10-1982

Guardians Assn. v. Civil Service Comm'n. N.Y.C.

Lewis F. Powell Jr.

10/26 CFR

Resp Req'd
Adds Nothing
Grant in
BOTH #431
& #432
dl

Then Grant 81-431 that presents long unsettled Q as to whether discriminatory intent must be shown in a Title VII case (See my op. in Davis v L.A.) or under §1981.

Major "discrimination in hiring" case involving N.Y.'s "finest" (Query: for how long?) 81-431 presents the "discriminatory intent" issue under Title VII & §1981.

Preliminary Memo

81-432 presents the St/Lim. issue as to when the 300 day period commences when a DC finds a continuing violation (Cf. Ricks v Delaware College. Then Q is the main issue in 80-951, Flight Attendants v TWA and 78-1545 Ziper v. TWA, two cases already granted. Also in question in 81-373 & 81-374 (Bridgeport Conn. Fire Dept. cases) on Oct 30-list

October 30, 1981 Conference
List 3, Sheet 3

Grant Both 1/6/82

No. 81-431 — Timely

GUARDIANS ASSOCIATION et al. (Plaintiffs)
v.
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al. (Defendants)

Cert to CA 2 (Meskill, Kelleher [DJ], concurring, & Coffrin [DJ], concurring) Federal/Civil

No. 81-432 — Timely

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.
v.
GUARDIANS ASSOCIATION, et al.

Cert to CA 2 (Meskill, Kelleher [DJ], concurring, & Coffrin [DJ], concurring) Federal/Civil

1. SUMMARY: The cross petitions in this class action case Title VII ask the Court to decide when a discriminatory hiring practice

CFR with eye to a grant in 81-431. The issues are whether plaintiffs in an employment discrimination suit must show discriminatory

ceases for purposes of Title VII, whether a timely claim of one or more class members resurrects other members' claims, and whether Title VI and §1981 prohibit conduct having discriminatory impact absent proof of discriminatory intent.

2. FACTS & PROCEEDINGS BELOW: Between 1968 and 1970 New York City administered eight written examinations to Police Department applicants. Each exam resulted in a list of eligible candidates ranked according to their test scores, and New York law requires that candidates be hired according to the order on the list. A hiring freeze was imposed on the NYPD from May 1970 to January 1973. While some appointments were made prior to the freeze, the bulk of the appointments from the lists were made after January 1973. Another hiring freeze was imposed in October 1974. On June 30, 1975, the Police Department was required to lay off approximately 2,800 officers for budgetary reasons. The layoffs were made pursuant to the Department's "last hired, first fired" policy.

In March 1972 black and Hispanic candidates brought suit alleging that the written exams administered between 1968 and 1970 were discriminatory, causing blacks and Hispanics to score lower than they otherwise would, thus causing them to hold lower positions on the eligible lists, which delayed their appointments (Guardians I). The DC denied a preliminary injunction which would have suspended hiring from the lists and the CA 2 affirmed on the grounds that the lists were nearly exhausted. Plaintiffs abandoned the action.

The plaintiffs in this suit filed charges with the EEOC in 1975, and in 1976 brought suit on behalf of all black and Hispanic officers laid off on June 30, 1975 (Guardians II). They claimed that but for the discriminatory exams in 1968-70, they would have been appointed earlier and would have established sufficient seniority to withstand the layoffs. The DC granted a preliminary injunction requiring the reordering of NYPD seniority lists to accord plaintiffs constructive seniority. The DC specifically held that the exams and the layoffs were not intentionally discriminatory. no discrim. intent.

The CA 2 vacated the injunction and remanded for consideration in light of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (neutral seniority system which perpetuates past discrimination cannot be challenged under Title VII). On remand the plaintiffs amended their complaint to assert a claim under Title VI, making their claims identical to the ones asserted in 1972 in Guardians I. The DC (Carter) again granted plaintiffs' motion for a preliminary injunction, concluding that relief could be granted under Title VII to those class members hired after 1972, when Title VII was amended to include municipalities. The court further determined that Title VI, which forbids discrimination by recipients of federal funds, impliedly confers a right of action on private individuals and bans conduct which has a discriminatory impact. Since Title VI has been applicable to municipalities since 1964, the DC found all black and Hispanic police officers who took the challenged exams to be entitled to an award of constructive seniority.

Wow

3. OPINION BELOW: The CA 2 reversed in a lengthy opinion. Writing for the court, Judge Meskill upheld the DC finding that the tests had a disproportionate impact on class members. He next found that the results of the tests were being used to discriminate, in violation of Title VII, each time a member of the plaintiff class was denied a chance to fill a vacancy in the Police Department. Thus the Department's actions were not merely effects of earlier discriminatory conduct. The discrimination began before Title VII was made applicable to municipalities in 1972, but it continued until 1974 when the defendants ceased hiring based upon the lists. The court held that plaintiffs demonstrated a continuing violation of Title VII as to which a timely EEOC charge was filed. Where a continuing, illegal employment policy is maintained, relief for injuries sustained prior to the beginning of the 300-day limitations period is appropriate. Thus the DC properly declined to limit relief to the plaintiffs who were wrongfully refused employment within 300 days preceding the filing of the EEOC charge, since the NYPD's actions were not discrete acts but were part of a consistent policy.

The CA 2 unanimously reversed the awarding of relief under Title VI. Judge Meskill found that there was no private right of action under Title VI. Writing for the court on the Title VI issue, Judge Coffrin, joined by Judge Kelleher, reversed the DC on the ground that Title VI requires proof of discriminatory intent. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justices Powell, Brennan, White, Marshall, and

Blackmun took the position that Title VI imposes an intent standard. Thus the majority of the Court overruled Lau v. Nichols, 414 U.S. 563 (1974), which holds that Title VI requires only proof of discriminatory impact. Relying on Washington v. Davis, 426 U.S. 229 (1976), the CA 2 rejected plaintiffs' §1981 claim on the ground that the statute prohibits only purposeful racial discrimination.

4. CONTENTIONS:

A. Plaintiffs seek review of the CA 2's determination that they must prove discriminatory intent as a prerequisite to relief under Title VI and §1981. They contend that the Court squarely and unanimously held in Lau v. Nichols that a showing of discriminatory impact is sufficient to establish a violation under Title VI. The CA 2 reached the opposite result by relying upon dicta in Bakke. In Bakke, the challenged preference was intentional, and the question of whether Title VI covers practices with a discriminatory impact was not before the Court. Instead, the question was what justification could legitimize a racial classification. It would be consistent with congressional intent to interpret Title VI as prohibiting acts that have the effect of discrimination yet permitting racial preferences designed to remedy past discrimination. Thus Bakke did not overrule Lau v. Nichols, a conclusion which is supported by the Court's reliance on Lau in Fullilove v. Klutznick, 448 U.S. 448, 479-80 (1980). While the CA 2, CA 5, and CA 7 have concluded that discriminatory intent must be shown to establish a violation of Title VII, the CA 3, sitting en banc, has recently reached the

opposite conclusion. NAACP v. The Medical Center, Inc., (June 29, 1981).[1] Panels of the CA 9 have also followed Lau after Bakke, although those opinions did not analyze the impact of Bakke. The decision below is inconsistent with the interpretations given to other provisions of the Civil Rights Acts of 1964 and 1968 and it conflicts with the regulations promulgated by federal agencies which must enforce Title VI.

Discussion: There is a direct conflict between the CA 2 and the CA 3 on this issue. Given the importance of the issue, and the confusion as to whether Bakke overruled Lau sub silencio, I would recommend CFR with a view to granting on this issue.

B. Plaintiffs next point out that the issue of whether intentional discrimination must be proven under §1981 has never been addressed by this Court. In Washington v. Davis the Court held that discriminatory intent must be established to show an equal protection violation, but §1981 was not addressed. This Court subsequently granted cert in County of Los Angeles v. Davis, 440 U.S. 625 (1979), to consider "whether the use of arbitrary employment criteria, racially exclusive in operation, but not purposely discriminatory, violates 42 U.S.C. §1981," but the case was vacated and remanded as moot. Most courts have required plaintiffs to prove intent to establish a violation of §1981, but the issue of what is the proper standard remains unresolved.

See my op. & also Judge Wallace's op. in Davis

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[1]Neither party has sought cert or an extension of time in which to file for cert.

Discussion: The CA 2 noted that guidance regarding the correct interpretation of §1981 has been eagerly awaited ever since Washington v. Davis. That cert was granted in County of Los Angeles v. Davis indicates the importance of the issue. However, the conflict in the circuits which existed when cert was granted in County of Los Angeles v. Davis is no longer present. See Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), cert. denied, 49 U.S.L.W. 3617 (Feb. 24, 1981) (overruling County of Los Angeles v. Davis). On the other hand, if the Court grants cert on the Title VI issue, there is no reason not to dispell any remaining doubt as to the proper standard under §1981. Thus I recommend CFR with a view to granting on this issue as well.

C. Defendants also seek cert on two issues. They first argue that the act of discrimination in a Title VII case must be precisely identified for statute of limitation purposes. The CA 2 characterized plaintiffs' claim as a discriminatory refusal to hire which continued until 1974, but the acts forming the basis of the claim were the giving of the exams and the promulgation of the rank-ordered eligibility lists. Under New York state law, the claim accrues and the statute of limitations begins to run upon promulgation of the eligibility list. Plaintiffs' claim is not a continuing violation of Title VII, and the continuing impact of a past discriminatory act does not per se constitute a continuing violation of Title VII. Delaware State College v. Ricks, 449 U.S. 250 (1980). The Court held in International Brotherhood of Teamsters v. United States that the application of a neutral seniority system does not violate Title VII even if it

perpetuates pre-Act discrimination, and bona fide merit systems are afforded the same protection. Frank v. Bowman Transportation Co., 424 U.S. 747 (1976). New York state law mandating rank-ordered appointments is clearly a neutral merit system. Plaintiffs' claims do not satisfy any of the traditional criteria for establishing a continuing violation, and the claims are identical to those in United Airlines v. Evans, where the Court held that the seniority system was neutral in its operation.

Plaintiffs' response tracks the CA 2 opinion. The contention that the operative event for Title VII purposes is the promulgation of eligibility lists conflicts with the express language of the statute, which provides that it is not unlawful for an employer "to act upon the results of any professionally developed ability test, provided that . . . action upon the results is not . . . used to discriminate. . . ." 42 U.S.C. §2000e-II(h). The statute clearly focuses on the use of examinations. Defendants' reliance on New York cases holding that a claim arises upon promulgation of eligibility lists is misplaced. Those cases concerned suits under New York law and are not relevant to a suit based upon Title VII. It is well-settled that an employer violates Title VII so long as it continues to deny jobs based on a discriminatory hiring policy. The CA 2's decision was not inconsistent with United Airlines v. Evans and Delaware State College v. Ricks, which hold that a Title VII claim may not be predicated solely upon the continuing impact within the limitations period of a violation which pre-dates the limitation period. The court's decision is premised

not on the continued impact of pre-Act discrimination, but on actual post-Act refusals to hire. Moreover, as the CA 2 concluded, a hiring system that ranks applicants according to their scores on a discriminatory examination cannot claim the status of a bona fide merit system within the meaning of the statute.

Discussion: Plaintiffs have the better of the argument on this issue. The CA 2 correctly distinguished this case from Evans, Ricks, and Teamsters in deciding that post-Act refusals to hire pursuant to pre-Act discriminatory exams violates Title VII. I recommend denial in light of defendants' failure to cite any conflicts in the circuits.

D. Defendants take issue with the CA 2's holding that all class members hired after 1972 were entitled to relief and its refusal to limit relief only to class members who were refused hire within 300 days prior to the filing of EEOC charges. They claim that the court erroneously relied upon Acha v. Beame, 570 F.2d 57 (2d Cir. 1978).

Plaintiffs argue that a purported misinterpretation by one panel of a circuit of a prior decision by the same circuit does not warrant cert. The denial of the petition for rehearing with suggestion for rehearing en banc suggests that the rest of the circuit concurs with the panel opinion. Moreover, there is ample support for the CA 2's position that relief is appropriate for injuries sustained prior to the limitations period where the defendant engaged in a consistent discriminatory policy.

Discussion: Defendants cite no cases suggesting that the CA 2 was incorrect. I recommend denial.

5. CONCLUSION: I recommend CFR in No. 81-431. While I do not think No. 81-432 presents any certworthy issues, it might be appropriate to hold it for consideration along with No. 81-431 rather than to dismiss it at this time.

There is a response to No. 81-432, but there is no response to No. 81-431.

October 21, 1981 Bell Opinion in Joint Appendix

ME

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 81-431

Submitted ....., 19... Announced ....., 19...

GUARDIANS ASSN.

vs.

CIV. SERV. COMMN. NY

Compliance

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

GRANT
Schlueter

OK

February 19, 1982 Conference
List 5, Sheet 6

No. 81-431 OK

GUARDIANS ASSN., et al.

v.

CIV. SERV. COMMN., NY, et al.

Motion of Parties to Dispense with Printing the Joint Appendix

SUMMARY: Petrs and resps jointly move to dispense with printing an appendix. They intend to rely only on the opinions of the courts below which have been included in the cert petns for both this case and 81-432. Cert was granted on January 11, 1982 and 81-432 is being held for this case.

DISCUSSION: The issues presented in this case center on application of Titles VI and VII of the Civil Rights Act of 1964 and 42 U.S.C §1981 in a class action suit brought by minority policeman. Presumably, any facts pertinent to this litigation are addressed in the opinions below or are not being contested by the parties. On that basis, the motion may be granted.

There is no response.

1/29/82 Schlueter

Grant. jw.

Court	*Voted on*....., *19*...	
Argued ....., *19*...	*Assigned* ....., *19*...	No. 81-431
Submitted ....., *19*...	*Announced* ....., *19*...	

GUARDIANS ASSN.

vs.

CIVIL SERV. COMMN. NY

Motion of parties to dispense with printing the joint appendix.

grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.											✓		
Blackmun, J.											✓		
Powell, J.											✓		
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Memorandum to File July 19, 1982

No. 81431, Guardians Association v. Civil Service Commission of the City of New York

I have read preliminarily the principal briefs in this important case. Rather than "scribble" on the covers as a means of refreshing my recollection, I dictate this sketchy memorandum.

This is a suit by ~~contest between~~ a class of black and Hispanic police officers appointed to positions in New York City on the basis of 1968-70 Civil Service examinations. This litigation commenced in 1976, and has been to the Court of Appeals three times. It was a Title VII initially, but in its present posture it is a suit under Title VI enacted in 1964. The present members of the class have no rights under Title VII because it was not made applicable to municipal governments until 1972, after the discrimination found in the 1968-70 examinations.

Prior decisions, not challenged here, held that these examinations were "not job related", and therefore "had a discriminatory impact on the scores of blacks and Hispanics". Although members of the class made passing scores, entrance into the system - i.e. appointment - was made in the order of test scores. Thus, seniority and related benefits were affected adversely by the low scores made by petitioners.

Although discriminatory impact was found, CA 2 held that both Title VI and § 1981 require proof of discriminatory intent, and it is conceded that no such intent was proved in this case.

Thus, the issue presented in this case on the basis of questions on which certiorari were granted is whether discriminatory intent is a prerequisite to injunctive and damages relief in a Title VI suit? Strong briefs both for petitioners and respondents have been filed. One of the Wall Street firms represents ~~petitioners, and~~ the Corporation Counsel of New York is Frederick ~~Swartz~~ Schwartz, Jr., the well educated son of one of the senior partners in Davis Polk for many years.

I must have been tired when I dictated this. We decided this Q in Gen. Bldg's Contractors case (Phila) in June of this year.

The debate centers primarily on three decisions of this Court. Petitioners rely on Lau v. Nichols, 414 U.S. 563 in which this Court, unanimously, stated that Title VI did not require discriminatory intent. Respondents rely, with equal confidence, on views expressed by five of us (in Brennan's and my opinions) in Bakke, and subsequently by a majority of the Court in Board of Education v. Harris, 444 U.S. 130. In both Bakke and Harris, this Court stated that Title VI incorporates the constitutional intent standard as set forth in Washington v. Davis.

The parties also debate whether § 1981 embodies an impact standard or requires a showing of discriminatory intent. Petitioners argue that we have never decided this question (which I believe is correct, so far as a Court opinion goes), while respondents say that § 1981 has its roots in the Thirteenth and Fourteenth Amendments, that at the time these were adopted no one had ever heard of an "impact standard" - one not articulated until 100 years later. Moreover, respondents argue that § 1981 must be construed to accord with our construction of §§ 1982, 1983 and 1985, each of which requires proof of discriminatory intent.

no

I have been of the opinion - and expressed it in one or more cases (see a case here from the city of Los Angeles three or four years ago) - that § 1981 does require a discriminatory intent (at least this is my recollection, without checking back). As stated in Bakke, it also has been my view that Title VI embodied the constitutional intent standard of Washington v. Davis and Arlington Heights. I do not recall, when working on Bakke, that I considered expressly what the Court said in Lau. I am dictating this in my residence, and probably will not do any legal research myself at this time, nor do I recall whether the Court's decision in Lau required a finding that proof of intent was unnecessary. That is, did we hold that only disparate impact is necessary in a Title VI case?

Both parties rely on legislative history. My impression from the briefs is that CA 2 and respondents have the better of this argument. Petitioners, however, do have support in the Regulations adopted by the Department of Labor.

My intuitive tentative view is that CA 2 decided the case correctly and should be affirmed. This view is based, in large part, on the following considerations:

(i) Congress was not explicit on this issue and I am reluctant to infer a wider type of liability on municipalities and employers than Congress made clear it wished to impose.

(ii) One must remember in cases of this kind that two innocent groups of persons are involved (See my dissent in Bowman). Here, petitioners are blacks and Hispanics who have less seniority in their jobs because of Civil Service tests that were not job related. But if petitioners win, police officers who scored higher grades on Civil Service examinations will forfeit seniority position - including rank with respect to lay-offs and other critical employment issues. Thus, the Civil Service Commission - in this important sense - is not the real party in interest on the respondents' side.

(iii) Finally, in Bakke and Harris, both decided since Lau, a majority of the Justices would have held that Title VI applies the constitutional standard of discriminatory intent. Since these two cases were decided, district courts and courts of appeals almost uniformly have read Bakke and Harris this way. We would look more than a little silly if, at this time, the Court reverted back to language in Lau.

Nevertheless, I would like for my clerk to address particularly these three cases, including the question whether Lau would have to be overruled if we follow the more recent statements of the Court.

* * *

There is a threshold issue mentioned only briefly in respondents' brief: whether a private remedy for injunctive relief and for damages may be inferred from Title VI. Judge Meskill, in his separate opinion, and the district court,

both discussed this issue, but it is not expressly included in the questions of our grant. I am inclined to think, however, that the question necessarily is subsumed in the questions now before the Court. Unless there is a private remedy, we do not reach the issue debated by the parties. For reasons I have stated - at perhaps too great a length in other cases commencing with my dissent in Cannon - I am less than enthusiastic about implying private causes of action particularly where Congress has provided other remedies.

L.F.P., Jr.

lfp/djb

Excellent memo

File

1. No private right of action implied under VI.

The reasoning of majority in Cannon (Title IX) appears to support such action. (BRW, HAB & 9 dissented): (BRW in Bakke also said no implied right under VI).

J. Meskill dissented from CA2's holding that right may be implied. He distinguished damage & back pay suits from injunctions & decla. judgments. His dissent, relying on leg. history, is powerful & its reasoning would extend to all private actions. Title VI provides other remedies: fund cut-off, reconciliation, etc. These are inconsistent with private suits.

Altho we did not grant Cert. on this issue, we should resolve it. If no action, no case or controversy, & courts below decided it. Additional briefing?

men 08/17/82

BENCH MEMORANDUM

2. "Intent or effect" standard. CA2, relying on Bakke (LFP, WJB, etc) & Fullilove & Harris, held "intent" must be proved - just as 14th Amend

No. 81-431:

The Guardians Association v. Civil Service Commission of the City of New York

Problem: Law held "effect" only is necessary under VI. But subsequent cases, esp. WJB (Bakke) can't be reconciled with Law. Douglas' opinion contains no analysis, & WJB & 9 (in Bakke) destroy validity of Law.

But 800,000 "foreign" language students now receive dual language instruction under Lau. We should try to find principled way to limit Lau to its special facts.

Mark Newell

August 17, 1982

Questions Presented[1]

1. Does Title VI provide an implied right of action for injunctive relief and damages?

2. Must plaintiffs prove discriminatory intent to obtain relief under Title VI?

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[1] This case also presented the issue whether plaintiffs must prove discriminatory intent to obtain relief under 42 U.S.C. §1981, an issue resolved in General Building Contractors Association, Inc. v. Pennsylvania, No. 81-280 (June 29, 1982).

WHR's opinion

yes

I. Background

A. Statutory Background

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

B. Facts

Between 1968 and 1970 the New York City Department of Personnel administered several civil service exams for the position of police officer. Candidates who passed a test were rank-ordered on an eligibility list on the basis of their test scores. New officers were hired from the top of the list. Following a hiring freeze between 1970 and 1973, the city hired new officers and exhausted the lists. In June 1975 the Police Department (NYPD) laid off 2800 officers, of whom 21.5% were minorities, on a last-hired, first-fired basis.

lay-offs on last hired, first fired

C. Decisions Below

In April 1976 petitioners, who represent minority police officers, brought this lawsuit alleging that but for the examinations given between 1968 and 1970, they would have been appointed earlier and accrued sufficient seniority to avoid the layoffs.

The DC (SDNY, Carter) found that the test was not job-related and had a discriminatory impact on minority candidates. Accordingly, use of the eligibility lists was unlawful after March 24, 1972, the date Title VII was applied to state and local governments. The DC further ruled that use of the tests and lists prior to March 1972 violated Title VI. The court held that Title VI contains an implied private right of action for damages and injunctive relief and that Title VI does not require petitioners to prove intentional discrimination. Claims under 42 U.S.C. §§1981 and 1983 were rejected, however, because petitioners had not established intentional discrimination. 466 F. Supp. 1273 (S.D.N.Y. 1979), Joint Appendix (J.A.) A108.

DC - test not job related - thus use invalid after 1972 when VII made applicable. But were invalid under VI even prior to 1972

The CA2 affirmed on the Title VII, §1981, and §1983 issues, but reversed on the Title VI issue. 633 F.2d 232 (CA2 1980), J.A. A1. Visiting Judge Coffrin (D. Vt.), joined by visiting Judge Kelleher (C.D. Cal.), held that Title VI requires proof of intentional discrimination. J.A. A88-A94. Judge Meskill did not reach that issue, finding instead that Title VI does not contain an implied right of action for damages. J.A. A46-A65.

CA2 initially held Title VI requires proof of intent to discriminate & reversed on this issue

Meskill - no implied right to sue.

This Court granted cert to decide whether proof of intentional discrimination is required under Title VI and §1981.

Amici briefs in support of petitioners have been filed by the NAACP; the ACLU; and the Asian American Legal Defense and Education Fund and the Mexican American Legal Defense and Education Fund. The Equal Employment Advisory Council has filed an amicus brief in support of respondents.

II. Discussion

A. The Private Right of Action Issue

but we should address issue

Cert was not granted on this issue. Only respondents raise it in the briefs. See Brief for Respondents at 8-9. Nonetheless, this Court should decide the issue. If there is no private right of action, the basis for the suit disappears. Moreover, although most circuits have held that Title VI creates a private right of action, this view is not unanimous. For example, the CA5 has held that even assuming that an action may be brought for declaratory and injunctive relief, an issue the court did not decide, "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 . . . ." Drayden v. Needville Independent School Dist., 642 F.2d 129, 133 (CA5 1981). Accord, Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments, 496 F. Supp. 522, 527 (N.D. Ill. 1980). And one district court has held that no private right of action exists under Title VI. Clark v. Louisa County School Bd., 472 F. Supp. 321, 323 (E.D. Va. 1979).

Conflict

Resps lost on this issue in DC & CA2 & did not appeal

It is true that respondents, for unknown reasons, neither appealed the issue to the CA2 nor requested that it be decided in this Court. But since Both the DC and the CA2 decided the issue, the prudential case for avoiding it is weak. Cf. University of California Regents v. Bakke, 438 U.S. 265, 283 (1978) (opinion of Powell, J.) (declining to reach the Title VI right of action is-

sue because it was neither argued nor decided below). Accordingly, I will discuss the merits of the right of action dispute.

1. Views of Supreme Court Justices in Bakke

Bakke view

Four current Justices went on record on this issue in Bakke.

(a) The Stevens Opinion (private right exists & CJ & WHR agreed)

Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, rejected the University of California's "belated" argument that Bakke could not enforce Title VI in a private action. Justice Stevens found that "the question is not properly before us," but went on to reject the claim. He cited lower court decisions; the agreement of the United States that a private action exists; subsequent legislation predicated on the assumption that a private action exists; and the general tenor of the legislative history. See 438 U.S. at 419-21.

(b) The White Opinion (no private action)

BRW

Justice White's separate opinion in Bakke argued that Title VI does not contain a private right of action. He emphasized that Titles II and VII specifically created private rights of action, whereas Title VI was silent; that implying a private right of action would be inconsistent with Congress' provision for extensive administrative review prior to funding termination; and that key legislators stated that no private right of action existed. See 438 U.S. at 379-87.

(c) The Powell and Brennan Opinions I did not express opinion, but

LFP

In Bakke you declined to decide the issue, but observed: "Several comments in the debates cast doubt on the existence of

any intent to create a private right of action." 438 U.S. at 283 n.18.

Justices Brennan, Marshall, and Blackmun expressed no views.

2. Cannon v. University of Chicago

Title IX

In Cannon, 441 U.S. 677 (1979), this Court decided that Title IX establishes a private right of action. Justice Stevens' majority opinion, joined by Justices Brennan, Stewart, Marshall, and Rehnquist, relied heavily on the fact that Title IX was modeled after Title VI, which at the time Title IX was enacted had been interpreted by lower courts as creating a private cause of action. See 441 U.S. at 694-703.

Justice White, joined by Justice Blackmun, reiterated his Bakke view that a private right of action should not be implied under Title VI. Id. at 718-30. Your dissenting opinion agreed with Justice White's analysis. Id. at 730.

3. Discussion

Cannon is relevant

The reasoning of the Cannon opinions almost surely will extend to this case. The majority opinion all but expressly ratified the lower court opinions implying a private right of action under Title VI. In contrast, under your dissent and Justice White's dissent no private right of action should be implied. In view of these set positions, I will not discuss the legislative history or the pro/con arguments. Rather I will confine my analysis to an issue not previously discussed by members of this Court: Judge Meskill's suggestion that Title VI may contain an

Mark's analysis

Meskill's Lewson VI
1. No private right to damages
2 Did not address non-monetary relief.
3. No prior case has awarded damages

implied right of action for declaratory and injunctive relief but not for damages.

Judge Meskill wrote that Title VI does not create a private action for damages; he expressed no view on the existence of an action for nonmonetary relief. (As noted at p. 4 supra, the CA5 has done the same.) He could find no prior case in which compensatory damages had been awarded under Title VI. All of the courts that had implied an action under Title VI had done so only with regard to declaratory or injunctive relief. J.A. A49-A52.

No prior case has awarded damages

Judge Meskill then argued that a damage remedy was "inconsistent with Title VI's express remedy of funding termination." He noted that even suits limited to declaratory and injunctive relief could circumvent Title VI's administrative process and, significantly, its emphasis on conciliation and voluntary compliance. But a damage remedy potentially was far worse: "[T]he present case illustrates that awards of compensatory and retrospective relief in such actions might have consequences far more crippling to the recipients of federal funds than termination." J.A. A63 n.56. Faced with the prospect of heavy damage remedies, recipients would be more likely to refuse federal funds rather than comply voluntarily with an agency's suggestions.

Yes

I agree with Judge Meskill that a damage remedy is inconsistent with Title VI's express remedy, but I think the argument shows that no private right of action should be implied under Title VI. The legislative history does not support the view that a private right of action exists for the limited purpose of

declaratory and injunctive relief, but not for damages.[2] Judge Meskill's reliance on Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), is misplaced. Transamerica held that since the Investment Advisors Act declared certain contracts void, Congress must have intended to permit some opportunity for litigation of voidness issues. But Title VI created an administrative mechanism for terminating federal funding, see 42 U.S.C. §2000d-1, and made these administrative decisions subject to judicial review, see id. §2000d-2. The Transamerica rationale for implying a limited right of action does not apply.

4. Should Briefing and Argument be Requested?

Further Briefing (did this in Bakke)

Extrapolating from Bakke and Cannon, this Court is split 3-3 on the right of action issue, with three Justices undecided. Given this division and the importance of the issue, full briefing and argument seem warranted. There is no justification for yet another decision simply to presume the existence of a right

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[2]Judge Meskill also criticized the DC for failing to find the amount of funds received by the NYPD and to consider whether a damage remedy might be limited to that amount. J.A. A63 n.56. The DC stated that Title VI applied because the NYPD accepted funds from the Departments of Labor, Housing and Urban Development, and Justice to pay officers' and trainees' salaries and to finance recruitment. Funds under the Comprehensive Employment and Training Act also were used to pay officers' salaries. The court did not state the amount of funding received. J.A. A123.

Just as I find no support in the legislative history for limiting a private right of action to noncompensatory relief, I find no support for the alternate suggestion that Title VI may contain an implied right of action for damages limited to the amount of federal funds received.

of action. And the Court should not resolve the issue solely on the basis of the arguments set forth by lower courts or individual Justices.

B. "Standard of Proof" in Title VI Actions { Lau - an "effect" test. Bakke & Fullilove -

This issue turns on the conflict between Lau v. Nichols, 414 U.S. 563 (1974), and the subsequent decisions in Bakke, Board of Education v. Harris, 444 U.S. 130 (1980), and Fullilove v. Klutznick, 448 U.S. 448 (1980). The CA2 majority relied on Bakke, see J.A. A92-A93, while the DC followed Lau, see J.A. A131-132.

1. Lau

In Lau the Court unanimously held that the San Francisco school system violated Title VI and the implementing Department of Health, Education, and Welfare (HEW) regulations by failing to provide adequate instruction to students of Chinese ancestry who did not speak the English language.

(a) The Douglas Majority Opinion

The key passage of Justice Douglas' brief opinion for the Court, joined by Justices Brennan, Marshall, Powell, and Rehnquist, relied on HEW regulations:

> Discrimination is barred which has that effect even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" 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." Id., §80.3(b)(2). (414 U.S. at 568 (emphasis in original).)

Justice Douglas also relied on HEW "clarifying guidelines" that required school districts to take "affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 414 U.S. at 568 (quoting 35 Fed. Reg. 11595 (1970)). Finally, he noted that the school district was bound by contractual agreement to comply with Title VI and HEW regulations. Id. at 569.

(b) The Stewart Concurring Opinion

Justice Stewart, joined by the Chief Justice and Justice Blackmun, concurred separately. He noted that plaintiffs had not alleged intentional discrimination, but only that respondents "have failed to act in the face of changing social and linguistic patterns." Id. at 570. This "laissez-faire attitude," he stated, may not be illegal under Title VI standing alone. But the HEW guidelines requiring affirmative efforts are entitled to great weight, and must be followed because they are reasonably related to the purposes of the legislation. Id. at 570-71.

2. Bakke (Title VI coextensive with 14th Amend.)

Five Justices in Bakke stated that Title VI was coextensive with the 14th Amendment.

(a) The Powell Opinion (discrim. intent necessary)

Your opinion noted that "supporters of Title VI repeatedly declared that the bill enacted constitutional provisions." 438 U.S. at 285. You concluded: "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or

the Fifth Amendment." Id. at 287. Lau was not discussed in that section of the opinion.

(b) The Brennan Opinion

Justice Brennan's extensive analysis of the legislative history of Title VI concluded unequivocally that the Title VI standard was meant to replicate the 14th Amendment standard. His opinion was replete with statements such as "Title VI's definition of racial discrimination is "absolutely coextensive" with the Constitution's." Id. at 352. See also id. at 327, 328, 329, 332. He also addressed the conflict with Lau: WJB

> We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. (Id. at 352.)

WJB - serious doubts as to Lau

Justice Brennan went on to note that even if Lau were correct, Bakke would not prevail.

(c) The Stevens Dissent ("effects" test)

Justice Steven's dissent in Bakke argued that Title VI establishes a colorblind standard. He cited Lau for the proposition that Congress may prohibit more conduct than does the Equal Pro-

tection Clause, but did not discuss the intent/effects issue. Id. at 417 n.20.

3. Harris

This decision upheld HEW's denial of Emergency School Aid Act (ESAA) funds to the New York City Board of Education because of racial disparities in teacher assignments.

(a) The Blackmun Majority Opinion

Justice Blackmun, joined by the Chief Justice and Justices Brennan, White, Marshall, and Stevens, rejected the Board's and the dissent's argument that the ESAA should be interpreted along with Title VI to require proof of intentional discrimination. In discussing why "Congress might impose a stricter standard under ESAA than under Title VI," Justice Blackmun argued: "A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional." 444 U.S. at 150.

HAB

(b) The Stewart Dissent

Justice Stewart, joined by Justices Powell and Rehnquist, stated without qualification that it "follows from Bakke that Title VI prohibits only purposeful discrimination." Id. at 160. This added Justice Rehnquist to the five other Justices who have stated that Title VI incorporates the 14th Amendment standard.

4. Fullilove

(a) The Burger Plurality Opinion

Chief Justice Burger's plurality opinion, joined by Justices White and Powell, compared the "minority business enterprise"

program to the regulation upheld in Lau, noting specifically that the Lau regulation had been upheld in spite of the lack of intentional discrimination. See 448 U.S. at 479. His point was to demonstrate Congress' authority to condition the grant of federal funds on compliance with affirmative action guidelines.

(b) The Powell and Marshall Concurring Opinions

Both your concurring opinion and Justice Marshall's opinion, joined by Justices Brennan and Blackmun, reiterated that Title VI is coextensive with the 14th Amendment and that the finding on the 14th Amendment issue therefore decided the Title VI issue. Id. at 517 n.5 (Powell, J., concurring); 517 n.1. (Marshall, J., concurring in the judgment).

5. Subsequent Federal Decisions

Like the CA2 here, most federal circuit courts have followed Bakke and Harris in holding that Title VI requires proof of intentional discrimination. See United States v. Marion County School Dist., 625 F.2d 607 (CA5), cert. denied, 451 U.S. 910 (1981); Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (CA6 1979), cert. denied, 101 S. Ct. 3079 (1981); Cannon v. University of Chicago, 648 F.2d 1104 (CA7), cert. denied, 102 S. Ct. 981 (1981). The exception is the en banc CA3, which ruled unanimously that Title VI extends to discriminatory effects. NAACP v. Medical Center, Inc., 657 F.2d 1322 (CA3 1981) (en banc).

6. Discussion

Your views on the Title VI standard were established in Bakke and Harris. Accordingly, my discussion focuses not on the con-

gressional intent in enacting Title VI, but on various ways of dealing with the Lau-Bakke conflict.

(a) Construing Bakke and Progeny: Is Lau Unaffected?

Petitioners assert that Bakke and subsequent decisions should be narrowly construed so that Lau's authority is undiminished. In this section I discuss the main arguments.

(1) The Constitutional Standard as of 1964

Amicus ACLU argues that even if Title VI was meant to incorporate the 14th Amendment standard, the standard in 1964 included an effects test. See Brief for ACLU at 23-36. In Bakke Justice Brennan refuted this argument:

> Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. . . . Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. . . . Many questions, such as whether the Fourteenth Amendment barred only de jure discrimination or in at least some circumstances reached de facto discrimination, had not yet received an authoritative judicial resolution. (438 U.S. at 337-39.)

Thus Washington v. Davis decided the Title VI standard as well.

(2) Bakke as Limited to the Affirmative Action Context

The en banc CA3 interpreted the Powell and Brennan opinions in Bakke as standing only for the proposition that "when the charge is intentional discrimination in the nature of a governmental preference, Title VI incorporates the constitutional standard." NAACP v. Medical Center, Inc., 657 F.2d at 1330. Al-

though doubt certainly existed concerning Lau's vitality, "a requiem may be premature and, in any event, should not be sung by this choir." Id. The court concluded that outside the context of affirmative action, an effects test was consistent with the congressional intent and with Titles VII and VIII.

This proposed distinction -- which is petitioners' chief argument, see Brief for Petitioners at 32-35 -- might be plausible, had it been made in Bakke. But as Judge Justice wrote in United States v. Texas, 506 F. Supp. 405, 430 (E.D. Tex. 1981), "the [Bakke] majority's finding of coextensiveness, based upon overwhelming evidence of congressional intent, did not depend upon the details of each alleged act of discrimination. Either Congress went beyond the constitutional notion of unlawful discrimination in enacting Title VI or it did not."

Petitioners and their supporters attempt to limit Justice Brennan's opinion by noting that at one point it says: "We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause . . . ." 438 U.S. at 325 (emphasis added). They also note that Justice Brennan stated that even if Lau remains valid, Bakke's case would not succeed. These marginal qualifications are overwhelmed, however, by the strong language of the rest of the Brennan opinion, such as the statement that Title VI and the 14th Amendment are "absolutely coextensive." Id. at 352. Justice Brennan directly attacked Lau's premise. In

yes

my view he could not resurrect Lau unless he repudiated the heart of his Bakke analysis.

(3) Harris as Superseding Bakke

Amicus ACLU argues that since the Stennis Amendment applied both to the ESAA and Title VI, and since Harris held that the ESAA requires only discriminatory effects, Harris requires that Title VI also be interpreted as establishing an effects test. See Brief for ACLU at 10-12. I am not certain whether this argument is ingenious or disingenuous. The Harris decision turned precisely on the majority's finding that a different version of the Stennis Amendment applied to the ESAA than to Title VI. If this Court adopts the ACLU's argument, I dare say you will be able to write a rather powerful dissent. I would try!

good

(4) Fullilove as Superseding Bakke

Petitioners argue that the Chief Justice's approving citation to Lau in Fullilove demonstrates Lau's continuing vitality. See Brief for Petitioners at 30. This reference to Lau unfortunately muddles the developing consensus that Lau erred in upholding an effects test. Still, the Chief Justice's limited purpose was to demonstrate that Congress may enact legislation designed to combat the effects of discrimination -- something Congress indisputably intended in creating the "minority business enterprise" program. The Chief Justice offered no further comments on whether the Lau Court correctly decided that Congress had intended to enact an effects test under Title VI. This plurality opinion cannot be read as cutting back on the majority position in Bakke.

(b) Construing Lau: Must it be Overruled under Bakke?

The preceding discussion demonstrates that Bakke unambiguously states that the Title VI standard is the constitutional intent standard. The next question is whether this means Lau must be overruled. In this section I discuss various interpretations of Lau and attempt to identify a basis on which to distinguish it from Bakke.

(1) Lau as Involving Intentional Discrimination

Finding that the San Francisco school district's failure to provide special help for non-English-speaking students constituted intentional discrimination would enable the Court to dismiss Lau's statement on discriminatory effects as dictum. Unfortunately this will not work. In Lau the CA9 found that discriminatory purpose had not been alleged or proven. 483 F.2d at 796-97. Justice Stewart's concurring opinion relied on this finding as well. Lau must be construed as involving only discriminatory effects.

(2) Deference to Agency Construction of the Statute

Both Justice Douglas and Justice Stewart relied on the HEW regulations, and Justice Stewart specifically cited deference to administrative construction as a basis for his decision. Petitioners defend Lau on this basis.

This seems to be a chief rationale of Lau. Certainly the Court did not purport to rely on its own analysis of Title VI and the legislative history. But this interpretation fails to provide a basis for reconciling Lau with Bakke. The same basic

regulation (see p. 9 supra) was written for all relevant agencies. Therefore, deferring to the HEW in Lau means deferring to the Department of Labor in this case. Even if such deference once was warranted,[3] it no longer is appropriate now that the Court has set forth its own conclusive construction of the legislative history.

(3) Deference to Agency Authority

Petitioners argue that even if Title VI contains only an intent standard, agencies reasonably may impose an effects test. See Brief for Petitioners at 29-31. They rely (as did Justice Stewart in Lau) on Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973), which held that an agency regulation promulgated under a general authorization provision "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Id. at 369 (quoting Thorpe v. Housing Authority, 393 U.S. 268, 280-81 (1969)). In petitioners' view, the administrative problems of proving intent make an effects test reasonable. For support, they cite Katzenbach v. Morgan, 384 U.S. 641 (1966), and City of Rome v. United States, 446 U.S.

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[3]Under current standards, only limited deference should have been given to the HEW or other agency constructions. In FEC v. Democratic Senatorial Campaign Committee, 102 S. Ct. 37, 44 (1981), this Court reaffirmed that "the thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." In this instance the agencies issued the regulations without explanation. See 29 Fed. Reg. 16298 (Dec. 4, 1964). Thus no reasons were given why an effects test was deemed appropriate and consistent with Title VI.

Q of "intent" is — as Mark says — is a "crucial quest. of substantive policy"

156 (1980), which held that Congress may enact an effects standard even though the 14th and 15th Amendments provide only an intent standard.

I believe this argument must be rejected. Yes The question of intent vs. effects is a crucial question of substantive policy, not administrative convenience. I do not read Mourning or any other case as standing for the general proposition that an agency may broaden a statute's reach merely by enacting a regulation.[4] Katzenbach and City of Rome deal with congressional power under constitutional amendments, not with agency power under an Act of Congress. The two relationships should not be equated.

In any event, this construction of Lau applies to all agency regulations, including those at issue in this case. It therefore provides no basis for narrowing or distinguishing Lau.

(4) The Contract Theory

Petitioners also rely on Justice Douglas' argument in Lau that the school district had bound itself by contract to follow the regulations. See Brief for Petitioners at 31-32. I do not agree that an invalid regulation must be followed if the promulgating agency has extracted a general promise that all regulations will be followed. In addition, the contract theory, like

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[4] I note, for example, that neither the majority nor dissent in Harris suggested that the validity of the HEW regulation might be independent of the standard enacted by Congress under the ESAA. Yet the argument would have been as applicable in Harris as in Lau.

the theories based on deference to agencies, fails to distinguish the Lau situation from any other.

(5) Reliance on a Specific Agency Requirement

One might construe Lau as emphasizing the specific HEW requirement that a school system take "affirmative steps" to deal with the problem of non-English-speaking students. No comparable regulation exists in this case, i.e., no regulation under Title VI specifying what type of civil service tests should/should not be used. Lau thus might be read as following that specific regulation, rather than the more general regulation (which applies in the case at hand) prohibiting criteria or methods of administration that have the effect of discrimination.

This interpretation fails to explain where HEW received authority to require affirmative steps in the absence of a finding of purposeful discrimination. If Title VI merely incorporates the constitutional standard, then such a remedy may not be imposed until de jure discrimination is demonstrated. Moreover, the HEW "requirement" actually was a mere clarifiying memorandum interpreting the general regulation.

(6) Limiting the Effects Test to Funding Termination

This argument was suggested in an article published just prior to the Lau decision. Administrative power to issue regulations derives from §602 of Title VI, which establishes the administrative mechanism for handling possible funding termination. But a private action is brought under §601, which sets forth the general antidiscrimination standard. Thus the agency's effects

test would govern funding termination but would not apply in private actions. See Sugarman & Widess, Equal Protection for Non-English-Speaking School Children: Lau v. Nichols, 62 Calif. L. Rev. 157, 170 (1974).

This two-tier standard would mean that certain policies could result in funding termination but not in injunctive relief or damages. I see no basis for this in the legislative history. Just as I think Congress meant either to create a complete private right of action or none at all, see pp.7-8 supra, I think Congress meant to create only one Title VI standard.

(7) Lau as Involving a Total Deprivation of Education

In United States v. Texas, 506 F. Supp. 405, 428 n.12 (E.D. Tex. 1981), Judge Justice suggested, but did not use, the following theory of Lau:

> In Lau v. Nichols, . . . the Supreme Court observed that students who do not understand English and are placed in all-English classrooms "are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." . . . Such students, the Court found, "are effectively foreclosed from any meaningful education." (emphasis added) Thus it could be argued that the defendants' failure to provide appropriate remedial instruction to Spanish-speaking children constitutes, in effect, an absolute deprivation of education, impinging upon a fundamental right and triggering strict scrutiny under the Equal Protection Clause. (Citations omitted.)

?

Since Title VI incorporates the constitutional standard, this absolute deprivation violates Title VI.

This is a plausible basis -- perhaps the only one -- for reaffirming Lau's mandate while discarding Lau's reasoning. But it

has problems, not the least of which is that there is virtually no support for it in Lau. The theory requires use of the "total deprivation" exception to San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). Although the same was true in Plyler v. Doe, 50 U.S.L.W. 4650 (June 15, 1982),[5] that decision was hotly contested. The Plyler dissenters likely would refuse to go along here, and even some members of the majority may not want to expand the exception to cover a case where it is not certain that the children are suffering a total deprivation of education. In addition, the creation of a new theory to justify Lau's result without Lau's reasoning might look a bit ridiculous.

Yes

Yes

(c) Pragmatic Considerations on Overruling Lau: Preserving the Result while Rejecting the Rationale

The preceding analysis demonstrates that Lau conflicts with Bakke. Your Bakke reasoning is sound, and I see no reason for you to abandon it.[6] At a minimum, then, Lau's reasoning with

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[5]Judge Justice suggested that strict scrutiny would apply in a case of total deprivation. Plyler v. Doe holds only that heightened scrutiny is appropriate. This difference does not affect the argument.

Fascinating suggestion

[6]I would note an additional practical argument, not raised in the briefs, why the Lau standard should be overruled. The pervasiveness of federal funding makes Title VI widely applicable. This is true regarding large metropolitan school districts. If Title VI outlaws discriminatory effects, then it forbids de facto school segregation. The Court's constitutional decisions on school desegregation would become irrelevant. A new body of law would have to be developed.

This issue is briefly discussed in Benjes, Heubert & O'Brien, The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Acts of 1964, 15 Harv. C.R.-C.L. L. Rev. 537, 545-46 (1980). The authors argue for an effects standard, but

Footnote continued on next page.

no analysis in Lau

regard to Title VI must be overruled.

Overruling a prior rationale always involves some problems, but doing so here should not prove difficult. The remarkable feature of Lau is the complete absence of analysis of Title VI and its legislative history to see whether an effects or intent standard was intended. (This absence is especially noteworthy given that neither the CA9 majority nor dissent discussed the Title VI issue; both focused only on the Equal Protection Clause. See 483 F.2d 791.) Justice Douglas and Justice Stewart simply deferred to the agency's regulations without evaluating their consistency with the legislative history. Lau can be overruled, therefore, with a minimum of accompanying embarassment in having to discard a prior interpretation of the legislative history.

Overturning the result in Lau, however, would have a large impact on education for non-English-speaking students. A brief post-Lau history demonstrates this problem.

After this Court's decision in 1974, the Office of Education issued the "Lau remedies," guidelines to be used by HEW in evaluating school districts' compliance with Lau. The guidelines em-

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concede that Congress did not intend Title VI to prohibit de facto school segregation. As a result, they are reduced to arguing that Congress still may have intended an effects standard to govern all other areas covered by Title VI. I have seen nothing in the legislative history that indicates an intent to create such a dual standard.

I have not researched this issue. At some point it might be worth discovering how courts have treated school desegregation claims under Title VI.

phasized use of bilingual education. Approximately 500 school districts, which contain about 90% of all affected students, entered into agreements with HEW to institute bilingual programs. At present about 800,000 students are being taught in their native languages.

In 1980 Secretary of Education Hufstedler proposed regulations to require bilingual programs. Congress blocked their implementation, and Secretary of Education Bell withdrew them in February 1981. The new Secretary wanted to permit school districts to use alternative remedies, such as intensive English instruction. He made clear, however, that the administration would continue to enforce the Lau mandate that schools receiving federal funds "do something" to help students who cannot speak English. Nonetheless, the decision caused an enormous outcry from Hispanic and other minority groups. (The information in this section is reported in Wash. Post, Apr. 24, 1982, A11; Feb. 7, 1981, A8; and Feb. 3, 1981, A1.)

If Lau is overruled, the regulations promulgated pursuant to Title VI may become unlawful. School systems then could drop all efforts to provide special help for non-English-speaking students. This will constitute a major change in federal policy. Regardless of its views on the policy, this Court presumably would like to avoid being the catalyst for such a change, given that this Court was the original source of the policy.

For these reasons, a desirable outcome would be to overrule Lau only insofar as it validates a "general" effects test" under

Title VI. Unfortunately, as the previous section indicates, it is difficult to find a basis for distinguishing the specific regulation upheld in Lau. The practical effects of overruling Lau's result, however, make this a worthwhile inquiry.

C. Standard of Proof in §1981 Actions

In General Building Contractors Assocation, Inc. v. Pennsylvania, No. 81-280 (June 29, 1982), this Court decided (7-2) that liability may not be imposed under §1981 without proof of intentional discrimination. Accordingly, the CA2's holding on this issue must be affirmed.

III. Conclusion (I am inclined to agree)

If the Court holds that no private right of action exists under Title VI, no decision will be necessary on the proper standard of discrimination. It appears from Cannon, however, that a slim majority of the Court is prepared to imply an action under Title VI. The Court therefore must decide whether Title VI creates an intent standard or an effects standard. Bakke should control. Lau's reasoning should be overruled. If possible, the Court should find and apply a reasonable basis for preserving the result in Lau. This will minimize the disruption caused by the Court's reversal of position.

Mark

See my memo of last summer.

81-431 GUARDIANS ASSN. v. CIVIL SERVICE Comm. of N.Y. . Argued 11/1/82
(memorandum

Discriminatory "impact" was found.
conceded there was no "intent"
and CA 2 found Title VI
~~[illegible] reject disparate~~
~~[illegible] intent.~~
~~does~~ ~~discrim.~~
But CA 2 held that Title VI
also requires proof of
disc. intent.

Crowley (Petrs.)

Relies on Regulations (not printed in Resp. or appendix) framed in terms of "impact"

Argues for "impact standard." Relies on J PS's op. in Fullilove

Koerner (Resp) (Strong argument on leg. hist.)

Implied right issue in here,

When Cannon mentioned Title VI, it merely "assumed" it created a private remedy.

Leg. history clearly show the Const. standard of "intent" was adopted by Congress.

Counsel for Petrs cites no contemporary leg. hist. to support their position

Bakke opn. as to "scope" of IV support intent standard.

Only support for Petrs' position are Regs adopted after the enactment of VI.

~~Hoerner~~

~~Hoerner (Rept.)~~

Crowley (Reply)

Relies on 1983 creation pr.

No. 81-431, Guardians Assn. v. Civil Service Conf. 11/3/82 Effects standard OK - 4 (But see John letter 11/4)

The Chief Justice

No private cause of action. ~~[illegible]~~

As to Title VI issue, only Regs of HUD support view that "effects" as well as "purpose" control. Agree with WJB that const. ~~[illegible]~~ standard applies. (This was WJB's view in Bakke).

But there are tentative views. Passed

In view of John letter of 11/4, there appear to be four votes to affirm on "intent" standard. If CJ votes to affirm, there should be a Court

Justice Brennan Rev. & Remand

Adhere to views expressed in Bakke as to §601, but §602 is ~~[illegible]~~ broad enough to support the HUD Regs.

No briefing on ~~[illegible]~~ private cause of action. Remand on this issue.

Need ~~[illegible]~~ not reach merits at all.

Justice White ~~[illegible]~~ Affirm on no implied cause of action

In Bakke we said no private cause of action. An Agency has no authority to "bootleg" a cause of action when Congress presented another remedy. No 1983 remedy either. See Lammers

If reach merits, would not overrule Lau. (But WJB did say Lau is doubtful authority). The "effects" standard applies. Rev. ~~on this~~ on this issue if we reach it.

Justice Rehnquist Aff'm

Not on vest as to private cause of action in view of having joined JPS in Bakke. Tentative vote - no private cause of action.

On merits, WJB's Bakke views - & P.S. op. in Harris (as well as HAB's op. in Harris) support the Const. standard. Aff'm also on this issue.

Regs. can't authorize a cause of action - nor can Regs add "effects" to statute.

After discussion, Bill indicated he probably could agree no cause of action

Justice Stevens Reverse. (But see John's letter of 11/4)

There is a private cause of action tho thinks Q is close whether there is a difference bet. a "damages" remedy & "injunctive" relief. CA7 so held on remand in Cannon.

Standard of §601 is the Constitutional one of intent. This was held in Bakke. But this is wrong. Doesn't want to over-rule Law.

But see JPS's letter of 11/4 citing note in Weber. I think John reversing. Aff'm.

Justice O'Connor Aff'm tentative

Agrees there is a private cause of action: Cannon is close on this.

But believes - tentatively - that Bakke discredited Law. Thus, would affirm on merits

Justice Marshall Reverse

Agree with DC's all down the line.
But CA2 was wrong as to standard in Title VI cases.

(No mention of ~~[illegible]~~ private cause of action issue)

Justice Blackmun Reverse

§1981 issue has been resolved.
Can be argued that Bakke, Harris & Fullilove support view of CA2.
But Regs under §602 establish an "impact" test. ~~[illegible]~~ Regs are reasonably related to legislation.

(HAB didn't discuss private cause of action)

Justice Powell Affirm

No private right of action under VI. Altho we didn't grant on this issue, it is jurisdictional. If Congress hasn't authorized this action, there is no case here. Both DC & CA2 below decided issue, Meskill dissenting.
Judge Meskill's dissent was limited to damages ~~or back pay~~ remedy. Prior cases have involved injunctive & declaratory relief.

On merits, I'd affirm. Discriminatory "intent" is required under Title VI (just as under §1981 and §1983.) Agree with WJB's Bakke views. ~~[illegible]~~. Leg. history & other cases agree.
See my concur in Fullilove. WOB's ~~[illegible]~~ "impact" standard in Lau must be rejected.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 4, 1982

Helpful & supportive of my view of Title VI

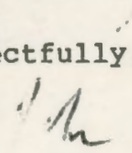
MEMORANDUM TO THE CONFERENCE

Re: 81-431 - Guardians Assn. v. Civil Service Comm. of New York

Although I still have not finally come to rest in this case, I have made a discovery that bears on the question whether stare decisis requires adherence to the view expressed by Bill Brennan and Lewis Powell in their separate writing in Bakke to the effect that the Title VI standard is coextensive with the constitutional standard. One reason that I had thought the combination of five votes for those two opinions might not have precedential effect is that there was no single Court opinion for the proposition. I have since found, however, that in the Weber case, 443 U.S. 193, 206 note 6, the Court did expressly hold that Title VII, unlike Title VI was not intended to incorporate the constitutional standard. That footnote seems to espouse the theory that Title VI deals with governmental activity and therefore appropriately adopts the same standard as the Fifth and Fourteenth Amendments. The footnote then states: "Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read in pari materia." This seems to me to be an adoption by the Court of the rationale expounded by the Brennan-Powell opinions.

Although, as I have indicated, I still am somewhat uncertain about how to deal with this case, it does seem to me that this footnote in an opinion by the Court lends substantial support to the view that Title VI incorporates an intent standard and must be read more narrowly than Title VII.

Respectfully,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 15, 1982

Re: 81-431 - Guardians Ass'n., et al. v. Civil Service Commission of City of New York, et al.

MEMORANDUM TO THE CONFERENCE:

During the vote at Conference, I passed on this case. I have since decided to vote to affirm the judgment below, on the view that no implied private cause of action exists in this case. As you are by now aware, I have assigned the opinion to Justice White.

Regards,

WEB

Discuss with Mark

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: **Justice White**

Circulated: 17 DEC 1982

Recirculated: _____

Inclined to join - though I could decide case on my view, that absent clear intent to contrary, no private action, for compensatory or otherwise, lies under Title VI

1st DRAFT

Received 12/17/82

SUPREME COURT OF THE UNITED STATES

No. 81-431

GUARDIANS ASSOCIATION, ETC., ET AL., PETITIONERS *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1982]

Byron does not address the Q whether Title VI applies the Const. standard of "discriminatory" intent — that would require overruling Law. Byron limits holding to saying no private remedy for "compensatory relief" may be inferred - 17,18

JUSTICE WHITE delivered the opinion of the Court.

We address in this case whether a plaintiff is entitled to compensatory relief in a private action alleging violations of Title VI of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000d, *et seq.*[1] We hold that such relief may not be obtained; declaratory and prospective injunctive relief are the only available private remedies for Title VI violations.

I

This class action involves a challenge by black and Hispanic police officers, petitioners here,[2] to several written examinations administered by New York City between 1968 and 1970 that were used to make entry-level appointments to the city's police department (the "Department") through October 1974.[3] The District Court found that the challenged exami-

[1] Section 601 of the Act, 42 U. S. C. § 2000d, provides:

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

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

[3] Petitioners also alleged that the Department's 5'7" minimum height re-

Join. This comports with your views. (Also, BRW makes much use of your opinions on the question of what constitutes retroactive relief.) MM

nations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings were not disturbed in the Court of Appeals.

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

On April 30, 1976, petitioners filed the present suit[4] against the Department and other New York City officials and entities, the respondents here. Petitioners' amended complaint alleged that the June 1975 layoffs violated their rights under Titles VI and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000d, *et seq.*, and 2000e, *et seq.*, under 42 U. S. C. § 1983, and under various other state and federal laws.[5] The primary allegation of the complaint was that but

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quirement discriminated against Hispanics. The disposition of this issue in the lower courts is not now before us.

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

[5] Among these was a claim under 42 U. S. C. § 1981, which the District Court twice rejected because petitioners failed to prove discriminatory intent, which the court found to be a necessary element of a § 1981 cause of

for the discriminatory impact of the challenged examinations upon minorities, petitioners would have been hired earlier and therefore would have accumulated sufficient seniority to withstand the layoffs.

After a hearing, the District Court held that, although petitioners had failed to prove that the respondents had acted with discriminatory intent, the use of the exams violated Title VII, because the tests had a disparate impact upon minorities and were not proven by respondents to be job-related.[6] The court therefore granted petitioners' motion for a preliminary injunction restraining the Department from firing or recalling any police officers until seniority lists were reordered to accord petitioners the seniority they would have had but for respondents' discriminatory practices. 431 F.Supp. 526 (S.D.N.Y. 1977). In light of its holding under Title VII, the District Court deemed it unnecessary to decide the merits of petitioners' claims under Title VI. *Id.*, at 530, n. 2.

On respondents' appeal, the Second Circuit vacated the District Court's decision and remanded the case for reconsideration in light of our holding in *Teamsters* v. *United States*, 431 U. S. 324 (1977), in which we ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U. S. C. § 2000e-2(h). 562 F. 2d 38 (CA2 1977). On remand, the District Court found that *Teamsters* had rendered its previous holding untenable to the extent that it granted

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action. 431 F.Supp. 526, 534 (S.D.N.Y. 1977); 466 F.Supp. 1273, 1276, n. 4 (S.D.N.Y. 1979). The Court of Appeals affirmed. 633 F. 2d 232, 263–268 (CA2 1980). Petitioners raised this § 1981 issue in their petition for certiorari, but they abandoned it after our decision last Term in *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, —— U. S. ——, (1982), decided the issue adversely to them. See Petrs. Reply Brief, at 1, n.*.

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

relief with respect to discrimination occurring prior to March 24, 1972, the date on which Title VII became applicable to municipalities. See Pub.L. 92-261 § 2(1), 86 Stat. 103 (1972). This meant that, under Title VII, class members hired prior to the effective date were not entitled to any relief, and that the remaining members of the class were only entitled to back seniority awards that did not take into account time periods prior to that date. 466 F.Supp. 1273, 1280 (S.D.N.Y. 1979).

The court then turned to Title VI, which has been applicable to municipalities since its enactment in 1964, to see if that provision would provide relief for the time periods prior to March 24, 1972. After considering *Cort* v. *Ash*, 422 U. S. 66 (1975), and the various opinions in *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978), the District Court concluded that an implied private right of action existed under Title VI. 466 F.Supp., at 1281–85. Then, citing *Lau* v. *Nichols*, 414 U. S. 563 (1974), and Title VI administrative interpretative regulations adopted by several federal agencies, the court reasoned that proof of discriminatory effect is enough to establish a violation of Title VI in a private action, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. *Id.*, at 1285–87. Finally, turning to the question of relief, the court held that the same remedies available under Title VII should be available under Title VI, unless they would conflict with some purpose peculiar to Title VI. "In the instant case, back seniority, approved as a Title VII remedy in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976), is just as necessary to make discriminatees 'whole' under Title VI." 466 F.Supp., at 1287.

Accordingly, relief was granted to the entire class pursuant to Title VI. In a subsequent order, the court set forth a detailed plan for the determination of the constructive seniority to which each individual member of the class would be entitled, and the corresponding monetary and nonmonetary en-

titlements that would be derived therefrom. The court also ordered respondents to meet and consult with petitioners on the preparation and use of future examinations. Joint App., at A99-A107.

Respondents appealed once again to the Second Circuit, which affirmed the relief under Title VII but reversed as to Title VI. 633 F. 2d 232 (CA2 1980). All three members of the panel agreed that the award of Title VI relief could not be sustained, but the panel divided on the rationale for this conclusion. The majority held that the trial court erred by concluding that Title VI does not require proof of discriminatory intent. They believed that this Court's decision in *Lau* v. *Nichols*, *supra*, which held that proof of discriminatory impact could suffice to establish a Title VI violation, had been implicitly overruled by the judgment and supporting opinions in *Bakke*, *supra*. 633 F. 2d at, 270 (Kelleher, J.); *id.*, at 274–75 (Coffrin, J.).

The third member of the panel, Judge Meskill, declined to reach the question whether Title VI requires proof of discriminatory intent. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." *Id.*, at 255. Nothing in the legislative history, Judge Meskill observed, indicated that Title VI was intended to compensate individuals excluded from the benefits of a program receiving federal assistance, and in his view a compensatory private remedy would work at cross-purposes with the administrative enforcement mechanism expressly provided by § 602 of Title VI, 42 U. S. C. §§ 2000d–1, and with the objectives of the federal assistance statutes. 633 F. 2d, at 255–62.[7]

no implied ~~a~~ right to sue for damages

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[7] The panel majority disagreed with Judge Meskill's views, reading our decisions in *Bakke* and *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), as allowing a private right of action under Title VI irrespective of the compensatory effect of the relief sought or granted. Also, fearing that part of the noncompensatory relief in the District Court's order might not

After the Second Circuit denied petitions for rehearing from both sides, —— F. 2d —— (CA2 1981), we granted the plaintiffs' petition for certiorari, —— U. S. ——,[8] which claimed error solely on the basis that proof of discriminatory intent is not required to establish a Title VI violation.

II

The Court squarely held in *Lau* v. *Nichols*, *supra*, that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on the grounds of race but also in those endeavors that have a disparate impact on racial minorities. The Court of Appeals recognized this but was of the view, as are respondents, that *Regents of the University of California* v. *Bakke*, *supra*, had confined the reach of Title VI to those programs that are operated in an intentionally discriminatory manner. Petitioners respond that although five members of the Court in *Bakke* concluded that, with respect to the issue then before the Court, Title VI imposed no stricter standard than does the Constitution, that case involved an express racial classification and addressed only whether Title VI barred that classification even though the Constitution might not; whether Title VI reaches discriminatory impact as well as discriminatory intent was therefore not at issue in that case.

We need not resolve these conflicting views as to whether *Lau* v. *Nichols* survived *Bakke* unimpaired with respect to whether Title VI prohibits disparate racial impact as well as

be available to the entire class under Title VII, the court could not agree with Judge Meskill's conclusion that his rationale made it unnecessary to decide whether Title VI requires proof of discriminatory intent. 633 F. 2d, at 274.

[8] Respondents also filed a petition for certiorari, in which they seek review of the Court of Appeals' determination that the plaintiff class is entitled to relief under Title VII. *Civil Service Comm'n* v. *The Guardians Ass'n*, No. 81–432. The petition does not merit certiorari and we deny it.

intentional discrimination. Although respondents did not include the question in their petition for certiorari, they defend the judgment of the Court of Appeals in this case on the alternative ground that no private cause of action is available under Title VI that will afford petitioners the relief which they seek in this case.[9] This submission is permissible under our prior cases. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419 (1977); *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); *Langnes* v. *Green*, 282 U. S. 531, 535–539 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435–436 (1924). Since we agree that the relief denied petitioners under Title VII is unavailable under Title VI, we affirm the judgment of the Court of Appeals.

III

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

Four years later, the Court decided *Regents of the University of California* v. *Bakke*, *supra*, which also involved a private suit seeking relief under Title VI against state educational authorities. Four Justices assumed, but did not decide, that a private action was available under Title VI.[10]

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[9] See Resps. Brief, at 8–9; Oral Arg. Trans., at 21–22.

[10] 483 U. S., at 281–284 (POWELL, J.); *id.*, at 328 (BRENNAN, MARSHALL, and BLACKMUN, JJ.).

A fifth Justice was of the view that no private cause of action could be implied under the Title.[11] The four remaining Justices concluded that a private action was available.[12]

Still later, in *Cannon* v. *University of Chicago*, 441 U. S. 667 (1979), the Court, applying the factors specified in *Cort* v. *Ash*, 422 U. S. 66 (1975), held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972, 20 U. S. C. §§ 1681, *et seq.*, against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended simiar remedies to be available under Title IX. 441 U. S., at 694–703. Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI. *Id.*, at 710–716. Two Justices, in dissent, were of the view that private remedies under Title VI itself were not available and that the same was true under Title IX. Those Justices, however, asserted that § 1983 was available to enforce the proscriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law. *Id.*, at 717–730 (WHITE, J., dissenting, joined by BLACKMUN, J.). Thus at least eight Justices in *Cannon* were of the view that Title VI and Title IX could be enforced in a private action against a state or local agency receiving federal funds, such as the respondent Department.[13] See also *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).

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

[12] *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 419–421, 420, n. 28 (1978) (STEVENS, J., joined by BURGER, C.J., Stewart and REHNQUIST, JJ.).

[13] One Justice disagreed with the Court's holding that a private right of

IV

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

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

We have also declined to allow "make whole" remedies in private actions seeking relief for violations of statutes passed

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action could be implied under Title IX itself, without expressing a view as to whether Title IX could be privately enforced via § 1983. 441 U. S., at 730–749 (POWELL, J., dissenting).

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

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

Pennhurst State School v. *Halderman*, *supra*, reiterated the *Rosado* approach: Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money

rather than assume the further obligations and duties that a court has declared are necessary for compliance. 451 U. S., at 29–30, 30, n. 23; *id.*, at 53–55 (WHITE, J., dissenting in part). The Court noted that "in no [Spending Clause] case—have we required a state to provide money to plaintiffs, much less less required" a state to assume more burdensome obligations. *Id.*, at 29. Thus, declaratory and prospective relief are presumed to be the only proper remedies in such cases. Absent clear congressional intent or valid regulatory or contractual provisions to the contrary, additional relief in the form of money or otherwise based upon past violations that a court might identify should be withheld.

V

Title VI is a spending power enactment:

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

Accord, *id.*, at 1527 (memorandum by Rep. Celler) (validity of Title VI "rests on the power of Congress to fix the terms on which Federal funds will be made available"); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore). Title VI rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination." *Id.*, at 7064 (Sen. Ribicoff). Accord, *id.*, at 7054–55, 7062 (Sen. Pastore); *id.*, at 7102 (Sen. Javits); *id.*, at 6566 (memorandum by the Republican Members of the House Committee on the Judiciary). The mandate of Title VI is "[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money." *Id.*, at 1542 (Rep.

Lindsay). Title VI imposes no obligations but simply "'extends an option'" that potential recipients are free to accept or reject. *Id.*, at 1527 (memorandum by Rep. Celler)(quoting *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923)). This legislative history clearly shows that Congress intended Title VI to be a typical "contractual" spending power provision.

Therefore, since Title VI is Spending Clause legislation, we must presume that private litigants seeking to enforce compliance with its terms are entitled to no more than the limited remedy deemed available to the plaintiffs in *Pennhurst*. Our inquiry is not at this point complete, however, because, like all rules of statutory construction, the *Pennhurst* presumption must "yield . . . to persuasive evidence of contrary legislative intent." *Transamerica, supra*, 444 U. S., at 20. As in *Transamerica*, our inquiry into the relevant legislative history reveals that "what evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action for a monetary award in a case such as this." *Ibid.*

Title VI does not explicitly allow for *any* form of a private right of action. This fact did not go unnoticed by Senators Keating and Ribicoff, who unsuccessfully proposed an amendment adding to Title VI a provision expressly allowing the institution of "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, . . . by the person aggrieved." 109 Cong. Rec. 15375 (1963). Senator Keating explained that, under this proposal, if someone violated Title VI, funds could be denied or "a suit for specific performance of the nondiscrimination requirement could be brought . . . by the victim of the discrimination." *Id.*, at 15376. The relevant language of the proposed amendment is identical to that of § 204(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3(a), the provision creating a private right of action to enforce Title II of the Act, which deals with

discrimination in public accommodations. Suits under § 204(a) are "private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 401–402 (1968). Senator Keating thought that elementary fairness required that victims of Title VI-proscribed discrimination be accorded the same private right of action as allowed in the "proposed education and public accommodations titles of the [Civil Rights] bill."[14]

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

The remaining indications of congressional intent are also circumstantial, but they all militate in favor of the conclusion that only an award of prospective relief is appropriate as a private remedy for Title VI violations. The "greatest possible emphasis" was given to the fact that the "real objective" of Title VI was "the elimination of discrimination in the use and receipt of Federal funds." 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). See also *id.*, at 7062 (Sen. Pastore). The

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

remedy of termination of assistance was regarded as "a last resort, to be used only if all else fails," because "cutoffs of Federal funds would defeat important objectives of Federal legislation, without commensurate gains in eliminating racial discrimination or segregation." *Id.*, at 6544, 6546 (Senator Humphrey).[15]

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

In summary, then, we find no legislative history that in any way rebuts the *Pennhurst* presumption that only prospective relief should be granted as a remedy for violations of statutes passed pursuant to the spending power. Quite the contrary, what little evidence there is evinces an intent not to allow any greater relief. We therefore hold that compensatory relief, or other relief based on past violations of the conditions attached use of federal funds, is not available as a private remedy for Title VI violations.[16]

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[15] See also, *e. g.*, 110 Cong. Rec. 1520 (1964) (Rep. Celler); *id*, at 7063 (Sen. Pastore); *id.*, at 7075 (Sen. Ribicoff).

[16] The lower courts are generally in agreement with this conclusion. See *Lieberman* v. *University of Chicago*, 660 F. 2d 1185 (CA7 1981) (Title IX case), *cert. denied*, —— U. S. —— (1982); *Drayden* v. *Needville Independent School District*, 642 F. 2d 129, 133 (CA5 1981); *Nabke* v. *HUD*, 520 F.Supp. 5, 10-11 (W.D. Mich. 1981); *Concerned Tenants Ass'n* v. *Indian Trails Apartments*, 496 F.Supp. 522, 526-527 (N.D. Ill. 1980); *Rendon* v. *Utah State Dept. of Employment Security Job Service*, 454

VI

If the relief unavailable under Title VII and ordered under Title VI is the kind of relief that should be withheld in enforcing a Spending Clause statute, we should affirm the judgment of the Court of Appeals without more. Only if all or some of this relief is the kind of declaratory or prospective relief that private enforcement of Title VI properly contemplates need we determine whether proof of intentional discrimination is an essential element of petitioner's cause of action based on Title VI. To resolve this matter, we now consider the items of relief ordered by the District Court to determine if any element is a permissible prospective remedy.

Although the Eleventh Amendment cases are not dispositive here, in holding that only prospective relief is available to remedy violations of federal law by state officials, the Court in *Edelman* v. *Jordan*, 415 U. S. 651, 667 (1974), observed that the difference between permissible and impermissible relief "will not in many instances be that between night and day." It seems as patent here as in the Eleventh Amendment context that prospective relief cannot include a monetary award for past wrongs, even if the award is in the form of "equitable restitution" instead of damages. See *id.*, at 665–667. However, prospective relief need not be "totally without effect on the [defendant's] revenues;" injunctive relief is permissible even if it means that the defendants, in or-

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

der to shape their conduct to the mandate of the court's decree, will have to spend more money "than if they had been left free to pursue their previous course of conduct." *Id.*, at 667–668. The key question for present purposes is whether the decree requires the payment of funds or grants other relief, "not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation" or other relief based on or flowing from violations at a prior time when the defendant "was under no court-imposed obligation to conform to a different standard." *Id.*, at 668.

The District Court in the present case granted a number of relatively discrete items of relief. First, each class member was awarded constructive seniority, which included the right to: 1) "all monetary entitlements which [the class members] would have received had they been appointed on their constructive seniority date," including backpay and back medical and insurance benefits; and 2) all other entitlements relative to the award of constructive seniority, including salary, benefits, and pension rights. Also, respondents were directed to give a sergeant's examination to those class members whose constructive seniority would have entitled them to take the last such examination. Finally, in an effort to insure that future hiring practices would be nondiscriminatory, respondents were ordered to consult with petitioners on the preparation and use of future police officer examinations for the next two years, and to provide petitioners with race and ethnicity information regarding the scores of the next scheduled examination. Joint App., at 99–107.[17]

On the one hand, it is obvious that the award of back pay and back benefits constitutes "retroactive" relief and therefore cannot stand. On the other hand, it is without doubt

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[17] As permitted by 42 U. S. C. § 2000e–5(k) and 42 U. S. C. § 1988, the District Court also awarded attorney's fees to petitioners. Joint App., at 107.

that the portion of the order requiring consultation to insure that future examinations will not have discriminatory effects constitutes permissible "prospective" relief.

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

In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766–67 (1976), we identified two types of seniority—"benefit" and "competitive status." The first of these, "which determines pension rights, length of vacations, size of insurance coverage and unemployment benefits, and the like, is analogous to backpay. . . . Benefit-type seniority, like backpay, serves to work complete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the one who was wronged." *Id.*, at 786–787 (POWELL, J.). Its constructive grant "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law." *Id.*, at 767, n. 27 (opinion of the Court). Since constructive benefit-type seniority in this case is obviously restitutionary and remedial in nature, it is "a form of compensation" to those whose rights were violated at a time when the respondents were "under no court-imposed obligation to conform to a different standard." *Edelman* v. *Jordan*, 415 U. S., at 668. It is therefore not an appropriate remedy for the Title VI violations alleged here.

An award of "competitive status" seniority likewise constitutes a form of compensation for past conduct now deemed violative of the Act and therefore must also be considered an

inappropriate Title VI remedy. Competitive-type seniority "determines an employee's preferential rights to various economic advantages at the expense of other employees. These normally include the order of layoff and recall of employees, job and trip assignments, and consideration for promotion." *Franks, supra,* 424 U. S., at 787 (POWELL, J.). Although an award of constructive seniority of this nature does not result in any increased costs to the wrongdoing employer, it "directly implicate[s] the rights and expectations of perfectly innocent employees," *id.*, at 788, and it can only be viewed as compensation for a past wrong. In no respect can an award of competitive-type seniority be said to be "a necessary consequence," *Edelman,* 415 U. S., at 668, of future Title VI compliance by the employer. Accordingly, we conclude that neither an award of "benefit" nor "competitive status" consructive seniority may be obtained as a private remedy for Title VI violations.

In view of the foregoing, it is apparent that the only proper Title VI relief granted by the District Court is the order directing the respondents to take actions and make disclosures intended to insure that future hiring practices will be nondiscriminatory and valid. However, this relief is wholly sustainable under the District Court's findings and conclusions with respect to petitioners' Title VII claim, and all members of the class will fully benefit from it.[18] Therefore, since a decision on the merits of petitioners' Title VI claim would not in any way increase or decrease the measure of relief to which petitioners are entitled, we shall leave the question whether Title VI requires proof of discriminatory intent for another day.

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[18] Under Title VII, this type of relief can be granted unconditionally. Under Title VI, the defendants would have to be given the option of complying or terminating participation in the federal program. See parts IV and V, *supra.*

VII

In conclusion, for the reasons expressed above, we hold that a private plaintiff can only recover prospective, noncompensatory relief for a defendant's violations of Title VI. Such relief cannot include, for any purpose, an award of constructive seniority. Albeit on different grounds, the judgment below is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-431 - Guardians Association v. Civil Service Comm'n of the City of New York

---

My vote at conference was to affirm unless the Title VI intentional discrimination issue is reached, in which event I would reverse. I have avoided the issue in this draft.

Byron

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-431 - Guardians Association v. Civil Service Comm'n of the City of New York

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Byron

December 20, 1982

81-431 Guardians Ass'n v. Civil Service Commission

Dear Byron:

Please join me.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

I'll Joined

December 20, 1982

Re: No. 81-431 Guardians Association v. Civil Service Commission of the City of New York

Dear Byron:

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1982

Re: No. 81-431, Guardians Assn. v. Civil Service Commission of New York

Dear Byron:

I join.

Regards,

WEB

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 28, 1982

Re: No. 81-431, Guardians Association v. Civil Service Comm'n

Dear Byron:

You have written a persuasive opinion in this case, and I have given it very serious consideration. Because you have avoided the issue that primarily divided us at conference, namely, whether Title VI requires proof of discriminatory intent, and now have based your affirmance of the judgment of the Second Circuit on remedial considerations, holding that compensatory relief is not available under Title VI, and that private cause of action relief under that Title is limited to declaratory and prospective injunction remedies, the opinion is almost entirely palatable to me.

My remaining concern is the holding, p. 18, that "competitive status" constructive seniority is not prospective. Judge Meskill, however, took the position below that the order that a new sergeant's examination be given was prospective.

I question only whether it is necessary now to take a position on competitive status constructive seniority. I say this because my "spies" tell me that the last time a sergeant's examination was given was in 1978; that the next is scheduled for January 1983; that at the time of the District Court's decision in February 1979 the New York Police Department asserted that all officers previously laid off had been rehired, App. 115; and that all these officers are thus eligible to take the examination scheduled for next month.

I therefore wonder whether competitive status constructive seniority is necessary at all as a matter of relief. If you would be willing to eliminate the holding that the competitive status seniority remedy is not prospective and replace it with a statement that that remedial feature now is not important to this case and need not be analyzed further, I could join your opinion and would be glad to do so.

Sincerely,

Harry

Justice White

cc: The Conference

I don't like this but there may not be a sound ground to object. BRW needs HAB's vote

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 29, 1982

Re: 81-431 - Guardians Association v. Civil Service Commission

Dear Harry,

As you can tell, my view is that awarding constructive seniority based on past transgressions is not just a form of prospective relief. Ordering new examinations for those deemed to have constructive senority is in the same category.

In your words, however, I shall give "very serious consideration" to your suggestion that the issue need not be decided.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

cpm

Marie - I've lost touch with this. What about

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 4, 1983

No. 81-431 Guardians Assoc. v. Civil Service Comm'n.

Dear Byron,

I like your approach to this case, but I agree with Harry that there are concerns with the holding that competitive status constructive seniority is not prospective relief. Harry has suggested that we need not take a position on the sergeants' examination and thereby avoid the problem altogether.

I think it is a good suggestion, however, there were other elements of the competitive status constructive seniority relief which cannot be so easily resolved, for example, the order placing the police officers who were victims of the discrimination in the position on the seniority roster that they would have occupied but for the discriminatory examinations. That form of relief may well be characterized as altering their employment status for the future.

For the present I will wait to see what changes you decide to make or what other writing emerges.

Sincerely,

Sandra

Justice White

Copies to the Conference

As we discussed earlier, the difficulty with Justice Blackmun's view is that competitive status constructive seniority includes more than just a right to take the sergeant's exam. Justice O'Connor provides one explicit example of this point.

Thus, you might tell BRW you agree with SOC. But, I note that SOC does not say she therefore agrees with BRW's resolution of the issue.

Rather she agrees with HAB's concerns. Thus, she leaves open the possibility that she would vote that competitive status constructive seniority *is* prospective relief. This is not your view. Therefore, you may agree with SOC's analysis of HAB's suggestion, but at this point there is no agreement as to the merits of the issue HAB wants to avoid.

Mark

File

men 01/05/83

MEMORANDUM TO JUSTICE POWELL

From: Mark

Re: Guardians Ass'n v. Civil Serv. Comm'n, No. 81-431

Attached is a proposed letter to Justice White in this case. I would suggest, however, that there may not be any point in sending such a letter. I agree.

Justice White now has four votes to hold that all constructive seniority is retroactive relief: his own vote, plus LFP, Chief, and WHR. He also appears to have the votes of HAB and SOC for everything in the opinion except the competitive status constructive seniority issue.

The problem is this: if BRW cannot get a fifth vote on the constructive seniority issue, it means that five members of the Court will hold that some portion of the relief in this case is prospective. That in turn means those five Justices must decide whether that portion of the relief was justified -- in other words, those five Justices must reach the intent/effect issue under Title VI. This would be a messy resolution.

It seems to me that if there is a reasonable way for BRW to avoid the competitive status issue, and thus get HAB and SOC, the result would be a clear and firm vindication of your view on the major issue in the case: the existence of a private damages action under Title VI. Accordingly, I am not sure there is any point in trying to persuade BRW to reject HAB's suggestion of avoiding the competitive status issue. If in fact there is no

way to avoid it -- and I think that probably is the case -- then BRW will have to say so, and the other five Justices will have to decide whether to join BRW. But it might be best simply to leave it to BRW to decide whether or not the competitive status issue can be avoided.

Draft Letter to Justice White

Dear Byron:

I write to comment briefly on the letters from Harry and Sandra concerning the possibility that your opinion need not reach the issue of whether competitive status constructive seniority constitutes prospective or retrospective relief.

It is desirable, of course, to avoid deciding issues unnecessarily. I am inclined to agree with Sandra, however, that the competitive status seniority relief in this case extends beyond the entitlement to take a sergeant's examination. For example, as Sandra suggests, the award of constructive seniority will affect the seniority lists used for purposes of lay offs. See J.A. at A106. This portion of the relief will not be mooted by the upcoming sergeant's exam.

On the merits, I continue to agree with your conclusion that any grant of constructive seniority -- whether "benefit" or "competitive status" -- constitutes compensation for a past wrong.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 13, 1983

Re: 81-431 - Guardians Ass'n v. Civil Service Comm'n

Dear Byron:

With apologies for not responding to your circulation more promptly, I can now state that I intend to write separately and will probably come to the conclusion that there is a remedy, either in accord with the analysis in Cannon, or under §1983, that the statute as construed by the majority in Bakke requires proof of intent, but that the regulation is nevertheless valid. Some of this may change in the writing, but I am sure that I will not be joining your opinion.

Respectfully,

JPS

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 14, 1983

Re: No. 81-431, Guardians Ass'n v. Civil Service Comm'n

Dear Byron,

I have reviewed all the circulating opinions in this case, including the proposed dissent circulated by Thurgood today, and have reluctantly come to the conclusion that I cannot agree with any of them entirely.

In an earlier letter, I indicated that I was troubled by your treatment of the issue of the kinds of relief available to enforce spending clause legislation in a private cause of action. I share John Stevens' view, as expressed in Part I of his proposed dissent, that Pennhurst does not compel a conclusion that only prospective relief is available. Therefore, I cannot join your proposed opinion as it now stands.

As I expressed at conference, I would recognize a private cause of action under Title VI. On the merits issue, however, I feel constrained, because of stare decisis concerns, to conclude that Bakke is controlling and that proof of intentional discrimination is required to make out a case under Title VI. Given this statutory standard, I am unable to say that regulations that impose an impact standard can be upheld as reasonably related to the statute. Therefore, although I could concur in a judgment to affirm the decision below, I cannot otherwise join your opinion. Therefore, as things now stand, I would write separately to express my own views on the case.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1983

MEMORANDUM TO THE CHIEF JUSTICE
AND JUSTICES BLACKMUN, POWELL, REHNQUIST, AND O'CONNOR

Re: 81-431 - Guardians Ass'n v. Civil Service Comm'n

It may be well to review the status of this case, in which I shall shortly recirculate. I hope to clarify the basis for affirmance in this case which is this: Unless Congress clearly indicates to the contrary, one way or another, a typical spending-clause statute should be construed as extending to private parties only the right to secure an injunction ordering compliance, from that date forward, with the terms on which federal funds have been furnished. Thus, in a §1983 suit against state officials, the only remedy is the enforcement of the right to future compliance.

To say that prospective, but not retrospective, relief is available is thus not wholly accurate, and the first draft perhaps was misleading in this respect. What private plaintiffs can get is a declaration of what compliance requires and an order to comply. This includes no individual or class relief, prospective or not, for past conduct by the grantee that was inconsistent with the grant.

The Chief Justice, Lewis and Bill Rehnquist have joined the first draft and thus agree that this approach forecloses any of the relief that must rest on Title VI in this case, including competitive seniority. Harry and Sandra have expressed their doubts about competitive seniority on the ground that it is prospective only. Harry has suggested that it need not be dealt with at all because of impending sergeant's examinations that in the circumstances would solve the competitive seniority issue completely. Unfortunately, I have been unable to verify that this is the case.

If the approach of the circulating draft does not carry the day with respect to competitive seniority, it will be necessary to confront the issue of whether intentional discrimination must be shown in a Title VI case. In that event, there would be no need to pursue the cause-of-action approach of the current draft. Of course, the intent issue is a recurring question, and it may be well to settle it. As you know, John has now written on the matter, concluding that the judgment of the Court of Appeals should be reversed.

Byron

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 15, 1983

Re: 81-431 - Guardians Ass'n v.
Civil Service Comm'n

Dear Chief,

In view of the various writings in this case and Sandra's letter of today, perhaps we should chat on Friday about whether the opinion should be reassigned.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

cpm

SOC has refused to provide a 5th vote — HAB is left, but that is doubtful. I do not understand, however, why BRW wants the opinion reassigned. Apparently, he

March 16, 1983

81-431 Guardian Association v. Civil Service Comm.

Dear Byron:

I note your letter of March 15 suggesting that possibly this case should be reassigned.

There has indeed been a variety of views expressed but this was the situation at Conference. My understanding, in light of Sandra's letter of the 14th, is that although she will not join you on the implying of a cause of action issue she will join your judgment to affirm.

This, at least, would give you a judgment.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 18, 1983

Re: Guardians Assn. v. Civil Service Commission, No. 81-431

Dear John:

Please join me.

Sincerely,

Bill

WJB, Jr.

Justice Stevens

Copies to the Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAR 24 '83

PP. 1-5

I'm with BRW
~~3/24~~
3/24

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-431

GUARDIANS ASSOCIATION, ETC., ET AL., PETITIONERS *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[March ——, 1983]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

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

I

As the plurality notes, *ante*, at 8, in the last five years at least eight Members of this Court have endorsed the view that Title VI, as well as the comparable provisions of Title IX of the Education Amendments of 1972, may be enforced in a

You might note the new fn. 2. JPS observes that the injunction in Bakke would not be permissible under BRW's circulation. That is a very restrictive holding, & JPS probably is right that few private litigants would have an incentive to sue for

private action against recipients of federal funds, such as the respondent in this case.[1] This Court has authorized relief in at least four such cases. *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Hills* v. *Gautreaux*, 425 U. S. 284 (1976); *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

The plurality today holds that a plaintiff who prevails in a suit under Title VI is entitled only to a limited form of prospective relief.[2] That holding is somewhat surprising, since no Member of the Court in *Lau*, *Bakke*, or *Cannon* mentioned such a limitation on remedies. Presumably, the conclusion rests on a finding that Congress, in enacting Title VI, intended to distinguish between prospective and retroactive relief. Yet it seems to me most improbable that Congress contemplated so significant and unusual a limitation on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute. It is one thing to believe, as I do, that the 1964 Congress,

All Bakke did in way of relief was prospective

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[1] Six Members of the Court—CHIEF JUSTICE BURGER, JUSTICE BRENNAN, Justice Stewart, JUSTICE MARSHALL, JUSTICE REHNQUIST, and JUSTICE STEVENS—endorsed the view that a private right of action exists directly under Title VI and Title IX. *Cannon* v. *University of Chicago*, 441 U. S. 677 (1977); *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 418–421 (1978) (STEVENS, J., dissenting). Two Members of the Court—JUSTICE WHITE and JUSTICE BLACKMUN—endorsed the view that private individuals may enforce Title VI and Title IX against appropriate defendants under 42 U. S. C. § 1983. *Cannon*, *supra*, at 722–724 (WHITE, J., dissenting).

[2] The plurality would prohibit any "form of compensation or relief based on past conduct now deemed violative of the Act." *Ante*, at 17. As a general matter, this prohibition would remove the incentive for virtually all private litigation: The purpose of any lawsuit is to obtain compensation or relief based on past illegal conduct. More concretely, the plurality's specific conclusion—that an award of "competitive status" seniority is impermissible—cannot be reconciled with the square holdings in *Bakke* and *Cannon* that Title VI and Title IX respectively authorized an injunction requiring admission to a university's medical school based on proof of past unlawful discrimination.

– no damages.

legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification.

In order to reach its creative conclusion about the scope of available relief under Title VI, the plurality relies heavily on the proposition that *Pennhurst State School* v. *Halderman*, 451 U. S. 1 (1981), establishes a "presumption that only limited injunctive relief should be granted as a remedy for violations of statutes passed pursuant to the spending power." *Ante*, at 14. That characterization seriously distorts the opinion of the Court in *Pennhurst*, which concerned the existence or nonexistence of statutory rights, not remedies.[3] We held that Congress will not be presumed to have created substantive legal obligations under the Spending Power by legislation so ambiguous that "a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.*, at 17.[4] In dictum,[5] we went on to speculate that an injunc-

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[3] We framed our opinion as follows:

"Petitioners first contend that 42 U. S. C. § 6010 does not create in favor of the mentally retarded any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or § 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual habilitation plans for the mentally retarded. *Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.*" 451 U. S., at 10–11 (emphasis added).

[4] Obviously, there can be no argument that the respondent in this case

tion requiring a State to provide "'appropriate' treatment in the 'least restrictive' environment" might be improper, noting that the Eleventh Amendment prohibits federal courts from requiring states to pay money damages. *Id.*, at 29–30. Without explaining why, the plurality today divines a general principle of statutory interpretation from this discussion of the Eleventh Amendment. The Eleventh Amendment obviously has no relevance in most Title VI litigation; it certainly is not implicated in this suit against the City of New York. I cannot fathom the plurality's supposition that Congress regularly analogizes to the Eleventh Amendment when it drafts Spending Power legislation. There is certainly nothing in the text or the legislative history of Title VI to suggest that the 1964 Congress did so.

Even if it were not settled by now that Title VI authorizes appropriate relief, both prospective and retroactive, to victims of racial discrimination at the hands of recipients of federal funds, the same result would follow in *this* case because the petitioners have sought relief under 42 U. S. C. § 1983. While Title VI applies to all recipients of federal funds, § 1983 governs a different class of persons: those who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Our past decisions establish that the respondent in this case, the Civil Service Commission of the City of New York, is bound by § 1983 as well as by Title VI. *Monell* v. *Department of Social Services*, 436 U. S. 658 (1978). Our past decisions also establish that § 1983 provides a damages remedy. *Ibid.* And finally, it is clear that the

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was unaware of its obligations. Both the statute and the regulations clearly prohibit racial discrimination, and they did so at the time the respondent accepted the federal money.

[5] After the sentence fragment quoted *ante*, at 10–11, the Court concluded, "These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here." *Id.*, at 30.

§ 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law. See *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).[6] See also *Cannon*, *supra*, at 722–724 (WHITE, J., dissenting); *ante*, at 8. Yet the plurality opinion today nowhere explains why § 1983 does not authorize the relief that the district court granted to the petitioners.

The policy arguments the plurality advances in support of its holding may be perfectly sound. There may well be situations in which one would fear that strict retroactive enforcement of a federal grant condition would discourage grant applications that are a high federal priority.[7] These are, however, arguments that should be addressed to Congress rather than to a court. Cf. *Cannon*, *supra*, at 709–710. I believe Congress implicitly authorized the Federal Judiciary to award appropriate relief to private parties injured by violations of Title VI. Whether these petitioners are within that special class is, of course, another question to which I now turn.

II

In *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 412–418 (1978), four Justices expressed the opinion that Title VI's prohibition against racial discrimination is significantly broader than the protection provided by the Equal

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[6] *Thiboutot* itself involved only federal statutes, not regulations. Its analysis of § 1983, however, applies equally to administrative regulations having the force of law. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301–303 (1979) (discussing what types of administrative regulations have "the force and effect of law").

[7] I must point out, however, that the record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondent's federal subsidy. And, as a general proposition, it is usually assumed that a cutoff of federal funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation. See *Cannon*, *supra*, at 705, and n. 38.

Protection Clause of the Fourteenth Amendment. That position was a dissenting one, however; five Members of the Court unequivocally rejected it.

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

> "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U. S., at 287.

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN reached the same conclusion. They wrote:

> "In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies. . . ." *Id.*, at 328.[8]

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

> "Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution." *Id.*, at 340.[9]

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[8] Accord, *id.*, at 332, 333, 334, n. 11, 336, 338. Towards the end of their opinion, JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN expressly considered and rejected the argument that the Court's earlier decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), foreclosed their reading of Title VI. See 438 U. S., at 352–353.

[9] Of course, in *Washington* v. *Davis*, 426 U. S. 229 (1976), the Court held that the Fourteenth Amendment is violated only by *purposeful* state racial

The interpretation of Title VI adopted by a majority in *Bakke* was confirmed in two subsequent opinions of the Court. In *Steelworkers* v. *Weber*, 443 U. S. 193, 206, n. 6 (1979), the Court distinguished Title VII from Title VI on the basis that the former provision "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments."[10] And in *Board of Education, New York City* v. *Harris*, 444 U. S. 130 (1979), the Court first concluded that the 1972 Emergency School Aid Act (ESAA), 86 Stat. 354, contemplates funding cutoffs in response to forms of discrimination that are not "discrimination in the Fourteenth Amendment sense." *Id.*, at 149. The Court then went on, in considered dictum, to distinguish the ESAA from Title VI:

> "A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found." *Id.*, a 150.[11]

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discrimination.

[10] The Court explained:

"Title VI of the Civil Rights Act of 1964, considered in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), contains no provision comparable to § 703(j) [of Title VII]. This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed 'program[s] or activit[ies] receiving Federal financial assistance.' 42 U. S. C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*." 443 U. S., at 206, n. 6.

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

The question to be decided today is not whether the Court has misread the actual intent of the Congress that enacted the Civil Rights Act of 1964. For when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. Compare *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 140–150 (1978) (STEVENS, J., dissenting), with *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 47 (1978) ((STEVENS, J., concurring) and *City of Rome* v. *United States*, 446 U. S. 156, 191 (1980) ((STEVENS, J., concurring). See also *Runyon* v. *McCrary*, 427 U. S. 160, 189–192 (1976) ((STEVENS, J., concurring). If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress.[12] Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke. Today, proof of invidious purpose is a necessary component of a valid Title VI claim.

III

The respondent in this case sought, received, and ex-

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[12] Like most, this proposition of law is not wholly without exceptions. Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition. One clear example of such a statute is the Sherman Act, 26 Stat. 209. See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978); *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, —— U. S. ——, —— (1983). For that reason, in *Continental T.V., Inc.* v. *GTE Sylvania*, 433 U. S. 36 (1977), the doctrine of *stare decisis* did not preclude the Court from overruling its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), even though Congress had not acted during the intervening decade. Cf. *Monnell* v. *Department of Social Services*, 436 U. S. 658, 695–701 (1978) (overruling an erroneous interpretation of § 1983 in *Monroe* v. *Pape*, 365 U. S. 167 (1961), despite the absence of congressional action). Title VI is different from those statutes, because Congress expected most interstitial lawmaking to be performed by administrative agencies, not courts.

pended federal grants to pay the salaries of policemen and to finance its recruitment programs. In order to obtain funds from the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development, see App. to Pet. for Cert. A123, it was required to promise not only that it would comply with Title VI, but also that it would abide by departmental regulations implementing that statute.[13] Ever since 1964, all three Departments have had virtually identical implementing regulations. Significantly, those regulations do more than merely prohibit grant recipients from administering the funds with a discriminatory purpose; they require recipients to administer the grants in a manner that has no racially discriminatory *effects*.[14]

This Court has repeatedly upheld the validity of those regulations and their "effects" standard. *Lau* v. *Nichols*, 414 U. S., at 568; *id.*, at 571 (Stewart, J., concurring); *Fullilove* v. *Klutznick*, 448 U. S. 448, 479 (1980) (Opinion of BURGER, C. J.). The reason is that Title VI explicitly authorizes "[e]ach Federal department and agency which is em-

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[13] One standard application form requires the following certification": "The grantee hereby assures and certifies that it will comply with the regulations, policies, guidelines and requirements with respect to the acceptance and use of Federal funds for this federally-assisted program. Also, the grantee gives assurances and certifies with respect to the grant that:

. . . . .

(6) The grant will be conducted and administered in compliance with:
(a) Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) *and implementing regulations* . . . ." Form HUD 4124 (emphasis added).

[14] For example, the regulations provide:
"A recipient, in determining the . . . benefits . . . which will be provided under any such program, . . . may not, directly or through contractual or other arrangements, utilize criteria which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 24 CFR § 1.4(b)(2) (1982); 28 CFR § 42.104(b)(2) (1982); 29 CFR § 31.3(b)(2) (1982).

powered to extend Federal financial assistance . . . to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . . ." 78 Stat. 252, 42 U. S. C. § 2000d-1. Nothing in the regulations is inconsistent with any of the statutes authorizing the disbursement of the grants that the respondent received.[15]

It is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal statute that governs completely private conduct, those regulations have the force of law so long as they are "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973). See also *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301–306 (1979); *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977). See generally K. Davis, *Administrative Law Treatise* § 7.8 (2d ed. 1980 and Supp. 1982). The presumption of validity must be at least as strong when a regulation does not seek to control the conduct of independent private parties, but merely defines the terms on which someone may seek federal money. By prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI.[16] The reasonableness of the agencies' method of implementation is apparent from the Court's opinion in *City of Rome* v. *United States*, 446 U. S. 156, 173–178

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

[16] Those purposes are evident from the statutory language:

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

(1980), which held that even if § 1 of the Fifteenth Amendment only prohibits purposeful racial discrimination in voting, Congress may implement that prohibition by banning voting practices that are discriminatory in effect. Thus, although the petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of the statute, they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of valid federal law.

IV

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

See my letter to SO'C.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: MAR 29 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–431

GUARDIANS ASSOCIATION, ETC., ET AL., PETITIONERS *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[March ——, 1983]

✓

A fine opinion.

L.F.P.

JUSTICE O'CONNOR, concurring in the judgment.

For the reasons given in Part I of the dissent by JUSTICE STEVENS, *post*, at 1–4, I cannot agree with the limitations that the plurality opinion would place on the scope of equitable relief available to private litigants suing under Title VI. Therefore, like the dissent, I would address two further questions: (1) whether proof of purposeful discrimination is a necessary element of a valid Title VI claim, and (2) if so, whether administrative regulations incorporating an impact standard may be upheld as within the agency's statutory authority. My affirmative answer to the first question leads me to conclude that regulations imposing an impact standard are not valid. On that basis, I would affirm the judgment below.

Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination. Cf. *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 412–418 (1978) (opinion of STEVENS, J.). In *Bakke*, however, a majority of the Court concluded otherwise. *Id.*, at 287 (opinion of POWELL, J.); *id.*, at 328 (opinion of BRENNAN, J., joined by WHITE, MARSHALL, and BLACKMUN, JJ.). Like JUSTICE STEVENS, *post*,

at 8, I feel constrained by *stare decisis* to follow that interpretation of the statute.

I part company with JUSTICE STEVENS' dissent, however, when it concludes that administrative regulations incorporating an "effects" standard may be upheld notwithstanding the statute's proscription of intentional discrimination only. See *post*, at 8–11. Administrative regulations having the force of law may be set aside only if they exceed the statutory authority of the agency or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Batterton* v. *Francis*, 432 U. S. 416, 426 (1977). JUSTICE STEVENS' dissent argues that agency regulations incorporating an "effects" standard reflect a reasonable method of "further[ing] the purposes of Title VI." *Post*, at 10. If, as five members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.

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

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

I acknowledge that in *Lau* v. *Nichols*, 414 U. S. 563 (1973), the Court approved liability under Title VI for conduct having only a discriminatory impact. Nevertheless, I believe that JUSTICE BRENNAN accurately observed in *Bakke*, 438 U. S., at 352, that *Bakke*'s interpretation of "Title VI's definition of racial discrimination to be absolutely coextensive with the Constitution's" casts serious doubt on the correctness of the *Lau* decision. In my view, the logical implications of that interpretation require that *Lau* be overruled. Accordingly, I would conclude that the Title VI regulations at issue here cannot validly serve as the basis for liability. Because petitioners have failed to prove intentional discrimination, I would affirm the judgment of the Court of Appeals.

March 31, 1983

81-431 Guardian Association v. Civil Service Comm'n

Dear Sandra:

Although I am with Byron in his plurality opinion, I have read with interest and admiration your opinion concurring in the judgment.

One of the serious problems with the way our government operates is that departments and agencies, when authorized to adopt rules and regulations, almost invariably use this authority to expand their jurisdiction. We have an example of it in the recent case involving 10b-5 of the Securities Exchange Act of 1934. The SEC is one of our better agencies, and yet it has expanded vastly its jurisdiction over the intervening years - accomplished in major part by anonymous staff personnel who write and then construe the regulations.

John's view would substantially enhance the power of this largely "invisible" government. But quite apart from broader concerns, you answer his legal argument in one sentence: "Reasonably related to" simply cannot mean "inconsistent with".

I hope that your opinion will serve to deter future efforts to vest such unprecedented authority in the agencies.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1983

MEMORANDUM TO THE CONFERENCE

Re: 81-431 - Guardians Association v. Civil Service Commission of the City of New York

As the votes on the presently circulating opinions stack up, there are five to affirm, four on my opinion because the additional remedy sought by the plaintiffs is not available under Title VI and one, Sandra, on the ground that the Court of Appeals was right in concluding that it is necessary to prove intentional discrimination to recover under Title VI. Of course, there are four to reverse; for them the Court of Appeals was wrong on the intent issue and I am wrong on the remedy issue.

If the judgment is affirmed based on the present opinions, that judgment will rest on two positions, both of which are rejected by a majority of the Court: my view with respect to the limitations on equitable relief is rejected by the four who would reverse and by Sandra who would affirm; Sandra's view is rejected by the four who would reverse and by myself. Of course, my view on the intent issue is not revealed in the present opinions, but it was my position at conference and I adhere to it. Hence, to the extent that affirmance on the present opinions would signal that intent is a necessary element in a Title VI case, that signal would be a false indication of the views of the present Members of the Court.

No doubt this sort of thing has happened before, but I think it undesirable, the false signal in particular. That element is curable by my expressing myself on the intent issue. I shall accordingly recirculate, reaching and deciding the intent question and then going on much as I now do to say that in my opinion the relief sought is unavailable here, at least in the absence of a showing of intentional discrimination.

Of course, I shall circulate as announcing the judgment, and it may work out that someone else will inherit that job.

Cheers
Byron

June 4, 1983

81-431 Guardians Association v. Civil Service Commission

Dear Byron:

In view of the additions to your opinion, I am considering writing separately and will try to get to it promptly.

I remain in agreement with the judgment.

Sincerely,

Justice White

lfp/ss

cc: The Conference

conclusion than I normally like to write. But it is what I suggested, & is well done. Go to a ~~[illegible]~~ 1st Draft unless your editor has substantive changes

men 06/14/83

DRAFT NO. 2 Guardians Assn., No. 81-431

JUSTICE POWELL, concurring in the judgment.

With reluctance, I write separately. The many opinions filed in this case draw lines that are not required by, and indeed in some instances seem incompatible with, our prior decisions. One may well doubt whether our opinions today will be helpful in affording guidance.[1]

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[1]In particular, the Court is divided on ~~badly split as to~~ the standard of proof required to prove violations of rights in cases involving Title VI. Seven Members of the Court agree that a violation of the statute itself requires proof of discriminatory intent. See post, at 1-2 (O'CONNOR, J., concurring in the judgment); post, at 9 (STEVENS, J., joined by BRENNAN and BLACKMUN, JJ.) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim"). Only JUSTICE WHITE and JUSTICE MARSHALL believe that a violation of Title VI may be established by proof of discriminatory effect, and JUSTICE WHITE would recognize only limited prospective relief for such a violation. See ante, at 21. JUSTICES BRENNAN, BLACKMUN, and STEVENS, however, believe that a

Footnote continued on next page.

I

In Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (POWELL, J., dissenting), I would have held that Congress intended no implied private right of action under Title IX of the Civil Rights Act. For the same general reasons, I also would hold that petitioners may not maintain this action under Title VI.

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violation of the regulations adopted pursuant to Title VI may be established by proof of discriminatory impact. See post, at 12.

Thus, a majority of the Court holds that proof of discriminatory effect will suffice to establish liability only when the suit is brought pursuant to the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. §1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory intent standard required to prove violations of Title VI. Thus, the apparent result is that a suit against governmental recipients of federal funds--who may be sued under §1983--will be governed by a different standard of liability than a suit against private fund recipients. One would have difficulty explaining this result in terms of the legislative history of Title VI.

The Chief Justice

clear legislative guidance.

Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without. We have recognized repeatedly that whether a private right of action may be implied requires a determination of congressional intent. See e.g. Touche Ross & Co. v. Redington, 442 U.S. ~~220~~ 560, ~~241~~ 568 (1979). We look, of course, to the legislative history, ~~In~~ particular~~y~~ ~~we look~~ to what other remedies have been provided. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that

taxpayers' money be spent nondiscriminatorily. See ante, at 16-17 (WHITE, J.). In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds.[2] In addition, it created a carefully constructed administrative procedure to insure that such withholding of funds was required only where appropriate.

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[2]JUSTICE MARSHALL argues that private relief must be available because the statutory remedy of a fund cut-off is "impractical" and "too Draconian to be widely used." Post, at 4-5 (dissenting opinion). See post, at 5, n. 7 (STEVENS, J., dissenting). In my view, such reasoning evinces a ~~clear~~ departure from the principle ~~that legislative~~ intent is the guide to implying a right of action. The judiciary is not free to decide that remedies affirmatively and expressly adopted by Congress are so "impractical" or Draconian that judicially-created remedies are necessary. Rather, the fact that Congress expressly adopted one remedy--and one only--should be viewed as a congressional choice that should be obeyed. See Cannon v. University of Chicago, 441 U.S. 677, 749 (1979) (POWELL, J., dissenting) ("Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes.").

In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertance. See also Regents of the University of California v. Bakke, 438 U.S. 265, 381 (1978) (WHITE, J.) ("[T]here is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI").[3] I would affirm the judgment below

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[3] I also would hold that private actions asserting violations of Title VI may not be brought under 42 U.S.C. §1983. Congress' creation of an express administrative procedure for remedying violations, ~~convinces me~~ strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under §1983. See Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 20-21 (1981); cf. Maine v. Thiboutot, 448 U.S. 1, 22, n. 11 (1980) (POWELL, J., dissenting) ("The only exception [to §1983 liability] will be in cases where the governing statute provides an

Footnote continued on next page.

solely on this issue.

II

There is, however, an alternative ground for affirmance. Both the District Court and the Court of Appeals agreed that respondents had failed to show any intentional discrimination. The Court of Appeals, relying on the opinions in Bakke, held that such a showing--one that must be made to establish an equal protection claim--is a prerequisite to a successful Title VI claim. I agree with Justice Stevens, post, at 6-9, that the Court of Appeals was correct in its reading of our opinions in Bakke.

My conclusion in Bakke was that "[i]n view of the clear legislative intent, Title VI must be held to

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exclusive remedy for violations of its terms.").

proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U.S., at 284-287. JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN undertook a thorough ~~an even more~~ ~~exhaustive~~ analysis of the legislative history in reaching the same conclusion. See id., at 328-340. They concluded ~~expressed~~ ~~the "view~~ "that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." Id., at 354. This construction necessarily requires rejection of the prior ~~holding~~ analysis in Lau v. Nichols, 414 U.S. 563 (1973), that discriminatory impact suffices to establish liability under Title VI.[4]

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[4]The Lau Court did not undertake any analysis of the legislative history assumed of Title VI. I have no occasion here to consider whether the ~~particular~~ result in Lau may stand despite rejection of its premise.

If expressed view ~~and~~ ~~to~~ is conclusory, ~~with~~ essentially without supporting reasoning.

In my view the Court of Appeals was fully justified in holding that petitioners had failed to establish their Title VI claims.[5]

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

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[5]For the reasons stated by JUSTICE O'CONNOR, post, at 2-4, I reject JUSTICE STEVENS' novel argument that an administrative agency is free to adopt any regulation that may be said to further the purposes of an enabling statute. Administrative agencies have - and should not have - no such lawmaking power.

JUSTICE WHITE and JUSTICE MARSHALL would avoid the explicit reasoning of Bakke by deferring to a prior administrative construction of Title VI. See ante, at 9-10 (opinion of WHITE, J.); post, at 14-20 (MARSHALL, J., dissenting). I do not question the view that the Court will "sustai[n] a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding." Post, at 18 (MARSHALL, J., dissenting). I do not question, however, how this principle can be applied after this Court has issued a definitive--and contrary--construction of its own. Moreover, in Bakke JUSTICE WHITE and JUSTICE MARSHALL agreed that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution." 438 U.S., at 322 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). If "nowhere" is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, then an agency interpretation to the contrary clearly is entitled to no deference.

But I know of no precedent whatever for asserting that this deference to administration interpretation is permissible

Mark: Did JPS or TM cite any authority?

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

JUN 16 1983

From: **Justice Powell**

Circulated: _____

Recirculated: _____

chambers

~~1st DRAFT~~

SUPREME COURT OF THE UNITED STATES

No. 81-431

GUARDIANS ASSOCIATION, ETC., ET AL., PETITIONERS *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1983]

JUSTICE POWELL, concurring in the judgment.

With reluctance, I write separately. The many opinions filed in this case draw lines that are not required by, and indeed in some instances seem incompatible with, our prior decisions. ~~One may well doubt whether our opinions today will~~ be ~~helpful in affording guidance.~~[1]

Our opinions today will further confuse rather than guide.

[1] In particular, the Court is divided as to the standard of proof required to prove violations of rights in cases involving Title VI. Seven Members of the Court agree that a violation of the statute itself requires proof of discriminatory intent. See *post*, at 1–2 (O'CONNOR, J., concurring in the judgment); *post*, at 9 (STEVENS, J., dissenting, joined by BRENNAN and BLACKMUN, JJ.) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim"). Only JUSTICE WHITE and JUSTICE MARSHALL believe that a violation of Title VI may be established by proof of discriminatory effect, and JUSTICE WHITE would recognize only noncompensatory, prospective relief for such a violation. See *ante*, at 21. JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS, however, believe that a violation of the *regulations* adopted pursuant to Title VI may be established by proof of discriminatory impact. See *post*, at 12.

Thus, a majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U. S. C. § 1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory intent standard required to prove violations of Title

?

We say seven agree on "intent" to violate ~~the~~ Title VI itself. Should let we name all seven?

I

In *Cannon* v. *University of Chicago*, 441 U. S. 677, 730 (1979) (POWELL, J., dissenting), I would have held that Congress intended no implied private right of action under Title IX of the Civil Rights Act. For the same general reasons, I also would hold that petitioners may not maintain this action under Title VI.

Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without clear legislative guidance. We have recognized repeatedly that whether a private right of action may be implied requires a determination of congressional intent. See, *e. g.*, *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 20–23 (1982); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). We look, of course, to the legislative history and in particular to what other remedies have been provided. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that taxpayers' money be spent nondiscriminatorily. See *ante*, at 17 (opinion of WHITE, J.). In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds.[2] In

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VI. Thus, the apparent result is that a suit against *governmental* recipients of federal funds—who may be sued under § 1983—will be governed by a different standard of liability than a suit against *private* recipients of federal funds. One would have difficulty explaining this result in terms of the legislative history of Title VI.

[2] JUSTICE MARSHALL argues that private relief must be available because the statutory remedy of a fund cut-off is "impractical" and "too Dra-

addition, it created a carefully constructed administrative procedure to insure that such withholding of funds was required only where appropriate. In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertance. See also *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 381 (1978) (WHITE, J.) ("[T]here is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI").[3] I would affirm the judgment below solely on this issue.

II

There is, however, an alternative ground for affirmance. Both the District Court and the Court of Appeals agreed that

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conian to be widely used." *Post*, at 4–5 (dissenting opinion). See *post*, at 5, n. 7 (STEVENS, J., dissenting). In my view, such reasoning evinces a departure from the principle that legislative intent is the guide to implying a right of action. The judiciary is not free to decide that remedies affirmatively and expressly adopted by Congress are so "impractical" or "Draconian" that judicially-created remedies are necessary. Rather, the fact that Congress expressly adopted one remedy—and one only—should be viewed as a congressional choice that should be obeyed. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 749 (1979) (POWELL, J., dissenting) ("Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes.").

[3] I also would hold that private actions asserting violations of Title VI may not be brought under 42 U. S. C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20–21 (1981); cf. *Maine* v. *Thiboutot*, 448 U. S. 1, 22, n. 11 (1980) (POWELL, J., dissenting) (an exception to § 1983 liability is "where the governing statute provides an exclusive remedy for violations of its terms.").

respondents had failed to show any intentional discrimination. The Court of Appeals, relying on the opinions in *Bakke*, held that such a showing—one that must be made to establish an equal protection claim—is a prerequisite to a successful Title VI claim. I agree with JUSTICE STEVENS, *post*, at 5–9, that the Court of Appeals was correct in its reading of our opinions in *Bakke*.

My conclusion in *Bakke* was that "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U. S., at 287. JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN undertook a thorough analysis of the legislative history in reaching the same conclusion. See *id.*, at 328–340. They concluded "that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." *Id.*, at 352. This construction necessarily requires rejection of the prior analysis in *Lau* v. *Nichols*, 414 U. S. 563 (1974), that discriminatory impact suffices to establish liability under Title VI.[4] In my view, the Court of Appeals therefore was fully justified in holding that petitioners failed to establish their Title VI claims.[5]

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

[5] For the reasons stated by JUSTICE O'CONNOR, *post*, at 2–4, I reject JUSTICE STEVENS' novel argument that an administrative agency is free to adopt any regulation that may be said to further the purposes of an enabling statute. Administrative agencies do not have—and should not have—such lawmaking power.

JUSTICE WHITE and JUSTICE MARSHALL would avoid the explicit reasoning of *Bakke* by deferring to a prior administrative construction of Title VI. See *ante*, at 9–10 (opinion of WHITE, J.); *post*, at 14–20 (MARSHALL, J., dissenting). I do not question the view that the Court should "sustai[n] a reasonable administrative interpretation even if we would have reached a

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

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different result had the question initially arisen in a judicial proceeding." *Post*, at 18 (MARSHALL, J., dissenting). But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive—and contrary—construction of its own. Moreover, in *Bakke* JUSTICE WHITE and JUSTICE MARSHALL agreed that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution." 438 U. S., at 332 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). If "nowhere" is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, clearly an agency interpretation to the contrary is entitled to no deference.

JUN 17 1983

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-431

GUARDIANS ASSOCIATION, ETC., ET AL., PETITIONERS *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1983]

JUSTICE POWELL, concurring in the judgment.

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

[1] In particular, the Court is divided as to the standard of proof required to prove violations of rights in cases involving Title VI. A majority of the Court agrees that a violation of the statute itself requires proof of discriminatory intent. See *infra*, at 3–4; *post*, at 1–2 (O'CONNOR, J., concurring in the judgment); *post*, at 9 (STEVENS, J., dissenting, joined by BRENNAN and BLACKMUN, JJ.) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim"). Only JUSTICES WHITE and MARSHALL believe that a violation of Title VI may be established by proof of discriminatory effect, and JUSTICE WHITE would recognize only noncompensatory, prospective relief for such a violation. See *ante*, at 21. JUSTICES BRENNAN, BLACKMUN, and STEVENS, however, believe that a violation of the *regulations* adopted pursuant to Title VI may be established by proof of discriminatory impact. See *post*, at 12.

Thus, a majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U. S. C. § 1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard required to prove violations of Title

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In *Cannon* v. *University of Chicago*, 441 U. S. 677, 730 (1979) (POWELL, J., dissenting), I would have held that Congress intended no implied private right of action under Title IX of the Civil Rights Act. For the same general reasons, I also would hold that petitioners may not maintain this action under Title VI.

Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without clear legislative guidance. We have recognized repeatedly that whether a private right of action may be implied requires a determination of congressional intent. See, *e. g.*, *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 20–23 (1982); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). We look, of course, to the legislative history and in particular to what other remedies have been provided. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that taxpayers' money be spent nondiscriminatorily. See *ante*, at 17 (opinion of WHITE, J.). In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds.[2] In

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VI. Thus, the apparent result is that a suit against *governmental* recipients of federal funds—who may be sued under § 1983—will be governed by a different standard of liability than a suit against *private* recipients of federal funds. One would have difficulty explaining this result in terms of the legislative history of Title VI.

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addition, it created a carefully constructed administrative procedure to insure that such withholding of funds was required only where appropriate. In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertance. See also *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 381 (1978) (opinion of WHITE, J.) ("[T]here is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI").[3] I would affirm the judgment below solely on this issue.

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There is, however, an alternative ground for affirmance. Both the District Court and the Court of Appeals agreed that

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[3] I also would hold that private actions asserting violations of Title VI may not be brought under 42 U. S. C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20–21 (1981); cf. *Maine* v. *Thiboutot*, 448 U. S. 1, 22, n. 11 (1980) (POWELL, J., dissenting) (an exception to § 1983 liability is "where the governing statute provides an exclusive remedy for violations of its terms").

respondents had failed to show any intentional discrimination. The Court of Appeals, relying on the opinions in *Bakke*, held that such a showing—one that must be made to establish an equal protection claim—is a prerequisite to a successful Title VI claim. I agree with JUSTICE STEVENS, *post*, at 5–9, that the Court of Appeals was correct in its reading of our opinions in *Bakke*.

My conclusion in *Bakke* was that "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U. S., at 287. JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN undertook a thorough analysis of the legislative history in reaching the same conclusion. See *id.*, at 328–340. They concluded "that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." *Id.*, at 352. This construction necessarily requires rejection of the prior decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), that discriminatory impact suffices to establish liability under Title VI.[4] In my view, the Court of Appeals therefore was fully justified in holding that petitioners failed to establish their Title VI claims.[5]

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

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[5] For the reasons stated by JUSTICE O'CONNOR, *post*, at 2–4, I reject JUSTICE STEVENS' novel argument that an administrative agency is free to adopt any regulation that may be said to further the purposes of an enabling statute. Administrative agencies do not have—and should not have—such lawmaking power.

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Mark - add C's name

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1983

Re: No. 81-431 - Guardians Ass'n v. Civil Serv. Comm'n of N.Y.

Dear Lewis:

I join your concurring opinion.

Regards,

WEB

Justice Powell

Copies to the Conference

pp 1, 3

JUN 23 1983

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 23 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-431

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JUN 29 1983

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

Not circulated; stylistic only.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-431

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: _____

1. CA2 views have an overruling by Bakke opn -6
2. Law squarely held -7
BRW disagreed with CA2 view.
Bakke & Law are entirely consistent -8
3. BRW agree no "private cause of action" at least for compensatory damages unless there was discriminatory action -11,15
4. In this case, limit to injunctive relief -16
5. Refer to JPS opinion as to effect of Bakke.
6. An award of "constructive seniority" is impermissible retroactively -2-4 (9 agree)

pp. 1-2,7-10,15-16,18,20-22,25
& stylistic changes throughout

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

JUSTICE WHITE announced the judgment of the Court and delivered the following opinion.

The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, *et seq*,[1] and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.[2]

I disagree

[1] Section 601 of the Act, 42 U. S. C. § 2000d, provides:

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

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

This is a mess. The line-drawing has become so fine that the result can only be great confusion. BRW now would make the availability of compensatory relief turn on

However, I conclude that the judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations. There being four other Justices who would affirm the judgment of the Court of Appeals, that judgment is accordingly affirmed.

I

This class action involves a challenge by black and Hispanic police officers, petitioners here,[3] to several written examinations administered by New York City between 1968 and 1970 that were used to make entry-level appointments to the city's police department (the "Department") through October 1974.[4] The District Court found that the challenged examinations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings were not disturbed in the Court of Appeals.

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

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discrimination. Part II, *infra*.

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

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

scores on the examinations were laid off first, and the plaintiff black and Hispanic officers were disproportionately affected by the layoffs.

On April 30, 1976, petitioners filed the present suit[5] against the Department and other New York City officials and entities, the respondents here. Petitioners' amended complaint alleged that the June 1975 layoffs violated their rights under Titles VI and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000d, *et seq.*, and 2000e, *et seq.*, under 42 U. S. C. § 1983, and under various other state and federal laws.[6] The primary allegation of the complaint was that but for the discriminatory impact of the challenged examinations upon minorities, petitioners would have been hired earlier and therefore would have accumulated sufficient seniority to withstand the layoffs.

After a hearing, the District Court held that, although petitioners had failed to prove that the respondents had acted with discriminatory intent, the use of the exams violated

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

[6] Among these was a claim under 42 U. S. C. § 1981, which the District Court twice rejected because petitioners failed to prove discriminatory intent, which the court found to be a necessary element of a § 1981 cause of action. 431 F. Supp. 526, 534 (S. D.N. Y. 1977); 466 F. Supp. 1273, 1276 n. 4 (S. D.N. Y. 1979). The Court of Appeals affirmed. 633 F. 2d 232, 263–268 (CA2 1980). Petitioners raised this § 1981 issue in their petition for certiorari, but they abandoned it after our decision last Term in *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, —— U. S. —— (1982) decided the issue adversely to them. See Reply Brief for Petitioners 1, n.*.

Title VII, because the tests had a disparate impact upon minorities and were not proven by respondents to be job-related.[7] The court therefore granted petitioners' motion for a preliminary injunction restraining the Department from firing or recalling any police officers until seniority lists were reordered to accord petitioners the seniority they would have had but for respondents' discriminatory practices. 431 F. Supp. 526 (S. D.N. Y. 1977). In light of its holding under Title VII, the District Court deemed it unnecessary to decide the merits of petitioners' claims under Title VI. *Id.*, at 530, n. 2.

On respondents' appeal, the Second Circuit vacated the District Court's decision and remanded the case for reconsideration in light of our holding in *Teamsters* v. *United States*, 431 U. S. 324 (1977), in which we ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U. S. C. § 2000e–2(h). 562 F. 2d 38 (CA2 1977). On remand, the District Court found that *Teamsters* had rendered its previous holding untenable to the extent that it granted relief with respect to discrimination occurring prior to March 24, 1972, the date on which Title VII became applicable to municipalities. See Pub.L. 92–261 § 2(1), 86 Stat. 103 (1972). This meant that, under Title VII, class members hired prior to the effective date were not entitled to any relief, and that the remaining members of the class were only entitled to back seniority awards that did not take into account time periods prior to that date. 466 F. Supp. 1273, 1280 (S. D.N. Y. 1979).

The court then turned to Title VI, which has been applicable to municipalities since its enactment in 1964, to see if that provision would provide relief for the time periods prior

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

to March 24, 1972. After considering *Cort* v. *Ash*, 422 U. S. 66 (1975), and the various opinions in *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978), the District Court concluded that an implied private right of action existed under Title VI. 466 F. Supp., at 1281–85. Then, citing *Lau* v. *Nichols*, 414 U. S. 563 (1974), and Title VI administrative interpretative regulations adopted by several federal agencies, the court reasoned that proof of discriminatory effect is enough to establish a violation of Title VI in a private action, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. *Id.*, at 1285–87. Finally, turning to the question of relief, the court held that the same remedies available under Title VII should be available under Title VI, unless they would conflict with some purpose peculiar to Title VI. "In the instant case, back seniority, approved as a Title VII remedy in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976), is just as necessary to make discriminatees 'whole' under Title VI." 466 F. Supp., at 1287.

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

Respondents appealed once again to the Second Circuit, which affirmed the relief under Title VII but reversed as to Title VI. 633 F. 2d 232 (CA2 1980). All three members of the panel agreed that the award of Title VI relief could not be sustained, but the panel divided on the rationale for this conclusion. The majority held that the trial court erred by concluding that Title VI does not require proof of discriminatory

Lau - overruled

intent. They believed that this Court's decision in *Lau* v. *Nichols*, *supra*, which held that proof of discriminatory impact could suffice to establish a Title VI violation, had been implicitly overruled by the judgment and supporting opinions in *Bakke*, *supra*. 633 F. 2d at, 270 (Kelleher, J.); *id.*, at 274–75 (Coffrin, J.).

The third member of the panel, Judge Meskill, declined to reach the question whether Title VI requires proof of discriminatory intent. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." *Id.*, at 255. Nothing in the legislative history, Judge Meskill observed, indicated that Title VI was intended to compensate individuals excluded from the benefits of a program receiving federal assistance, and in his view a compensatory private remedy would work at cross-purposes with the administrative enforcement mechanism expressly provided by § 602 of Title VI, 42 U. S. C. §§ 2000d–1, and with the objectives of the federal assistance statutes. 633 F. 2d, at 255–62.[8]

After the Second Circuit denied petitions for rehearing from both sides, —— F. 2d —— (CA2 1981), we granted the plaintiffs' petition for certiorari, —— U. S. ——,[9] which

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

[9] Respondents also filed a petition for certiorari, in which they seek review of the Court of Appeals' determination that the plaintiff class is entitled to relief under Title VII. *Civil Service Comm'n* v. *The Guardians Ass'n*, No. 81–432. The petition is not certworthy and I will vote to deny it.

claimed error solely on the basis that proof of discriminatory intent is not required to establish a Title VI violation.

II

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

A

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

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[10] See *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 287 (POWELL, J.); *id.*, at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

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

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B

Even if I am wrong in concluding that *Bakke* did not overrule *Lau*, as so many of my colleagues believe, there is another reason for holding that disproportionate-impact discrimination is subject to the Title VI regime. In *Lau*, the Court was unanimous in affirming a holding that the school district there involved was forbidden by Title VI from practicing unintentional as well as intentional discrimination against racial minorities. Five Justices were of the view that Title VI itself forbade impact discrimination. *Lau*, *supra*, at 566–569. Justice Stewart, joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN, concurred in the result. The concurring opinion stated that it was not at all clear that Title VI, standing alone, would prohibit unintentional discrimination, but that the Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because not inconsistent with the purposes of Title VI. *Id.*, at 569–571.[11] Even if *Bakke* must be taken as overruling *Lau*'s

[11] Section 602 of Title VI, 42 U. S. C. § 2000d–1, empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance. . . ." Justice Stewart explained that the regulations therefore should be upheld as valid, because they were "'reasonably related to the purposes of the enabling legislation.'" *Lau* v. *Nichols*, 414 U. S. 563, 571 (1974) (opinion concurring in

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

Of course, this leaves the question whether THE CHIEF JUSTICE, Justice Stewart, and JUSTICE BLACKMUN were correct in their reading of the statute. I am convinced that they were. The language of Title VI on its face is ambiguous; the word "discrimination" is inherently so. It is surely subject to the construction given the anti-discrimination proscription of Title VII in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), at least to the extent of permitting, if not requiring, regulations that reach disparate-impact discrimination. As Justice Stewart pointed out, the federal agency given enforcement authority had consistently construed Title VI in that manner. *Lau*, *supra*, at 570 (opinion concurring in the result). Moreover, soon after the passage of Title VI, the Department of Justice, which had helped draft the legislation, assisted seven agencies, in the preparation of regulations incorporating the disparate impact standard of discrimination.[12] These regulations were early interpretations

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the result) (quoting *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268, 280–281 (1969)).

[12] See 29 Fed. Reg. 16274–16305 (1964). As JUSTICE MARSHALL notes, *post*, at 16, before long after these initial regulations were promulgated,

of the statute by the agencies charged with its enforcement, and we should not reject them absent clear inconsistency with the face or structure of the statute or with the unmistakable mandate of the legislative history. *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). I discern nothing in the legislative history of Title VI, and nothing has been presented by respondents, that is at odds with the administrative construction of the statutory terms. The Title, furthermore, has been consistently administered in this manner for almost two decades without interference by Congress.[13] Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.[14]

III

Although the Court of Appeals erred in construing Title VI, it does not necessarily follow that its judgment should be

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every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination.

[13] JUSTICE MARSHALL details, *post*, at 17–18, how Congress has rebuffed efforts to overturn the Title VI disparate-impact regulations, and how Congress, with full awareness of how the agencies were interpreting Title VI, has modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition. Cf. *Bob Jones University* v. *United States*, —— U. S. —— (1983); *Haig* v. *Agee*, 453 U. S. 280, 291–300 (1981) (agency interpretation of a statute may be confirmed or ratified by congressional inaction).

[14] JUSTICE STEVENS correctly states that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. . . . If a statute is to be amended after it has been authoratatively construed by this Court, that task should almost always be performed by Congress." *Post*, at 8. However, JUSTICE STEVENS appears to ignore his own admonition by disregarding the square holding of *Lau* v. *Nichols*, the only case that directly addressed the present issue. In *Lau*, we "unequivocally reject[ed]" the notion that Title VI requires proof of discriminatory intent. Since Congress has chosen not to modify Title VI after it was "authoritatively construed" in *Lau*, we should be especially slow to adopt a new construction of the statute at this late date.

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

private cause of action - none for a damages remedy

A

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

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

Still later, in *Cannon* v. *University of Chicago*, 441 U. S.

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[15] See Brief for Respondents 8–9; Tr. of Oral Arg. 21–22.

[16] *Bakke*, *supra*, at 281–284 (POWELL, J.); *id.*, at 328 (BRENNAN, MARSHALL, and BLACKMUN, JJ.).

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

[18] *Id.*, at 265, 419–421, 420 n. 28 (STEVENS, J., joined by BURGER, C. J., Stewart, and REHNQUIST, JJ.).

667 (1979), the Court, applying the factors specified in *Cort* v. *Ash*, 422 U. S. 66 (1975), held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972, 20 U. S. C. §§ 1681, *et seq.*, against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended simiar remedies to be available under Title IX. 441 U. S., at 694–703. Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI. *Id.*, at 710–716. Two Justices, in dissent, were of the view that private remedies under Title VI itself were not available and that the same was true under Title IX. Those Justices, however, asserted that § 1983 was available to enforce the proscriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law. *Id.*, at 717–730 WHITE, J., dissenting, joined by BLACKMUN, J.) Thus at least eight Justices in *Cannon* were of the view that Title VI and Title IX could be enforced in a private action against a state or local agency receiving federal funds, such as the respondent Department.[19] See also *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).

B

It does not necessarily follow, however, that petitioners are entitled to a "make whole" remedy for repondent's alleged Title VI violations. Whether a litigant has a cause of action "is analytically distinct and prior to the question of

[19] One Justice disagreed with the Court's holding that a private right of action could be implied under Title IX itself, without expressing a view as to whether Title IX could be privately enforced via § 1983. *Cannon* v. *University of Chicago*, 441 U. S. 667, 730–749 (POWELL, J., dissenting).

what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman*, 442 U. S. 228, 239 (1979). The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief. *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). The general rule nevertheless yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.

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

We have also indicated that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its "power under the Spending Clause to place conditions on the grant of federal funds." *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 15 (1981). This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their re-

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ceipt. Typically, before funds are advanced, the appropriate federal official will determine whether the grantee's plan, proposal or program will satisfy the conditions of the grant or other extension of federal funds, and the grantee will have in mind what its obligations will be. When in a later private suit brought by those for whose benefit the federal money was intended to be used it is determined, contrary to the State's position, that the conditions attached to the funds are not being complied with, it may be that the recipient would rather terminate its receipt of federal money rather than assume the unanticipated burdens.

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

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

IV

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

However that may be, the Court of Appeals in this case did not disturb the District Court's finding that there was no intentional discrimination on racial grounds. The discrimination was unintentional and resulted from the disproportionate impact of the entry-level tests on racial minorities. In this

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[20] It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at ~~a~~ the time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable "so as to have the opportunity of judging for himself as to the degree of this probability." 5 Corbin on Contracts § 1014 (1964). See also *id.* §§ 1006–1019; 11 W. Jaeger, Williston on Contracts § 1344A (3d ed. 1968). And in tort law, usually only persons who have intentionally violated another's rights are liable for punitive damages. See W. Prosser, Handbook of the Law of Torts 9–10 (4th ed. 1971).

Yes

no private right to sue for damages absent deserving intent

and similar situations, it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations. In such cases, proof of discriminatory impact does not end the matter. If the grantee can bear the burden of proving some "business necesity" for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation. *Griggs* v. *Duke Power Co.*, *supra*, at 431. Therefore, in the typical case where deliberate discrimination on racial grounds is not shown, the recipient will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

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

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

Accord, *id.*, at 1527 (memorandum by Rep. Celler)(validity of Title VI "rests on the power of Congress to fix the terms on which Federal funds will be made available"); *id.*, at 6562

(Sen. Kuchel); *id.*, at 7063 (Sen. Pastore). Title VI rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination." *Id.*, at 7064 (Sen. Ribicoff). Accord, *id.*, at 7054–55, 7062 (Sen. Pastore); *id.*, at 7102 (Sen. Javits); *id.*, at 6566 (memorandum by the Republican Members of the House Committee on the Judiciary). The mandate of Title VI is "[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money." *Id.*, at 1542 (Rep. Lindsay). Title VI imposes no obligations but simply "'extends an option'" that potential recipients are free to accept or reject. *Id.*, at 1527 (memorandum by Rep. Celler) (quoting *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923)). This legislative history clearly shows that Congress intended Title VI to be a typical "contractual" spending power provision.

Therefore, since Title VI is Spending Clause legislation, it is presumed that private litigants seeking to enforce compliance with its terms are entitled to no more than the limited remedy deemed available to the plaintiffs in *Pennhurst*. The inquiry is not at this point complete, however, because, like all rules of statutory construction, the *Pennhurst* presumption must "yield . . . to persuasive evidence of contrary legislative intent." *Transamerica*, *supra*, 444 U. S., at 20. As in *Transamerica*, the relevant legislative history reveals that "what evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action for a monetary award in a case such as this," *ibid*, at least absent proof of intentional discrimination.

Title VI does not explicitly allow for *any* form of a private right of action. This fact did not go unnoticed by Senators Keating and Ribicoff, who unsuccessfully proposed an amendment adding to Title VI a provision expressly allowing the institution of "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, . . .

by the person aggrieved." 109 Cong. Rec. 15375 (1963). Senator Keating explained that, under this proposal, if someone violated Title VI, funds could be denied or "a suit for specific performance of the nondiscrimination requirement could be brought . . . by the victim of the discrimination." *Id.*, at 15376. The relevant language of the proposed amendment is identical to that of § 204(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3(a), the provision creating a private right of action to enforce Title II of the Act, which deals with discrimination in public accommodations. Suits under § 204(a) are "private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 401–02 (1968). Senator Keating thought that elementary fairness required that victims of Title VI-proscribed discrimination be accorded the same private right of action as allowed in the "proposed education and public accommodations titles of the [Civil Rights] bill."[21]

The Keating-Ribicoff proposal was not included in Title VI, but the important point for present purposes is that even the most ardent advocates of private enforcement of Title VI contemplated that private plaintiffs would only be awarded "preventive relief." Like the drafters of Title II, they did not intend to allow private plaintiffs to recover monetary

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[21] Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., at 335 (1963) (Sen. Keating). JUSTICE MARSHALL incorrectly argues, *post*, at 6, that the Keating-Ribicoff proposal was intented to "restrict available remedies." Quite the contrary, Sens. Keating and Ribicoff clearly intended to *expand* what they thought to be the available remedies; they feared that, without their amendment, no private relief at all would be available under Title VI. Hearings, *supra*, at 335 (Sen. Keating); 109 Cong. Rec. 15375 (1963) (Sen. Ribicoff) (Title VI "relies entirely on the punitive remedy of cutting off funds;" amendment needed to make Title VI "more effective and more humane").

awards. Although the expressed intent of Senators Keating and Ribicoff is alone not determinative of whether a compensatory remedy may be obtained in a private action to enforce Title VI, "it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 22. Surely, it did not intend to do so where intentional discrimination is not shown.

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

To ensure that this intent would be respected, Congress included an explicit provision in § 602 of Title VI that requires that any administrative enforcement action be "consistent with the achievement of the objective of the statute authorizing the financial assistance in connection with which the action is taken." 42 U. S. C. § 2000d-1. Although an award of damages would not be as drastic a remedy as a cutoff of funds, the possibility of large monetary liability for unintended discrimination might well dissuade potential nondiscriminating recipients from participating in federal

[22] See also, *e. g.*, 110 Cong. Rec. 1520 (1964) (Rep. Celler); *id*, at 7063 (Sen. Pastore); *id.*, at 7075 (Sen. Ribicoff).

programs, thereby hindering the objectives of the funding statutes. See 633 F. 2d, at 261–262 (opinion of Meskill, J.).

In summary, then, there is no legislative history that in any way rebuts the *Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power. Quite the contrary, what little evidence there is evinces an intent not to allow any greater relief.[23] We con-

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

My rationale is not, as JUSTICE STEVENS asserts, *post*, at 2, n. 2, contrary to the "square holdings" of *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978), and *Cannon* v. *University of Chicago*, 441 U. S. 677 (1977). In *Cannon*, the Court held that the plaintiff was entitled to maintain a private cause of action under Title IX. The case was remanded for trial without a word of discussion as to the relief to which the plaintiff would be entitled in the event she prevailed. In *Bakke*, five Members of the Court voted to affirm a judgment directing a Title VI plaintiff to be admitted to a medical school, but this only ordered the state to comply with Title VI. There was no monetary award or other relief based on a past violation of the Act. In addition, one of the five Justices who voted to affirm this judgment only assumed for the purposes of the case that *any* private remedy at all was available under Title VI. 438

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

U. S., at 283–284 (POWELL, J.). It therefore follows *a fortiori* that this Justice expressed no conclusive opinion on the availability of any particular form of private relief.

JUSTICE STEVENS also argues, *post*, at 4–5, that even if Title VI authorizes only a limited remedy, full relief is available in this case because the petitioners "sought relief under 42 U. S. C. § 1983," and § 1983 "provides a damages remedy." Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute. Thus, in *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 27–29 (1981), the Court indicated that, even if the plaintiffs were entitled to relief uner § 1983 for defendants' alleged violations of certain Spending Clause legislation, the defendants would not be required "to provide money to [the] plaintiffs."

[24] JUSTICE MARSHALL erroneously contends, *post*, at 10, that my view "would allow recipients to violate the conditions of their contracts with impunity until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money." This is not so, because the Federal Government can always sue any recipient that fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. See *Bell* v. *New Jersey*, —— U. S. ——, —— (1983) (WHITE, J., concurring). But it is an entirely different matter to subject the recipient to open-ended liability to private plaintiffs. JUSTICE MARSHALL'S third-party beneficiary analogy is appealing, but he simply ignores the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy might dissuade potential recipients from participating in important federal programs. Of course, not every contract that benefits third persons accords enforceable rights in such persons; it is a question of intent. See 4 Corbin on Contracts § 777 (1964). Section 313 of the Restatement (2d) of Contracts (1981) states that a party who contracts with a government agency to do an act or render a service to the public is generally *not* subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform. The only exceptions to this rule involve situations where the terms of the contract provide for such liability, or where the governmental entity would be subject to liability to

V

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

Although the Eleventh Amendment cases are not dispositive here, in holding that only prospective relief is available to remedy violations of federal law by state officials, the Court in *Edelman* v. *Jordan*, 415 U. S. 651, 667 (1974), observed that the difference between permissible and impermissible relief "will not in many instances be that between night and day." It seems as patent here as in the Eleventh Amendment context that the relief cannot include a monetary award for past wrongs, even if the award is in the form of "equitable restitution" instead of damages. See *id.*, at 665–67. However, prospective relief need not be "totally without effect on the [defendant's] revenues;" injunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court's decree, will have to spend more money "than if they had been left free to pursue their previous course of conduct." *Id.*, at 667–68. The key question for present purposes is whether the decree requires the payment of funds or grants other relief, "not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation" or other relief based on or flowing

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the injured member of the public. Neither of these exceptions is applicable in the present context.

from violations at a prior time when the defendant "was under no court-imposed obligation to conform to a different standard." *Id.*, at 668.

The District Court in the present case granted a number of relatively discrete items of relief. First, each class member was awarded constructive seniority, which included the right to: 1) "all monetary entitlements which [the class members] would have received had they been appointed on their constructive seniority date," including backpay and back medical and insurance benefits; and 2) all other entitlements relative to the award of constructive seniority, including salary, benefits, and pension rights. Also, respondents were directed to give a sergeant's examination to those class members whose constructive seniority would have entitled them to take the last such examination. Finally, in an effort to insure that future hiring practices would be nondiscriminatory, respondents were ordered to consult with petitioners on the preparation and use of future police officer examinations for the next two years, and to provide petitioners with race and ethnicity information regarding the scores of the next scheduled examination. App. 99–107.[25]

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

This leaves the award of constructive seniority for purposes of future entitlements: the right to take the special sergeant's exam ordered by the District Court and the right to an increase of salary and benefits to the level warranted by

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[25] As permitted by 42 U. S. C. § 2000e–5(k) and 42 U. S. C. § 1988, the District Court also awarded attorney's fees to petitioners. App. 107.

the constructive seniority. Because such an award affects only the future conduct of a defendant, it arguably could be categorized as permissible prospective relief. We conclude, however, that an award of constructive seniority, for any purpose whatsoever, must be deemed impermissible retroactive relief.

In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766–67 (1976), we identified two types of seniority—"benefit" and "competitive status." The first of these, "which determines pension rights, length of vacations, size of insurance coverage and unemployment benefits, and the like, is analogous to backpay. . . . Benefit-type seniority, like backpay, serves to work complete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the one who was wronged." *Id.*, at 786–87 (POWELL, J.). Its constructive grant "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law." *Id.*, at 767 n.27 (opinion of the Court). Since constructive benefit-type seniority in this case is obviously restitutionary and remedial in nature, it is "a form of compensation" to those whose rights were violated at a time when the respondents were "under no court-imposed obligation to conform to a different standard." *Edelman* v. *Jordan*, 415 U. S., at 668. It is therefore not an appropriate remedy for the Title VI violations alleged here.

An award of "competitive status" seniority, although purely prospective in form, nevertheless constitutes a form of compensation or relief based on past conduct now deemed violative of the Act. In no respect can such an award be said to be "a necessary consequence," *Edelman*, 415 U. S., at 668, of future Title VI compliance by the employer. It therefore must also be considered an inappropriate Title VI remedy. I also note that competitive-type seniority "determines an employee's preferential rights to various economic advantages at the expense of other employees. These nor-

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

In view of the foregoing, it is apparent to me that the only proper Title VI relief granted by the District Court is the order directing the respondents to take actions and make disclosures intended to insure that future hiring practices will be nondiscriminatory and valid. However, this relief is wholly sustainable under the District Court's findings and conclusions with respect to petitioners' Title VII claim, and all members of the class will fully benefit from it.[26] There is thus no need to disturb the judgment of the Court of Appeals.

VI

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

Affirmed.

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[26] Under Title VII, this type of relief can be granted unconditionally. Under Title VI, the defendants would have to be given the option of complying or terminating participation in the federal program. See parts IV & V, *supra.*

whether the discrimination was intentional or not. I don't see any merit in this.

At this point, I am inclined to suggest you disassociate yourself from BRW. Your vote can be explained in a 1-2 paragraph concurrence: you have previously stated that there is no private right of action (Cannon) & that Title VI requires discriminatory intent (Bakke). You could just ~~[illegible]~~ reiterate these views.

(Note the strange outcome: 5 Justices ~~say~~ there can be full recovery for compensatory damages (WJB, TM, HAB, JPS, SOC) & 5 say that discriminatory effect is enough (WJB, TM, HAB, JPS, BRW) — & yet the case is still being affirmed!)

Mark.

(If you would like, I can give you a more full memo on exactly what BRW is saying.)

Yes - I'd like to do this

81-431 Guardians Assn. v. Civil Service of NYC (Mark)

BRW for the Court
1st draft 12/17/82
2nd draft 3/15/83
3rd draft 6/2/83
4th draft 6/24/83
5th draft 6/29/83
Joined by CJ, LFP, WHR(?)

TM dissent
1st draft 3/14/83
2nd draft 4/29/83
3rd draft 6/29/83
Joined by HAB

LFP concurring in the judgment
1st draft
2nd draft 6/23/83
Joined by CJ

JPS dissent
1st draft 3/8/83
2nd draft 3/22/83
3rd draft 3/24/83
4th draft 3/25/83
5th draft 4/1/83
7th draft 4/15/83
8th draft 6/21/83
9th draft 6/22/83
10th draft 6/23/83
Joined by WJB

SOC con. in part and diss. in part
1st draft 3/29/83
2nd draft 4/14/83
3rd draft 6/28/83

WHR, concurring in judgment
1st draft 6/21/83

[81-431]

Merkulov views on Title VI [n.d.]

[Both courts below reached unif

1. No private rt to damages action.
Would be incompatible with express remedy by cutting off funding.
2. No prior case has involved damages.
3. Expressed no view as to injunctive or declaratory