Washington and Lee Law Review

Volume 37 | Issue 1 Article 17

Winter 1-1-1980

An Implied Private Right of Action Under Title VI

Rebecca D. Graves

AN IMPLIED PRIVATE RIGHT OF ACTION UNDER TITLE VI

Although the statute does not explicitly provide for a private right of action, private plaintiffs have employed Title VI of the Civil Rights Act of 1964[1] (Title VI) to remedy a wide variety of discriminatory practices which disadvantage ethnic and racial minorities.[2] The Supreme Court has not expressly decided whether a private right of action may be implied under Title VI. The lower federal courts, however, generally allow private suits as a necessary tool for enforcement of the statute.[3] In implying these private rights of action, courts also face the secondary issue of whether Title VI prohibits only intentional discrimination, or also forbids facially neutral practices which have a discriminatory impact.[4]

Section 601 of Title VI forbids any program or activity receiving federal funds from discriminating on the basis of race, color or national origin.[5] Congress has created two methods to enforce section 601. Each agency granting federal funds is empowered under Title VI to issue implementing rules and regulations.[6] This method seeks voluntary compliance by fund recipients and allows an aggrieved party to complain to the appropriate federal department or agency. If attempts to secure voluntary compliance fail, the agency then may terminate program funding.[7]

---

[1] 42 U.S.C. §§ 2000d - 2000d-4 (1976).

[2] Plaintiffs have relied on Title VI to obtain relief from employment discrimination where the federal funds specifically created the jobs. Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1287 (S.D.N.Y. 1979). Furthermore, plaintiffs may seek relief from educational discrimination through Title VI. For example, in *Lau v. Nichols,* 414 U.S. 563 (1974), Chinese-speaking school children brought a Title VI suit against San Francisco school district. The school district required proficiency in English for graduation from high school, but did not provide remedial English classes for 1800 non-English speaking students. *Id.* at 565-66. The Court ordered the school district, which had contractually agreed to comply with Title VI, to fashion appropriate relief for the students. *Id.* at 568-69. In an unusual Title VI case, a black plaintiff employed Title VI to obtain admission to an all-white country club built with proceeds from a federal loan. *See* Hawthorne v. Kenbridge Recreation Ass'n, Inc., 341 F. Supp. 1382, 1384 (E.D. Va. 1972).

[3] *See, e.g.,* Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied,* 388 U.S. 911 (1967); Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1285 (S.D.N.Y. 1979); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146 (W.D. Tex. 1972).

[4] *See* text accompanying notes 72-87 *infra.*

[5] 42 U.S.C. § 2000d (1976). The statute provides that "[n]o person in the United States shall, on the ground of race, color or national origin, he excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[6] 42 U.S.C. § 2000d-1 (1976). Presently, 27 agencies have promulgated regulations implementing Title VI. *See* Lamber, *Private Causes of Action under Federal Agency Nondiscrimination Statutes,* 10 CONN. L. REV. 859, 859 n.3 (1978) [hereinafter cited as Lamber].

[7] 42 U.S.C. § 2000d-1 (1976). Before a fund termination, the agency must comply with certain procedural safeguards. The safeguards an agency must follow after efforts to secure voluntary compliance have failed include an opportunity for hearing and an express finding of non-compliance on the record. *Id.* In addition, the head of the federal department or agency

Although fund termination serves as a deterrent to the offenders, monetary cut-offs often may leave the injured party without a remedy, because fund termination may eliminate entirely the benefit sought by the victim of discrimination.[8] Courts, therefore, have allowed aggrieved parties to sue directly under Title VI, which does not expressly provide a direct cause of action. Although some lower courts have explicitly decided the issue of implication of a private right of action,[9] most courts address the merits of a Title VI case, bypassing the initial determination of a plaintiff's statutory right to bring his action.[10] The Supreme Court has never ruled directly on whether the right exists, despite twice allowing private plaintiffs to recover under the statute.[11]

One of the leading cases to address the Title VI private right of action issue was *Bossier Parish School Board v. Lemon.*[12] The Bossier Parish School Board denied to black children of parents stationed on a nearby Air Force base the right to attend the local high school.[13] The children sued to enforce a contractual agreement between the government and the school board allowing the children to be admitted to school in accordance with Louisiana law.[14] The Fifth Circuit viewed section 601's prohibition against

---

must first file a written report with the congressional committees having legislative jurisdiction over the activity involved and allow 30 days before terminating the funds. A cut-off of funds is used only as a last resort. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1969 (1979) (White, J. dissenting); 110 CONG. REC. 6546 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 6749 (1964) (remarks of Sen. Moss).

[8] *See* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1284 (S.D.N.Y. 1979).

[9] *See, e.g.*, NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1285 (S.D.N.Y. 1979). *But see* Clark v. Louisa County School Bd., 472 F. Supp. 321, 323 (E.D. Va. 1979).

[10] *See, e.g.*, Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Pabon v. Levine, 70 F.R.D. 674 (S.D.N.Y. 1976); Soria v. Oxnard School Dist., Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974); Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967); Lemon v. Bossier School Bd., 240 F. Supp. 709 (W.D. La. 1965), *aff'd* 370 F.2d 847 (5th Cir. 1967).

[11] The Supreme Court allowed private plaintiffs to recover under Title VI in Lau v. Nichols, 414 U.S. 563 (1974), *see* note 2 *supra*, and in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The plaintiff in *Bakke* challenged the special admissions program of the Medical School of the University of California at Davis. *Id.* at 269. The Davis program allowed members of minority groups to compete for all 100 openings in the first year class, while restricting white applicants to only 84 openings. *Id.* at 289. Although *Bakke* was ultimately decided on Title VI grounds, the Court assumed the existence of a private right of action for purposes of the case and did not expressly decide whether the plaintiff was entitled to bring the action. The issue was neither argued nor decided in the lower courts, and was, therefore, not properly before the Court. *Id.* at 283. *Bakke* was decided by a divided court, with only four justices willing to state categorically that a Title VI private right of action exists. *Id.* at 420-21 (Stevens, J., concurring and dissenting). Justice White adamantly denied its existence. *Id.* at 380-87 (White, J., dissenting).

[12] 370 F.2d 847 (5th Cir. 1967).

[13] *Id.* at 850.

[14] Under the terms of the contract, the school district agreed to allow the children of Air Force parents to attend the local schools. The *Bossier* court viewed the school district's

discrimination as a condition which the government attached to the fund-granting contract and which it may enforce by terminating the funding.[15] The court concluded that, because Title VI provides aggrieved individuals no statutory remedy, the courts may take cognizance of their claims.[16]

The Supreme Court first granted relief in a private enforcement action under Title VI in *Lau v. Nichols.*[17] *Lau* was a class action involving 1800 Chinese-speaking San Francisco children denied a right to equal education by a requirement of proficiency in the English language with no attendant remedial instruction.[18] The Court granted relief on the merits of the case without addressing the private right of action issue.[19] Language in Justice Blackmun's concurring opinion, however, gave rise to speculation whether Title VI relief would be granted only to substantial numbers of litigants or whether individual plaintiffs might also obtain relief.[20]

Two years later in *Regents of University of California v. Bakke,*[21] the Supreme Court allowed an individual plaintiff to recover under Title VI. Plaintiff Bakke challenged a university admissions system which effectively established minority quotas.[22] Ordering the plaintiff be admitted to medical school, the Court held that a university may consider race as a factor in selecting among university applicants,[23] but may not use a quota system.[24]

Bakke did not decide whether a private right of action might be im-

---

acceptance of federal funds as a ratification of the contract and as an obligation to comply with section 601 by providing education without racial discrimination. *Id.* at 851.

[15] The *Bossier* court held that once the parish accepted federal funds, it could not deny the plaintiffs their right to attend school. *Id.*

[16] *Id.* at 852. *Bossier* subsequently has been cited as squarely deciding the private right of action question. Cannon v. University of Chicago, 99 S. Ct. 1946, 1957 (1979).

[17] 414 U.S. 563 (1974).

[18] *Id.* at 566. California law required full-time compulsory education for children between the ages of six and sixteen years. *Id.* Although English was the mandatory basic language in all California schools, and proficiency in English was a prerequisite for a diploma of graduation, only 1,707 of 3,457 Chinese students needing remedial English instruction were receiving it. *Id.* at 564-66. The result was that 1800 students were receiving incomprehensible and meaningless classroom instruction. *Id.* at 566.

[19] *Id.* at 569.

[20] *Id.* at 572 (Blackmun, J., concurring). Justice Blackmun raised the question of whether the relief in *Lau* would have been granted had there been only a few children affected. *Id; see* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974) (Title VI violation exists only where substantial group deprived).

[21] 438 U.S. 265 (1978), *see* note 11 *supra.*

[22] 438 U.S. at 269, *see* note 11 *supra.*

[23] *Id.* at 323.

[24] *Id.* at 289-305. Six opinions were filed in the case. Four Justices (Justices Stevens, Stewart, Rehnquist and Chief Justice Burger) agreed with Justice Powell that plaintiff Bakke should be admitted. *Id.* at 271. The remaining four Justices would deny Bakke admission, but agreed with Justice Powell that race may be considered in admissions decisions. *Id.* at 272. Commentators have not hailed *Bakke* as a model of clarity for judicial opinion writing. *See generally Symposium:* Regents of University of California v. Bakke, 67 CALIF. L. REV. 1 (1979); Bakke *Symposium: Civil Rights Perspectives,* 14 HARV. C.R.-C.L. L. REV. 1 (1979).

plied[25] because the issue was not properly before the Court.[26] Justice Stevens, in a concurring opinion joined by three other justices, concluded that implication would be proper.[27] The concurrence based its conclusion on an analysis of the *Cort v. Ash* test.[28]

The *Cort v. Ash* test consists of four factors to aid courts in determining whether Congress intended to enforce a statute through a private right of action.[29] The first inquiry is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.[30] Where the language of the statute explicitly confers a right or duty on a class of persons, the Supreme Court generally has endorsed the propriety of implying a private right of action.[31] Justice Stevens concluded that the language of Title VI

---

[25] 438 U.S. at 269.

[26] *Id.* at 283; *see* note 11 *supra.*

[27] *Id.* at 408-421 (Stevens, J., concurring and dissenting).

[28] *Id.* at 420 n.28; *see* Cort v. Ash, 422 U.S. 66 (1975). For an exhaustive analysis of Title VI under *Cort v. Ash,* see Lamber, *supra* note 6. Prior to the *Cort* decision, the Supreme Court had upheld the implication of private causes of action in extremely limited sets of circumstances. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1975 (1979) (Powell, J., dissenting). Under the Federal Safety Appliance Act, 45 U.S.C. §§ 1-161 (1976), and the Railway Labor Act of 1926, 45 U.S.C. §§ 151-163 (1976), the Court looked to the unavailability of other means of enforcement as a circumstance calling for a private right of action. *See* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944) (prohibition against union discrimination); Virginian Ry. v. System Fed'n, 300 U.S. 515, 548-50 (1937) (enforcement of collective bargaining); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 42 (1916) (tort action). The Supreme Court had also allowed private remedies under several other federal statutes. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (42 U.S.C. § 1981); Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6, 9-10 (1971) (SEC Rule 10b-5); Allen v. State Bd. of Elections, 393 U.S. 544, 554-57 (1969) (preclearance provisions of §5 of the Voting Rights Act of 1965); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-17 (1968) (42 U.S.C. § 1982). Since *Cort v. Ash,* however, the courts of appeals have implied private rights of action in numerous areas. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1980 (1979) (Title IX).

Justice Powell has questioned the constitutionality of implying a private right of action. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1975-85 (1979) (Powell, J., dissenting). Powell feels such implication cannot be reconciled with the doctrine of separation of powers. Congress alone determines the jurisdiction of courts created under Article III of the Constitution. Therefore, according to Justice Powell, Congress alone should determine when private parties are allowed causes of action. Justice Powell reasons that federal courts should not enlarge their jurisdiction by creating such a remedy. *Id.* at 1981. Justice Powell would reject the *Cort v. Ash* analysis entirely and imply a right of action only if very compelling evidence of congressional intent exists. *Id.* at 1980-81. He constantly urges the Court to stop assuming legislative functions and resolve all doubts against implication, regardless of the temptation in an appealing case to provide relief where none has been provided by Congress. *See also* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979). Although *Transamerica* limits application of the *Cort* analysis in implying private rights of action, *id.* at 245-49, it does not appear to affect Titles IX or VI.

[29] *Cort v. Ash,* 422 U.S. at 78.

[30] *Id.*

[31] *See* note 28 *supra.* The conclusion that Title VI explicitly confers a specific benefit was not questioned in *Bakke,* nor in subsequent cases. *See, e.g.,* NAACP v. Medical Center, Inc., 599 F.2d 1247, 1257-58 (3d Cir. 1979). *See generally,* note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View,* 87 YALE L.J. 1378 (1978).

confers a benefit on victims of racial discrimination.[32]

The second consideration under the *Cort v. Ash* analysis is whether Congress explicitly or implicitly intended to create or deny a private remedy.[33] In statutes such as Title VI where the law clearly grants certain rights to a class of persons, an explicit intent to create a private right of action need not be shown.[34] An express intent to deny a private cause of action, however, would be fatal to implication.[35] Justice Stevens concluded that the legislative history of Title VI, examined as a whole, indicated that Congress did not intend to deny a private right of action.[36]

The next judicial inquiry is whether the private remedy would frustrate the underlying purpose of the legislative scheme.[37] Justice Stevens argued that Title VI involved personal rights and was drafted for a remedial purpose which would be severely hampered without a private remedy to complement the agency procedures.[38] Justice White dissented, contending that Congress intended the statute to be enforced only through the administrative process or pre-existing statutory means.[39] Justice White stated that section 601's procedural safeguards[40] indicated that Congress did not intend to allow a private party to circumvent the administrative process.[41] In addition, the dissenting Justice felt that inclusion of explicit provisions for private rights of action in Titles II[42] and VII[43] of the Civil Rights Act of 1964 precluded implying such a right under Title VI.[44]

The final consideration under the *Cort v. Ash* analysis is whether the subject matter in issue is traditionally a state concern.[45] Justice Stevens concluded that Title VI obviously was not an exclusive state concern, since Title VI's rights are federally created and the expenditure of federal funds justifies the prohibition against using such funds to further racial discrimination.[46]

---

[32] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 420 n.28 (1978) (Stevens, J., concurring and dissenting).

[33] Cort v. Ash, 422 U.S. 66, 78 (1975).

[34] *Id.* at 82.

[35] *Id.*

[36] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 420 n.28 (1978) (Stevens, J., concurring and dissenting). The *Bakke* dissent disagreed with Justice Stevens and contended that the legislative history did evince an explicit intention to foreclose implication. *Id.* at 381-82 (White, J., dissenting).

[37] Cort v. Ash, 422 U.S. 66, 78 (1975).

[38] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 420 n.28 (1978) (Stevens, J., concurring and dissenting).

[39] *Id.* at 381-83 (White, J., dissenting); *see* note 7 *supra.*

[40] *See* note 7 *supra.*

[41] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 383 (1978) (White, J., dissenting).

[42] 42 U.S.C. § 2000a-3(d) (1976); *see* note 62 *infra.*

[43] 42 U.S.C. §§ 2000e-5(f)(*1*) & 2000e-16(c) (1976); *see* note 62 *infra.*

[44] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 381 (1978) (White, J., dissenting).

[45] Cort v. Ash, 422 U.S. 66, 78 (1975).

[46] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 420-21 n.28 (Stevens, J., concurring and dissenting). Like the conclusion that Title VI confers a benefit on a special class, *see* note

The *Bakke* decision did not settle the Title VI private right of action issue. Lower courts have continued to differ on the propriety of implying a private right of action with each side citing appropriate sections of the *Bakke* opinion for support. One of the leading cases denying a private right was *NAACP v. Wilmington Medical Center, Inc.*,[47] a class action seeking to block construction of a suburban medical center.[48] The opponents of the center contended that black, elderly, Hispanic, and handicapped citizens would be unable to reach the new facility and would be forced to use the inner city hospital.[49] The *Wilmington* court viewed the elaborate and carefully constructed enforcement mechanism of Title VI[50] as manifest evidence that Title VI is essentially an administrative program.[51] The court concluded that the rights of aggrieved parties would be adequately protected by the provisions for judicial review of agency action.[52]

Eschewing the *Cort v. Ash* analysis, the Third Circuit set forth three arguments against implying a private right of action under Title VI. First, the court reasoned that implication would violate the evident congressional intent to vest initial adjudication of Title VI claims in the appropriate administrative agency.[53] In addition, implication of a private right of action would expand the remedies already explicitly provided by the statute.[54] Finally, the *Wilmington* court reasoned that implication might allow a court to substitute its discretion for an administrative agency's decision and thereby undermine the agency function.[55]

---

32 *supra*, the conclusion that Title VI is not an exclusive state concern has not been questioned since *Bakke*. NAACP v. Medical Center, Inc., 599 F.2d 1247, 1257-58 (3d Cir. 1979).

[47] 453 F. Supp. 280 (D.Del. 1978), *rev'd sub nom.* NAACP v. Medical Center, Inc. 599 F.2d 1247 (3d Cir. 1979).

[48] *Id.* at 289-90.

[49] *Id.* Pursuant to court order, the Secretary of HEW had negotiated a voluntary compliance plan with the hospital to lessen the discriminatory impact. *Id.* at 290. The plaintiffs, dissatisfied with the proposed plan, filed the instant suit to secure a trial de novo rather than judicial review as required by 42 U.S.C. § 2000d-2. 453 F. Supp. at 291.

[50] 42 U.S.C. § 2000d-1 (1976) (§ 602 of Title VI); *see* note 7 *supra*.

[51] 453 F. Supp. at 294-95. The *Wilmington* court saw its function as assuring that the agency construed its statutory obligations properly and consistently, rather than resolving particular questions of compliance or non-compliance. *Id.* at 295.

[52] *Id.* The court noted that an aggrieved party may seek judicial review to challenge the failure or refusal of federal officials to terminate funding to programs that purportedly engage in discrimination. *Id.*

[53] *Id.* at 301-02. Representative Gill noted that section 602 does not contain a right of legal action for a person denied the right to participate in federally funded programs unless the program funds have been cut off. 110 CONG. REC. 2467 (1964) (remarks of Rep. Gill). Similarly, Senator Kuchel noted that no remedy is provided for the victim of discrimination. *Id.* at 6562 (remarks of Sen. Kuchel).

[54] 453 F. Supp. at 302-03. The *Wilmington* court noted that if the plaintiffs had alleged a violation of a fundamental constitutional or federal right for which Congress had not created a remedy, a remedy could be implied under the doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). 453 F. Supp. at 303. *See generally* Comment, *New Damage Remedies for Violations of Constitutional Rights*, 31 BAYLOR L. REV. 67 (1979).

[55] 453 F. Supp. at 302-05. The *Wilmington* court saw its reviewing function as limited to

Reaching a result contrary to *Wilmington,* a federal district court in New York recently held that a private right of action may be implied under Title VI. In *Guardians Association v. Civil Service Commission of New York (Guardians II),*[56] the plaintiffs, black and Hispanic New York City policemen, brought a class action to challenge allegedly discriminatory hiring and firing practices of the New York City Police Department. Like the *Wilmington* court, the *Guardians II* court did not dwell on the *Cort v. Ash* analysis.[57] The district court rejected the idea that Title VI is essentially administrative, arguing that individual actions for declaratory and injunctive relief would not interfere with agency action.[58] The statute provides only two methods of enforcement, voluntary compliance and fund

---

determining if agency action were "arbitrary and capricious" within the meaning of the Administrative Procedures Act, 5 U.S.C. § 706 (1976). 453 F. Supp. at 302-05. The court's inquiry should be directed to whether agency procedures to adduce evidence were inadequate as a matter of law. *Id.* at 304. The agency action is presumed valid, unless its decision were not based on relevant factors or unless a clear error in judgment occurred. *Id.*

[56] 466 F. Supp. 1273 (S.D.N.Y. 1979). In 1972 plaintiffs brought suit to challenge written employment tests and height requirements of the New York City Police Department. Guardians Ass'n. v. Civil Serv. Comm'n of N.Y. (Guardians I), No. 72-928 (S.D.N.Y. 1972). The district court denied a preliminary injunction, and the Second Circuit affirmed because of the pending expiration of the eligibility lists based on these requirements. Guardians Ass'n. v. Civil Serv. Comm'n of N.Y., 490 F.2d 400 (2d Cir. 1973). In 1975, in response to a fiscal crisis, the city laid off several policemen on a last hired-first fired basis. Guardians Ass'n v. Civil Serv. Comm'n of N.Y. (Guardians II). 466 F. Supp. 1273, 1275 (1979). The plaintiffs in *Guardians II* prayed for an injunction reordering the police department's senority lists which perpetuated the effects of the tests and height requirements beyond the effective date of Title VII. Guardians Ass'n v. Civil Serv. Comm' of N.Y., 431 F. Supp. 526 (S.D.N.Y. 1977). The Second Circuit vacated and remanded the district court's grant of an injunction for consideration in light of International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Guardians Ass'n. v. Civil Serv. Comm'n of N.Y., 562 F.2d 38 (2d Cir. 1977). On remand the *Guardians II* court held that most, but not all, of the plaintiff class could recover under Title VII. 466 F. Supp. at 1280.

Although Title VII did not originally apply to municipalities, it was amended by the Equal Employment Opportunity Act of 1972 to apply as of March 24, 1972. 42 U.S.C. § 2000e(a). Thus, that portion of the plaintiff class hired before March 24, 1972 could not recover under Title VII. 466 F. Supp. at 1280. The district court, therefore, examined the case under Title VI, which applied as of 1964, to determine whether the remaining plaintiffs might recover under that title. *Id.*

[57] 466 F. Supp. at 1282. The *Guardians II* court mentioned *Cort v. Ash* in only one paragraph which discussed Justice Stevens' concurrence in *Bakke. Id.*

[58] *Id.* at 1284. While recognizing that relief available through agency channels is not necessarily identical to that available through private suits, the *Guardians II* court rejected the idea that the two are antagonistic. Fund termination is an approved remedy only in agency actions; therefore, private actions would not necessarily disturb the fund termination procedure. The administrative procedure is reserved for cases of last resort where the intensity of opposition to change makes voluntary compliance impossible. *Id.; see* Lau v. Nichols, 414 U.S. 563, 569 (1974) (declaratory judgment); Coates v. Illinois State Bd. of Educ., 559 F.2d 445, 449 (7th Cir. 1977) (declaratory judgment); Uzzell v. Friday, 547 F.2d 801, 802-03 (4th Cir. 1977) (injunction); Serna v. Portales Mun. Schools, 499 F.2d 1147, 1148 (10th Cir. 1974) (declaratory and injunctive relief). *See also* Gilliam v. City of Omaha, 388 F. Supp. 842 (D. Neb. 1975) (plaintiff seeking money damages).

termination.[59] Termination of federal funds, however, may not protect the individual victim of discrimination, particularly in an isolated incident.[60]

The *Guardians II* court further concluded that Congress did not intend to foreclose private suits to enforce section 601 rights.[61] Although private actions were expressly created in Titles II and VII, in both instances Congress also established specific procedural prerequisites.[62] Therefore, failure to expressly create a private right of action may indicate only that Congress did not intend to establish similar procedural requirements for vindicating Title VI rights.[63]

While the lower federal courts were undecided on the propriety of implying a private cause of action, the Supreme Court decided *Cannon v. University of Chicago.*[64] The plaintiff in *Cannon* claimed that certain age requirements for admission to medical school operated to exclude women from consideration.[65] The Court's holding that a private right of action existed under Title IX of the Education Amendments of 1972[66] (Title IX) was based on the legislative history indicating that Congress intended Title IX to be enforced like Title VI, and that Congress believed Title VI to encompass a private right of action.[67]

---

[59] *See* text accompanying note 7 *supra.*

[60] Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1284 (1979). *See generally,* Note, *Administrative Cutoff of Federal Funding under Title VI: A Proposed Interpretation of "Program"*, 52 IND. L.J. 651 (1977).

[61] 466 F. Supp. at 1283. In its analysis, the *Guardians II* court did not place much reliance on the congressional comments, noting that "comments made in the heat of a floor debate are not scholarly exercises in textual exegesis. Rather they are more or less intentional distortions calculated to promote or inhibit the passage of a bill." *Id.*

[62] *Id.* at 1282. Under 42 U.S.C. § 2000a-3(d) (1976) (Title II), an individual may bring a civil action to enforce the provisions of Title II, but the court has the option to refer the matter to the Community Relations Service so long as the court believes there is a reasonable possibility of obtaining voluntary compliance. *Id.*

Under 42 U.S.C. §§ 2000e-5(f)(*1*) & 2000e-16(c) (1976) (Title VII), the right to bring a private action under Title VII is contingent upon first bringing a timely claim before the Equal Employment Opportunity Commission. *Id.* For a discussion of "timely" under Title VII, see Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1280 (S.D.N.Y. 1979). *See also* Chambers v. Omaha Pub. School Dist., 536 F.2d 222, 225-27 (8th Cir. 1976) (statute of limitations for Title VI actions).

[63] 466 F. Supp. at 1282. The *Guardians II* decision is noteworthy for the use made of Title VI. The plaintiff class was seeking relief under Title VII to remedy past employment discrimination. *Id.* However, Title VII was not applicable to municipalities until March 24, 1972. *Id.* at 1275. In comparison, Title VI contained no exception for municipalities, and applied from the date of its passage in 1964. By allowing a cause of action under Title VI, the *Guardians II* court was able to grant relief to the entire plaintiff class hired after the passage of the Act, including those hired before March 24, 1972. *Id.* at 1285.

[64] 99 S. Ct. 1946 (1979).

[65] *Id.* at 1949.

[66] 20 U.S.C. § 1681(a) (1976). Title IX's language creating rights and duties is substantially similar to that of Title VI. The statute reads, in pertinent part, "[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 . . ." *Id.*

[67] 99 S. Ct. at 1956-58 (1979). In analyzing the underlying statutory scheme of Title VI,

The *Cannon* decision already has affected the outcome of several Title VI cases. The *Wilmington* decision, which barred private plaintiffs from the right to a trial de novo, has been reversed.[68] The *Wilmington* court, while basing its reversal on a *Cort v. Ash* analysis,[69] cited *Cannon* as support for its holding.[70] Furthermore, a federal district court recently has cited *Cannon* as the Supreme Court authority for a private right of action under Title VI.[71]

A secondary issue raised by the implication of a private right of action is whether Title VI prohibits only intentional discrimination, or whether

---

the *Cannon* Court found two basic purposes for the statute. *Id.* at 1961. One purpose was to avoid using federal money to pay for discriminatory programs. The second purpose was to protect individual citizens from discriminatory practices, a purpose which the Court felt cannot be adequately carried out by agency procedures alone. *Id.* Comments in the Congressional Record show that law suits were contemplated as a more efficient method of achieving that purpose. *See* 110 CONG. REC. 7067 (1964) (remarks of Sen. Ribicoff).

Furthermore, the *Cannon* majority stated that the private right of action issue had been squarely decided in 1967 by the Fifth Circuit in Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967). 99 S. Ct. at 1957. Other federal courts reached the same result in the ensuing years. *Id.* The Court noted that private Title VI litigation has not been unduly costly or voluminous. *Id.* at 1964. Furthermore, it rejected the argument that creation of express private remedies in other sections of the Act precludes implication under Title VI. *Id.* at 1965.

Congress has passed other legislation which implies the existence of a private right of action under Title VI. *See* 20 U.S.C. § 1617 (1976) (attorney's fees under the Emergency School Aid Act); 29 U.S.C. § 794 (1976) (Rehabilitation Act of 1973); 42 U.S.C. § 1988 (1976) (Civil Rights Attorneys Fee Awards Act of 1976). The legislative history of the Attorneys Fee Awards Act shows that it was intended to authorize fees to reimburse private victims of discrimination who have brought suit under the statutes listed in the Awards Act. The civil rights laws listed therein were characterized as "depending heavily on private enforcement." S. REP. No. 1011 94th Cong., 2d Sess. ____, *reprinted in* [1976] 2 U.S. CODE CONG. & AD. NEWS 5908, 5908-10.

The *Cannon* decision also found § 718 of the Education Amendments, 20 U.S.C. § 1617 (1976), persuasive evidence for the existence of a private right of action under Title VI. 99 S. Ct. at 1959. Section 718 explicitly presumes that private suits are available to enforce Title VI against educational agencies. *Id.* at 1958. *See also* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R.-C.L. L. REV. 52 (1974).

[68] NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979).

[69] *Id.* at 1252-59.

[70] *Id.* at 1256-57.

[71] Brown v. New Haven Civ. Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979). The impact of legitimizing private actions under Title VI probably will be felt predominantly in public housing and public education. *See, e.g.,* Lau v. Nichols, 414 U.S. 563 (1974) (public education); Blackshear Residents Organization v. Housing Auth., 347 F. Supp. 1138 (W.D. Tex. 1972) (public housing). Title VI is not generally used in employment discrimination cases since most of these cases are covered by Title VII. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); note 65 *supra. See generally, Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964.* 84 HARV. L. REV. 109 (1971).

Furthermore, plaintiffs turn to Title VI in unusual fact situations not covered by other more specific titles of the Act. *See, e.g.,* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (reverse discrimination); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1384 (E.D. Va. 1972) (black seeking admission to whites-only country club built with proceeds from federal loan).

it also applies to facially neutral practices which have a discriminatory impact.[72] The Supreme Court has held that Title VII of the Civil Rights Act of 1964 forbids practices with a discriminatory effect.[73] Title VI does not specify the standard to apply, although certain implementing regulations under Title VI seem to mandate an effect standard.[74] The Supreme Court had indicated in *Lau v. Nichols* that facially neutral practices with a discriminatory effect might violate Title VI.[75] The *Bakke* court, however, clearly stated that Title VI prohibits only racial classifications that would violate the fifth amendment or the equal protection clause of the fourteenth amendment.[76] The Court based this holding on the clear legislative intent that the scope of Title VI's prohibition should be the same as that of the Constitution.[77]

A violation of constitutional dimensions of the prohibition against dis-

---

[72] Some lower courts have required intentional discrimination by the defendant to constitute a Title VI violation. *See, e.g.*, Coates v. Illinois State Bd. of Educ., 559 F.2d 445, 449 (7th Cir. 1977); Gilliam v. City of Omaha, 388 F. Supp. 842, 848 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975). Other lower courts only require that plaintiffs show a course of conduct which has a discriminatory effect. *See, e.g.*, Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539, 544 (C.D. Cal. 1974). *See also* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjucication*, 52 N.Y.U. L. REV. 36 (1977).

The Supreme Court itself had intimated the possibility that Title VI prohibited practices with a discriminatory effect. Lau v. Nichols, 414 U.S. 563 (1974), upheld a Title VI charge of discrimination in violation of H.E.W. implementing regulations which prohibit acts which have the effect of discriminating against certain persons. *Id.* at 568; *see* note 74 *infra*. *But see*, Board of Educ. of City of N.Y. v. Harris, 100 S. Ct. 363, 374 (1979).

[73] Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). Title VII declares illegal any unlawful employment practice which limits, classifies or segregates employees or applicants in a way which deprives or tends to deprive an individual of employment opportunities because of his race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2) (1976).

[74] The HEW regulations implementing Title VI forbid recipients of federal funds from providing to some individuals services or benefits which differ from those provided to other under the program. 45 C.F.R. § 80.3(b)(1)(ii) (1979). Furthermore, the regulation forbids recipients from restricting an individual's enjoyment of advantages or privileges enjoyed by others receiving benefits under the program. *Id.*

[75] 414 U.S. 563 (1974). The *Lau* Court found a violation of Title VI in a violation of the HEW implementing regulation, 45 C.F.R. § 80.3(b), promulgated under Title VI. 414 U.S. at 568. This finding led other courts to find a violation of Title VI on the basis of discriminatory impact alone. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1286 (S.D.N.Y. 1979). Because this aspect of the *Lau* holding has been questioned in *Bakke*, 438 U.S. at 352 (Brennan, J., concurring and dissenting), *Lau's* precedential value is unclear. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 716 (2d Cir. 1979).

[76] 438 U.S. at 287. Four Justices explicitly agreed with Justice Powell. *Id.* at 322 (Brennan, J., concurring and dissenting).

[77] *Id.* at 285-87. Senator Ribicoff characterized Title VI as spelling out the procedure for enforcing the constitutional restriction against discrimination in the use of federal funds. 110 CONG. REC. 13,333 (1964) (remarks of Sen. Ribicoff). Similarly Senator Humphrey stated that the purpose of Title VI was to give citizens the rights and opportunities guaranteed by the Constitution. *Id.* at 6553 (remarks of Sen. Humphrey).

crimination requires a showing of an intentional plan or purpose,[78] although a discriminatory impact may be one factor in the totality of the circumstances indicating a discriminatory intent.[79] Yet even an overwhelming discriminatory effect will not invalidate an action if no discriminatory intent or purpose can be shown.[80]

Despite the clear holding in *Bakke* that Title VI prohibits only those actions that would violate the Constitution,[81] subsequent treatment by the lower courts has been varied.[82] Some lower courts, basing their holdings on two theories, continue to require only a showing of disproportionate impact. One theory gives great deference to the implementing regulations promulgated under Title VI which require only a showing of discriminatory effect.[83] Under the second theory, the lower courts look to the similarity between Title VII and Title VI and hold that Congress intended that they

---

[78] Washington v. Davis, 426 U.S. 229, 242-43, 245 (1976). The plaintiff in *Davis* challenged the validity of an employment qualification test which screened out a disproportionately high number of black applicants. *Id.* at 232-33. The disputed test measured verbal ability, vocabulary, reading and comprehension. The Court of Appeals for the District of Columbia decided the case in favor of the petitioners on constitutional grounds alone. *Id.* at 236. Guided by Griggs v. Duke Power Co., 401 U.S. 424 (1971), a Title VII case, the court of appeals had found the lack of discriminatory intent irrelevant. 512 F.2d 956, 960 (D.C. Cir. 1975). The court held that disproportionate impact on black applicants was sufficient to establish a constitutional violation, unless the defendants could show the test measured job performance and future success. *Id.* The Supreme Court reversed, holding that the constitutional standard for invidious discrimination was not identical with that of Title VII. *Id.* at 239.

[79] Washington v. Davis, 426 U.S. 229, 242 (1976). An action does not violate the Constitution merely because it has a racially discriminatory impact. *See* Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264-65 (1977). A constitutional violation requires a showing of racially discriminatory intent or purpose, although the discrimination need not be the sole or even primary purpose of the action. *Id.* at 265. Plaintiffs may show discriminatory intent through several kinds of circumstantial evidence, including disproportionate impact and legislative history. *Id.; see* Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (sequence of events leading to discriminatory action); Lane v. Wilson, 307 U.S. 268, 275-77 (1939) (historical background of the decision constitutes adequate circumstantial evidence); Daley v. City of Lawton, 425 F.2d 1037, 1039-40 (10th Cir. 1970) (departure from normal procedures or substance indicates discriminatory intent). *See also* Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause,* 12 HARV. C.R.-C.L. L. REV. 725 (1977), Note, *Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact,* 36 WASH. & LEE L. REV. 109 (1979).

[80] Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979). In *Feeney,* the Supreme Court reaffirmed its holdings in *Davis* and *Arlington Heights* and upheld a Massachusetts veterans preference statute which operated to exclude virtually all women from high level civil service jobs. The Court held that invidious purpose must be shown to make out a violation of constitutional dimensions, regardless of the impact of the action. *Id.* at 2292-93. *See also,* Keynes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 213 (1973) (schools); Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964) (elections); Akins v. Texas, 325 U.S. 398, 403-07 (1945) (jury selection).

[81] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1979).

[82] *See* text accompanying notes 83-86 *infra.*

[83] *See, e.g.,* Jackson v. Conway, 476 F. Supp. 896 (E.D. Mo. 1979); Caulfield v. Board of Educ. of City of N.Y., No. 77 C 2155 (JBW) (E.D.N.Y. Aug. 27, 1979).

be enforced similarly.[84]

Some lower courts, however, follow *Bakke* and require a showing of discriminatory intent.[85] These courts consider the discriminatory impact of a program's action to be a strong, but not conclusive, indication of discriminatory intent.[86] In light of *Personnel Administrator v. Feeney*,[87] which holds that the Constitution bars only intentional discrimination, the approach of these courts seems to be the better one.

Although the Supreme Court has not yet ruled on whether a private right of action may be implied under Title VI, the Court's decision in *Cannon v. University of Chicago* indicates that the Court will hold a Title VI private right exists if the question is properly before it. In addition, the Court's decisions in the line of cases following *Washington v. Davis* suggest the Court will require a finding of intentional discrimination to establish a violation of Title VI.

REBECCA D. GRAVES

---

[84] *See, e.g.*, Association Against Discrim. in Employment, Inc. v. City of BridgePort, 479 F. Supp. 101, 111 (D. Conn. 1979); Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 466 F. Supp. 1273, 1284 (S.D.N.Y. 1979). The *Guardians II* court used the perceived similarity between Title VI and Title VII to hold that the full range of Title VII relief is also available under Title VI. *Id.* at 1284.

[85] *See, e.g.*, Detroit Police Officer's Ass'n v. Young, 20 FAIR EMPL. PRAC. CAS. 1728 (6th Cir. 1979); Parents Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 716 (2d Cir. 1979); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn. 1979); Otero v. Mesa County Valley School Dist., 470 F. Supp. 326, 330-31 (D. Colo. 1979).

[86] Most cases that regard discriminatory impact as evidence of intent involve litigation over affirmative action programs. *See, e.g.*, Detroit Police Officer's Ass'n v. Young, 20 FAIR EMPL. PRAC. CAS. 1728 (6th Cir. 1979).

[87] 99 S. Ct. 2882 (1979).