moore et al., *Moore's Federal Practice* ¶65-04[1] (2d ed. 1993) (remarking that unlike other circuits which hold that no single factor is determinative, the Fifth Circuit Court of Appeals requires the movant to carry the burden of proof on each factor). Failure to prove even one of the prerequisites means that the request for injunctive relief must be denied. *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 120 (5th Cir.1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 668-69, 62 L.Ed.2d 646 (1980).

[2] The Fifth Circuit has established no particular quantum of proof as to each of the four criteria. The district court should use a balancing-type approach in reviewing an application for injunctive relief. See *Louis v. Meissner*, 530 F.Supp. 924, 925 (S.D.Fla. 1981), citing *Seatrains Int'l, S.A.*, 518 F.2d at 180. The heavy burden of proof in justifying an injunction is wholly on the movant. *Murillo v. Musegades*, 809 F.Supp. 487, 497 (W.D.Tex.1992), citing *Hardin v. Houston Chron. Publishing Co.*, 572 F.2d 1106, 1107 (5th Cir.1978) (per curiam). The non-moving party bears no burden to defeat the motion for injunctive relief. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 442-43, 94 S.Ct. 1113, 1125-26, 39 L.Ed.2d 435 (1974). In *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir.1981), the Fifth Circuit held that the four factors set forth in *Canal Authority* are inter-related, rather than independent, and compose a four-step analysis which serves as a mechanism to assist the court in determining whether an injunction is necessary to

preserve the court's ability to render a meaningful decision on the merits.

[3] In this case, the plaintiffs contend that their constitutional rights under the Fourteenth Amendment of the Constitution of the United States and Title 42 U.S.C. § 2000d have been violated. Plaintiffs ask this court to bandage their constitutional wounds by ordering defendants to reopen State Line Elementary School. To merit this interim relief until a full-blown trial on the merits of this dispute is scheduled, plaintiffs must satisfy the four factors recognized in *Canal Authority*. Alas, as mentioned at the top of this opinion, this court is not persuaded to find in favor of plaintiffs. The court's reasoning is set out below.

SUBSTANTIAL LIKELIHOOD OF SUCCESS

The closing of schools for purely racial reasons is impermissible under *Brown v. Board of Education of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). See *Bell v. West Point Mun. Separate Sch. Dist.*, 446 F.2d 1362, 1363 (5th Cir.1971). However, a particular school may be closed for sound educational or other non-racial reasons. *Mims v. Duval County Sch. Bd.*, 447 F.2d 1330, 1331 (5th Cir.1971) (noting deteriorated building and unhealthful conditions), citing *Carr v. Montgomery County Bd. of Educ.*, 429 F.2d 382, 385 (5th Cir.1970) (noting inferior physical plant), and *Wright v. Board of Pub. Instruction of Alachua County*, 431 F.2d 1200, 1202 (5th Cir.1970) (citing ample educational reasons and absence of proof of discrimination).

In *Fitzpatrick v. Board of Education for the City of Enid*, 578 F.2d 858 (10th Cir. 1978), the Court refers to six factors other courts have used to ascertain whether a school's closing is racially motivated. These six factors are as follows:

- (1) the existence of valid nonracial educational reasons for closing school facilities located in predominantly black areas;
- (2) the condition and adequacy of the facilities at the school being closed;
- (3) whether the facilities to which the minority students were being transferred were adequate and whether the transfer would cause those

facilities to be "overtaxed"; (4) whether the primary or sole reason for the school board's action was the fear that less constitutionally suspect solutions to segregation would lead to "white flight" from the school district; (5) whether the entire or primary burden of integration is placed on black students and teachers; and (6) whether the school board considered alternatives which did not require the closure of predominantly black schools before making a final decision.

Id. at 861, citing *Lee v. Macon County Bd. of Educ.*, 448 F.2d 746 (5th Cir.1971); *Bell*, 446 F.2d at 1365; *Carr*, 429 F.2d at 385; *Gordon v. Jefferson Davis Parish Sch. Bd.*, 330 F.Supp. 1119 (W.D.La.), *aff'd*, 446 F.2d 266, 268 (5th Cir.1971).

Defendants assert that all six of these factors are more than friendly to their position. The presence of friable asbestos, say defendants, certainly qualifies as a valid non-racial reason for the closure of State Line Elementary School. The facilities at Leakesville Elementary School where the State Line students were transferred, continue defendants, are adequate and are not overcrowded as the result of this transfer. There is no proof that "white flight" played any role in the decision to close State Line Elementary School, say defendants. Nor, they maintain, is there any competent proof that the entire or primary burden of integration has been placed on black students and teachers. Finally, defendants contend that they considered alternatives to closing State Line Elementary School, to include obtaining federal or state funds, sealing off the asbestos, and actually initiating a bond issue for increasing taxes to pay for the removal of the asbestos.

Defendants' proof on these matters has raised some strong points which, at this stage, pack more persuasive muscle than plaintiffs' presentation to the contrary. Plaintiffs here who have the burden of persuasion simply have not placed enough evidence on the scales at this point to show racial animus or overcome the defendants' pocketbook defense. Therefore, this court is unpersuaded that plaintiffs have shown a

substantial likelihood of success on the merits.

IRREPARABLE HARM

Irreparable harm in this instance would rest upon plaintiffs' showing that their constitutional rights have been violated. Violation of a constitutional right is irreparable harm, even for minimal periods of time. One who shows deprivation of a constitutional right need go no further in showing the requisite harm for injunctive relief. See *Elrod v. Burns*, 427 U.S. 347, 374, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir.1981). However, since plaintiffs have failed to show any constitutional deprivation sufficient for the issuance of a preliminary injunction, this court finds that plaintiffs have failed to carry this *Canal Authority* factor as well. *Black Fire Fighters Ass'n*, 905 F.2d at 65.

PUBLIC INTEREST AND BALANCE OF HARMS

This court finds that the public interest is best served by transferring the State Line students away from a facility where they would be exposed to friable asbestos. Although the plaintiffs claim to be exposed to longer bus rides in order to attend school, defendants have shown that white students attending the three remaining elementary schools endure equally long bus rides. Furthermore, the defendants have made a case of financial embarrassment. Imposition of an injunction at this point would only add to the defendants' financial woes and disrupt, if not destroy, their budgetary plans to achieve fiscal integrity. Accordingly, this court finds no basis in these two factors for granting injunctive relief.

CONCLUSION

Therefore, in light of all of the foregoing, the court finds that the plaintiffs' request for injunctive relief is not well taken at this time, and the same is hereby denied.

This memorandum opinion represents merely truncated findings based upon incomplete submissions of proof by the parties and shall not be construed to indicate the court's

position with regard to the final disposition of this matter.

SO ORDERED AND ADJUDGED.



Carlos PATERNOSTRO and Debbie Paternostro, Plaintiffs,

v.

DOW FURNACE COMPANY, Defendant.

Civ. A. No. 3:91-cv-463WS.

United States District Court,
S.D. Mississippi,
Jackson Division.

March 18, 1994.

Worker who was injured in a furnace explosion filed a products liability action in state court. The seller and installer of the furnace removed the action and filed a motion to dismiss. The District Court, Wingate, J., held that: (1) the seller and installer of the furnace in a workplace in Louisiana had no contacts with Mississippi that would permit the assertion of long-arm jurisdiction, and (2) the motion to dismiss was timely.

Motion to dismiss granted.

1. Federal Civil Procedure ⇨1825

When motion to dismiss challenges personal jurisdiction, plaintiff must make *prima facie* case on issue. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

2. Federal Courts ⇨76.25

Seller and installer of furnace in workplace in Louisiana had no contacts with Mississippi that would permit assertion of long-arm jurisdiction in products liability action by worker who claimed that he was injured at his workplace in Louisiana. Miss.Code 1972, § 13-3-57.

PATERNOSTRO v. DOW FURNACE CO.

Cite as 848 F.Supp. 706 (S.D.Miss. 1994)

3. Constitutional Law ⇨305(6)

Federal Courts ⇨76.25

Even if seller and installer of furnace in workplace in Louisiana had been subject to long-arm jurisdiction in Mississippi in products liability action by worker who claimed that he was injured at his workplace in Louisiana, assertion of jurisdiction would violate due process, absent any contacts with Mississippi or any proof that accident arose out of activities directed at Mississippi. Miss.Code 1972, § 13-3-57; U.S.C.A. Const.Amend. 14.

4. Federal Civil Procedure ⇨1822.1

Motion to dismiss for lack of personal jurisdiction was timely, even though it was not consolidated with other dispositive pretrial motions; omissions in products liability complaint required some discovery and issue had been raised in earlier motions. Fed. Rules Civ.Proc.Rule 12(b)(2), (g), (h)(1), 28 U.S.C.A.

Wayne E. Ferrell, Jr., Ferrell & Hubbard, Jackson, MS, for plaintiffs.

Richard P. Salloum, Franke, Rainey & Salloum, Gulfport, MS, for intervenors-plaintiffs Baker Cac, Inc., Constitution State Service Co.

Douglas R. Duke, Shell, Buford, Bufkin, Callicutt & Perry, Jackson, MS, for defendant.

ORDER

WINGATE, District Judge.

Before the court is the motion of defendant Dow Furnace Company (hereinafter "Dow") asking the court to reconsider Dow's motion to dismiss for lack of *in personam* jurisdiction pursuant to Rule 12(b)(2),¹ Federal Rules of Civil Procedure. Plaintiffs oppose the motion. Having examined the motion,

1. Rule 12(b)(2) provides that:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (2) lack of jurisdiction over the person....

the response, the rebuttal, the arguments in memoranda of the parties, affidavits, exhibits, and all other relevant submissions, this court finds that the motion is well taken and should be granted. Accordingly, for the reasons which follow, this court dismisses this action.

FACTS

This is a product liability action that was removed to this court from the Chancery Court of Hinds County on August 14, 1991. Effectuating removal under 28 U.S.C. § 1441, defendant Dow relied upon diversity of citizenship and an amount-in-controversy in excess of \$50,000, 28 U.S.C. § 1332.² This action arose out of an accident which occurred on July 14, 1988, wherein plaintiff Carlos Paternostro sustained injuries while on the site of his employer, Baker CAC, Inc., in Belle Chasse, Louisiana. At the time of the alleged injury, plaintiffs were Louisiana residents. However, in 1991 plaintiffs allegedly moved to Mississippi and filed this action.

On the dates of August 20 (Answer) and September 10, 1991 (First Amended Answer), the defendant first raised the defense of lack of jurisdiction over the person. See Answer & Defenses at 1; First Am. Answer at 1. Over the course of the next year, this litigation witnessed disputes concerning removal, remand, the intervention of plaintiffs' employer, and a proper scheduling order. No meaningful discovery occurred during this year.

On September 22, 1992, the defendant filed a motion to dismiss pursuant to Rule 37(b)(2), Federal Rules of Civil Procedure, on account of plaintiffs' (1) alleged failure to comply with the scheduling order compelling plaintiffs to answer interrogatories and (2) alleged failure to comply with a request for

2. Title 28 U.S.C. § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

charges. Third, though I do not intend to resurrect Justice Rehnquist's "bitter with the sweet" rationale from *Arnett v. Kennedy*, the contract under which Plaintiff was employed expressly provided for the treatment he received. Not only must this affect the scope of his property rights, but, as Defendants point out, there are principles of waiver applicable here. *E.g., Gorham v. Kansas City*, 590 P.2d 1051 (Kan.1979).

The risk of erroneous deprivation under the procedures followed was not large, even though it eventually turned out that it was improper from a contractual standpoint. The university engaged in what Plaintiff concedes was an extensive investigation before finally acting on January 31. Moreover, the allegations upon which it acted were rational and highly detailed; they bore many traditional indicia of truthfulness.

Finally, the governmental interest at stake here was strong. A state university has not only a desire but an obligation to avoid even the appearance of what might be characterized as sexual blackmail of students, at worst, and unprofessional conduct, at best. Moreover, the allegations against Plaintiff with which the university was confronted related not only to past conduct on his part, but to presently occurring improprieties.

[11, 12] In view of the promptness with which Plaintiff obtained notice of the charges against him and ultimately a plenary trial-type hearing at which he cleared his name and secured reinstatement with back pay, I conclude he was not denied due process of law. I also note that even if there had been a technical denial of due process in this case, it would have been inappropriate to award punitive or exemplary damages, while compensatory damages would only have been nominal. In *Carey v. Phipps*, 435 U.S. 247, 258-259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978), the Court said: "[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." A minor, technical violation of

procedural due process in an employment context calls for only a nominal award of damages.

Conclusion

Defendants Johnson and the AAUP are granted summary judgment because they did not act under color of law. Plaintiff's request for a declaration as to Article XII B.4. is denied as presenting an inappropriate case for the exercise of my discretion. As to the constitutional deprivation claim, summary judgment is granted for the EMU Defendants. The defamation and invasion of privacy claims are dismissed for lack of any substantial basis for federal jurisdiction.

An appropriate order may be submitted.



Earl JACKSON, and Ad Hoc Committee to Save Homer G. Phillips Hospital, Frank Chapman, Co-Chairperson, et al., Plaintiffs,

v.

James F. CONWAY, Individually and as Mayor of the City of St. Louis, et al., Defendants.

No. 79-966C(1).

United States District Court,
E. D. Missouri, E. D.

Sept. 5, 1979.

Plaintiffs, who were either recipients of federal aid payments used to pay for medical care or group whose members associated together for purpose of representing interests of indigent citizens, moved for a preliminary injunction against Secretary of HEW and city and hospital officials, alleging that closure of certain facilities at one

city hospital and consolidation of such services at a second city hospital was violative of Fifth and Fourteenth Amendments and federal legislation. The United States District Court for the Eastern District of Missouri, Wangelin, J., held that: (1) given nature of rights asserted and necessity of proceeding on merits to determine nature and extent of injury, plaintiffs alleged sufficient injury to satisfy standing requirement; (2) plaintiffs were not entitled to a preliminary injunction compelling Secretary of HEW to make an investigation which was condition precedent for termination of federal financial assistance; and (3) plaintiffs failed to make clear showing of probable success on merits so as to be entitled to preliminary injunction against city defendants.

Motion denied.

1. Federal Civil Procedure ⇐103

To satisfy standing requirement, a litigant must allege that challenged action has caused him injury in fact, economic or otherwise, and that interest sought to be protected by complainant is arguably within zone of interests to be protected or regulated by statute or constitutional guarantee in question.

2. Federal Civil Procedure ⇐103

Representatives of a class action must themselves satisfy the standing requirement without regard to similar attributes common to persons who may have been illegally discriminated against but who are not before the court.

3. Injunction ⇐136(3)

Given nature of rights asserted and necessity of proceeding on merits to determine nature and extent of injury allegedly resulting from closing of certain facilities at one city hospital and consolidation of those services at second city hospital, plaintiffs, who were recipients of federal aid payments used to pay for medical care and who alleged that they would require use of first hospital in future and would be unable to bear additional burdens of traveling to second hospital, alleged sufficient injury to

satisfy standing requirement for obtaining a preliminary injunction. 28 U.S.C.A. §§ 1331, 1343, 1361; Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; U.S.C.A. Const. Amends. 5, 14.

4. Injunction ⇐134

Standards for issuance of a preliminary injunction require that plaintiff make a clear showing of probable success on merits and possible irreparable injury or show that there are sufficiently serious questions going to merits making them a fair ground for litigation and a balance of hardships tipping decidedly towards plaintiff.

5. Civil Rights ⇐13.9

Exhaustion of administrative remedies is a prerequisite to suit for termination of funding to an agency covered under title of Civil Rights Act governing federal financial assistance to programs and activities. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

6. Civil Rights ⇐13.2(4)

Parties alleging that closure of hospital services and consolidation of those services at another city hospital was violative of Federal Constitution, Rehabilitation Act and title of Civil Rights Act governing federal financial assistance to programs and activities were not entitled to a preliminary injunction compelling Secretary of HEW to make an investigation which was condition precedent for termination of federal financial assistance, particularly in light of facts that plaintiffs had submitted their complaints to Secretary in past 30 days and that no abuse of discretion by the Secretary in carrying out her duties was shown. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; U.S.C.A. Const. Amends. 5, 14.

7. Injunction ⇐16

Basic requirement for issuance of an injunction is a showing by plaintiff that he does not have an adequate legal remedy or that he has exhausted any available administrative remedies.

8. Injunction ⇐133

Generally, a mandatory preliminary injunction at preliminary stage of proceedings should be granted only in rare instances where facts and law are clearly in favor of moving party, especially if grant of temporary injunction would in effect give plaintiffs the relief which they seek in the main case.

9. Civil Rights ⇐9.5

Elements for establishing cause of action pursuant to title of the Civil Rights Act banning discrimination in any program or activity receiving federal financial assistance are: (1) that the entity involved is engaging in racial or national origin discrimination and (2) entity involved is receiving federal financial assistance; discriminatory effect alone is sufficient to satisfy the first element inasmuch as intent to discriminate need not be proven. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

10. Civil Rights ⇐13.2(4)

Recipients of federal aid payments used to pay for medical care, who alleged that as result of closing of certain facilities at one city hospital and consolidation of those services at a second city hospital injury would be suffered in that they would be unable to bear additional burden of traveling to second city hospital, failed to make clear showing of probable success on merits with respect to their causes of action brought pursuant to Civil Rights Act of 1964 or pursuant to Rehabilitation Act; thus, plaintiffs were not entitled to preliminary injunction against city and hospital officials with regard to consolidation of hospital, which had already been substantially completed. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

William P. Russell, Joseph S. McDuffie, St. Louis, Mo., for plaintiffs.

Peter H. Ruger, Thomas J. Ray, Anne C. Travis, St. Louis, Mo., David R. Spitznagel, Clayton, Mo., for defendants.

MEMORANDUM

WANGELIN, District Judge.

This matter is before the Court upon plaintiffs' motion for a preliminary injunction. Plaintiffs are thirteen (13) individuals, a church, and an unincorporated association. It is alleged that the individual plaintiffs are predominately black residents of North St. Louis who have used, are using, or will use Homer G. Phillips Hospital in the future. Some of the individual plaintiffs are recipients of Medicare, Medicaid and other federal disability payments used to pay for medical care. The remaining plaintiffs are St. Paul A.M.E. Church and the Ad Hoc Committee to Save Homer G. Phillips Hospital and all public hospitals, whose members associated together for the purpose of representing the interests of indigent citizens of St. Louis, including residents of North St. Louis, who require the use of Homer G. Phillips Hospital.

Defendant James F. Conway is the Mayor of the City of St. Louis, Missouri, and its chief executive and administrative officer. Defendant Dr. Helen Bruce is Commissioner of Hospitals of the City Hospitals and has general supervision over public health programs. Defendant R. Dean Wochner is Director of Health and Hospitals of the City of St. Louis and his duties include the management, control and supervision of all business of the department of health and hospitals. Defendant John Noble is Administrator for City Hospital No. 1 of the City of St. Louis Missouri. Defendant Board of Estimate and Apportionment, and its individual members, James F. Conway, Mayor, Paul Simon, President, Board of Aldermen and Raymond T. Percich, Comptroller, is the chief fiscal body of the City of St. Louis, Missouri, and has general supervision of the budget of the hospitals of the City of St. Louis. Defendant St. Louis University School of Medicine and defendant Washington University School of Medicine both contract with the City of St. Louis, Missouri, to operate certain of its hospitals, facilities and programs which receive federal

financial assistance. Defendant Institute of Medical Education & Research is primarily responsible for the recruitment of students and doctors at City Hospital No. 1. Defendant Patricia Harris is the Secretary of Health, Education and Welfare of the United States of America, and has responsibility for all federal programs administered by the Department.

Plaintiffs filed their original complaint on August 8, 1979, seeking a class action certification and declaratory relief. No temporary restraining order was sought. On August 17, 1979, plaintiffs filed an amended complaint requesting a preliminary injunction against the City defendants and the Secretary. A hearing on the motion for a preliminary injunction was held August 27th through August 30th, 1979.

In essence, plaintiffs' amended complaint alleges that the closing of acute in-patient facilities and certain emergency room and out-patient facilities (hereinafter denominated solely as acute in-patient facilities) at Homer G. Phillips Hospital (hereinafter "Phillips" or City Hospital No. 2) and the consolidation of those services at City Hospital No. 1 or Max Starkloff (hereinafter City Hospital No. 1 or Starkloff) is violative of the Fifth and Fourteenth Amendments, the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

The only matter to be presently decided is plaintiffs' motion for a preliminary injunction. Jurisdiction of this Court is principally based upon 28 U.S.C. §§ 1331, 1343 and 1361.

The first issue which must be decided is whether or not plaintiffs have alleged an adequate basis for standing to assert their claims. With respect to the individual plaintiffs, the predominant allegation in this regard is that plaintiffs will require use of Phillips in the future and are unable because of their poverty or other reasons to bear the additional burden of traveling from Phillips to City Hospital No. 1. None of the plaintiffs here has alleged seeking and being denied treatment at City Hospital No. 1 nor have the plaintiffs alleged

that treatment at City Hospital No. 1 would be inadequate due to the effects of consolidation. As a corollary to the standing issue, the nature of the injury alleged bears directly on plaintiffs' ability to allege a justiciable case on controversy. Both of these issues will be considered. In *Urban Contractors Alliance v. Bi-State Development Agency*, 531 F.2d 877 (8th Cir. 1976). The Eighth Circuit stated that:

... it is fundamental that the plaintiff himself must have suffered the injury he seeks to redress. For if the plaintiff has not '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 constitutional questions . . .', *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), no 'case or controversy' [has been] presented.

Id. at 881.

[i]n the absence of a factual setting demonstrating concrete injury to these plaintiffs we could not be sure that any relief granted would be appropriately tailored to correct the alleged discrimination.

Id. at 882.

To be sure, the logical nexus between proximity and injury is more attenuated here than the injury in most disparate impact cases, wherein the otherwise neutral factor challenged operates to completely and automatically excluded a certain percentage of the minority plaintiffs. In the opinion of this Court, however, a justiciable case or controversy has been presented.

[1] To satisfy the standing requirement, a litigant must allege "that the challenged action has caused him injury in fact, economic or otherwise", and that "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question". *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152,

153, 90 S.Ct. 827, 829, 830, 25 L.Ed.2d 184 (1970).

[2] The matter is complicated somewhat by the fact that certification of plaintiffs' class has not yet been sought. It appears to the Court, however, that the representatives of the class must themselves satisfy the standing requirement without regard to similar "attributes common to persons who may have been illegally discriminated against" but who are not before the Court. *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1972); *Urban Contractors Alliance v. Bi-State Development Agency*, 531 F.2d 877, 882 (1976).

[3] This Court has decided to proceed with plaintiffs' claims regardless of its doubt as to whether or not plaintiffs have standing to maintain the claims because of (1) the nature and importance of the right asserted; and (2) the fact that the standing issue appears to be inextricably bound up with the injury or discrimination alleged. With respect to (1) above, the Supreme Court has stated that "medical care is 'a basic necessity of life.'" *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 306 (1974). Although a municipality is not constitutionally required to provide a particular quantity or quality of health services, when a municipality receives federal financial assistance pursuant to a municipal program both Title VI and the Rehabilitation Act of 1973 require that the service or program involved be provided in a non-discriminatory manner. 42 U.S.C. § 2000d sets forth the general purpose of Title VI by stating that:

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

29 U.S.C. § 794 sets forth the similar purposes of the Rehabilitation Act of 1973:

No otherwise qualified handicapped individual in the United States, as defined in § 706(6) of this Title, shall, solely by reason of his handicap, be excluded from

the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

With respect to number (2) above, site selection of the consolidated hospitals' acute in-patient services is the major focus of plaintiffs' attempt to show discrimination. The rights asserted by the plaintiffs may arguably fall within the zone of interests to be protected by the statutes in question if plaintiffs can show they have suffered such an impediment through the relocation of acute in-patient services and their resultant proximity that the resultant relocation and proximity amount to a denial of care at City Hospital No. 1. Such a showing also relates to plaintiffs' ability to demonstrate concrete injury. In the opinion of this Court, given the nature of the right asserted and the necessity of proceeding on the merits to determine the nature and extent of the injury alleged, plaintiffs have alleged sufficient injury to satisfy the concept of standing. *United States v. SCRAP*, 412 U.S. 669, 683-690, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-156, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

[4] The standards for the issuance of a preliminary injunction are as follows: (1) Plaintiff must make a clear showing of probable success on the merits and possible irreparable injury, or (2) plaintiff must show that there are sufficiently serious questions going to the merits making them a fair ground for litigation and a balance of hardships tipping decidedly towards plaintiff. *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978), cert. denied 437 U.S. 906, 98 S.Ct. 3093, 57 L.Ed.2d 1136 (1978); *Dakota Wholesale Liquor, Inc. v. Minnesota*, 584 F.2d 847 (8th Cir. 1978); *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1973); See also *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 254, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

The injunctive relief sought against Patricia Harris, Secretary of H.E.W., is an injunction compelling her agency to "make a full and complete investigation of the health and hospital delivery system as required under Title VI, 42 U.S.C. § 2000d et seq. and regulations pursuant thereto". 42 U.S.C. § 2000d has been previously set out in this Memorandum. 42 U.S.C. § 2000d-1 provides for the issuance of regulations by federal agencies to achieve the objectives of the Act. The section further authorizes agencies to effect compliance with the Act's requirements by the termination or refusal to grant or continue federal financial assistance following certain findings by the agency, provided voluntary compliance is not able to be achieved. 42 U.S.C. § 2000d-2 provides that an agency action taken pursuant to § 2000d-1 is subject to judicial review under the Administrative Procedure Act. This has been interpreted to include agency actions both terminating and refusing to terminate federal financial assistance.

[5] It is apparent to this Court from the above described provisions that plaintiffs are premature in requesting a termination of federal financial assistance before an investigation has ever been conducted by the Secretary. Exhaustion of administrative remedies is a prerequisite to suit for the termination of funding to an agency covered under Title VI, e. g., *Caulfield v. Board of Education*, 583 F.2d 605 (2d Cir. 1978); *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D.Pa.1977); Cf. *School Dist. of Saginaw v. United States Department of Health, Education and Welfare*, 431 F.Supp. 147 (E.D.Mich.1977); See also *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 426 F.Supp. 919, 924 (D.Del.1977), and cases cited therein.

[6] Plaintiffs have only just submitted complaints to the Secretary in the past thirty (30) days. The complaint submitted on March 5, 1979 was submitted by the office of Legal Services of Eastern Missouri, Inc. and not by any of the plaintiffs. Plaintiffs allege that on June 20, 1979, in response to the complaint filed by the office of Legal

Services, H.E.W. stated that no action would be taken on their complaint until the headquarters office in Washington, D. C., promulgated a policy interpretation setting forth the conditions under which a hospital closure could violate Title VI and the corrective action which would be required. In the opinion of this Court such a response by the Secretary does not show an abdication of her responsibilities. See *Caulfield v. Board of Education*, supra. In *Caulfield*, plaintiffs brought suit for declaratory and injunctive relief under Title VI, following voluntary settlement by the agency with defendant Board of Education. The District Court remanded to the agency, but the Appeals Court reversed the remand on the grounds that absent a showing that the agency had abused its discretion, or violated a mandate, a remand to the agency is inappropriate. Plaintiffs have failed to show that the Secretary has abused her discretion in carrying out her duties pursuant to Title VI or the Rehabilitation Act of 1973. Plaintiffs have not even shown a likelihood of such an abuse of discretion. Absent an abuse, intervention in administrative proceedings is considered an extraordinary remedy. The preliminary delay which plaintiffs have suffered does not constitute an irreparable injury since the procedures set out by Congress itself in § 2000d-1 of Title VI provides for an investigation, letter of findings, attempts at voluntary settlement, and a hearing, prior to the termination of federal financial assistance to any entity which discriminates. The Court fails to see how a slightly longer delay in the processing of their complaints will cause them irreparable injury particularly in light of the fact that the removal of acute care facilities at Phillips has already taken place and an immediate termination of federal financial assistance would not be possible in any event.

Plaintiffs have failed to make a clear showing of probable success on the merits and possible irreparable injury with respect to the relief requested against the Secretary. Neither have plaintiffs shown a sufficiently serious question going to the mer-

its making them a fair ground for litigation with the balance of hardships tipping decidedly in plaintiffs' favor. For these reasons, plaintiffs' motion for a preliminary injunction must be denied. However, this Court would most urgently request the Secretary to proceed with all deliberate speed in using her special expertise to conduct an investigation of the allegations contained within plaintiffs' complaint and otherwise implement the legislative mandate expressed in Title VI and the Rehabilitation Act of 1973 by processing the complaint in accordance with the applicable regulations, 45 C.F.R. part 80 (Title VI) and 45 C.F.R. part 84 (Rehabilitation Act of 1973).

As set forth above, since agencies of the government should be given a reasonable time within which to conduct investigations this Court is of the opinion that H.E.W. has not abdicated its responsibility to plaintiffs at this time. See *Brown v. Weinberger*, 417 F.Supp. 1215 (D.D.C.1976). Therefore, plaintiffs' motion for a temporary injunction predicated upon their Fifth and Fourteenth Amendment rights would not appear to be ripe even assuming plaintiffs have a "liberty" or "property" interest within the meaning of the due process clause of the Fifth or Fourteenth Amendments. See *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 453 F.Supp. 330, 337 (D.Del.1978). As such, plaintiffs' motion for a preliminary injunction brought pursuant to the Fifth and Fourteenth Amendments will be denied.

The temporary relief requested against all city defendants is an injunction against removing, transferring or dismantling equipment from Homer G. Phillips Hospital, from transferring personnel from Homer G. Phillips Hospital to other city hospitals, from transferring services, closing down or stopping emergency services between the hours of 3:00 p. m. and 7:00 a. m., Monday through Friday, from closing down emergency room services on Saturdays, Sundays and Holidays, and from transferring patients from Homer G. Phillips Hospital to other city hospitals. Such relief is requested pursuant to Title VI, the Rehabilitation Act of 1973 and their implementing regulations.

[7] Plaintiffs' causes of action against the city defendants also invoke issues relating to the doctrine of exhaustion of administrative remedies and the allied doctrines of irreparable injury and the inadequacy of legal remedies. The basic requirement for the issuance of an injunction is a showing by the plaintiff that he does not have an adequate legal remedy or that he has exhausted any available administrative remedies. See *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-507, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) (the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies); and See *Macauley v. Waterman S. S. Corp.*, 327 U.S. 540, 543-544, 66 S.Ct. 712, 90 L.Ed. 839 (1946); and *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) (exhaustion of administrative remedies).

[8] Although the relief requested by plaintiffs is worded in terms of a temporary prohibitory injunction, it is clear from the evidence adduced that the consolidation of hospitals was substantially completed at the time of the hearing and as such plaintiffs are requesting temporary mandatory relief. Plaintiffs' motion for a preliminary prohibitory injunction to preserve the status quo is moot. At no time did plaintiffs move this Court pursuant to Rule 65(b) of the Federal Rules of Civil Procedure for a temporary restraining order to preserve this status quo pending a hearing on the preliminary injunction. In general, a mandatory preliminary injunction at the preliminary stage of the proceedings should be granted only in rare instances where the facts and law are clearly in favor of the moving party, especially if the grant of the temporary injunction would in effect give the plaintiffs the relief which they seek in the main case. See *Bricklayers, Masons, Marble and Tilesetters, Protective and Benevolent Union No. 7 v. Lueder Const. Co.*, 346 F.Supp. 558, 561 (D.Neb.1972); *Miami Beach Fed. Savs. & Loan Assn. v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958). Because this Court is un-

certain as to what effect the *Bricklayers'* decision might have on the Eighth Circuit's standard for the issuance of a preliminary injunction as set forth in *Fennell, supra*, the Court will determine the motion on the grounds set forth in *Fennell*.

[9] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. bans discrimination based upon ground of race, color, or national origin in any program or activity receiving federal financial assistance. The two elements for establishing a cause of action pursuant to Title VI are (1) that the entity involved is engaging in racial or national origin discrimination and (2) the entity involved is receiving federal financial assistance. As in Title VII cases, discriminatory effect alone is sufficient to satisfy the first element, intent to discriminate need not be proven. *Lora v. Board of Education of New York*, 456 F.Supp. 1211 (E.D. N.Y.1978).

42 U.S.C. § 2000d-1 authorizes the Department of Health, Education and Welfare (H.E.W.) to issue rules, regulations and orders, to make sure the recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with Title VI. H.E.W.'s regulations, 45 C.F.R. § 80.3(b)(1) specify that recipients may not:

(i) deny an individual any service, financial aid, or other benefit provided under the program;

(ii) provide any service . . . or other benefit to an individual which is different, or as provided in a different manner, from that provided to others under the program;

(iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service . . . or other benefit under the program;

(iv) restrict the individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service . . . or other benefit under the program.

45 C.F.R. § 80.3(b)(2) provides:

(2) A recipient, in determining the types of services . . . or facilities which will be provided under any such

program . . . or the situations in which, such services . . . or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals 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 as respect individuals of a particular race, color, or national origin.

45 C.F.R. § 80.3(b)(3) provides:

(3) In determining the site or location of a facility, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

See also *Lau v. Nichols*, 414 U.S. 563, 566-568, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Johnson v. City of Arcadia, Fla.*, 450 F.Supp. 1363, 1379 (M.D.Fla.1978).

The parties have stipulated that the City of St. Louis and its hospital system is a recipient of federal financial assistance and the health care at issue herein is a "program" subject to the Act and regulations.

[10] In the opinion of this Court, plaintiffs have not made a clear showing of probable success on the merits with respect to the second element of their Title VI cause of action. At most plaintiffs have shown that the distance or proximity of obtaining acute in-patient and weekend emergency room services and certain out-patient services has been increased for a substantial but uncertain percentage of northside St. Louis residents. In this respect, the most applicable regulation appears to be 45 C.F.R. § 80.3(b)(3) which

requires a showing that the site selection has the effect of excluding individuals from the program or denying them the benefits of the program or has the purpose or effect of defeating or substantially impairing the objectives of the Act or the regulations.

In the opinion of this Court there is no evidence that any plaintiff has suffered such an impediment through the proximity of acute in-patient health care, weekend emergency room services, and certain out-patient care at consolidated City Hospital No. 1, that it was in effect a denial of such care. With respect to the above question, the Court accepts the plaintiffs' testimony that certain isolated incidents occurred during the turbulent consolidation period which delayed needed treatment. For instance, a patient requiring an appendectomy experienced a delay in being transferred from Phillips to City Hospital No. 1. However, such a claim is not properly before this Court, see the standing discussion, *supra*. Furthermore, this Court finds no reason to believe such incidents will occur in the future considering the attendant circumstances. Plaintiffs have not shown nor alleged that they have been refused or denied treatment at City Hospital No. 1. The testimony regarding available transportation is disputed. The lineal distance from Phillips to City Hospital No. 1 is just over three and one-quarter ($3\frac{1}{4}$) miles. Phillips is in a rather inaccessible location, however, with respect to traffic flow. City furnished ambulances can make the trip in approximately nine (9) minutes given good driving conditions. Many plaintiffs rely on public transportation for access to the hospitals, however, and there is no direct route on the bus system from Phillips to City Hospital No. 1. The testimony indicates that such a trip can take from forty to sixty (40-60) minutes.

The nature of plaintiffs' injury through the proximity of consolidated services at City Hospital No. 1 is closely related to the standing discussion set out *supra*. In the opinion of this Court this case is vastly different from several Title VI cases where location or proximity of an activity or program was crucial. In these types of cases a

municipality would provide a certain service to a predominately white section of town and a disparate or inferior service in a predominately black section of town. Typically the service involved such as street lights, sewers, roads and fire hydrants was useful only in a particular location or area and was of no use to those outside the immediate area because of the limited geographical nature of the services it provides. In the instant case the racially identifiable neighborhoods in the immediate vicinity of City Hospital No. 1 and City Hospital No. 2 are not so stratified nor is the program or service useful or beneficial to those only in its immediate vicinity. See *e. g.*, *Johnson v. City of Arcadia, Fla.*, *supra*; *Hawkins v. Town of Shaw*, 303 F.Supp. 1162 (N.D.Miss. 1969), *rev'd* 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972). *Lau v. Nichols*, *supra*, is instructive as to what types of conditions or requirements imposed by a program subject to the Act can effectively deny access to benefits or programs. In *Lau*, the district court found that there were twenty eight hundred and fifty six (2,856) students of Chinese ancestry in the San Francisco, California school system who did not speak English. Of those with the language deficiency about one thousand (1,000) were given supplemental courses in English but about eighteen hundred (1,800) did not receive that instruction. A class suit was brought by the non-English speaking Chinese students under the Equal Protection Clause and the Civil Rights Act of 1964. Basing its decision squarely on 42 U.S.C. § 2000d, the Supreme Court used a standard of effective foreclosure, *Lau v. Nichols*, *supra*, 414 U.S. at 566, 568, 94 S.Ct. 786. In the opinion of this Court, no such effective foreclosure through proximity has been shown by the plaintiffs herein. Furthermore, in determining whether plaintiffs have made a clear showing of probable success on the merits or sufficiently serious questions going to the merits making them a fair ground for litigation, certain testimony offered by the defendants must be considered. Credible testimony introduced at the hearing indi-

cates that over-all acute in-patient care has been improved through consolidation and consolidation has definitely been beneficial to the delivery of improved health care in the City of St. Louis. Both hospitals have historically had low percentages of actual bed usage. City Hospital No. 1 was originally built in 1846 and rebuilt at the turn of the Century with subsequent additions and remodelings as late as 1975. City Hospital No. 1 is located at 14th and Lafayette Streets just south of downtown St. Louis with an in-patient capacity of five hundred and fifty (550) beds. Phillips was completed in 1937 and is located at Whittier and Kennerly in North St. Louis. It has an in-patient capacity of four hundred and sixty six (466) beds. As a result of various surveys and studies it was concluded on various bases, e. g., age of the buildings, support services, access, etc., that consolidation should occur at City Hospital No. 1. Mayor James Conway, on the basis of experts' conclusions, ordered consolidation on July 30, 1979, and consolidation was completed with the transfer of the last few patients on August 17, 1979. Furthermore, it was shown at trial that City Hospital No. 1 has better support facilities, ambulance service between City Hospital No. 1 and Phillips including four full life support vehicles, far better highway access and better university medical school support than Phillips. All these factors and another, the current financial situation facing the divisions of hospitals of the City of St. Louis and the seven million dollar (\$7,000,000) per year savings projected to be realized through consolidation (this was not, however, the principal factor in deciding to consolidate the hospitals) are relevant in determining probable success on the merits or sufficiently serious questions going to the merits, because of similar defenses afforded Title VII and Equal Protection defendants facing allegations of disparate impact set forth to make a prima facie cause of action. However, in the opinion of this Court plaintiffs have not made such a statistical showing although it appears defendants would prevail in such a defense.

With respect to the possibility of irreparable injury or a balance of hardships tipping decidedly toward plaintiffs, the Court can only state that the hardships which defendants would experience in complying with any temporary mandatory injunction would far outweigh any hardships plaintiffs would experience in pursuing their administrative remedies. Plaintiffs alleged injury, i. e., site selection of the consolidated hospital, has already taken place. For the reasons set forth above, this Court will deny plaintiffs' motion for a mandatory preliminary injunction against the City defendants brought pursuant to 42 U.S.C. § 2000d.

The same impediments to the issuance of the requested injunctions exists as to plaintiffs' claims brought pursuant to the Rehabilitation Act of 1973. Additionally, plaintiffs have failed to show this Court how proximity considered alone would appear to be a greater barrier to access to treatment at City Hospital No. 1 for handicapped individuals "solely by reason of [their] handicap". The only handicapped plaintiff to testify indicated that because of his epilepsy it would be more difficult for him to travel the additional distance from his home to City Hospital No. 1. This testimony alone, like the evidence introduced by plaintiffs in support of their Title VI cause of action, does not show an effective denial of access to the hospitals' benefits or programs. Surely, it is not sufficient to clearly show probable success on the merits or a sufficiently serious question going to the merits making them a fair ground for litigation with the balance of hardships tipping decidedly in plaintiffs' favor. Therefore, plaintiffs' motion for a preliminary injunction pursuant to the Rehabilitation Act of 1973 must be denied.



looks forward to no action at all, it is more than likely to be mere "gripping."

The present case clearly fails to meet the *Mushroom Transportation* standard.

[4] The Board, in its brief, argues that the precedential value of *Buddies Supermarkets* was weakened, if not eliminated, by this court's decision in *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980). In dicta, that case implied that the *Mushroom Transportation* standard may have been discarded by the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). However, the *Anchortank* court explicitly declined to decide whether *Weingarten* overruled the *Mushroom Transportation* standard, noting that the results in the two cases were consistent with each other. *Anchortank, Inc. v. NLRB*, *supra*, 618 F.2d at 1161 & n.10. Without a clearly contrary opinion of the Supreme Court or of this court sitting *en banc*, we cannot overrule a decision of a prior panel of this court, and we decline to hold that the dicta of *Anchortank* did so. Moreover, we would not overrule *Buddies Supermarkets* even if we could do so. The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

Accordingly, enforcement of the order of the National Labor Relations Board is hereby

DENIED.



Dorothy H. DRAYDEN, Alvesia C. Echols and Ernestine Sayles Wilson, Plaintiffs-Appellants,

v.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT, Louis E. Ludwig, United States of America and The Department of Health and Human Services, Defendants-Appellees.

No. 80-1128.

United States Court of Appeals,
Fifth Circuit.

Unit A

April 8, 1981.

An action brought by discharged black school teachers was dismissed by the United States District Court for the Southern District of Texas at Houston, Robert O'Connor, Jr., J. On appeal by the discharged teachers, the Court of Appeals, Garza, Circuit Judge, held that: (1) claim under the Ku Klux Klan Act was barred by Texas statute of limitations, and (2) plaintiffs failed to state a cause of action under the statute under which no person is to be excluded, on the ground of race, color or national origin, from participation in, denied benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance.

Affirmed.

1. Federal Courts 425

Federal law controlled date of beginning of action brought under federal civil rights laws, but applicable state law determined length of limitation period within which to bring the action. 42 U.S.C.A. §§ 1981, 1985, 1986; Civil Rights Act of 1964, §§ 601 et seq., 601-605, 42 U.S.C.A. §§ 2000d et seq., 2000d to 2000d-4; 28 U.S.C.A. §§ 2201, 2202; Elementary and Secondary Education Amendments of 1966, § 182, 42 U.S.C.A. § 2000d-5; Elementary and Secondary Education Amendments of 1969, § 2, 42 U.S.C.A. § 2000d-6; Vernon's Ann.Tex.Civ.St. art. 5526.

2. Civil Rights ⇐40

Two-year Texas statute of limitations was applicable to Texas school district teachers' action brought under federal civil rights statutes. 42 U.S.C.A. § 1985; 28 U.S.C.A. §§ 2201, 2202; Civil Rights Act of 1964, §§ 601-605, 42 U.S.C.A. §§ 2000d to 2000d-4; Elementary and Secondary Education Amendments of 1966, § 182, 42 U.S.C.A. § 2000d-5; Elementary and Secondary Education Amendments of 1969, § 2, 42 U.S.C.A. § 2000d-6; Vernon's Ann.Tex. Civ.St. art. 5526.

3. Civil Rights ⇐13.10

In civil rights cases, cause of action commences when plaintiff knows or has reason to know of injury which is basis of action. 42 U.S.C.A. §§ 1981, 1985, 1986; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Vernon's Ann. Tex.Civ.St. art. 5526.

4. Civil Rights ⇐40

Running of statute of limitations against civil rights cause of action was not tolled on ground of ongoing conspiracy in failing to correct alleged wrongs, where alleged unlawful discharges of teachers occurred in 1966 and no further injury occurred to them beyond such discharges. 42 U.S.C.A. §§ 1981, 1985, 1986; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Vernon's Ann.Tex.Civ.St. art. 5526.

5. Civil Rights ⇐40

Fact that equal employment opportunity claim is pending does not toll statute of limitations applicable to actions under civil rights statutes. 42 U.S.C.A. §§ 1981, 1985, 1986; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Vernon's Ann.Tex.Civ.St. art. 5526.

6. Civil Rights ⇐9.5

Purpose of civil rights statutes forbidding any person or institution which receives federal funds to discriminate on basis of race, color or national origin is to avoid use of federal funds to support discriminatory practices and to provide individual citizens effective protection against such practices. Civil Rights Act of 1964, §§ 601, 602,

42 U.S.C.A. §§ 2000d, 2000d-1; Education Amendments of 1972, §§ 901-907, 20 U.S.C.A. §§ 1681-1686.

7. Civil Rights ⇐9.5

For purposes of standing, in cases such as where discharged black teachers sued under statute providing that no person shall, on ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance, students, if not teachers, are beneficiaries of federal assistance to public schools. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C.A. §§ 2000d, 2000d-1; Education Amendments of 1972, §§ 901-907, 20 U.S.C.A. §§ 1681-1686.

8. Civil Rights ⇐13.10

Where Department of Health, Education and Welfare had decided that school district was not in compliance with statutes under which no person is to be excluded, on ground of race, color or national origin, from participation in, or denied benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance, and Department had also reached voluntary settlement with school district, any declaratory or injunctive relief granted by district court regarding cessation of discriminatory practices against plaintiffs would be moot, as well as redundant and superfluous. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C.A. §§ 2000d, 2000d-1; Education Amendments of 1972, §§ 901-907, 20 U.S.C.A. §§ 1681-1686.

9. Civil Rights ⇐13.17

Private right of action allowed under statute providing that no person shall, on ground of race, color or national origin, be excluded from participation in, denied benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance encompasses no more than an attempt to have any discriminatory activity cease and does not include right to recovery of back pay or other losses. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C.A.

§§ 2000d, 2000d-1; Education Amendments of 1972, §§ 901-907, 20 U.S.C.A. §§ 1681-1686.

10. United States — 125(3)

Neither United States nor Department of Health and Human Services is amenable to suit if judgment sought would expend itself on public treasury or domain, unless sovereign immunity has been waived by statute, and there has been no statutory waiver of sovereign immunity in statutes under which no person is to be excluded, on ground of race, color or national origin, from participation in, denied benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C.A. §§ 2000d, 2000d-1; Education Amendments of 1972, §§ 901-907, 20 U.S.C.A. §§ 1681-1686; Emergency School Aid Act, § 718, 20 U.S.C. (1976 Ed.) § 1617.

Horace R. George, Houston, Tex., for plaintiffs-appellants.

Reynolds, Allen & Cook, Houston, Tex., for Needville Independent School Dist. and Louis E. Ludwig.

Anna E. Stool, Asst. U. S. Atty., Houston, Tex., for U. S. and Dept. of Health, etc.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and GARZA, Circuit Judges, and SUTTLE,* District Judge.

GARZA, Circuit Judge:

The appellants filed a complaint on May 9, 1979, alleging a violation of their civil rights under 42 U.S.C. §§ 1981, 1985 and 1986. The appellants are all black women who were employed as teachers by the Needville Independent School District. The three were allegedly discharged without a hearing by the school district in 1966. The appellants claimed that a written complaint was filed with the Equal Employment Opportunity Commission [EEOC] in May of

1966 against the school district. The appellants allege that the EEOC took no action until March 19, 1978, when the Department of Health, Education and Welfare issued a directive to the school district that it was not complying with Title VI of the Civil Rights Act of 1964 regarding teacher dismissals. The appellants in their original complaint sought declaratory relief against the school district, as well as injunctive relief prohibiting the federal government from allocating funds to the school district. The appellants also sought an order requiring the school district to return all federal funds it had received and in addition sought damages and attorney's fees. A more detailed amended complaint was filed in August of 1979.

On August 23, 1979, the district court ruled that the action was barred by the state statute of limitations, Tex.Rev.Civ. Stat. Ann. art. 5526 (Vernon's Supp.1980). The court allowed the appellants to file an amended complaint. The amended complaint was then filed on November 16, 1979, in which the appellants sought declaratory and injunctive relief and damages pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 2000d-2000d-6, the latter statutes known collectively as Title VI of the Civil Rights Act of 1964. Finally on December 10, 1979, the district court dismissed the action for failure to state a claim on the grounds that any action brought under § 1985 is barred by the state statute of limitations and that 42 U.S.C. § 2000d does not allow a private individual to bring a suit seeking the cessation of the allocation of federal funds to school districts.

[1,2] The appellants now challenge the district court's rulings as to the § 1985 and Title VI claims. The federal civil rights laws do not contain a provision regarding a statute of limitations. Thus, although federal law controls the date of the beginning of the action, *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980), the applicable state law determines the length of the limitation period within which to bring the action.

* District Judge for the Western District of Texas, sitting by designation.

Kirk v. Cronvich, 629 F.2d 404, 406 (5th Cir. 1980); *Dumas v. Town of Mt. Vernon, Alabama*, 612 F.2d 974, 977 (5th Cir. 1980). In the present case, the applicable period of limitations is two years. Tex.Rev.Civ.Stat. Ann. art. 5526 (Vernon's Supp.1980).

[3-5] In civil rights cases, a cause of action commences when a plaintiff knows or has reason to know of the injury which is the basis of the action. *Rubin v. O'Koren*, 621 F.2d at 116. In this case, if the injury was the discharge, it occurred in 1966. If, however, the injury was the conspiracy, it presumably began when the EEOC complaint was filed. This was also in 1966. The appellants contend that the running of the statute of limitations was tolled because of an ongoing conspiracy among the defendants in failing to correct the alleged wrongs. This ongoing conspiracy argument of appellants is specious. The alleged unlawful discharges occurred in 1966 and no further injury occurred to the appellants beyond those discharges. The fact that an EEOC claim is pending does not toll the statute of limitations in regard to actions under the civil rights statutes. *Dumas v. Town of Mt. Vernon, Alabama*, 612 F.2d at 979. The appellants were well aware of the alleged wrong done to them and were not prevented from filing a lawsuit within two years of their discharges. In light of the foregoing, the district court was correct in ruling that the appellants' § 1985 claim was time barred.

The district court dismissed the second claim under Title VI for failure to state a claim, holding that no private right of action exists under that part of the civil rights statutes. In their second amended complaint, the appellants sought a number of forms of relief under the auspices of Title VI. The appellants requested the

court 1) to require the school district to repay all federal funds it has received since it began discriminating against black teachers, 2) to order all federal assistance to the school district to be terminated and 3) to order the Department of Health, Education and Welfare [now Health and Human Services] "to take proper action." The appellants also sought backpay and attorney's fees.

[6] Although the Supreme Court has yet to categorically hold that a private right of action does or does not exist under Title VI, recent cases indicate that a private right of action may be cognizable in certain circumstances. 42 U.S.C. § 2000d¹ forbids any person or institution which receives federal funds to discriminate on the basis of race, color or national origin. The purpose of Title VI is twofold: 1) to avoid the use of federal funds to support discriminatory practices, and 2) to provide individual citizens effective protection against these practices. *Cannon v. University of Chicago*, 441 U.S. 677, 704, 99 S.Ct. 1946, 1961, 60 L.Ed.2d 560, 579 (1979). The first purpose is fulfilled by the statutory procedures found under Title VI for the termination of federal funds due to intentional engagement in discriminatory practices. See 42 U.S.C. § 2000d-1; 45 C.F.R. §§ 80.1-80.13 and apps. A & B (1979). These procedures are highly structured and provide a great number of preconditions before such funding can be terminated.

[7] A majority of the Court has refused to reach the issue of whether there is a private right of action under Title VI. *Regents of the University of California v. Bakke*, 438 U.S. 265, 328, 98 S.Ct. 2733, 2767, 57 L.Ed.2d 750, 795 (1978).² The Supreme Court has assumed, however, that

1. 42 U.S.C. § 2000d reads as follows:

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 Court has discussed the issue of a private right of action under Title VI in a more recent

case, but it was mentioned in the context of an appeal brought under Title IX. 20 U.S.C. §§ 1681-1686. In that case, *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Court reasoned that a private right of action might exist under Title IX. *Id.* at 707, 99 S.Ct. at 1961-63, 60 L.Ed.2d at 580-81.

the beneficiaries of federal assistance have, under Title VI, a private right of action to satisfy the second objective of Title VI, the termination of the offending discriminatory activity itself by declaratory or injunctive relief.³ *Cannon v. University of Chicago*, 441 U.S. at 702, 99 S.Ct. at 1960, 60 L.Ed.2d at 578 n. 33; *Bakke*, 438 U.S. at 419, 98 S.Ct. at 2814, 57 L.Ed.2d at 852 and n. 28 (Stevens, J., concurring in part and dissenting in part). See also *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967) (holding that black students who had been victims of discrimination had standing to assert their rights under Title VI).⁴

[8] However, even assuming that the appellants do have a right to bring a private cause of action seeking to declare acts perpetrated by a school district as discriminatory and seeking to enjoin any such future action under the provisions of Title VI, such a finding has already been made by the HEW in this case.⁵ The HEW decided in 1978 that the school district was not in

compliance with Title VI regarding its dismissal of the appellants. The HEW also reached a voluntary settlement with the school district. Any declaratory or injunctive relief granted by a district court regarding the cessation of discriminatory practices regarding the appellants would now be moot, not to mention redundant and superfluous.

[9, 10] Finally, this private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased. It does not include the right to recover backpay or other losses, which the appellants seek in this action.⁶ Therefore, based upon the above discussion, we find that taking the complaint as true in all respects in regard to the Title VI claim, the appellants have failed to state a claim upon which relief can be granted. Having already determined that the § 1985 claim is time barred, we find no error in the ruling of the district court.

AFFIRMED.

3. Although the Court in *Cannon* relied predominantly upon legislative history to show that legislators at the time of the enactment of Title IX presumed a private right of action, the Court also noted that 20 U.S.C. § 1617, which authorizes federal courts to award attorney's fees to the prevailing parties in private actions brought against public educational agencies to enforce Title VI, was a further indication that a private right of action could be assumed. *Cannon*, 441 U.S. at 699, 99 S.Ct. at 1958, 60 L.Ed.2d at 576-77.

4. In the present case, the government concedes that beneficiaries under Title VI might be entitled to bring a cause of action against HEW for injunctive relief to require the Department to more quickly enforce the provisions of Title VI. The Department contends, however, that the appellants are not beneficiaries. Brief for the United States of America and the Department of HEW at 13. We agree with HEW that in cases such as the present one, students are certainly beneficiaries of federal assistance to public schools. See *Bossier Parish School Board v. Lemon*, 370 F.2d at 852. Because we find appellants' claim for injunctive relief to be moot, it is unnecessary to answer the question of whether teachers are beneficiaries of the federal assistance given to the school district, and, therefore, have standing to bring a cause of action under Title VI. See e. g., *Rogers v. Frito-Lay*, 611 F.2d 1074, 1079-80 (5th Cir. 1980).

5. Because plaintiffs' claims under Title VI are moot, we find it unnecessary to discuss whether Title VI encompasses a private action regarding termination of federal funding to a school district. See, e. g., *N.A.A.C.P. v. Medical Ctr., Inc.*, 599 F.2d 1247 (3d Cir. 1979); see also *Regents of the University of California v. Bakke*, 438 U.S. 265, 328, 98 S.Ct. 2733, 2767, 57 L.Ed.2d 750, 828 (1978) (separate opinion of White, J.) and 438 U.S. at 419, 98 S.Ct. at 2814, 57 L.Ed.2d at 852 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C. J., Stewart and Rehnquist, JJ.). In addition, we note that to the extent plaintiffs seek recapture of previously paid federal funds, Title VI authorizes no such relief.

6. In regard to appellants' request for backpay, it should be noted that two of the four defendants would be able to avail themselves of the defense of sovereign immunity. Neither the United States nor the Department of Health and Human Services is amenable to suit if the judgment sought would expend itself on the public treasury or domain unless the sovereign immunity has been waived by statute. See *Unimex, Inc. v. United States Department of Housing and Urban Development*, 594 F.2d 1060, 1061 (5th Cir. 1979); *Schlaflly v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974). There has been no statutory waiver of sovereign immunity in Title VI cases.