1981

Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination'

Charles F. Abernathy
Georgetown University Law Center, abernath@law.georgetown.edu

70 Geo. L.J. 1-49 (1981)

Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"

CHARLES F. ABERNATHY*

In recent years confusion has surrounded the proper interpretation of title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs receiving federal financial assistance. Some courts have held that the title prohibits only intentional discrimination. Others have held that it proscribes actions having discriminatory effects as well, an interpretation that imposes a great burden on federal grantees. The Supreme Court heightened the confusion when five individual justices in Regents of the University of California v. Bakke *questioned the propriety of the Court's earlier adoption of an "effects" test for title VI. Professor Abernathy argues that this confusion results from a misdirected inquiry on the part of the courts. After a comprehensive review of pertinent legislative history, Professor Abernathy concludes that Congress did not intend title VI to require either an "intent" or an "effects" test. Instead, Congress accepted a compromise position, delegating the definition of discrimination to the administrative agency responsible for implementating each affected program. As a result of his analysis, Professor Abernathy suggests standards under which agencies should adopt regulatory decisions.*

Title VI of the Civil Rights Act of 1964[1] bans discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance. Although Congress passed title VI during a period of intense concern with public school desegregation, the statute encompasses not only education but also every other area of federal concern, from agriculture to transportation.[2] Title VI also has served as a model for recent legislation banning other forms of discrimination, including that based on sex,[3] mental and physical handicap,[4] and age.[5] Moreover, because a great number of privately controlled organizations, as well as state and local governments, now receive

---

* Associate Professor of Law, Georgetown University Law Center. A.B. 1969, J.D. 1973, Harvard University. The author expresses appreciation to those colleagues who commented on his ideas, and particularly to Roy Schotland who criticized Part III of this article.

1. 42 U.S.C. § 2000d (1976).

2. Most federal cabinet-level departments have promulgated regulations under title VI to govern the funding programs that each administers. *See* 7 C.F.R. §§ 15.1-.143 (1981) (Agriculture); 15 C.F.R. §§ 8.1-.15 (1981) (Commerce); 22 C.F.R. §§ 141.1-.12 (1980) (State); 24 C.F.R. §§ 1.1-.12 (1981) (Housing and Urban Development); 28 C.F.R. §§ 42.1-.540 (1980) (Justice); 29 C.F.R. §§ 31.1-.12 (1980) (Labor); 32 C.F.R. §§ 300.1-.14 (1980) (Defense); 34 C.F.R. §§ 100.1-.13 (1981) (Education); 43 C.F.R. §§ 17.1-.12 (1980) (Interior); 45 C.F.R. §§ 80.1-.13 (1980) (Health and Human Services); 49 C.F.R. §§ 21.1-.23 (1980) (Transportation). The Department of the Treasury apparently has failed to adopt such regulations.

3. *See* Education Amendments of 1972, 20 U.S.C. § 1681 (1976) (repeating language of title VI to ban sex discrimination in certain educational programs).

4. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III 1979) (repeating language of title VI to ban discrimination against handicapped in programs receiving federal funds).

5. *See* Age Discrimination Act of 1975, 42 U.S.C. § 6102 (1976) (repeating language of title VI to ban age discrimination in programs receiving federal funds).

federal funds that subject them to the command of title VI,[6] the statute and its analogues have become important modern adjuncts to the equal protection principles of the Constitution.[7]

Yet, precisely what does title VI add to the equal protection guaranteed by the Constitution? In covering private parties, the statute reaches beyond the probable limit of the state action doctrine of the fourteenth amendment,[8] and that is certainly an important contribution. But does the title VI prohibition of "discrimination" also extend the substantive content of the constitutional equal protection principle? That has been the focus of a long-running dispute. The Supreme Court held in *Lau v. Nichols*[9] that title VI, supplemented by agency regulations, prohibits action having a discriminatory effect even though the Constitution prohibits only intentional discrimination.[10] A majority of the Court in *Regents of the University of Califorina v. Bakke*,[11] however, cast doubt on the holding of *Lau* by suggesting that the standards applicable under title VI might be coterminous with those of the equal protection clause.[12] The federal courts of appeals have likewise followed divergent paths.[13]

This dispute has obvious public policy implications. The *Lau* "effects test" for discrimination would so effectively supplement constitutional claims by plaintiffs, because of the pervasiveness of federal funding of state and local government, that the Court's adoption of an intent test for unconstitutional discrimination[14] would be substantially superseded, if not practically reversed. If the effects test were to prevail, recipients of federal funds would necessarily

---

6. Compiling a complete list of federal aid programs to private entities and state and local governments is as elusive today as it was in 1963-64, when Congress debated and passed title VI. *See* note 51 *infra* (discussing inability of 88th Congress to establish with certainty number of programs or dollar value of grants to be covered by title VI). A sense of the pervasiveness of such federal aid is apparent, however, from the aggregate figures in the federal budget. The actual figures for 1980, the latest available for a completed fiscal year, show grants-in-aid totaling over $91 billion, or 15.8% of total budget outlays. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982 at 252 (Table H-7). That figure, although it includes over $34 billion in grants to states and localities for payments to individuals, excludes direct federal grants to private entities. *Id.* Every cabinet-level department except Energy and Justice exceeded one billion dollars in such outlays in 1980, and Health and Human Services ($28.6 billion) and Transportation ($13 billion) each exceeded $10 billion in grants to state and local governments. *Id.* at 250 (Table H-5). By region, the outlay in such grants ranged from $328 to $502 per capita in 1980. *Id.* at 251 (Table H-6). Although such expenditures may now be decreasing in their rate of growth, *id.* at 239, for the period from 1958 to 1978 such grants grew at an average annual rate of 14.6%. *Id.*

7. *See* U.S. CONST. amend. XIV, § 2 (equal protection binding on state governments); *id.* amend. V (due process binding on federal government). Although the fifth amendment does not contain an equal protection clause, the Supreme Court has held that the fourteenth amendment equal protection requirements are implicit in the due process clause of the fifth amendment. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam) (equal protection analysis under fifth amendment same as that under fourteenth amendment); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (invalidating racial segregation in public schools of District of Columbia as violative of due process guaranteed by fifth amendment).

8. *See* G. GUNTHER, CONSTITUTIONAL LAW 983-84 (10th ed. 1980) (discussing inability of fourteenth amendment to reach discrimination not resulting from state action).

9. 414 U.S. 563 (1974).

10. *Id.* at 567-69.

11. 438 U.S. 265 (1978).

12. *See id.* at 287 (opinion of Powell, J.) (title VI proscribes only actions that would violate equal protection clause or fifth amendment); *id.* at 325, 351-52 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (title VI meaning of discrimination absolutely coextensive with constitutional meaning).

13. *See* note 138 *infra* (citing contradictory title VI cases from Second, Third, and Fifth Circuits).

14. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (showing of discriminatory purpose necessary to prove violation of equal protection clause; disproportionate impact alone insufficient).

become more attentive to the discriminatory effects of their actions, which in turn probably would place renewed emphasis on affirmative action to end discriminatory results.

There are also substantial institutional considerations affecting the allocation of responsibility between the executive and judicial branches of government. If title VI standards are coterminous with those of the Constitution, the Supreme Court ultimately will set the standards when it interprets the Constitution. If title VI standards are independent of the Constitution, however, then other federal decisionmakers may set the definitional standards. Under the latter scheme, the Court's interpretation of the Constitution becomes a safety net below which title VI may not fall, but above which it may soar. The Constitution-based scheme, on the other hand, would produce more mixed results, for although it might relieve some of the current angst over intrusive federal regulation,[15] it would not placate those who lodge similar complaints against the federal judiciary.[16]

This article seeks to resolve the dispute by re-examining the legislative events of 1963 and 1964 that led to the passage of title VI. An examination of the legislative history will demonstrate that Congress neither intended to mimic the Constitution's equal protection clause nor to create a new rigid standard. Rather, it adopted, as part of a complicated compromise, a regulatory model for title VI that invested federal departments and agencies with the power to define the discrimination forbidden by title VI. This means that both of the traditionally competing views of title VI are incorrect;[17] Congress adopted neither an effects nor an intent test for discrimination, but instead authorized agencies to make the choice through regulations.

To recognize that Congress adopted a regulatory model for title VI, however, solves only half the problem. The remaining question is how courts should respond to agency interpretation of title VI. The flexible answers offered by administrative law principles fail to provide their usual enlightenment because Congress placed in title VI quite stringent limits on agencies' interpretive powers. Moreover, one of these limitations, the requirement that the President approve all agency regulations, has proved so cumbersome that it has spawned an entirely new set of regulatory problems as agencies adopt unofficial "guidelines" which they consider binding even without presidential approval. This article seeks to articulate the considerations that should govern judicial response to administrative interpretations of the title VI antidiscrimination mandate.

Finally, suggesting a judicial role for reviewing agency decisions under title VI requires that this article examine more closely than courts have done in the past what is meant by "effects" discrimination and "intentional" discrimina-

---

15. *See* SLOAN COMMISSION ON GOVERNMENT AND HIGHER EDUCATION, REPORT: A PROGRAM FOR RENEWED PARTNERSHIP 1-2, 5, 9-11 (1980) (criticizing "clumsy, duplicative, insensitive, time-consuming, ineffective and expensive" regulatory procedures, particularly those relating to antidiscrimination).

16. *See* L. GRAGLIA, DISASTER BY DECREE 17 (1976) (criticizing Court's regulation of schools through desegregation decrees); *cf.* Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 387-88 (criticizing Court's "constitutional" regulation of family-state relations).

17. *See generally* Benjes, Heubert & O'Brien, *Legality of Minimum Competency Testing Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L. L. REV. 537, 542-43 (1980) (discussing challenges to competency tests based on both "effects" and "intent" theories of discrimination under title VI).

tion. These phrases mask a wide range of subtler issues, issues so controversial that one occasionally suspects that the phrases prove attractive to courts and agencies because they obscure statutory lines of authority. If courts are to give proper weight to agency regulations and guidelines, however, they must know which definition of discrimination an agency has chosen, and that topic is therefore a necessary part of the conclusion.

I. AN INTELLECTUAL HISTORY OF TITLE VI: CONSTITUTIONAL AND STATUTORY PRINCIPLES

A. LEGISLATIVE HISTORY AND EARLY IMPACT

1. Conceptual Origins: The Constitution or Wider Principle?

When Congress in 1964 declared that recipients of federal funds may not discriminate on the basis of race, color, or national origin, it did not so much initiate one social and philosophical revolution as it enshrined two. Contrary to popular assumptions,[18] the drive for racial equality in the United States had not lain dormant during the first half of the twentieth century.[19] Rather, it had proceeded along two parallel lines, one in the courts and the other in Congress, leading ultimately to enactment of the Civil Rights Act of 1964. On one front, reformers in the legislative and executive branches argued that as a matter of social policy the federal government ought to use all of its article I powers to reach and eradicate private racial discrimination.[20] At the same time, reform-

---

18. An official government publication designed to promote understanding of discrimination in education, for example, begins its discussion of the issue with the 1954 decision of Brown v. Board of Education, 347 U.S. 483 (1954), and makes no mention of earlier civil rights efforts. NAT'L INST. OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, A CITIZEN'S GUIDE TO SCHOOL DESEGREGATION LAW 1 (1978). *See also* 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES *Constitutional Law: Civil Rights* 315 (1968) (failing to discuss civil rights activities that occurred between 1896 and 1938, when separate-but-equal doctrine first questioned). One of the first widely disseminated documents revealing the long and continuous nature of the civil rights movement did not appear until 1968. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 100-13 (1968) (discussing origins and history of black protest movements from 1883 to 1967). Black civil rights groups won significant constitutional victories in the first half of the twentieth century, but they relied on principles other than the equal protection clause to do so. *See* Herndon v. Lowry, 301 U.S. 242, 259-61 (1937) (black agitator's conviction violated first amendment rights when evidence failed to demonstrate incitement to violence); Powell v. Alabama, 287 U.S. 45, 71 (1932) (black defendant's conviction without effective counsel violated due process in capital case when defendant incapable of making own defense). Law was not the only discipline to ignore black dissatisfaction. Historians and the predominant schools of thought through the early 1950's downplayed slavery as an institution and looked benignly upon the experience of blacks in America. Davis, *Slavery and the Post-World War II Historians*, DAEDALUS, Spring 1974, at 1; *see* Banton, *1960: A Turning Point in the Study of Race Relations*, DAEDALUS, Spring 1974, at 31 (explaining that sociologists perceived race relations as field with low status and slow theoretical development until 1960's); *cf.* K. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877, at 3-23 (1965) (discussing myths about Reconstruction).

19. *See generally* R. KLUGER, SIMPLE JUSTICE 1-314 (1976) (discussing history of civil rights enforcement before 1950); C. VOSE, CAUCASIANS ONLY (1959) (providing specific study of role of NAACP in litigation challenging racially restrictive covenants).

Legislative efforts produced only negative "successes." Civil rights advocates stopped some segregationist legislation early in the century, but were unable to push through any of their own programs until the late 1950's. *See* REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 101 (1968) (discussing NAACP court victories and absence of new civil rights legislation in early 1900's); Douglas, *Introduction* to J. PELTASON, FIFTY-EIGHT LONELY MEN at ix-xiii (1961) (Senator Paul H. Douglas noting Senate's inability to pass legislation mandating desegregation in the 1950's).

20. *See* PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 107-12, 151-73 (1947) (recommending federal protection of civil rights through article I powers over voting, defense,

minded groups urged the Supreme Court to overturn or restrict its nineteenth-century decisions in *Plessy v. Ferguson*[21] and the *Civil Rights Cases*,[22] so that discrimination could be eliminated in state government and some private organizations as a matter of constitutional law.[23] These two different roots of title VI are significant because they explain the essential ambivalence concerning doctrine and implementation which have surrounded the statute since its passage.

In 1947, seven years before the Court overruled the separate-but-equal doctrine,[24] the President's Committee on Civil Rights[25] issued its remarkable agenda for civil rights enforcement, *To Secure These Rights*,[26] which called for the programs and policies that Congress would later adopt in the civil rights acts of the 1960's.[27] Although the report urged the overthrow of the separate-

---

interstate commerce, taxing and spending, postal system, District of Columbia, and territories) [hereinafter TO SECURE THESE RIGHTS]. Congress has legislative power originating outside article I as well. *See* U.S. CONST. amend. XIII, § 2 (empowering Congress to abolish slavery by legislation); *id.* amend. XIV, § 5 (empowering Congress to enforce fourteenth amendment by legislation); *id.* amend. XV, § 2 (empowering Congress to enforce voting rights by legislation); *cf.* Screws v. United States, 325 U.S. 91, 100 (1945) (upholding constitutionality of criminal statute prohibiting willful violation of fourteenth amendment). The Supreme Court, however, had viewed these powers as limited to enforcing the judicially defined terms of the Civil War amendments. *See* Civil Rights Cases, 109 U.S. 3, 20-22, 32 (1883) (fourteenth amendment does not authorize direct congressional regulation of private rights, but only correction of prohibited state action); *cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 169, 173-74 (1970) (42 U.S.C. § 1983 (1964) requires same degree of state action as required for fourteenth amendment violation). Use of article I power to prohibit racial discrimination, therefore, would free Congress to develop its own definition of civil rights.

21. 163 U.S. 537, 548 (1896) (upholding constitutionality of separate but equal accommodations).

22. 109 U.S. 3, 20-22, 32 (1883) (holding unconstitutional 1875 Civil Rights Act that prohibited discrimination not involving state action).

23. *See generally* R. KLUGER, SIMPLE JUSTICE (1976) (describing litigation efforts of NAACP to ban segregation).

24. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal").

25. President Truman created the Committee by executive action for the sole purpose of preparing a report concerning "whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people." Exec. Order No. 9808, 3 C.F.R. § 184 (Supp. 1946). The Committee should not be confused with the later United States Commission on Civil Rights, created by statute. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, 71 Stat. 634 (codified at 42 U.S.C. § 1975 (1976)). The Commission has existed since 1957, although it has described itself as a "temporary, independent, bipartisan agency." U.S. COMM'N ON CIVIL RIGHTS, A GENERATION DEPRIVED (frontispiece) (1977). It publishes regular reports on problems arising from discrimination and civil rights enforcement. *See id.* (presenting Commission's findings and recommendations concerning school desegregation efforts in Los Angeles).

26. TO SECURE THESE RIGHTS, *supra* note 20.

27. The Committee offered many suggestions, including recommendations for a federal fair employment practice act, *id.* at 167, and for a public accommodations act, *id.* at 170-71, which were adopted in federal law in the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1976, Supp. II 1978 & Supp. IV 1980) (employment discrimination); *id.* §§ 2000a to 2000a-6 (1976) (public accommodations). Other recommendations also met with later congressional approval. *Compare* TO SECURE THESE RIGHTS, *supra* note 20, at 160 (recommending abolition of poll taxes) *with* U.S. CONST. amend. XXIV (abolition of poll taxes in federal elections); TO SECURE THESE RIGHTS, *supra* note 20, at 160-61 (recommending protection of right to vote) *with* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-4 (1976) (enforcement of voting rights); TO SECURE THESE RIGHTS, *supra* note 20, at 161 (recommending self government and suffrage for District of Columbia) *with* U.S. CONST. amend XXIII (District of Columbia suffrage). Other committee suggestions were acted upon by the courts. *Compare* TO SECURE THESE RIGHTS, *supra* note 20, at 166, 168 (recommending elimination of all segregation and enactment of state legislation to end segregation in education) *with* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (segregation in public schools solely on basis of race violates equal protection clause of fourteenth amendment); TO SECURE THESE RIGHTS, *supra* note 20, at 169 (recommending renewed court

but-equal doctrine,[28] the Committee's legislative proposals assumed that both *Plessy* and the *Civil Rights Cases* would remain in force, and recommended that Congress bypass them with affirmative legislation under, *inter alia*, the "taxing and spending powers."[29] Presaging title VI, the Committee urged "[t]he conditioning by Congress of all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination *and segregation* based on race, color, creed, or national origin."[30]

The subsequent revolution at the Supreme Court, however, gave equal impetus to those who took the constitutional approach to placing restraints on discriminatory use of federal funds. *Brown v. Board of Education* (*Brown I*)[31] put an end to government practice of segregation—the most blatant form of discrimination,[32] but the Court went further after *Brown*, amending the narrow view of state action it had adopted in the *Civil Rights Cases* and announcing that it was prepared to enforce desegregation directly against some private parties.[33] Beginning in 1961, in *Burton v. Wilmington Parking Authority*,[34] the Supreme Court issued notice that private parties having commercial or financial dealings with state governments may be subject, under some circumstances, to the same standard of nondiscriminatory conduct that the fourteenth amendment imposes on the government itself.[35]

The *Burton* case, which involved a commercial restaurant lease in part of a state-owned garage facility,[36] led two years later to the Fourth Circuit's decision in *Simkins v. Moses H. Cone Memorial Hospital*,[37] in which physicians

---

attack upon restrictive covenants and enactment of state legislation outlawing restrictive covenants) *with* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (judicial enforcement of covenants excluding persons of designated race from ownership of real property is state action violating equal protection clause of fourteenth amendment).

28. *See* TO SECURE THESE RIGHTS, *supra* note 20, at 81-82 (criticizing *Plessy* because segregation inherently creates inequality).

29. *Id.* at 109; *see id.* at 104-12 (enumerating eleven specific constitutional bases for federal action in civil rights field).

30. *Id.* at 166 (emphasis added). The emphasized language is important. Because segregation was still constitutionally permissible at the time of the Committee's report in 1947, the inclusion of "segregation" in this passage demonstrates that this conceptual progenitor of title VI incorporated an expectation that Congress would enact legislation to reach practices not prohibited by the Constitution.

31. 347 U.S. 483 (1954) [hereinafter Brown I].

32. *Id.* at 493; *see* Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (requiring implementation of *Brown I* "with all deliberate speed") [hereinafter *Brown II*]. Although *Brown II* did not articulate precisely what steps states ultimately would have to take, the Court made clear as early as 1958 that it would accept no state attempt to retain segregation. *See* Cooper v. Aaron, 358 U.S. 1, 12-14 (1958) (refusing to allow postponement of desegregation even though efforts had impeded education of all students). *See generally* Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 73-86 (1979) (discussing Court's internal decisionmaking process in *Cooper*).

33. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961).

34. *Id.*

35. *See id.* at 726 (discrimination by private party who leases state property and derives benefit from adjoining state facility constitutes state action sufficient to violate fourteenth amendment). Later decisions confined the holding. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-65 (1978) (state statute allowing warehouseman's sale of goods on nonpayment of storage fee provides insufficient state involvement to constitute state action under fourteenth amendment); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) (privately owned, state-regulated utility's termination of services for nonpayment not state action violative of fourteenth amendment).

36. 365 U.S. at 722-25.

37. 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964).

claimed that two private hospitals had discriminated on the basis of race in denying admittance to black physicians and patients.[38] Judge Sobeloff, writing for the court en banc, found that the hospitals' receipt of construction grants under the federal Hill-Burton Act,[39] which "appropriat[ed] millions of dollars of public monies pursuant to comprehensive governmental plans,"[40] required that the private hospitals operate their programs in accordance with the guarantees of equal protection.[41] Moreover, the court stated that federal agencies could not authorize grantees to take unconstitutional action but were constrained to ensure that grantees operated constitutionally.[42]

These two doctrinal sources for title VI, the use of article I powers and the reliance on Constitution-based equal protection principles, surfaced repeatedly throughout the 1964 debates, as sponsors argued that the title was both wise social and moral policy as well as a restatement of the *Burton* and *Simkins* constitutional holdings. In the House hearings on the 1964 Act,[43] the Civil Rights Commission took the lead in placing title VI on a high constitutional plane, arguing that the statute would merely enforce existing executive authority to ensure that "federally assisted programs comply with the requirements of the fifth and fourteenth amendents to the Constitution."[44] The Commission viewed the law as primarily a procedural device for withholding federal funds until a state "demonstrates its compliance with the Constitution and laws of the United States."[45] Civil rights organizations tended to support the Commis-

---

38. *Id.* at 961.

39. Hospital Survey and Construction (Hill-Burton) Act, Pub. L. No. 79-725, § 622(f), 60 Stat. 1041 (1946) (current version at 42 U.S.C. § 291c(e) (1976)). Congress substantially amended the Act in 1964. *See* Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, §§ 2-625, 78 Stat. 447 (current version at 42 U.S.C. §§ 291 to 291o-1 (1976)). It retained, however, the same underlying goal of promoting hospital construction through state planning and monetary grants. *Compare Hospital Construction Act: Hearings on S. 191 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 190 (1945) (remarks of Sen. Ellender) (primary purpose to furnish adequate health facilities for all people) *with* 42 U.S.C. § 291 (1976) (same). *See also* Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. C.R.-C.L. L. REV. 351, 383 (1973) (discussing problem of medical services to poor). For a contemporary treatment of hospitals, providing background material useful in evaluating their status as state "actors," see Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416, 1426-28 (1980) (discussing governmental subsidies of health care industries, which account for approximately 60% of health care expenditures).

40. 323 F.2d at 967.

41. *Id.*

42. *Id.* at 968.

43. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101-1106, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000a to 2000h-6 (1976, Supp. II 1978 & Supp. IV 1980)). Following a presidential message on civil rights legislation on February 28, 1963, the House of Representatives promptly began consideration of a set of bills that later yielded the 1964 Act. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 907-08 (1963) (opening remarks of Chairman Celler) [hereinafter *House Subcomm. Hearings*]. In that same year, the Senate considered a narrow bill dealing only with public accommodations. *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 1 (1963) (opening remarks of Chairman Magnuson) [hereinafter *Senate Hearings*]. Final congressional action came after President Kennedy's death on November 22, 1963, and was facilitated by a strong statement from President Johnson that he supported the legislation and wished to see it enacted promptly. *See* H.R. DOC. No. 178, 88th Cong., 1st Sess. 3, *reprinted in* 109 CONG. REC. 22,838, 22,839 (1963) (President Johnson addressing Joint Session of Congress on Nov. 27, 1963) (urging "earliest possible passage" of civil rights bill).

44. *House Subcomm. Hearings, supra* note 43, at 1103 (prepared statement of Berl Bernhard, Staff Director, U.S. Comm'n on Civil Rights).

45. *See id.* at 1093 (testimony of Commissioner Spottswood W. Robinson III) (explaining earlier Commission recommendations that President explore existing legal authority to withhold funds).

sion's view,[46] some even arguing that the title was unnecessary because the Constitution already required what Congress proposed to do in title VI.[47] Others, however, thought title VI to be compelled not by the Constitution but by more general "national policy,"[48] one Senator even equating the statute with the coinage motto "E Pluribus Unum."[49] The confusion over whether title VI rested primarily on constitutional or primarily on other philosophical foundations was understandable, not only because the state of constitutional interpretation was continually evolving,[50] but also because the vast majority of grantees covered by the title were governments already subject to the fourteenth amendment.[51]

---

46. A curious split among the civil rights groups is detectable: white-dominated organizations tended to take the doctrinaire approach that title VI merely restated constitutional law, *see* note 47 *infra*, while black-dominated groups saw the provision as having substantial independent value. *See House Subcomm. Hearings*, *supra* note 43, at 2229 (testimony of James Farmer, National Director, Congress of Racial Equality) (title VI involves great principle that federal government should not subsidize segregation); *id.* at 2160 (statement of Roy Wilkins, Executive Secretary, NAACP) (Congress should clarify antidiscrimination policy independent of court decisions). Although aware that a connection could be drawn between title VI and constitutional law, the black-dominated civil rights groups tended to look upon discrimination as a systemic problem to be attacked by any practical means producing results and without regard for doctrinal niceties. *See id.* at 2161-65 (statement of Roy Wilkins) (advocating mandatory termination of funds and shift of burden to school systems to show nondiscrimination).

47. *See House Subcomm. Hearings*, *supra* note 43, at 2406 (supplementary statement of Joseph Rauh, Vice Chairman, Americans for Democratic Action) (title VI "is not only constitutional, but is required by the Constitution"); *cf. id.* at 2122 (prepared statement of John Pemberton, Jr., Executive Director, American Civil Liberties Union) (suggesting withdrawal of title VI because President already had authority to withhold funds). At the time of these remarks title VI contained only a short declaration of principle with none of the restrictive language it now contains. Its necessity, therefore, may have seemed less compelling at that stage of development. *Compare* note 148 *infra* (quoting original text of title VI) *with* notes 140-41 *infra* (quoting final text of title VI). Nevertheless, Mr. Rauh's statement manifests his view that the origin of title VI, as then written, lay in the Constitution's equal protection principles.

48. *See* HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 914, 88th Cong., 1st Sess. 56 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2425 (additional views of Rep. Meader) (federal government can and should incorporate national policy against discrimination in financial aid grants) [hereinafter HOUSE JUDICIARY REPORT].

49. 110 CONG. REC. 7061 (1964) (remarks of Sen. Pastore).

50. At the early stages of the House debates, for example, Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964), was still pending in the Fourth Circuit. *House Subcomm. Hearings*, *supra* note 43, at 1541 (statement of HEW Secretary Celebrezze); *see* notes 37-42 *supra* and accompanying text (discussing *Simkins*). In addition, the Supreme Court had not yet handed down the first decision in which it defined the scope of its *Brown II* implementation decree. *See* Goss v. Board of Educ., 373 U.S. 683 (1963) (decided June 3, 1963); note 64 *infra* (discussing *Goss*).

51. *See* 45 C.F.R. pt. 80 app. A (Supp. 1966) (listing private and state-administered programs affected by title). Congress was never able to establish with certainty the number of programs or the dollar value of grants that title VI would cover. *See* Letter from Deputy Attorney General Nicholas Katzenbach to Chairman Emanuel Celler, *reprinted in Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2773-79 (1963) (providing list of programs and activities involving federal financial assistance affected by title VI, but acknowledging impossibility of compiling complete list) [hereinafter *House Comm. Hearings*]. Some opponents had argued that title VI would apply to private individuals who received payments from the government. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 69-70, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2437-39 (minority report) (admonishing that title VI would destroy freedom of contract for subsidized farmers and homeowners). Mr. Katzenbach's letter, however, stated that the Justice Department deemed such grants or payments to fall outside the coverage of title VI. *See* Letter from Deputy Attorney General Nicholas Katzenbach to Chairman Emanuel Celler, *reprinted in House Comm. Hearings, supra*, at 2773 (noting that direct payments to individuals do not constitute aid to a "program or activity," as required by title VI). *See also* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 837-38 (1968) (amendments resolved uncertainty by placing insurance and

Early developments indicated that these constitutional and legislative forces, although they drove toward the same social goal, were not altogether compatible; most of the evidence of this dichotomy surfaced not in philosophical statements but in the mechanics adopted by section 602 of title VI.[52] Congress realized that the scope of title VI's antidiscrimination principle clearly would not be self-evident in all contexts, and for that reason affected agencies—not courts—were empowered to adopt "rules, regulations, or orders" to guide their respective programs.[53] Significantly, Congress also directed that agencies draw these regulations with an eye not merely toward attaining single-minded compliance with title VI's antidiscrimination principle but also toward maintaining "achievement of the objectives" of the various underlying federal authorization statutes.[54] Finally, by requiring presidential approval of all such regulations,[55] Congress frankly admitted that it desired the final implementing rules to bear strong political accountability, a goal theoretically at odds with the view that the origins of title VI lay exclusively in constitutional command.[56]

The differences in opinion regarding the philosophical origins of the statute mattered little in 1963 and 1964. In the euphoric days following the death of the "separate-but-equal" doctrine, but before the rise of two- and three-tier constitutional analysis,[57] equal protection for most members of Congress had a rather clearly discernible substantive content that paralleled the command of section 601, the definitional section of title VI: do not discriminate on the basis of race, color, or national origin.[58] This primarily connoted an end to segregation,[59] and storm clouds over the consensus appeared to most as no more than a dispute over details. Section 602 authorized affected agencies and the President to clear up those details and proceed on a joint march with the federal courts to end a century of mistreatment of black Americans.[60] As in the early

---

guaranty contracts beyond scope of title VI). Some viewed title VI favorably because of its broad reach. *See* 110 CONG. REC. 7061 (1964) (remarks of Sens. Pastore and Hart) (title VI would obviate need to amend each grant statute individually).

52. *See* 42 U.S.C. § 2000d-1 (1976) (providing enforcement procedures for title VI); note 141 *infra* (quoting final text of § 602).

53. 42 U.S.C. § 2000d-1 (1976).

54. *Id.*

55. *Id.*

56. *Cf.* Civil Rights Act of 1964, § 407, 42 U.S.C. § 2000c-6 (1976) (authorizing Attorney General to institute school desegregation suits, using phrase "equal protection of the laws" as in Constitution rather than "discrimination" as in title VI).

57. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-132 (1969) (distinguishing two tiers of review under equal protection clause: "active review" of cases involving suspect classifications or fundamental interests and "restrained review" of other cases); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ.) ("middle tier" scrutiny used in sex discrimination cases also applies to affirmative action program).

58. See 42 U.S.C. § 2000d (1976); *see* note 140 *infra* (quoting text of § 601).

59. *See* Letter from Deputy Attorney General Nicholas Katzenbach to Chairman Emanuel Celler, *reprinted in House Comm. Hearings, supra* note 51, at 2774 (stating one purpose of title VI to override existing federal law allowing assistance to segregated facilities); Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 828-29 (1968) (title VI intended to overrule existing federal statutes providing aid to segregated institutions).

60. Title VI, with its directive to the President and federal agencies concerning funding termination, should be seen as only part of a wide-ranging attack contemplating that the executive department would also directly involve the judiciary in the effort to alleviate discrimination against blacks. *See* 42 U.S.C. § 2000a-5 (1976) (authorizing suits by Attorney General to enforce public accommodation provisions of title II); *id.* § 2000c-6 (1976) (authorizing suits by Attorney General against school boards violating fourteenth amendment).

stages of any revolution,[61] conceptual origins seemed less important than the belief that all would work together to get the job done.

2. Early Reception by Appellate Courts: the Primacy of Judicial Law

In the five years following the passage of title VI, the executive and the judiciary worked together to implement the statute, as Congress had envisioned. Despite hortatory language in some cases following *Brown I*,[62] the school desegregation effort that had begun in 1954 as constitutional litigation had by 1964 bogged down in a slough of implementation details.[63] The Supreme Court had spoken clearly only once on the mechanics of desegregation,[64] and its indecisiveness on that occasion reflected the Court's reluctance in the early

---

61. *See generally* Monaco v. Mississippi, 292 U.S. 313, 320-28 (1934) (discussing conceptual origins and later disputes concerning sovereign immunity doctrine in postrevolutionary America); H. BERMAN, JUSTICE IN THE U.S.S.R. 13-96 (rev. ed. 1963) (discussing conceptual origins of Soviet law; disputes and changes following 1917 revolution); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-19 (1963) (discussing changing view of sovereign immunity doctrine before and after American Revolution); Shirk, *The 1963 Temporary Work Regulations for Full-Time Middle and Primary Schools: Commentary and Translation*, 55 CHINA Q. 511, 511 (1973) (discussing educational policy disputes in postrevolutionary China).

62. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218, 232 (1964) (ordering "quick and effective" desegregation); Cooper v. Aaron, 358 U.S. 1, 7 (1958) (ordering "earliest practicable completion" of desegregation plan); *Brown II*, 349 U.S. at 301 (ordering desegregation "with all deliberate speed").

63. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 855 (5th Cir. 1966) (discussing court's difficulty in composing detailed administrative plans), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); J. PELTASON, FIFTY-EIGHT LONELY MEN 18-21 (1961) (describing variety of court decrees that apparently satisfy *Brown II*). *See generally* HUMAN RIGHTS CASEFINDER 1953-69, at 105-18, 133-34 (A. Ginger ed. 1972) (providing extensive collection of representative cases). For the progress of a case illustrating the many obstacles that impeded successful desegregation, see Lee v. Macon County Bd. of Educ., 221 F. Supp. 297 (M.D. Ala. 1963) (order to submit detailed desegregation plan); 9 RACE RELATIONS L. REP. 148 (M.D. Ala. 1964) (granting delay in instituting plan; granting temporary restraining order requiring transfer of black students); 231 F. Supp. 743 (M.D. Ala. 1964) (per curiam) (preliminary injunction prohibiting state from interfering with desegregation); 10 RACE RELATIONS L. REP. 588 (M.D. Ala. 1965) (modification of plan); 10 RACE RELATIONS L. REP. 1512 (M.D. Ala. 1965) (transfer of some students; reconsideration of others); 253 F. Supp. 727 (M.D. Ala. 1966) (per curiam) (order to institute freedom-of-choice plan); 267 F. Supp. 458 (M.D. Ala. 1967) (per curiam) (requiring interim statewide desegregation plan); 270 F. Supp. 859 (M.D. Ala. 1967) (per curiam) (prohibiting cutoff of federal funds independent of court action); 12 RACE RELATIONS L. REP. 1835 (M.D. Ala. 1967) (state teacher choice and tuition grant statutes unconstitutional); 12 RACE RELATIONS L. REP. 1840 (M.D. Ala. 1967) (teacher desegregation order); 12 RACE RELATIONS L. REP. 1844 (M.D. Ala. 1967) (order reopening schools closed by order of state court); 283 F. Supp. 194 (M.D. Ala. 1968) (per curiam) (order to desegregate athletic programs); 289 F. Supp. 975 (M.D. Ala. 1968) (per curiam) (mem.) (conversion of temporary classrooms); 292 F. Supp. 363 (1968) (order to effect further faculty desegration and to close some schools).

64. *See* Goss v. Board of Educ., 373 U.S. 683, 688 (1963) (transfer programs that promote segregation invalid). The case involved a so-called "minority to majority" transfer provision that permitted students, following desegregative assignment by geographic zones, to transfer from a school in which their race was the minority to one in which their race was the majority. *Id.* at 684. The admitted purpose was to "permit a child [or his parents] to choose segregation." *Id.* at 687 (quoting Superintendent of Schools). The Court invalidated the transfer plan because it tended to perpetuate segregation and because race was the factor upon which the plans operated. *Id.* at 686, 688. The Court found it unnecessary to consider any other aspects of the overall desegregation plan and reserved judgment on whether unrestricted transfer provisions would prove acceptable. *Id.* at 688-89. That issue was not addressed by the Court for another five years. *See* Green v. County School Bd., 391 U.S. 430, 440-41 (1968) ("freedom-of-choice" plans unacceptable unless they offer "real promise" of aiding desegregation). Although the Court expressed some dissatisfaction with the pace of desegregation, it showed little resolve to work out the problems itself. 373 U.S. at 689. It offered no guidance to the lower courts for further applying *Brown II* except to characterize the transfer plans cryptically as not "reasonably designed to meet legitimate local problems." *Id.*

1960's to make broad pronouncements on racial issues.[65] Federal trial and appellate courts were left alone to treat the practical problems in greater detail.[66] Seeking to aid the desegregation effort and armed with its authorization to enforce title VI's antidiscrimination principle,[67] the Department of Health, Education and Welfare (HEW) adopted guidelines setting concrete targets for school desegregation.[68] In considering how to respond to HEW's standards, appellate courts were faced with a delicate question: were the standards synonymous with those of the Constitution, and if not, which standards should prevail?

The United States Court of Appeals for the Fifth Circuit, the appellate court most affected by school desegregation problems,[69] responded with an ambivalence typical of judicial reaction to the HEW guidelines. Initially, the court welcomed the agency's show of support. Judge Wisdom, writing for the panel in *Singleton v. Jackson Municipal Separate School District*,[70] noted:

> We attach great weight to the standards established by the Office of Education [of HEW]. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy the three departments of government are united by a common objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy.[71]

In addition to the moral support and encouragement that all southern fed-

---

65. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (holding equal protection may apply to private lessee of state property, but discounting fears of "nigh universal application" of fourteenth amendment); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959) (holding literacy test not per se discriminatory, but condemning in dictum discriminatory implementation of tests). *See also* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 4 (1957) (criticizing Court's early reluctance to articulate reasoning on racial issues as shown by per curiam reversals); Hutchinson, *supra* note 32, at 60-73 (providing historical account of Court's use of per curiam reversals and refusals to hear cases apparently within its jurisdiction).

66. *See* note 63 *supra* (illustrating complexity of problems facing lower courts).

67. *See* 42 U.S.C. § 2000d-1 (1976) (granting agency power to enforce § 601).

68. OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, GENERAL STATEMENT OF POLICIES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 RESPECTING DESEGREGATION OF ELEMENTARY AND SECONDARY SCHOOLS 45 C.F.R. § 181 (Supp. 1966) [hereinafter 1965 GUIDELINES]; OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 45 C.F.R. § 181 (1967) [hereinafter REVISED GUIDELINES]; *see* Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 55-64 (1967) (discussing guidelines). Mr. Dunn, a legal advisor in the Office of Education of HEW, described the implementation of the 1965 Guidelines as an initial attempt to secure paper compliance. Dunn, *supra*, at 58-59. With the Revised Guidelines, the emphasis shifted toward testing the effectiveness of the plans. *Id.*

69. *See* Dunn, *supra* note 68, at 73 (Fifth Circuit most prolific and progressive on subject of school desegregation). *See generally* J. BASS, UNLIKELY HEROES (1981) (describing Fifth Circuit's efforts to implement mandates of *Brown II*). At the time, the Fifth Circuit included the states of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. 28 U.S.C. § 41 (1976). Other circuits substantially affected by the guidelines at this early date were the Fourth, Sixth (including Kentucky and Tennessee), and the Eighth (including Arkansas). *See* Dunn, *supra*, at 71-76 (discussing resolution of "free choice" issue by various courts).

70. 348 F.2d 729 (5th Cir. 1965) [hereinafter *Singleton I*].

71. *Id.* at 731.

eral judges must have needed during this period,[72] more objective reasons led the Fifth Circuit to welcome HEW's guidelines. First, the guidelines set out not one but two tests for compliance: either satisfaction of the department's detailed standards or compliance with a court's desegregation order.[73] As the *Singleton* court perceptively realized, this had the practical, if unintended, effect of inducing courts either to adopt HEW's standards or to mimic them.[74] Otherwise, school districts could flaunt HEW's detailed standards and merely meet the second test of the guidelines by complying with "substantially less burdensome" judicial standards.[75] In short, in order to ensure the integrity of title VI standards[76] and to avoid a deluge of recalcitrant school boards seeking laxer rules in the federal courts,[77] courts would have to match HEW's guidelines.

Judge Brown, writing for the court in *Price v. Denison Independent School District*,[78] pinpointed another concern that led the Fifth Circuit to accept the HEW guidelines. The delayed-implementation decree of *Brown v. Board of Education* (*Brown II*),[79] said Judge Brown, had caused great anxiety for lower court judges because it "inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped . . . ."[80] The title VI guidelines eliminated this problem by putting responsibility for administration "largely where it ought to be—in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational, questions."[81]

The Fifth Circuit initially implied, therefore, that executive and judicial concepts of equal protection should be brought into harmony[82] and that the

---

72. *See* J. PELTASON, FIFTY-EIGHT LONELY MEN 9-12, 236-38 (1961) (describing harassment of federal judges for pre-*Brown* rulings and political pressure suffered for desegregation actions); *Judges: Interpreters in the Front Line*, TIME, May 12, 1967, at 72-78 (describing bomb threats and local ostracism of District Judge Frank M. Johnson, Jr. because of his desegregation decisions).

73. 1965 GUIDELINES, *supra* note 68, § II, 45 C.F.R. § 182.2 (Supp. 1966). HEW's earlier regulations under title VI had recognized the same distinction. *See* 45 C.F.R. § 80.4(c)(1) (court approval) (Supp. 1966); *id.* § 80.4(c)(2) (agency approval). Whether adoption of such a bifurcated approach was necessary or proper has been the subject of keen debate. *Compare* Lee v. Macon County Bd. of Educ., 270 F. Supp. 859, 865 (M.D. Ala. 1967) (three-judge court) (executive may not disapprove court-adopted plan by terminating funds) *with* Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 324 (1967) (exception for court orders may be merely matter of administrative discretion).

74. 348 F.2d at 731.

75. *Id.*

76. Judge Wisdom referred in *Singleton I* to the possibility that school boards might try to satisfy low judicial standards "as a means of circumventing" the explicit requirements contained elsewhere in the HEW guidelines. *Id.*

77. *Id.* The Eighth Circuit's reasons for giving substantial deference to the HEW guidelines echoed those expressed in *Singleton I*. *See* Kemp v. Beasley, 352 F.2d 14, 18-19 (8th Cir. 1965) (practicalities dictate that courts should model plans after executive standards). The other circuit most affected by title VI, the Fourth, refused to follow the guidelines, noting that while they gave a "persuasive gloss" to title VI, "the definition of constitutional standards . . . is peculiarly a judicial function." Bowman v. County School Bd., 382 F.2d 326, 328 (4th Cir. 1967). The question of whether HEW's rules could act as minimum standards arose ambiguously in *Bowman*, however, because, although HEW had approved the board's plan, *id.* at 328, the plan may have failed to meet the guidelines' test for desegregation. *See id.* at 333 n.11 (Sobeloff, J., concurring specially) (comparing guidelines' recommended results with actual, less successful, results).

78. 348 F.2d 1010 (5th Cir. 1965).

79. 349 U.S. 294 (1955).

80. 348 at 1013.

81. *Id.* at 1014.

82. *See Singleton I*, 348 F.2d at 731 (advocating close correlation between judicial and executive standards of desegregation).

judiciary should be willing to defer to HEW's special expertise when applying constitutional principles in the educational setting.[83] This rosy picture of perfect cooperation was short-lived, however, for when the *Singleton* case came again before the Fifth Circuit,[84] Judge Wisdom took a decidely narrower view of the guidelines, adopting them only as "*minimum* standards of general application."[85]

Exaggerated deference to HEW's guidelines failed in light of both of the practical factors which had earlier induced the Fifth Circuit to honor the guidelines. First, avoiding recalcitrant attempts to evade the standards through litigation required only that the guidelines be treated as *minimum* desegregation standards, not standards coterminous with judicially declared rules. If court decrees were at least as stiff as HEW's standards, school boards would have no incentive to try to circumvent the guidelines by obtaining a court decree.[86] Second, although southern judges sought the assistance of agency expertise, in *Singleton* Judge Wisdom quickly realized that the line between "operational" administrative problems and "justiciable" judicial problems[87] was illusory.[88] A court has its own expertise when applying constitutional law to educational policy, because the court determines what the Constitution requires even if HEW experts find such relief to be educationally unsound.[89] Similarly, the administrative help that title VI offered, especially after revised standards were published in 1966,[90] could be realized by adopting

---

83. *See id.* (HEW better qualified than courts to weigh administrative difficulties of desegregation plans). The Fifth Circuit suggested that the HEW guidelines originated from judicial opinions and, therefore, saw little problem with allowing courts to adopt and enforce them. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 851 (5th Cir. 1966) (guidelines represent standards previously established by Supreme Court and Fifth Circuit), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); Dunn, *supra* note 68, at 58 n.85 (quoting *Jefferson County*). *See also* Bowman v. County School Bd., 382 F.2d 326, 328 (4th Cir. 1967) (noting guidelines reflect earlier judicial opinions).

84. Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966) [hereinafter *Singleton II*].

85. *Id.* at 869 (emphasis in original). Judge Wisdom attached great weight to the HEW standards, but recognized that the courts should not abdicate their responsibility as interpreters of the Constitution. *Id.*

86. *See* note 73 *supra* and accompanying text (explaining two methods for showing title VI compliance).

87. *See* Price v. Denison Independent School Dist., 348 F.2d 1010, 1014 (5th Cir. 1966) (judicial function confined to deciding justiciable, not operational, questions).

88. *Cf. Singleton II*, 355 F.2d at 869 (it is for courts alone to determine when operation of school system violates Constitution). For an incisive commentary on the actual expertise of HEW and its capacity to apply that expertise, see Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 339-56 (1967).

89. *See Singleton II*, 355 F.2d at 869 (HEW standards may be too low to meet constitutional requirements); Kemp v. Beasley, 352 F.2d 14, 19 (8th Cir. 1965) (courts may require, under constitutional law, something more than, less than, or different from HEW guidelines). For example, in *Singleton II*, Judge Wisdom noted that courts since *Brown* had ordered the immediate admission to formerly all-white schools of the individual named plaintiffs in desegregation suits. 355 F.2d at 869-70. Certainly no educational or administrative reasons would lead the court to overrule itself on that point. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 849 (5th Cir. 1966) (court has duty to desegregate while recognizing political, social, and moral aspects of problem), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); *Singleton II*, 355 F.2d at 869 (administrative problems cannot justify denial of constitutional rights). Nevertheless, for most problems arising from class-wide relief, the HEW guidelines provided invaluable assistance to the courts. 372 F.2d at 849.

90. *See* note 68 *supra* (citing REVISED GUIDELINES). The Revised Guidelines rendered ineffective the "freedom-of-choice" plan as a desegregation device (previously supported by school boards because it did not in fact lead to desegregation) and concentrated on more specific techniques and numerical results. *See* Dunn, *supra* note 68, at 59-64 (explaining that Revised Guidelines added new requirements

the guidelines as a judicial minimum. The Fifth Circuit admitted in *United States v. Jefferson County Board of Education*[91] that case-by-case appellate development of the law was a poor way to ensure reasonably prompt and uniform desegregation.[92] The 1966 guidelines relieved the pressure by providing minimum standards binding on district court judges,[93] thereby leaving the appellate courts free to monitor only the remaining details.[94]

The early judicial response to title VI, therefore, showed that federal courts were willing to accord the statute an ancillary, but not co-equal, role in enforcing national antidiscrimination policy. When appellate courts found HEW's standards to be minimally suitable they were willing to allow the Department to share the burden of justifying relief decrees in the face of public hostility. They reserved, however, the power to dictate that the Constitution required higher standards than those mandated by an agency. These courts made no suggestion that HEW officials had misconstrued title VI or acted outside their statutory authority by adopting standards less stringent than what courts interpreted the Constitution to require.[95] Rather, the courts assumed that it was a permissible interpretation of title VI to allow the antidiscrimination standards of agencies to vary from those of the Constitution.[96] The view of title VI as a wise legislative policy rather than as a mere restatement of constitutional law had apparently prevailed: in an area of article I competence, Congress and executive agencies could require much of federal grantees, but courts, when

---

for voluntary desegregation in freedom-of-choice plans); *cf.* Bowman v. County School Bd., 382 F.2d 326, 333 n.11 (1967) (Sobeloff, J., concurring specially) (demonstrating that freedom-of-choice plans in two Virginia counties ineffective).

91. 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

92. *Id.* at 854-55. By 1967 the Fifth Circuit had reviewed 41 school districts, many several times, and had issued 76 orders in the process. *Id.* at 860 & n.51. District courts had confronted 128 desegregation cases and had issued 513 orders. *Id.* Judge Wisdom complained of a "wide lack of uniformity" and a "time-lag" in district court enforcement of circuit standards. *Id.* at 860.

93. *Cf. id.* ("In certain cases—we consider unnecessary to cite—there has been a manifest variance between this Court's decision and a later district decision"). Some of the illustrative cases that Judge Wisdom chose not to cite are discussed in critical and embarrassing detail in J. PELTASON, FIFTY-EIGHT LONELY MEN 7-8, 110 (1961).

94. Although the Fifth Circuit stressed in *Jefferson County* that the guidelines were to serve as minimum standards, it tacitly admitted that it reluctantly might permit exceptional plans to fall below them: "In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court." 372 F.2d at 848.

95. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 886-88 (5th Cir. 1966) (HEW guidelines requiring affirmative desegregation efforts consistent with title VI and valid as minimum standards), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); *cf.* Lau v. Nichols, 414 U.S. 563, 571 (1974) (Stewart, J., with Burger, C.J. & Blackmun, J., concurring in result) (regulation and guidelines statutorily correct and therefore control disposition of title VI case).

96. Because HEW chose to model its guidelines after court decisions and the courts chose to give the guidelines great deference, the precise question whether title VI guidelines could vary from court-declared standards never specifically arose. In *Jefferson County*, Judge Wisdom stated that the guidelines "are required by the Constitution." 372 F.2d at 848. He followed that declaration, however, with an expression of willingness to permit exceptions. *See id.* (exceptions to guidelines should be few and carefully restricted). Later in the opinion, Judge Wisdom rejected the school board's argument that certain provisions of title VI did not permit busing or assignment of teachers with the pronouncement that "we deal here with constitutional rights and not with those established by statute." *Id.* at 883-84 (quoting Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966)). In short, the court welcomed the support of Congress and HEW in achieving desegregation, but when title VI and the guidelines departed from judicial views, the court was prepared to support its views by resort to the Constitution alone. *See also* Kemp v. Beasley, 352 F.2d 14, 19 (8th Cir. 1965) (in reviewing desegregation plan courts not bound by guidelines but only by Constitution).

the Constitution commanded it, could require more.[97]

As the first round of school desegregation ended in the late 1960's,[98] federal courts had asserted the primacy of judicial law—the Constitution—over the less protective legislative law—title VI. When desegregation moved outside the South, to areas where detecting violations was of more immediate concern than formulating remedies, a curious role reversal took place. HEW's title VI regulations appeared to demand *more* of governmental grantees than did the Constitution.[99] It was unclear whether federal courts would continue to give primacy to the Constitution, making judicial law both the ceiling and the floor on federal rights, or whether they would view title VI as an ordinary statute, incapable of diminishing constitutional principle but capable of extending it.[100]

---

97. Laying aside the question whether the guidelines mimicked court decisions or the courts the guidelines, it is ironic that the appellate courts systematically began to enforce *Brown II* only as a result of legislative and agency prodding. The cross-pollination between court and agency is even more striking at the Supreme Court level. The Court, for example, declined to invalidate all freedom-of-choice plans in 1963. *See* Goss v. Board of Educ., 373 U.S. 683, 688-89 (1963) (invalidating freedom-of-choice transfer plan based on race, but reserving judgment on validity of unrestricted transfer provisions); note 64 *supra* (discussing freedom-of-choice plans and *Goss*). This undoubtedly led HEW to permit freedom-of-choice plans in both its original and revised guidelines. In the other direction, the Revised Guidelines reflected HEW's apparent disapproval of freedom-of-choice plans by requiring numerically favorable results for those plans; this certainly influenced the Supreme Court in its later decision to restrict the use of such plans. *See* Green v. County School Bd., 391 U.S. 420, 432 n.2, 439 (1968) (citing REVISED GUIDELINES, *supra* note 68, without comment and subjecting freedom-of-choice plans to close judicial supervision).

98. In 1968 the Supreme Court broke almost a decade and one-half of silence on implementation issues by insisting upon complete enforcement of the *Brown* decree in the states that had practiced de jure segregation. *See* Green v. County School Bd., 391 U.S. 430, 439 (1968) (requiring desegregation plan to produce immediate results). *See also* Northcross v. Board of Educ., 397 U.S. 232, 235 (1970) (per curiam) (same); Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 292 (1970) (per curiam) (same); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) (same). The Court heard its final case of this era in 1971, when it again confirmed the work of the lower courts rather than laying down new rules. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971) (canvassing and approving techniques for desegregation prescribed by district court). This period, to paraphrase Winston Churchill, marked the end of the beginning rather than the beginning of the end. *See generally* TEXAS ADVISORY COMM., U.S. COMM'N ON CIVIL RIGHTS, REPORT: SCHOOL DESEGREGATION IN CORPUS CHRISTI, TEXAS 14-16, 76-81 (1977) (background discussion of segregation in Corpus Christi schools; findings and proposed desegregation plans).

99. This was due primarily to the "effects" analysis that the regulations and guidelines adopted. Because segregated housing patterns prevailed in the North and West, the use of neighborhood school zones necessarily had the *effect* of establishing highly segregated school systems, or de facto segregation. *See* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 217-19, 236 (1973) (Powell, J., concurring) (de facto segregation due to housing patterns must be corrected). *See generally* U.S. COMM'N ON CIVIL RIGHTS, STAFF REPORT: SCHOOL DESEGREGATION IN KALAMAZOO, MICHIGAN 1-2 (1977) (discussing segregation in Kalamazoo schools); U.S. COMM'N ON CIVIL RIGHTS, STAFF REPORT: SCHOOL DESEGREGATION IN COLORADO SPRINGS, COLO. 1 (1977) (discussing segregation in Colorado Springs schools). Supreme Court cases dealing with such discrimination in constitutional terms have been marked by use of evidentiary techniques to stretch previously accepted constitutional principles, *see* Keyes v. School Dist. No. 1, 413 U.S. at 207-211 (burden-shifting); loss of unanimity and an increase in closely split decisions, *id.* at 254 (Rehnquist, J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 469 (1979) (Stewart, J.) (explaining split opinions); reversals of lower court findings of discrimination, *see* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*); limitations on remedies, *see* Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); and finally, analytical conversions of the cases into one fitting the traditional southern model of *de jure* segregation). *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*); Columbus Bd. of Educ. v. Penick, 443 U.S. at 525 (Rehnquist, J., joined by Powell, J., dissenting). By 1979 the constitutional aspects of school desegregation outside the South had severely fractured the Court. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 468-69 (1979) (Burger, C.J.) (noting diversity of opinions among members of Court).

100. *Cf.* Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (title II of 1964 Civil

B. THE STATUTE'S ROLE RE-EXAMINED: THE PRIMACY OF LEGISLATIVE LAW

1. The *Lau* Decision

Lau v. Nichols,[101] decided in 1974 after the first wave of southern school desegregation,[102] was the first Supreme Court case to arise under title VI. In *Lau*, the Court suggested that title VI might play a substantial role in supplementing the antidiscrimination command of the fourteenth amendment.[103] The case involved a suit by non-English-speaking students of Chinese ancestry who claimed that San Francisco school officials had failed to provide adequate and equal instruction for them, violating their rights under both the equal protection clause and title VI.[104] Lower courts had denied relief on the theory that the educators had not intentionally discriminated against this group of students and had provided the same educational opportunity to all students within the system.[105] The Ninth Circuit stated that any resulting inequality derived not from discrimination, but from the "different advantages and disadvantages" that each "student brings to the starting line of his educational career."[106]

Justice Douglas' opinion for a unanimous Court rejected this theory, holding that in the context of California's requirements of compulsory education and English proficiency for graduation,[107] there was "no equality of treatment" because the non-English-speaking students were "effectively foreclosed from any meaningful education."[108] The Court declined, however, to base its conclusion on the Constitution,[109] instead relying upon the "effects test" for discrimination adopted by HEW's title VI regulations.[110] The Court noted that HEW guidelines specifically addressed the language problem for national-ori-

---

Rights Act prohibits private discriminatory acts affecting commerce even though Constitution alone does not).

101. 414 U.S. 563 (1974).

102. *See* note 98 *supra* (discussing cases in "first wave").

103. *Id.* at 566.

104. *Id.* at 564-65.

105. *See* Lau v. Nichols, 483 F.2d 791, 796 (9th Cir. 1973). The school system previously had undergone a general desegregation plan as a result of federal litigation. *See* Lee v. Johnson, 404 U.S. 1215, 1218 (1971) (denying stay of district court decree ordering reassignment of Chinese students within San Francisco public schools); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315, 1324-25 (N.D. Cal. 1971) (ordering district to provide racial and ethnic balance among students by busing).

106. 483 F.2d at 797.

107. 414 U.S. at 565-66. The requirements are codified in California law. *See* CAL. EDUC. CODE §§ 71, 8573 (West Supp. 1973) (current version at §§ 30, 51225 (West 1978)) (requiring English proficiency in public schools); *id.* § 12101 (West Supp. 1973) (current version at § 48200 (West 1978)) (requiring attendance at school).

108. 414 U.S. at 566.

109. The Court had faced a similar issue in 1966, when it was called upon to decide the constitutionality of a New York law requiring English literacy as a prerequisite to voting. *See* Cardona v. Power, 384 U.S. 672, 673 (1966). Instead of reaching the constitutional question, the Court remanded the case, *id.* at 674, for reconsideration in light of a statutory decision it had rendered the same day. *See* Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (New York literacy requirement unenforceable to extent inconsistent with federal Voting Rights Act). Justice Douglas, the author of *Lau*, dissented from the Court's action in *Cardona* on the ground that the Court should have reached the constitutional issue. 384 U.S. at 675-77 (Douglas, J., with Fortas, J., dissenting).

110. Lau v. Nichols, 414 U.S. at 566. The Court, quoting from HEW regulations, stated:

> 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 im-

gin minority students[111] and directed that affected schools "must take affirmative steps" to open their programs to such persons.[112]

In retrospect the Court's decision to defer to federal administrators in *Lau* appears to have been the high-water mark for federal judicial willingness to halt state conduct which did not rather obviously stem from intentional state-iniated discrimination.[113] Indeed, the difficult issue of whether the equal protection clause forbids only intentional discrimination, a question avoided in *Lau*, came to the Court twice in the three terms following that decision and the Court resoundingly decided it in the affirmative both times.[114] In adopting an effects test for title VI in *Lau*, therefore, the Court must have been aware that it was recognizing a distinction between the statute and constitutional principles. The Court also must have known that this departure from the intent standard would yield a title VI that expanded upon and supplemented the antidiscrimination theme of the equal protection clause.[115]

Moreover, the *Lau* Court implicitly rejected a possible reading of the early appellate decisions under title VI, that the supplementary role of the statute extended only to defining remedies for fourteenth amendment violations.[116] *Lau* quite clearly considered title VI to be more than simply a remedy for equal protection violations. The Court relied on the statute, and its underlying regulations, to define a violation as any action that has the "effect" of denying educational opportunities to national-origin minorities.[117] Indeed, the Court declined to rule on whether the defendants had violated the fourteenth amendment, but instead found that they had violated the substantive prohibitions of title VI.[118] The ancillary role that the Court saw for title VI in 1974, therefore, was to provide supplemental substance to the fourteenth amendment, not merely to provide supplemental enforcement procedures for it.

---

pairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

Id. at 568 (quoting 45 C.F.R. § 80.3(b)(2) (1970)) (emphasis in original).

111. 414 U.S. at 568.

112. *Id.* (quoting 35 Fed. Reg. 11,595 (1970)).

113. *Cf.* Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (no persuasive reasons to overturn state supreme court judgment invalidating state constitutional amendment on federal constitutional grounds). *See also* C. ABERNATHY, CIVIL RIGHTS 92 (1980) (*Reitman* high-water mark in Warren Court's willingness to find state action).

114. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-71 (1977) (equal protection clause of fourteenth amendment incorporates intent standard); Washington v. Davis, 426 U.S. 229, 239-45 (1976) (equal protection component of fifth amendment incorporates intent standard).

115. The *Lau* Court's awareness that constitutional claims would require proof of intent but could be supplemented by statutes adopting an effects test is illustrated by two earlier decisions. *Compare* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 201-03 (1973) (Brennan, J.) (constitutional claim of school segregation requires proof that school authorities pursued intentionally segregative policy) *with* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (title VII claim of employment discrimination may succeed with proof of discriminatory effect).

116. Because the Fifth Circuit decisions involved cases in which the courts had made prior findings of discrimination, unaided by the then-unformulated title VI guidelines, it is possible that the guidelines provided not a definition of wrongs constituting "discrimination," but only a remedy for those wrongs. *Cf.* R. BORK, THE CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS (1972) (busing proposals adopted by Congress not unconstitutional because provide remedy for, and not definition of, wrong).

117. 414 U.S. at 566.

118. *Id.*

2. *Bakke* and Its Limits

Four years later, in *Regents of the University of California v. Bakke*,[119] the Court reopened the question of the role of title VI and cast doubt on its holding in *Lau*. Bakke, a white applicant for admission to a state medical school, charged that he was denied admission because of his race.[120] He based his claim on the school's affirmative action program, which partially segregated the admissions process and applied different admissions criteria to applicants on the basis of race.[121] He argued that this procedure violated both his constitutional right to equal protection and his statutory right under title VI not to be subjected to discrimination in the university's federally-supported programs.[122] Although the California Supreme Court decided the case on equal protection grounds,[123] the United States Supreme Court, following its usual practice of disposing of a case whenever possible through statutory rather than constitutional interpretation,[124] ordered argument on the title VI claim.[125]

A majority of the justices, however, found it impossible to avoid the constitutional issue.[126] Their investigation convinced them that Congress had, in the words of Justice Powell, intended "incorporation of a constitutional standard into Title VI,"[127] and that, in in the words of Justices Brennan, White, Marshall, and Blackmun (the Brennan coalition), "as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."[128] Consequently, five members of the Court found that the statutory issue merged with the constitutional issue, requiring an interpretation of the equal protection clause.[129]

---

119. 438 U.S. 265 (1978).

120. *Id.* at 272-77 (opinion of Powell, J., joined as to this statement of facts by a majority of the Court).

121. *Id. See generally* A. SINDLER, BAKKE, DEFUNIS, AND MINORITY ADMISSIONS 49-86 (1978) (providing detailed discussion of facts of *Bakke*).

122. 438 U.S. at 277-78. Before initiating his court case Bakke had filed a title VI complaint against the university with the San Francisco regional office of HEW. *See* A. SINDLER, *supra* note 121, at 78-79 (discussing procedural background of case).

123. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 63, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

124. 438 U.S. at 281 (opinion of Powell, J.) (Court will not pass on constitutional question if other basis for disposition exists) (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).

125. 434 U.S. 900 (1977) (order to file supplemental brief).

126. *See* 438 U.S. at 281, 284-87 (opinion of Powell, J.); *id.* at 328-40 (opinion of Brennan, White, Marshall & Blackmun, JJ.). The remaining justices deemed it unnecessary to decide the constitutional issue because, in their view, title VI on its face required that no person be "excluded from" any covered program. *Id.* at 412 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.) (quoting 42 U.S.C. § 2000(d) (1964)). The medical school was a covered program, and the "plain language of the statute therefore require[d] affirmance" of the California court's judgment for Bakke. *Id.*

127. *Id.* at 286. Elsewhere, Justice Powell referred to the title VI prohibition on discrimination as "*similar* to that of the Constitution." *Id.* at 284 (emphasis added). He offered no explanation for the difference in statements, and the language quoted in the text displays what appears to be the major thrust of the opinion. *See id.* at 285 (noting that many supporters believed title VI "enacted constitutional principles").

128. 438 U.S. at 325. Like Justice Powell's opinion, the opinion of the Brennan coalition uses phrases of varying intensity to indicate how closely title VI relates to the Constitution, but the quoted statement appears to express the major thrust of the opinion.

129. Although reaching the same conclusions in *Bakke*, Justice Powell and the Brennan coalition developed opinions with substantially different flavors. The Brennan group focused on refuting the dissent's view that title VI forbade affirmative action that excluded whites; thus, they directed their

Looking back on the *Bakke* decision in *Board of Education v. Harris*,[130] Justice Stewart, in dissent, read the earlier case as one in which "[f]ive Members of the Court concluded that Title VI . . . prohibits only discrimination violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth."[131] Because only intentional discrimination violates equal protection principles, he continued, title VI must also demand discriminatory intent.[132] Such an argument, of course, would mean the implicit overruling of *Lau v. Nichols* and would limit the ancillary role of title VI to a primarily procedural one—imposing constitutional standards on all federal grantees and providing a means for enforcement by terminating funds. Moreover, Justices Brennan, White, Marshall, and Blackmun frankly admitted in *Bakke* that they entertained "serious doubts concerning the correctness of what appears to be the premise of [the *Lau*] decision."[133]

Despite their doubts, the former Brennan coalition, together with Chief Justice Burger and Justice Stevens,[134] refused in *Harris* to overrule *Lau*.[135] The reluctance to determine the precise contours of title VI was consistent with the coalition's analysis in *Bakke*. There they explicitly stated that title VI should be read to be coextensive with the equal protection clause, but predicated their decision upon the administrative regulations under title VI as well as constitutional premises.[136]

Because both Congressional and administrative interpretations of title VI

---

attention toward showing that the words of title VI could not be taken literally. That led them in turn to focus not only on the Constitution as a guide to interpretation, but also on HEW's permissive regulations, to which they devoted considerable attention. *See id.* at 341-45 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (regulations entitled to "considerable deference in construing Title VI"). This emphasis on the regulations, absent from Justice Powell's opinion, may be significant because it is primarily the regulations that vary from constitutional standards, particularly in their adoption of the "effects" test used in *Lau*. *See* note 110 *supra* (quoting Court's opinion in *Lau*).

130. 444 U.S. 130 (1979).

131. *Id.* at 160 (Stewart, J., with Powell & Rehnquist, JJ., dissenting).

132. *Id.*

133. 438 U.S. at 352.

134. Chief Justice Burger and Justice Stevens adhered to the position they had taken in *Bakke*, 438 U.S. at 418-19, which was to read the statute at issue independently of the fourteenth amendment. 444 U.S. at 149. Justice Powell, dissenting in *Harris*, also maintained consistency with his position in *Bakke* by reading the statute in conjunction with the fourteenth amendment and requiring proof of intentional discrimination. 444 U.S. at 160. The position of the majority in *Harris*, however, appears to be contrary to the position those justices took in *Bakke*. *Compare Harris*, 444 U.S. at 149 (leaving open question whether title VI limited by fourteenth amendment) *with Bakke*, 438 U.S. at 352 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (title VI no broader than Constitution). In addition, Justices Stewart and Rehnquist, dissenting in *Harris*, appeared to take a view different from their position in *Bakke*. *Compare Harris*, 444 U.S. at 160 (Stewart, J., with Powell & Rehnquist, JJ., dissenting) (title VI incorporates constitutional standard) *with Bakke*, 438 U.S. at 417-18 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.) (title VI can proscribe conduct Constitution does not).

135. 444 U.S. at 149. The precise issue in *Harris* was whether Congress had adopted an intent or an effects test in determining eligibility for federal funding under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 1601-1619 (1976) (current version at 20 U.S.C. §§ 3191-3207 (Supp. III 1979)). ESAA is an outgrowth of earlier efforts, dating from the Civil Rights Act of 1964, by which Congress sought to aid special efforts to promote integration. *See id.* § 3192(b) (purpose to assist in desegregation of schools). In *Harris* the school board contended that the ineligibility test of the statute should be read in parallel with title VI, which it contended now possessed an intent requirement. 444 U.S. at 139. The Court held that because ESAA could be interpreted on its own terms, there was no need to decide the issue of its congruence with title VI or the scope of title VI. *Id.* at 149. The Court, however, labored painfully to establish that the two statutes could adopt different tests. *See id.* at 146 n.10, 150 n.13 (legislative histories of ESAA and title VI indicate two acts need not be entirely interdependent).

136. 438 U.S. at 341-45. The coalition pointedly noted that "Congress specifically eschewed any

favored the Brennan coalition's result, its statement that "Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's"[137] was unnecessary for decision of the case; the pertinent inquiry is not whether Congress intended to adopt equal protection principles as the source for title VI's standards, but whether it adopted constitutional standards as the *exclusive* determinant of title VI prohibitions, eliminating the relevance of administrative interpretation. That issue was unnecessary for decision in *Bakke*, painfully avoided in *Harris*, and most critical to the proper interpretation of title VI.[138]

II. TITLE VI AND THE ART OF STATUTORY CONSTRUCTION

A. INTRODUCTION

1. Principles and Institutions

Although the *Bakke* Court was deeply divided, all of the justices implicitly agreed upon one issue: title VI could not be treated as a constitutionally compelled statute, as a mere legislative restatement of what the Constitution already required.[139] But what role was title VI to play? The legislative history

---

static definition of discrimination in favor of broad language that could be shaped by *experience, administrative necessity*, and evolving judicial doctrine." *Id.* at 337 (emphasis added).

137. *Id.* at 352.

138. The United States Court of Appeals for the the Second Circuit, the court most troubled by the issue, has split on how to read the Supreme Court's interpretations of title VI. The first case to present the issue to the Second Circuit was the one that later became the Supreme Court decision of *Harris*. Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978), *aff'd on other grounds sub. nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979). The court, including two visiting judges, upheld the use of an effects test in an employment case arising under title VI, relying in part on an analogy to title VII's effects test and in part on *Lau*. *Id.* at 587-88. In the first case following the Supreme Court's decision in *Harris*, however, the Second Circuit panel adopted an intent test for title VI in the context of school desegregation, drawing an analogy to title IV of the 1964 Act and holding that it employed an intent test. *See* Parents Ass'n v. Ambach, 598 F.2d 705, 715-16 (2d Cir. 1979). A year later the circuit faced a claim that emotionally disturbed students were suffering racial discrimination and once again held that title VI required proof of intent, citing to Justice Stewart's dissenting opinion in *Harris*. *See* Lora v. Board of Educ., 623 F.2d 248, 250 (2d Cir. 1980) (title VI standard same as constitutional standard). Judge Oakes wrote separately to emphasize his view that *Lau* was still good law. *Id.* at 251-52 (Oakes, J., concurring). Disposition of the case again depended upon the vote of a district judge sitting by designation. *Id.* at 249. Five weeks following *Lora*, a panel majority consisting of Judge Newman and Chief Judge Feinberg refused to apply either *Lora* or *Ambach* to a suit alleging racial discrimination in the closing of a hospital. Bryan v. Koch, 627 F.2d 612, 616-17 (2d Cir. 1980) (appeal from denial of preliminary injunction). The court held that even if the effects test were applicable, the defendant had justified the disparate impact of its actions sufficiently to defeat the plaintiffs' claim. *Id.* Judge Kearse, in dissent, argued that the regulations adopted pursuant to title VI required the "effects" test to be the guiding standard in such cases. *Id.* at 621-23 (Kearse, J., concurring in part and dissenting in part).

The Third Circuit recently faced the same problem seen in *Bryan*, and ruled that title VI requires no proof of intent. NAACP v. Medical Center, Inc., 50 U.S.L.W. 2032, 2033 (3d Cir. June 29, 1981) (en banc). The effects test, however, did not require a finding of violation because the defendant demonstrated business necessity for its actions. *Id.*

A panel of the Fifth Circuit has concluded that *Bakke* requires proof of intent in title VI cases, although it admitted confusion over the current status of *Lau*. *See* Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981) (school's ability-grouping system based on racial and ethnic criteria not violative of title VI because statute does not prohibit benignly motivated discrimination).

139. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (opinion of Powell, J.) (title VI legislatively adopts by reference the constitution's equal protection standard); *id.* at 336 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (title VI not constitutionally compelled); *id.* at 416 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.) (title VI has independent force in addition to that of Constitution).

allows us to conclude further that Congress also did not intend in section 601[140] to adopt constitutional principle which section 602[141] would then merely procedurally enforce; rather Congress adopted philosophical constitutional principle knowing that it would be tempered by other non-constitutional considerations. More tellingly, Congress saw title VI not as one more vehicle for enforcement of *judicial* law and principle, but as a new, though somewhat parallel, source of *legislative* law and principle.

The wording of title VI, its legislative history, and its relation to other provisions of the Civil Rights Act of 1964 show that Congress intended to enshrine a policy of nondiscrimination in the use of federal program funds that was to be responsive to agency expertise and to congressional political desires. It was to reflect, and to draw upon, judicial law under the Constitution but would be within what Congress viewed as the swift and flexible control of federal agencies, not lumbering judicial processes.

2. The Focus of Inquiry: H.R. 7152

The *Bakke* Court's inquiry into the interpretation of title VI properly began with the notation that the word "discrimination," which appears in the prohibitory language of section 601 of title VI, has no fixed meaning.[142] Definitions of discrimination may run the gamut from demanding intentional causation to

---

140. Section 601 of title VI 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." 42 U.S.C. § 2000d (1976).

141. Section 602 of title VI provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d [§ 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part therof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action, terminating, or refusing to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C 2000d-1 (1976).

142. *See* 438 U.S. at 284 (opinion of Powell, J.) (concept of "discrimination" susceptible of varying interpretations); *id.* at 337-38 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (Congress eschewed static definition of "discrimination"). Justice Stevens, in dissent, attempted to impart specific meaning to the word "discrimination," but he relied principally on the more easily defined word "excluded." *See id.* at 413-14 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.) (clear language of statute precludes qualification of word "exclusion"). Justice Stevens was incorrect; Con-

requiring only discriminatory impact or effect. Turning to the legislative record to determine which meaning Congress intended, and employing as their favored technique the quotation of congressional debaters, the judicial historians in *Bakke* relied on numerous excerpts to prove their points.[143] This method of historical inquiry has dubious value in the easiest of cases[144] and decisively fails to give an accurate picture of the making of legislation in such a charged atmosphere as that surrounding adoption of title VI. Members of the legislative branch, no less than those of the judicial, recognize that constitutional rhetoric strengthens a difficult argument, and it is not surprising, therefore, that those who rely on quotations can find many in the title VI debates that allude to constitutional principles. Sifting of quotations, however, simplistically treats the legislative history of title VI and obscures the complex "dance of legislation"[145] that produced that provision. The Congress that considered title VI was aware of the ambiguity inherent in the word "discrimination," and indeed this central definitional problem set the agenda for legislative action. Congress, however, resolved the problem not with a flurry of rhetoric, but with a carefully constructed compromise.

The bill that Congress ultimately enacted began as H.R. 7152,[146] an omnibus bill designed to alleviate racial discrimination in voting, public accommodations, public education, federally assisted programs, and employment.[147] The provision regarding federally funded programs, then as now labeled title VI,[148] had two purposes. First, in a single sentence it gave the executive branch the power to withhold funds when program beneficiaries had been "discriminated against on the ground of race,"[149] a power applicable to all

---

gress itself saw great ambiguity in the word "discrimination." *See* notes 170-91 *infra* and accompanying text (relying on legislative history to show congressional uncertainty regarding definition).

143. *See* 438 U.S. at 284-87 (opinion of Powell, J.) (quoting from statements of members of Congress); *id.* at 328-40 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (same); *id.* at 413-16 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.) (same).

144. *See* Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155 (1965) (criticizing Supreme Court's reliance on "dubious" legal history).

145. E. REDMAN, THE DANCE OF LEGISLATION 10 (1973) (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 297 (1913)).

146. *See House Subcomm. Hearings, supra* note 43, at 649-60 (quoting text of H.R. 7152).

147. *Id.* at 2349 (statement of Rep. Celler) (acknowledging H.R. 7152 as basis for subcommittee's efforts). Actually, 168 bills and four joint resolutions, many fairly repetitious, had been introduced in the House and were before the subcommittee. *Id.* at iii-iv (table of contents). Meanwhile, the Senate's efforts on a civil rights bill focused on a public accommodations law, and hearings on the Senate side were restricted to that topic. *See generally Senate Hearings, supra* note 43 (record of hearings).

148. *See House Subcomm. Hearings, supra* note 43, at 659 (text of title VI of H.R. 7152). The original text provided:

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

Id.

149. *Id.*

federal programs and contracts.[150] Second, the drafters of title VI intended it to provide the source of Congress' power under article I of the Constitution to reach private discrimination in employment,[151] and in a second sentence, therefore, they gave the President power to prescribe federal contract provisions that would outlaw employment discrimination by federal contractors, a goal to be pursued by a presidentially appointed Commission on Equal Employment Opportunity established under title VII.[152]

The procedural confusion that surrounded progress of the bill makes it difficult to find a specific statement of reasons why Congress altered this first version of title VI and what it hoped the changes would accomplish. Only one set of fact-finding hearings on the bill took place,[153] and the House committee adopted a substantially revised substitute after a brief but revealing executive session with the Attorney General[154] and after the powerful committee chairman had stifled debate.[155] The Senate held no hearings and indeed did not consider the bill at all in committee, but only in an informal caucus among the bipartisan leadership.[156] The Senate made few changes in title VI,[157] however, and the House hearing record and Judiciary Committee report, therefore, comprise the most authoritative sources reflecting the concerns that led to the final version of title VI.

---

150. *Id.* Previous executive orders forbidding racial discrimination by federal contractors had operated upon the same spending power rationale. *See* Exec. Order No. 11,063, 27 C.F.R. 11,527, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 4386, 4386-89 (Kennedy order prohibiting discrimination in housing industry). There was concern, however, that the President alone lacked constitutional authority to attach congressionally unapproved conditions to federal contracts, *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (presidential power to act without congressional authorization limited), and title VI, together with the proposed title VII, was designed to supplement with specific statutory authority the President's argument of inherent authority to set terms of contracts. *See House Subcomm. Hearings, supra* note 43, at 1023-24 (oral testimony of Robert Sauer, Assistant Gen. Counsel, Housing and Home Finance Agency).

151. *See House Subcomm. Hearings, supra* note 43, at 1489-92 (statement of Secretary of Labor Wirtz) (discussing problem of minority unemployment and hope that titles VI and VII would eliminate discrimination causing it).

152. *See* note 148 *supra* (text of title VI of H.R. 7152). Such a limited equal employment enforcement program had operated without explicit legislative sanction for two decades prior to 1964. *See* Exec. Order No. 8802, 3 C.F.R. § 957 (1938-1943 Compilation) (1941 Presidential order under war powers prohibiting discrimination in defense production industry).

153. *See House Subcomm. Hearings, supra* note 43 (comprising 2649 pages of transcribed material, including presentations from 101 witnesses and correspondents); HOUSE JUDICIARY REPORT, *supra* note 48, at 44, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2413 (additional views of Rep. Meader) (summarizing subcommittee action).

154. *See House Comm. Hearings, supra* note 51, at 2651, 2653-60 (testimony of Attorney General Kennedy) (seeking revisions in other titles of bill but demonstrating satisfaction with subcommittee's version of title VI).

155. *See* note 178 *infra* and accompanying text (discussing Chairman Celler's attempts to close discussion).

156. The Senate leaders persuaded their colleagues to make substantial changes in other portions of the act, but not in title VI. *See* BUREAU OF NATIONAL AFFAIRS OPERATIONS MANUAL, THE CIVIL RIGHTS ACT OF 1964, at 289, 298 (1964) (explaining Senator Humphrey's position that Senate made no substantive changes in title VI). The Senate held hearings only on public accommodations. *See Senate Hearings, supra* note 43, *passim* (record of hearings).

157. *See* notes 219-21 *infra* and accompanying text (explaining minor Senate changes).

B. THE DRAFTING OF TITLE VI—THE NEED TO COMPROMISE

1. Criticism of H.R. 7152 at the House Hearings

Criticism of title VI of H.R. 7152 focused on four perceived problems: (1) discretionary enforcement power placed in the executive; (2) the scope of sanctions in relation to the extent of discrimination; (3) the denial of judicial review; and (4) the vagueness of the term "discrimination." In order to construe properly the present version of title VI, it is necessary to understand these criticisms, with the last being especially important.

Discretionary Enforcement. The passive language of the original first sentence of title VI[158] was designed by the administration to allow it some flexibility in enforcement of the provision. President Kennedy had argued in his second public address on the bill that inflexible funding termination decisions could close programs needed by blacks as well as whites.[159] Neither conservatives nor liberals in the House found that argument very persuasive. Liberals, led by Representative (now Senator) Charles Mathias, Jr., voiced concern that such discretion would allow presidents to make title VI a dead letter, pointing out that the President had waived similar antidiscrimination requirements in the past.[160] Conservatives and some moderates, on the other hand, feared that discretion would give the President "a free hand to grant or withhold funds when and where he pleases."[161] He could use that power for political ends,[162] either to punish southern states[163] or to gain control of matters historically reserved to the states.[164]

Scope of Sanctions. Both liberals and conservatives criticized the original version of H.R. 7152 because they believed it could either authorize statewide termination of funds when only one locality had discriminated or a com-

---

158. For the original text of title VI, see note 148 *supra* ("no such law shall be interpreted as requiring" financial assistance to discriminatory programs).

159. *See* President's Special Message to Congress on Civil Rights and Job Opportunities, June 19, 1963, 1963 PUB. PAPERS 483, 492, *reprinted in House Subcomm. Hearings, supra* note 43, at 1454 (unconditional withdrawal of all federal funds may penalize those who least deserve it without ending discrimination); *House Subcomm. Hearings, supra* note 43, at 1465 (testimony of Secretary Wirtz) (interpreting provision to give "discretionary authority" to administrators).

160. *See House Subcomm. Hearings, supra* note 43, at 956-60, 971, 1133 (remarks of Rep. Mathias) (discussing government's failure to terminate contract for power plant on federal land despite contractor's violation of equal employment provisions).

161. *Id.* at 1715 (testimony of Rep. Watson of South Carolina); *cf. id.* at 1723 (testimony of Rep. Seldin of Alabama) (expressing concern that President may use power for "other purposes" than helping blacks).

162. *See id.* at 1716 (testimony of Rep. Watson) (foreseeing "string-pulling and coercion by the administration in their effort to impose their will on others"); *cf. id.* at 1736-37 (testimony of Rep. Waggonner of Louisiana) (criticizing bill because "pure equality is communism").

163. *See id.* at 2139 (statement of South Carolina attorney Douglas McKay, Jr.) (characterizing power to withhold funds as extension of "government-by-threat").

164. *See id.* at 1522 (remarks of Rep. Meader of Michigan) (title VI may impair vitality of local governments); *id.* at 1596 (testimony of Rep. Dorn of South Carolina) (every state and local government could be coerced and intimidated by President); *cf. id.* at 1733 (testimony of Rep. Waggonner) (bill will relegate state and local government to "ashcan of history"). Chairman Celler answered those who feared administrative discretion by noting that mandatory enforcement "would be very difficult to put in a law. . . . You would have to trust the [federal administrative] officials." *Id.* at 2233. Mr. Celler later compromised. *See* notes 183-206 *infra* and accompanying text (explaining development of compromise position).

plete funding denial for an entire program that had engaged in only isolated and minor acts of discrimination. Even Chairman Emanuel Celler of New York, who led the administration's forces, asked of one witness, "What degree would the discrimination have to be before you issue that proscription: that no Federal funds should be expended in those states? . . . Where would all this end?"[165] Members of both parties recognized that some discrimination existed in every state and that without some limitation on title VI sanctions, any state could suffer a complete loss of federal funds because of discrimination by a few program officers or political subdivisions.[166]

Judicial Review. The lack of a provision for judicial review of funding terminations also drew wide criticism. Most vociferous were southern members who "would rather have an explicit provision denying completely such funds"[167] than subject themselves to the federal administrators' unreviewable discretion: "At least then we would still be under the rule of law and not the rule of men . . . ."[168] Perhaps more important, the Republicans favoring a civil rights bill supported an alternative to H.R. 7152 which contained a provision for judicial review.[169]

Definition of Discrimination. The last problem was addressed by two members present at the hearings who perceptively remarked that the word "discrimination" had no fixed meaning[170] and was nowhere defined in title VI.[171] Although debaters did not use the modern jargon of "intentional" discrimination versus "impact" discrimination (or discriminatory "effects"),[172]

---

165. *House Subcomm. Hearings*, *supra* note 43, at 1095 (remarks of Chairman Celler).

166. *See id.* at 1512 (remarks of Chairman Celler) (by implication) (alluding to pockets of discrimination in several local governments); *id.* at 1504 (remarks of Judiciary Comm. Gen. Counsel Foley) (describing desegregation cases in Ohio, Michigan, and New York); *cf. id.* at 1093 (remarks of Rep. McCulloch) (one of repeated references to previous problems arising from federal termination of grant to Ohio).

Bills offered by several Republicans would have solved the problem of scope of termination by limiting coverage to employment contracts and allowing the administration to terminate only specific contracts upon proof of discrimination by an employee under that contract. *See* H.R. 3139, 88th Cong., 1st Sess. § 211 (1963), *reprinted in House Subcomm. Hearings, supra* note 43, at 72-73; H.R. 3144, 88th Cong., 1st Sess. § 211 (1963), *reprinted in House Subcomm. Hearings, supra*, at 129-30.

167. *House Subcomm. Hearings, supra* note 43, at 1716 (remarks of Rep. Watson of South Carolina).

168. *Id.*; *cf. id.* at 1735 (testimony of Rep. Waggonner) (civil rights proposals grant sweeping power to one appointed individual).

169. A good indication of this came when Representative McCulloch of Ohio, leader of the Republicans favoring passage of a civil rights bill, phrased his questions to the southern representatives in a manner designed to demonstrate the desirability of judicial review. *See id.* at 1583 (question to Rep. Dorn of South Carolina) (emphasizing unreviewable termination power of one individual); *id.* at 1716 (question to Rep. Watson of South Carolina) (same); *cf. id.* at 1547 (remarks while questioning HEW Secretary Celebreeze) ("there is need for some review by somebody somewhere").

170. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 106, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2473 (minority views of Reps. Poff and Cramer). A similar problem arose under title VII. *Id.* at 110-11, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2477-78. The Supreme Court resolved the interpretation problem for title VII in 1971. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employment practice that has effect of excluding blacks prohibited unless related to job performance).

171. Title III defined "desegregation," although not "discrimination." *See House Subcomm. Hearings, supra* note 43, at 654-65 (original text of title III, facilitating desegregation in public education). The use in title III of the phrase "racial imbalance," however, tended to exacerbate concern about what title VI covered. *See* note 173 *infra* (discussing confusion over meaning of racial imbalance).

172. *See generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legis-*

several members expressed the same concerns in the catchwords of a different decade: "racial imbalance."[173] The hearings show that several members were concerned that "discrimination" might include mere racial imbalance,[174] especially since title III of the administration's bill, designed to end discrimination in public education, specifically provided for special funding to alleviate the problems of "racial imbalance."[175] These concerns became fears when Secretary Celebrezze of HEW seemed to imply in testimony that the use in title VI of the word "discrimination" would incorporate the "racial imbalance" concept of title III.[176]

2. The Celebrezze Testimony on "Discrimination"

The Celebrezze testimony is the key to understanding the House's resolution of the fourth criticism of the original version of title VI. Moreover, the Secretary's testimony explains the way in which the later, substitute version of H.R. 7152 encompassed a compromise position that met all four criticisms.

Under detailed cross-examination from Representative Cramer of Florida, Secretary Celebrezze seemed to endorse racial balance as a goal of title VI.[177] As the exchange grew more heated, Chairman Celler cut off further Republican questioning.[178] Representative Rodino and Chairman Celler then tried to defuse the situation by pointing out that the "racial imbalance" language did

---

lative Motive, 1971 SUP. CT. REV. 95 (one of first two articles, appearing well after passage of 1964 Act, expounding intent-impact distinction); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (same).

173. Although Rep. Cramer complained that "racial imbalance" lacked a statutory definition, *House Subcomm. Hearings, supra* note 43, at 1512, he and his colleagues appeared to understand the term "racial imbalance" to mean statistically unequal representation of races due to housing patterns or other private action, rather than to governmentally imposed segregation. *See id.* at 1425 (remarks of Rep. Cramer) (summarizing article submitted for record, detailing unbalanced housing patterns); *id.* at 1518 (remarks of Rep. Meader) (defining racial balance in terms of population statistics); *cf. id.* at 1509 (testimony of HEW Secretary Celebrezze) (residential segregation has resulted in de facto segregation of schools). Because it was unclear whether the term connoted unintentional segregation or legally imposed segregation, the Secretary's agreement to study the issue further only heightened some members' suspicions. *See id.* at 1516 (remarks of Rep. Cramer) ("You want us to give you a blank check . . . and we don't know what racial imbalance is, and you apparently don't know, yourself").

174. *See id.* at 1424 (remarks of Rep. Cramer) (expressing particular concern over new concept of discrimination known as racial imbalance); *id.* at 1580 (remarks of Rep. Meader) (expressing concern that "if racial imbalance is discrimination," title VI could bestow unreasonably broad powers).

175. *See id.* at 654-55 (quoting text of original title III of H.R. 7152).

176. *See id.* at 1514-17 (testimony of HEW Secretary Celebrezze) (discussing title VI power to withhold funds in context of racial imbalance). Although Secretary Celebrezze suggested at one point that the agency would scrutinize school zoning for racial imbalance only to determine if it were part of a "scheme" to maintain segregation, he immediately expanded this statement by opining that "racial imbalance in *any* community comes because of school district lines." *Id.* at 1514 (emphasis added). The imprecision in defining racial imbalance, however, was not as alarming as the Secretary's tying of "racial imbalance" in title III with "discrimination" in title VI. Concern over the latter term dominated the remainder of the subcommittee's discussion with Secretary Celebrezze. *See id.* at 1516-33 (discussing implications of broad definition of "discrimination").

177. *See id.* at 1514 (responding that funds could be terminated for schools rejecting federal "assistance" to end imbalance if title VI passed). Representative Cramer inferred from the testimony that the Secretary was claiming power to withhold all funds whenever he found racial imbalance. *Id.* at 1518 (remarks of Rep. Cramer).

178. *See id.* at 1517-18 (remarks of Chairman Celler) ("I don't want the hearing prolonged with unduly redundant questions").

not appear in title VI itself,[179] but under questioning by Representative Meader, Secretary Celebrezze again took the position that if HEW determined after study that racial imbalance in a particular school system caused the same problems as traditional segregation, then "steps will have to be taken under title VI."[180] The Secretary's statement followed an admission to Representative Cramer that "no court decision" had outlawed racial imbalance,[181] and made clear his view that any action against such imbalance under title VI would arise from an executive, not a judicial, determination of what constitutes discrimination in any specific locality.[182]

The Secretary's inability to clarify this critical issue for the Republican members, at a time when Chairman Celler was trying to build broad bipartisan support for the Act,[183] led even the chairman to suggest that "[s]ome criteria might be added to this bill that would . . . help you in your determination as to whether or not there was discrimination, or whether or not racial imbalance is the discrimination referred to in title VI."[184] When Representative Meader revived the issue,[185] the chairman again explicitly demanded that the Secretary submit "some sort of guidelines under which you would have to operate with reference to title VI."[186]

The brouhaha that led Chairman Celler to request that HEW suggest guidelines for construing title VI provided the ranking minority member, Representative McCulloch, an opportunity to argue once again for the Republicans' pet provision—judicial review of title VI sanctions.[187] The chairman, however, presented the case against judicial review.[188] Recalling a number of instances in which federal judges had taken two to seven years to decide desegregation cases, Celler argued that "we would have to wait until doom's day before you [the agency] can implement your decision."[189] The Secretary's agreement with the chairman[190] manifested the administration's intent that title VI serve as a vehicle not for judicial action, but rather for congressional, executive, and agency action—and control.[191]

---

179. *See id.* at 1518 (remarks of Rep. Rodino) ("racial imbalance only appears in the title III"); *id.* at 1519 (remarks of Chairman Celler) (no provision in title VI allows cutoff of funds for racial imbalance).

180. *Id.* at 1519 (remarks of Secretary Celebrezze).

181. *Id.* at 1517.

182. *See id.* at 1514-17 (HEW investigation revealing segregationist scheme behind school zoning would justify cutoff of funds).

183. *See id.* at 908 (opening statement of Chairman Celler) ("I am confident that Congress will meet its responsibility and further our program in a nonpartisan and unprejudiced fashion").

184. *Id.* at 1521.

185. *See id.* (noting that his state of Michigan had suffered from federal administrator's decision to withhold funding for state programs).

186. *Id.* at 1522.

187. *See id.* at 1524 (remarks of Rep. McCulloch) (urging need for right to appeal "capricious" acts of administrators).

188. *See id.* at 1523 (remarks of Chairman Celler) (considering need for expeditious action, resort to courts would be "very, very wrong").

189. *Id.*

190. *See id.* at 1533 (testimony of Secretary Celebrezze) (expressing complete agreement with chairman's statement concerning judicial review).

191. *See id.* In the Secretary's view, "Congress can call in and question the administrator as to why he acted in that way [in terminating funds], and if they find he acted in a malicious manner Congress has a right to change the law. That is the check on it." *Id.*

C. THE EMERGENCE OF COMPROMISE

1. The Ingredients of Success

At the close of hearings the subcommittee held seventeen days of mark-up in executive session,[192] in which it altered H.R. 7152 in several substantial respects. Most importantly, the subcommittee decided to split off title VII and to extend substantially its coverage from just federally funded employers to all employers engaged in interstate commerce.[193] Placing title VII on its own constitutional footing allowed the subcommittee to consider in greater detail the wide-ranging impact of title VI, which, with its spending power basis, applied to all funding situations, not just employment. Separating out the employment provision, of course, left the original version of title VI as a single sentence, simply declaring the President's discretionary authority to withhold funds.[194]

This single sentence, compared with the detailed provison that eventually emerged from the full committee,[195] shows the exent of compromise reached to meet the criticisms of H.R. 7152. A successful compromise would have had to accomplish four major objectives: to make nearly mandatory the executive's enforcement obligation while retaining some flexibility, as the Attorney General and Chairman Celler demanded; to limit the scope of any sanction so that minor or localized acts of discrimination would not result in a cutoff of all funds for a state; to provide for judicial review of sanctions while not robbing administrators of their ability to act quickly; and to reconcile seemingly irreconcilable views concerning whether title VI should reach only de jure discrimination or de facto discrimination as well. The subcommittee compromise contained each of these necessary ingredients.[196]

The key to the compromise was the decision to authorize the executive departments and agencies to adopt their own regulations for enforcement of the general antidiscrimination clause.[197] This new element allowed the remainder of the compromise to fall neatly into place. First, in order to satisfy the liberals, the amended version made promulgation of implementing regulations mandatory.[198] To accommodate the conservatives, however, the compromise

---

192. HOUSE JUDICIARY REPORT, *supra* note 48, at 44, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2413 (additional views of Rep. Meader).

193. *See id.* at 66, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2434 (minority report) (under title VII EEOC should have power over businesses affecting commerce).

194. *See* note 148 *supra* (quoting original text of title VI).

195. The bill that emerged from the subcommittee moved from the full committee to the house floor with only two changes: deletion of an explicit provision for enforcement via injunction, and deletion of coverage of insurance contracts. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 85-86, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2454 (minority report) (discussing deletions).

196. HOUSE JUDICIARY REPORT, *supra* note 48, at 85-86, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2453-55 (minority report) (comparing reported bill with subcommittee proposal).

The compromise language apparently was drafted by the Department of Justice and accepted by the subcommittee. *See House Comm. Hearings, supra* note 51, at 2703 (remarks of Rep. Brooks) (compromise language authorized by Attorney General's office and considered by committee). Although labeled "title VII" in this draft, it would regain its original title number upon passage. To avoid confusion, reference to the provision throughout this discussion will be to title VI.

197. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 85, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2454 (minority report) (quoting text of provision granting enforcement authority); *House Subcomm. Hearings, supra* note 43, at 2703 (testimony of Attorney General Kennedy) (agencies will issue rules and regulations prior to cutoff to afford recipient opportunity to comply).

198. *House Comm. Hearings, supra* note 51, at 2732 (testimony of Attorney General Kennedy).

also required that the regulations be "consistent with the achievement of the objectives" of the various underlying federal grant programs.[199] Moreover, the amended version provided the executive branch flexibility in choosing the means of enforcing the regulations and directed it to seek voluntary compliance before initiating formal sanctions.[200] Second, these changes also helped to satisfy those who sought to limit the scope of the funding termination. As Attorney General Kennedy explained, the language requiring that terminations be "consistent with the achievement of the objectives" of the federal program would ensure that isolated acts of discrimination would not prompt an agency to subvert an entire congressionally authorized program.[201] The language of the termination provision, limiting termination to "such discriminatory programs,"[202] would ensure that any cutoff would be limited to a particular program, and would not be of statewide scope.[203]

Finally, the decision to adopt a general statutory principle to be supplemented with specific regulations facilitated a compromise on the issue of judicial review.[204] The subcommittee compromise envisioned a limited judicial role: it did not require an agency to go to court to enforce its decision, but permitted an aggrieved party to seek judicial review of the agency's action.[205] Most important in preserving the agency's power, and in preventing unwarranted delay through de novo judicial factfinding, this form of administrative review allowed the agency's determination the benefit of the deferential "substantial evidence" test prevailing under the Administrative Procedure Act.[206]

2. Regulatory Definition of "Discrimination"

The delegation of regulatory authority not only catalyzed compromise on other issues, it also quieted some of the controversy concerning the final criticism of the bill, the lack of a definition of discrimination. Under intense questioning by Representative Mathias, Attorney General Kennedy pointedly explained that the feared "breadth of delegation of rulemaking authority"[207]

---

199. *See id.* at 2740-41 (discrimination against one individual would not cause cutoff to entire program); *cf. id.* at 2740 (remarks of Rep. Willis) (funding termination can undercut federal program goals by denying benefits to those who need them).

200. *See id.* at 2740 (testimony of Attorney General Kennedy) (agency should seek amicable solution before resorting to cutoff of funding).

201. *See* note 199 *supra* (statement by Attorney General Kennedy); *cf. House Comm. Hearings, supra* note 51, at 2739 (remarks of Rep. Ashmore) (expressing fear that innocent people would be harmed by termination based on discrimination against one person); *House Subcomm. Hearings, supra* note 43, at 1890 (remarks of Chairman Celler) (same).

202. HOUSE JUDICIARY REPORT, *supra* note 48, at 85, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2454 (minority report).

203. *See House Comm. Hearings, supra* note 51, at 2766 (testimony of Attorney General Kennedy) (regulations adopted for each grant program would provide procedure for funding review for that program alone).

204. *See id.* at 2703 ("there is judicial review, which we didn't provide for in the original measure"); *id.* at 2740 (each program has right to judicial review of agency finding of violation).

205. *See id.* at 2732 (remarks of Rep. Cramer) (discussing right to court determination when funds withheld).

206. *See* 5 U.S.C. § 706 (1976) (providing standard of review under "substantial evidence" test); *cf. House Comm. Hearings, supra* note 51, at 2732 (testimony of Attorney General Kennedy) (acknowledging that under judicial review court would apply "substantial evidence" test, not "preponderance of evidence" test).

207. *House Comm. Hearings, supra* note 51, at 2765 (remarks of Rep. Mathias).

was necessary because "there are so many different programs" and "to try to write out something specifically in legislation as to what should be done, and what rules and regulations would be issued is virtually impossible."[208] As if responding to Chairman Celler's original criticism that title VI lacked standards defining discrimination, Kennedy pointed out that the "particular [federal] program, with that [antidiscrimination principle of section 601] as a general criterion to follow, will establish the rules that will be followed in the administration of the program—so that the recipients of the program will understand what they can or cannot do."[209]

The compromise on the definition of discrimination constituted a decision to confer on another body—the executive agencies—the final power to determine the meaning of the word. Although the subcommittee at the same time struck out the references to "racial imbalance" in title III,[210] the committee members were quite aware that elimination of that phrase from title III provided no clarification of the meaning of title VI. The Minority Report on the bill characterized the delegation to the agencies as "a matter of 'public relations,' "[211] and accurately predicted that the administration would "rely upon its own construction of 'discrimination' as including the lack of racial balance,"[212] as agencies had done in regulations enforcing previous antidiscrimination legislation.[213] The majority did not take issue with that interpretation of the compromise.[214]

---

208. *Id.* at 2765-66 (testimony of Attorney General Kennedy).

209. *Id.* at 2740 (testimony of Attorney General Kennedy). The following colloquy, in which the Attorney General outlined the changes made in the original version of title VI, shows the importance of the regulation-making authority in reaching a bipartisan compromise on the title:

> Attorney General Kennedy . . . . I think first the fact you have judicial review—and the second—the strong point is that the fact that the rules and regulations dealing with the problem are set out so that everybody understands it. Everybody understands what regulations they have to meet, what rules they have to follow, if they are going to receive the aid and assistance.
>
> Mr. Ashmore. Rules and regulations are the things I am opposed to.
>
> Attorney General Kennedy. I understand, Congressman, but it is set forth now. And that I think is better than originally.
>
> Mr. Ashmore. What are the conditions now since it has been modified?
>
> Attorney General Kennedy. What it sets forth is that basically there will not be discrimination in the expenditures of any funds, there will not be discrimination against any individual based on his color or his country of origin. The particular program, with that as a general criterion to follow, will establish the rules that will be followed in the administration of the program—so that the recipients of the program will understand what they can or cannot do. Then if there is a problem, if they feel that—if there is a breakdown and there is an allegation that they have violated the rules, then there can be judicial review. So I think that is an advantage of the program—although there is still strong criticism about it.

Id.

210. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 81-84, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2450-52 (minority report) (discussing text of title III reported out by subcommittee, omitting reference to racial imbalance).

211. *Id.* at 67, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2436.

212. *Id.* at 68, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2436.

213. *See id.* (citing broad language in standards proposed in 1963 by Secretary of Labor concerning union apprenticeship programs).

214. The silence of the committee report on the issue of interpreting discrimination is not surprising

3. Fine Tuning and Passage

The version of title VI that emerged from the subcommittee, which the full committee altered only slightly,[215] contained all of the essential elements that the full Congress later adopted and that President Johnson signed into law.[216] The few amendments that Congress accepted tended to strengthen and confirm the compromise rather than alter it. Representative Lindsay's one-sentence amendment on the House floor, for example, required that all regulations promulgated under title VI be approved by the President,[217] thereby ensuring that, on the "important" and volatile issue of discrimination, the highest political sensitivity would serve to control bureaucratic discretion in rulemaking.[218] Thus, the amendment tended to ameliorate the one shortcoming of the bill—that administrative discretion could go unchecked. Another provision in the final House version required notice to the House and Senate committees responsible for the particular programs before funds could be withheld.[219] This addition reinforced the thrust of the Lindsay amendment, further demonstrating Congress' belief that the legislators ultimately ought to determine for themselves whether sanctions should, as a political matter, be enforced against certain grantees. Similarly, a Senate-initiated amendment implicitly ratifying one element of the compromise made absolutely clear the provision that an agency could terminate funds only to a program in which discrimination was found.[220] Senator Humphrey summarized the work of the Senate by declaring, "We have made no changes of substance in title VI . . . ."[221]

---

in light of Chairman Celler's attempt to cool tempers and minimize the issue during the Celebreeze testimony before the subcommittee. *See* text accompanying notes 178-84 *supra* (discussing Celebreeze testimony). In the subcommittee hearings Joseph Rauh, testifying in favor of passage of the bill, felt the stern hand of the chairman who did not want to let Rauh reopen the issue of racial imbalance: "I think," said Rep. Celler, interrupting Rauh, "you ought to give that a little more time before you present an opinion on that, because there are lots to be said on both sides." "I was going to be careful," replied Rauh, sheepishly. *House Subcomm. Hearings, supra* note 43, at 1889. In light of the Chairman's stated view that he preferred "to give the widest kind of discretion" to administrators in dealing with the "wholesale variety of cases,"*id.* at 1890, the provision in the revised bill for formalized rulemaking represented a workable compromise, obviating any need to mention racial imbalance. *Cf. id.* at 1521 (remarks of Chairman Celler) (bill should contain standards consistent with need for flexibility to govern agency action).

215. *See* HOUSE JUDICIARY REPORT, *supra* note 48, at 85-86, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2453-55 (minority report) (comparing reported bill with subcommittee proposal).

216. Title VI, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1976)).

217. *See* 110 CONG. REC. 2499 (1964) (quoting Lindsay amendment).

218. *See id.* (remarks of Rep. Lindsay) ("latitude" of regulatory power creates need for presidential approval). Representative Lindsay's constituents in New York were among those who could have been most affected by an administrator's decision to adopt "racial imbalance" as the test for discrimination under title VI. *See House Subcomm. Hearings, supra* note 43, at 1512 (remarks of Chairman Celler of New York City) (discussing serious racial imbalance in New York).

219. *See* 110 CONG. REC. 16,001 (1964) (comparing House version to Senate version of title VI).

220. *See id.* at 14,219-20 (1964) (remarks of Sen. Holland) (listing changes made to House version). The Senate, however, made substantial changes in parts of the 1964 Act other than title VI. *Id.* at 14,219 (remarks of Sen. Holland).

221. *Id.* at 12,714 (remarks of Sen. Humphrey). Many of the arguments presented earlier in the House subcommittee hearing resurfaced in the Senate but resulted in no significant amendments. For example, to charges from relative moderates that title VI omitted definitional standards for guiding those who would administer the law, *id.* at 12,320 (remarks of Sen. Byrd of West Virginia), and allowed "lesser appointed officials" to determine what constitutes discrimination, *id.* at 13,130 (remarks of Sen. Gore), proponents responded not with denials but with assurances that procedural safeguards would

Although Senate proponents of title VI repeatedly invoked constitutional principles to support section 601 of the bill,[222] they did so under a barrage of equally lofty attacks from senators who deemed the bill "clearly unconstitutional."[223] The senior chamber heard Senator Byrd of West Virginia raise the volatile issue whether section 602 would permit regulations to correct "racial imbalance," a fear shared by many southerners.[224] He condemned the regulations as tools "whereby the Federal Government can force whatever sociological concepts may strike the fancy of those in power" upon local grantees.[225] Instead of precluding the "racial imbalance" test by defining discrimination,[226] however, the Senate dealt narrowly with racial balance only by prohibiting school busing orders to achieve it.[227] This so-called Javits amendment, no more than a minor limitation on the possible scope of the definition of discrimination, reinforces the conclusion that Congress intended to confer wide discretion on agencies by giving them rulemaking authority.[228]

D. SUBSEQUENT CONGRESSIONAL ACTIONS: TITLE VI AND ITS ANALOGUES

The peculiarly legislative and administrative—rather than constitutional—

---

reduce the resulting harm. *See id.* at 13,128-30 (remarks of Sen. Ribicoff) (explaining safeguards, including limited funds termination and judicial review).

222. *See, e.g., id.* at 5253 (remarks of Sen. Humphrey) (discrimination in use of federal funds "clearly violative of the Constitution"); *id.* at 13,333 (remarks of Sen. Ribicoff) ("basically, there is a constitutional restriction against discrimination in the use of Federal funds"); *id.* (remarks of Sen. Morse) (use of federal funds in discriminatory programs "unconstitutional"); *id.* at 13,334 (remarks of Sen. Pastore) (same). The senators, however, were not always meticulous in their use of constitutional rhetoric; Senator Humphrey, the bill's floor manager, once asserted that title II (private accommodations) and title VII (private employment) "protect the rights already guaranteed in the Constitution," *id.* at 5252, a demonstrably false assertion. *See* Civil Rights Cases, 109 U.S. 3, 17-18 (1883) (fourteenth amendment does not reach private discrimination). These Senators, by invoking constitutional principle, may have been thinking of their Article I-type constitutional power to legislate on these issues. *See* 110 CONG. REC. 5252 (1964) (remarks of Sen. Humphrey) (discussing authority of Congress).

Senate proponents, in any event, knew that in some respects title VI might cover fewer areas than would the Constitution. *See id.* at 5255 (Case-Humphrey colloquy demonstrating that exclusion of insurance contracts in § 602 would, in effect, limit scope of § 601). The narrow question of whether the Senators intended section 601 to be absolutely coterminous with the Constitution, therefore, cannot be answered affirmatively.

223. 110 CONG. REC. 13,383 (remarks of Sen. McClellan); *see id.* at 5233 (remarks of Sen. Long) ("no business passing this unconstitutional law"); *cf. id.* at 13,416 (remarks of Sen. Talmadge) (title would create veritable "dictatorship"); *id.* at 13,417 (remarks of Sen. Stennis) (same).

The constitutional rhetoric of both proponents and opponents reached its height during the limited period of heated debate following invocation of cloture. *See generally id.* at 13,327-418 (post-cloture debate).

224. *See* notes 173-74 *supra* (House subcommittee discussions on racial imbalance).

225. 110 CONG. REC. 12,321 (1964) (remarks of Sen. Byrd).

226. The Senate rejected an amendment by Senator Long that would have defined the term in another title of the Act. *See id.* at 12,320 (Amendment No. 764 to title II) (discrimination means "any arbitrary and unreasonable differentiation in the treatment regularly and habitually accorded" to groups covered by title).

227. Pub. L. No. 88-352, tit. IV, 78 Stat. 248-49 (1964) (codified at 42 U.S.C. § 2000c-6(a) (1976)); *see* 110 CONG. REC. 12,717 (remarks of Sen. Javits) (assuring Sen. Byrd that "there is no case" in which statute would require federal funds be "directed toward restoring or bringing about a racial balance in the schools").

228. *Cf.* Drummond v. Acree, 409 U.S. 1228 (Powell, Circuit Justice, 1972). Justice Powell refused a stay, *id.* at 1231, under a statute that required postponement of busing orders made to achieve racial balance. *Id.* at 1229. He reasoned that the lower court's order was designed to achieve not racial balance, but desegregation. *Id.* at 1231. "If Congress had desired . . . [a wider result] it could have used clear and explicit language appropriate to that result." *Id.* at 1229.

approach that Congress brought to bear on title VI in 1964 resurfaced in later congressional attempts to deal with civil rights through use of the spending power. A number of amendments to title VI failed to change the 1964 compromise,[229] and, more importantly, a series of new pieces of legislation accentuated Congress' acceptance of, and reliance on, that compromise.[230]

1. Subsequent Amendments to Title VI

Congress has amended the 1964 version of title VI on three occasions. Each arose in connection with education aid statutes, not in the course of direct and substantial review of title VI itself. The first two amendments, passed in 1966[231] and 1968,[232] manifested congressional concern with HEW's first serious enforcement efforts. The department had begun to defer new funding requests of grantees thought to be engaged in discrimination, rather than terminating existing funding[233] as had been originally contemplated.[234] The 1966 amendment limited the period that the agency could defer requests without holding a hearing and making express findings of discrimination.[235] The 1968 amendment arose amid fears that HEW might move more diligently than the courts in providing remedies for southern school segregation; Congress responded narrowly by providing that compliance with an outstanding court decree would constitute compliance with title VI.[236] Significantly, the amendment said nothing about schools not under court decree and did not even apply to those aspects of a system not covered by a decree.[237] Moreover, even for schools under court order, the amendment made no practical difference because circuit courts had already ruled that HEW's guidelines were only minimum standards.[238] Court decrees, therefore, tended to be stricter than HEW's standards, and not laxer, as the amendment's sponsors contemplated.[239]

---

229. *Compare* Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (1964) (original compromise as enacted) *with* 42 U.S.C. § 2000d (1976) (current version, incorporating amendments concerning fund deferral, compliance with federal court orders, and uniform application of desegregation guidelines).

230. *See* notes 254-67 *infra* and accompanying text (discussing title VI analogues).

231. Pub. L. No. 89-750, tit. I, § 182, 80 Stat. 1209 (1966) (codified at 42 U.S.C. § 2000d-5 (Supp. III 1979)) (education funding act).

232. Pub. L. No. 90-247, tit. I, § 112, 81 Stat. 787 (1968) (codified at 42 U.S.C. § 2000d-5 (Supp. III 1979)) (proviso clause) (education funding act).

233. 112 CONG. REC. 25,573-74 (1966) (remarks of Rep. Fountain of North Carolina, author of amendment); *id.* at 25,574-75 (remarks of Rep. Abbitt of Virginia).

234. *See* 110 CONG. REC. 13,128-30 (1964) (remarks of Sen. Ribicoff) (explaining enforcement steps originally contemplated under title VI).

235. 42 U.S.C. § 2000d-5 (Supp. III 1979).

236. *Id.* (proviso clause).

237. S. REP. NO. 726, 90th Cong., 1st Sess. 13, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2730, 2743; CONF. REP. No. 1049, 90th Cong., 1st Sess. 46, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2814, 2817.

238. *See Singleton II*, 355 F.2d. at 869 (guidelines only minimum standards of general application); notes 83-86 *supra* and accompanying text (explaining courts' interpretation of guidelines).

239. A disturbing historical anomaly can be seen in the early days after passage of the 1964 Act. Debates in the House on the 1966 amendment to the Act disclosed that the members of the originating committee, the Committee on Education and Labor, then understood that title VI forbade only intentional racial discrimination, not "de facto racial imbalance as such." 112 CONG. REC. 25,551 (1966) (remarks of Rep. Goodell); *see id.* at 25,549-54 (remarks of Reps. O'Hara & Waggonner) (title VI does not bar de facto racial imbalance). Because the 1964 compromise had originated in a different committee, the Judiciary Committee, it is not surprising that representatives on the substantive education com-

The Stennis Amendment[240] is more difficult to interpret. It was added in 1970 after the Supreme Court, in *Green v. County School Board*,[241] apparently adopted an effects test for proving continuing equal protection violations in formerly de jure systems.[242] Pressed originally by southerners in Congress who thought that courts were attacking de facto discrimination in the South while leaving it untouched in the North,[243] the proposal sought to ensure one nationwide desegregation policy without specifying what that policy should be.[244] The opponents suspected that the bill was only a ploy to undermine continuing desegregation efforts in the South.[245] This was a reasonable suspicion in light of both the sponsors' thinly veiled expectations that northern politicians would never permit a policy of attacking de facto discrimination, as well as the southerners' assertions that de jure discrimination had already been eliminated

---

mittee did not fully understand the scope of title VI. These representatives did not in 1966 offer an amendment incorporating their views directly into title VI, leaving unresolved the question whether the full Congress would have adopted their position.

The actual provision enacted, the O'Hara Amendment, insofar as it related to HEW's use of an effects test, prevented federal officials only from using their grant powers to require transportation to cure "racial imbalance." Pub. L. No. 89-750, § 181, 80 Stat. 1209 (1966) (codified at 20 U.S.C. § 1232a (1976)) (now covering all educational aid programs). The legislation was precipitated by congressional concern that HEW officials were using title VI authority to intrude into local educational decisionmaking. *E.g.*, 112 CONG. REC. 25,549, 25,550-51 (1966) (remarks of Rep. Waggonner); *id.* (remarks of Rep. Powell); *id.* at 25,554 (remarks of Rep. Anderson). Another amendment, the Fino Amendment, explicitly would have forbidden HEW from reimbursing local districts for expenses incurred directly or indirectly in transporting pupils to achieve racial balance. *Id.* at 25,553; *see id.* at 25,554 (remarks of Rep. Anderson) (O'Hara Amendment would allow HEW to indirectly require busing by ordering rezoning; Fino Amendment would not). *But see id.* at 25,551 (remarks of Rep. O'Hara) (HEW may not condition grants on eliminating racial imbalance). The more specific Fino amendment failed. *Id.* at 25,555.

Courts interpreting the amended statute have avoided a resolution of the issue by resorting to a constitutional basis for decision. *See* Dandridge v. Jefferson Parish School Bd., 456 F.2d. 552, 554-55 (5th Cir. 1972) (upholding court-ordered busing plan under fourteenth amendment; rejecting argument that § 1232a forbids such busing); *cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16-18 (1971) (title IV of Civil Rights Act does not withdraw from courts "historic equitable remedial powers"). The adoption in 1970 of the Stennis Amendment, Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. § 2000d-6 (1976)), rendered the 1966 debate somewhat insignificant by contemplating, although not specifically authorizing, application of an effects test. *See id.* (title VI requires that "such other policy as may be provided pursuant to law [be] applied uniformly to de facto segregation wherever found").

240. Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. § 2000d-6 (1976)).

241. 391 U.S. 430 (1968).

242. *See id.* at 439-42 (quoting with approval Judge Sobeloff's results-conscious language in Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)). *See generally The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 111-18 (1968) (discussing *Green* and freedom-of-choice plans).

243. *See* 116 CONG. REC. 1267 (1970) (remarks of Sen. Stennis) (discussing motivation behind amendment).

244. *See id.* at 1266 (remarks of Sen. Stennis). The original amendment provided that:

> It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to origin or cause of such segregation.

Id.

245. *See, e.g., id.* at 2744-45 (remarks of Sen. Pastore) (voicing objection to amendment if it would be used to continue segregation); *id.* at 2935-36 (remarks of Sen. Hatfield) (voicing fear that under amendment there would be no enforcement of Civil Rights Act); *id.* at 2935 (remarks of Sen. Case) (disagreeing with contention that segregation in North justifies diminution of pressure for desegregation in South).

in their region.[246]

The House-Senate conference, however, so altered the scope of the bill that its sponsors thereafter repudiated it. The major offending provision defined "uniformity" as one desegregation policy applied uniformly nationwide to de jure segregation, and another policy "as may be provided pursuant to law" applied uniformly to de facto segregation.[247] Because this preserved the very de facto-de jure distinction that southerners believed harmed them and protected the North and West, southerners objected.[248] They lost,[249] and the revised Stennis Amendment, disowned by its father, became law.

It would be supportive to argue that the Stennis Amendment, like the 1966 and 1968 amendments, ratified the 1964 compromise by adopting an administrative solution to defining discrimination. Yet, the best interpretation of these amendments is more complex. During the consideration of each bill several speakers expressed the view that title VI outlawed only intentional discrimination,[250] showing neither appreciation of the 1964 compromise nor familiarity with HEW's regulations, which had adopted an effects test.[251] This is not surprising, because these amendments did not come from the Judiciary Committee, which had originally drafted title VI.[252] Moreover, all regulatory enforcement had taken place in southern schools that had been segregated under admittedly de jure systems. The Congressional utterances from 1966 through 1970 were more statements of what HEW had done rather than what it, under authority of title VI, might yet do.

Whatever some in Congress might have wanted to do, they in actuality accomplished little. The 1966 and 1968 amendments changed no part of the 1964 compromise, and the Stennis Amendment was seen by all in 1970 as more hot air than legislation, its author admitting that he offered it "just as a statement of policy, hoping it will have influence on HEW in applying these guidelines."[253] Although Congress has never explicitly reaffirmed its 1964 decision, it has not mustered a majority to reverse the initial decision to defer to agency authority in defining discrimination. Obfuscation, sometimes calculated, has preserved the status quo.

---

246. *See id.* at 2550 (remarks of Sen. Stennis) (agreeing with Sen. Ervin that "what is sauce for the New York gander is not sauce for the southern goose"). *See also id.* at 2546-65 (remarks of Sen. Stennis and other supporters of an anti-busing amendment) (identifying extensive segregation in the North).

247. *Id.* at 10,005. *Compare* note 244 *supra* (quoting text of original Stennis amendment) *with* 42 U.S.C. § 2000d-6 (1976) (revised Stennis amendment). The revised amendment added that "[s]uch uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found." 42 U.S.C. § 2000d-6(b) (1976).

248. *See* 116 CONG. REC. 10,000 (remarks of Sen. Stennis) (criticizing conference action); *id.* at 10,006 (remarks of Sen. Talmadge) (same); *id.* at 10,014 (remarks of Sen. Cooper) (same). On the other hand, those legislators suspicious of Senator Stennis' intentions argued that the conference report was true to the Senate's initial demand for uniformity in application of law: separate policies regarding de facto and de jure discrimination would apply uniformly nationwide. *See id.* at 10,009 (remarks of Senator Javits) (supporting conference report).

249. 116 CONG. REC. 10,020 (recorded vote on motion to recommit conference report).

250. *See* note 239 *supra* (discussing House debate on amendments).

251. *See* 45 C.F.R. § 80.3(b)(2) (Supp. 1966) (prohibiting recipients from using criteria that have "the effect of subjecting individuals to discrimination").

252. *See* note 239 *supra*.

253. 116 CONG. REC. 1001 (1970) (remarks of Sen. Stennis).

2. Title VI Analogues

More illuminating than subsequent congressional action on title VI itself has been Congress' penchant for using that title as a model for other legislation passed under the spending power. These subsequent bills were passed to protect beneficiaries of federally funded programs from other types of discrimination, specifically that based on sex,[254] handicap,[255] and age.[256] In each of these new statutes Congress again used the word "discrimination," and in each instance it became increasingly apparent that Congress intended to allow the meaning to vary from the judicial interpretation of the equal protection clause by having agency administrators promulgate definitive regulations.

The first provision emulating title VI, title IX of the Higher Education Amendments of 1972,[257] contains a virtually verbatim adoption of the 1964 compromise elements: funding termination limited to particular programs, presidential review, notice to Congress, and agency power to promulgate regulations.[258] Enacted after seven years of experience with HEW's regulations and guidelines, however, and in an area in which there was probably even less

---

254. *See* Education Amendment of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1976)) (prohibiting sex discrimination in certain education programs).

255. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 504, 87 Stat. 393 (codified at 29 U.S.C. § 794 (Supp. III 1979)).

256. *See* Age Discrimination Act of 1975, Pub. L. No. 94-135, tit. III, § 303, 89 Stat. 728 (codified at 42 U.S.C. § 6102 (1976)).

257. 20 U.S.C. §§ 1681, 1682 (1976).

258. *Id.* Title IX provides, in part:

> (a) Prohibition against discrimination; exceptions.
>
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Id. § 1681 (exceptions omitted). It provides, further:

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

Id. § 1682. The provision for judicial review also mimics title VI. *Compare* 20 U.S.C. § 1683 (1976) (review provision using title VI language) *with* 42 U.S.C. § 2000d-2 (1976) (title VI review provision).

consensus about the meaning of discrimination,[259] the general prohibitory language echoing section 601 of title VI was supplemented by numerous exceptions.[260] Although these exceptions limited the scope of the statute, Congress did not preclude use of an effects test.[261] Later analogues to title VI follow the same general pattern of title IX.[262]

The most persuasive indication that Congress did not intend the language of title VI, as repeated in the analogues, to adopt the constitutional definition of discrimination lies in the subject matter of the analogues. Even before passage of the Age Discrimination Act, the Supreme Court held that claims of age discrimination arising under the equal protection clause would be subjected only to "rational basis" scrutiny,[263] scrutiny that has led to the Court's invalidation of virtually no state action since the beginning of two-tier analysis in the 1960's.[264] Yet Congress surely intended that its statute prohibit something

---

259. The Supreme Court in 1972 had not agreed upon a protective constitutional standard of review for sex classifications, having purported to rely only on the old "rational basis" test when it struck down a discriminatory statute. *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (statute favoring men over women as administrators of estates violates equal protection clause because classification not reasonably related to object of legislation). In 1973 four members of the Court found sex, like race, a "suspect classification" requiring "strict scrutiny." *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (statute granting automatic benefits to dependents of men but not women in military violates due process clause). Three years later a Court majority adopted a less strict, although still demanding, level of review. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classifications must serve "important governmental objectives" and be "substantially related to those objectives"). The contours of the *Craig* test, however, are far from clear. *Compare* Caban v. Mohammed, 441 U.S. 380, 384-85 (1979) (5-4 decision) (statute permitting unwed mother but not father to withhold adoption consent represents overbroad generalization in gender-based classification and thus violates equal protection clause) *with* Parham v. Hughes, 441 U.S. 347, 348-49 (1979) (5-4 decision) (statute permitting unwed mother but not father, if mother alive, to sue for wrongful death of child not an overbroad generalization violating equal protection clause). *See also* Rostker v. Goldberg, 101 S. Ct. 2646, 2658 (1981) (statute requiring only men to register for draft does not violate due process clause because women not similarly situated).

260. *See* Pub. L. No. 92-318, tit. IX, § 901(a), 86 Stat. 373 (1972) (excepting from coverage certain religious, military, and traditionally single-sex institutions). The current version of title IX contains further exceptions. *See* 20 U.S.C. § 1681(a)(1)-(9) (1976) (excepting fraternities, beauty pageant scholarships, voluntary youth organizations, and others).

261. Indeed, the language used in section 1618(b), 20 U.S.C. § 1681(b) (1976), closely paralleled language in title VII of the 1964 act, 42 U.S.C. § 2000e-2(j) (1976), which the Supreme Court had previously construed to authorize an effects test for defining discrimination. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (title VII prohibits employment practices that are discriminatory in operation).

262. There are some variations. Section 504, which protects handicapped persons, contains none of the explicit compromise provisions seen in title VI. *See* 29 U.S.C. § 794 (Supp. III 1979). Congress legislated there, however, against the background of a pre-existing statutory scheme of aid to handicapped persons, which already embodied single-agency enforcement with wide regulatory authority. *See* 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979) (previous aid-to-handicapped scheme). The Age Discrimination Act (ADA) manifests an even greater deference to agency expertise, especially that of HEW. The ADA authorizes agencies to define "discrimination," 42 U.S.C § 6101 (Supp. III 1979), in two stages: first by "general" regulations drafted by HEW after consultation with the Civil Rights Commission, *id.* § 6103(a) (1976), and then by "enforcement" regulations drafted by each affected agency which were to be "consistent" with the general regulations. 42 U.S.C. § 6103(a)(4) (Supp. III 1979). Regarding the scope and use of agency power under the Age Discrimination Act, see Schuck, *Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979).

263. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, 317 (1976) (per curiam) (statute requiring retirement of state police officers at age 50 does not violate rational basis standard).

264. *See generally* G. GUNTHER, *supra* note 8, at 671 (discussing advent of "strict scrutiny" to replace rational basis test in certain circumstances). Cases such as Reed v. Reed, 404 U.S. 71 (1971), which claimed to impose rational-basis scrutiny, appeared later to have been the products of greater scrutiny. *See* Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) (*Reed* showed that Court subjects sex classifications to greater scrutiny than ordinarily imposed when suspect classes not involved); Fron-

more than the lunatic or wholly irrelevant actions outlawed by rational basis scrutiny. Similarly, although the Supreme Court has never made explicit the level of review applicable to constitutional claims of discrimination against handicapped persons,[265] and apparently has adopted a fluid, balancing approach to constitutional claims of sex discrimination,[266] Congress intended its title VI analogues in those areas to go beyond minimal constitutional balancing with stronger rules against discrimination.[267] In short, Congress in the 1970's understood the phraseology and pattern already employed in title VI to allow agencies to attack discriminatory actions that do not violate judicial conceptions of constitutional equal protection.

E. LESSONS FROM THE DRAFTING OF TITLE VI

The wording and legislative history of title VI point inexorably toward two conclusions: (1) Congress did not intend to adopt a discrimination standard that would necessarily mimic constitutional equal protection doctrine, and (2) Congress intended to give interpretive control over title VI to federal agencies, while retaining some supervisory power for itself.

The compromise that produced title VI showed a peculiarly legislative approach to defining discrimination, which contradicts the proposition that constitutional equal protection notions alone should provide the standards for title VI. In some respects the bill patently differed from the Constitution by offering less secure safeguards. Most pertinently, the limitation that agency regulations must "be consistent with the objectives" of the underlying federal program introduced a political balancing into title VI to prevent broad findings of violation based on isolated acts. Similarly, the Lindsay Amendment requirement of presidential approval of regulations also showed that Congress wanted executive—political—action to control the discretion inherent in defining discrimination. In other respects, title VI permitted agency regulations to exceed constitutional standards, as shown by Congress' awareness that agencies might define "discrimination" so as to attack de facto discrimination not forbidden by judicial construction of the Constitution.

---

tiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (*Reed*'s "departure from 'traditional' rational basis analysis" clearly justified); G. GUNTHER, *supra*, at 867 n.2 (*Reed* represents level of scrutiny between "rational basis" test and "strict scrutiny"). *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (discussing different levels of scrutiny).

265. For a discussion of the issue, see Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975).

266. *See* note 259 *supra* (describing disposition of sex discrimination cases).

267. The Supreme Court has never decided the scope of title IX, having dealt only narrowly with the right of private beneficiaries to sue under the statute. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (finding implied private right of action under title IX).

The Rehabilitation Act of 1973, title V, has received Supreme Court attention only once, in Southeastern Community College v. Davis, 442 U.S. 397 (1979), in which the Court construed the affirmative action language somewhat narrowly. *See id.* at 413 (statute requires only that institutions not exclude on basis of handicap, not that they make major adjustments to accommodate handicapped). Apparently, however, the Court's reading of the statute would require more of grantees than the Constitution would require under a rational basis test.

In title VI, therefore, as in many other titles of the 1964 Act,[268] Congress drew upon the inspiration provided by the Constitution and *Brown v. Board of Education*. Rather than apply the principle blindly in new areas, however, it fashioned practical new legislative contours to the antidiscrimination consensus.

Finally, constitutional law is, of course, judicial law, and even clearer than Congress' appreciation that title VI could vary from constitutional law is its intent that the title vary from law as made by judges. Congress chose not to make the principles of section 601 subject to judicial interpretation and enforcement, but rather decided that "what [grantees] can and cannot do"[269] would be defined in regulations drafted by agencies and executive departments. Moreover, Congress rendered these agencies and departments responsible both to the President, who would review the regulations, and to Congress, which could negate their regulations through legislation. The only role assigned to courts was to provide judicial review under the standards applicable to any ordinary agency action. This limited judicial role negates any idea that Congress intended to adopt the judiciary's constitutional standards as the touchstone for title VI.[270]

III. TOWARD A TRADITIONAL REGULATORY MODEL OF TITLE VI

A. INTRODUCTION

The preceding discussion refutes two predominant views of title VI. The first, argued by several white-dominated civil rights groups in 1964, is that by enacting title VI Congress was only performing its constitutional duty.[271] This view, however, was never fashionable in the courts, and the legislative history suggests that it does not accurately reflect congressional intent. The second view, recently adopted by several justices of the Supreme Court, is that Congress, in choosing from a range of possible definitions, adopted verbatim for title VI the Court's constitutional standards of discrimination.[272] Legislative history indicates that this view is also incorrect and ahistorical. This article has argued instead that Congress chose to avoid defining discrimination by vesting in agencies that power and responsibility.

Although the standards set forth by title VI may differ in scope from the judiciary's equal protection rules, the problem of judicial-administrative inter-

---

268. *See* 42 U.S.C. § 2000-c (1976) (title II provisions on public accommodations); 42 U.S.C. § 2000-e (1976) (title VII provisions on employment discrimination).

269. *House Comm. Hearings*, *supra* note 51, at 2740 (testimony of Attorney General Kennedy).

270. Although other governmental organs than courts have a duty to consider constitutional issues in making their decisions, *see* Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975), we have come to think of the federal courts as final arbiters or ultimate intepreters of the Constitution. *See* United States v. Nixon, 418 U.S. 683, 703-04 (1974) (Court has authority to determine Constitution grants privilege to executive); Powell v. McCormack, 395 U.S. 486, 548-49 (1969) (determination of Constitutional right to sit in Congress within traditional role of courts). At the very least, therefore, it would seem curious for Congress to adopt judicially declared constitutional rules as standards for agency decisions, and then relegate judicial review to the stand-by position it occupies in reviewing ordinary statutory cases. *Cf.* Cox v. Louisiana, 379 U.S. 536, 545 & n.8 (1965) (Supreme Court will examine for itself facts that implicate application of constitutional law); Fiske v. Kansas, 274 U.S. 380, 385 (1927) (same).

271. *See* note 46 *supra* (discussing split among different civil rights groups).

272. *See* note 12 *supra* and accompanying text.

play remains because courts may be asked to review an agency's application of its regulations[273] or to hear private suits invoking the provisions of title VI.[274] This problem is especially complex because agencies, particularly HEW, have adopted two kinds of rules: formal regulations and interpretive guidelines.[275] Only the former have received presidential approval.[276]

B. COURTS AND REGULATIONS

1. Judicial Standard of Review

Although this article has concluded that Congress adopted a traditional regulatory model for title VI, the inquiry into its application is not complete. A review of the passage of title VI helps to determine what kind of agency rulemaking power the statute confers and whether an agency has exercised it properly. The full Supreme Court has not confronted these issues,[277] but a concurring group of three justices addressed the problem in *Lau v. Nichols* and

---

273. *See* 42 U.S.C. § 2000d-2 (1976) (subjecting department or agency action under title VI to judicial review).

274. *Cf.* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (implying private right of action under title IX because title patterned after title VI); Lau v. Nichols, 414 U.S. 563, 566 (1974) (allowing class action by students against school district under title VI).

275. HEW developed a multi-tiered system of "regulations" and "guidelines," as well as "policy interpretations," "procedural announcements," and "decision announcements" (agency case digests). *See* 43 Fed. Reg. 18,630 (1978) (promulgating policy determinations); note 327 *infra* (citing policy digests). HEW enforced as law memoranda and task force reports construing the regulations. *See* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MEMORANDUM FOR CHIEF STATE SCHOOL OFFICERS AND LOCAL SCHOOL DISTRICT SUPERINTENDENTS: IDENTIFICATION OF DISCRIMINATION IN THE ASSIGNMENT OF CHILDREN TO SPECIAL EDUCATION PROGRAMS (August 1975) (listing examples of possible violations of titles VI and VII) (copy on file at *Georgetown Law Journal*); U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TASK FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULED UNLAWFUL UNDER *Lau v. Nichols* (Summer 1975) (discussing specific procedures in remedial bilingual education programs) (copy on file at *Georgetown Law Journal*). The Task Force Findings, in particular, reveal the flexibility of the lawmaking process. Although this document purports only to propose remedies for prior violations, the agency uses the requirements in determining whether violations exist. The agency also considers any program not meeting the standards required of formerly discriminating programs to be guilty of discrimination. Statement to author by Ellen Myasato, Office for Civil Rights, U.S. Dep't of Health & Human Services, May 10, 1981 (formerly Special Assistant to Director of Office for Civil Rights, HEW).

276. *See* U.S. Dep't of Health, Educ. & Welfare, Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979) (signed by Director of Office for Civil Rights and Secretary of HEW); U.S. DEP'T OF HEALTH, EDUC. & WELFARE, GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS, 45 C.F.R. § 80 app. B (1980) (published in 44 Fed. Reg. 17,164-68 (1979)) (signed by Director of Office for Civil Rights). These materials sometimes appear in the Federal Register, obviating the problem of public notice, but sometimes such interpretive materials are not published. Should a guideline be approved by a president, and meet the procedural and publication requirements generally applicable to regulations, that guideline would fall within the analytical definition of regulation for purposes of the discussion following in text.

277. In Lau v. Nichols, 414 U.S. 563 (1974), the majority upheld the constitutionality of title VI as supplemented by regulations and guidelines, *id.* at 568-69, but did not specifically address the narrower issue whether the regulations were consistent with the statute. Similarly, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), no majority spoke on the validity of the applicable regulations. Justice Powell did not discuss the issue at all. *Id.* at 269-324 (opinion of Powell, J.). The Brennan coalition noted only that one regulation was consistent with the emphasis of title VI on voluntary remedial action. *Id.* at 345 (opinion of Brennan, White, Marshall & Blackmun, JJ.). The remaining justices found the HEW regulations irrelevant to the case. *Id.* at 418 n.22 (opinion of Stevens, J., with Burger, C.J., Stewart & Rehnquist, JJ.).

upheld HEW's standards.[278] Justice Stewart first quoted the principle that regulations are acceptable so long as they are "reasonably related to the purposes of the enabling legislation."[279] He then added, however, that the regulations represent a "consistent administrative construction" of remedial legislation, and thus are entitled to great weight in interpreting the antidiscrimination language of section 601.[280] The *Lau* concurrence in effect adopted as a second consideration the administrative law test used under title VII of the 1964 Civil Rights Act,[281] which assigns weight to consistent agency interpretations of vague statutory language.[282]

An examination of the legislative history of title VI, however, shows that Justice Stewart should have omitted the second consideration. "Discrimination" in section 601 is no vague term to be defined once authoritatively and frozen into law; rather, it is a broad term that Congress deliberately chose to provide a basis for an evolving agency policy expressed through administrative rulemaking authority. HEW Secretary Celebrezze informed those conducting the hearings on title VI that he intended to adopt expansive definitions of discrimination to root out underlying social problems.[283] The committee responded not by curbing agencies altogether, but by requiring them to adopt regulations in advance so that grantees would "know what they can and cannot do."[284] The analogy to title VII, in which Congress refused to give such power to the affected agency, is therefore inapposite.[285]

Justice Stewart's alternative test, requiring a reasonable relation to legislative purposes, is a workable approach only with the proviso that the legislative purpose of title VI was to permit an evolving definition of discrimination.[286] A simpler and preferable solution is to recognize that when Congress delegated broad power to agencies to define discrimination it was following the guide of earlier legislation directing agencies to act "in the public interest"[287] or to con-

---

278. 414 U.S. at 571 (Stewart, J., with Burger, C.J. & Blackmun, J., concurring in result).

279. *Id.*

280. *Id.* (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972)). The Brennan coalition in *Bakke* took the same approach. 438 U.S. at 342 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (citing *Lau*). Its reasoning, however, appears inconsistent: title VI cannot be both coextensive with the Constitution, in the court's view, and yet also be free for interpretation by agencies.

281. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976).

282. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976) (declining to give weight to EEOC guideline contradicting earlier agency position and conflicting with other indicia of proper interpretation of title VII). The degree of weight that courts accord an agency's construction of legislation has been a controversial issue since at least 1941. *See* Gray v. Powell, 314 U.S. 402, 411 (1941) (judicial review of agency interpretation of statutory term ends if construction "just and reasonable"); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.10 (1958) (discussing *Gray*); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 232-37 (1976) (same). The standard of "great deference" apparently supplies modern courts with the flexibility necessary to apply the *Gray* doctrine under title VII. Because, as stated below, title VI expressly authorizes agencies to define "discrimination" rather than merely to construe the statute, the issue in *Gray* should not arise in title VI cases.

283. *See* notes 180-82 *supra* and accompanying text (discussing Celebrezze testimony).

284. *See* note 209 *supra* and accompanying text (quoting Attorney General Kennedy at House subcommittee hearings).

285. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 & n.20 (1976) (EEOC may issue procedural regulations, but non-procedural rules merit less weight); 42 U.S.C. § 2000e-12(a) (1976) (EEOC may issue regulation to govern intra-agency affairs; no general rulemaking authority).

286. If this proviso were not adopted, the *Gray* problem discussed in note 282 *supra* would be raised.

287. *See* Federal Power Act, 16 U.S.C. § 797(e) (1976) (requiring finding on record that licensed facilities be in public interest) (transferred to Department of Energy, 16 U.S.C. § 797 (Supp. III 1979));

trol "unreasonable" practices.[288] Such a delegation is not unconstitutionally vague,[289] and any other unfairness was addressed by Congress in provisions requiring presidential approval of regulations, advance publication, and congressional review of agency action before imposition of final sanctions. Thus read, title VI created an evolutionary model, whereby an agency can change its definition of discrimination to meet the needs of the time.

2. Consequences of the Open-Ended Standard of Review

The phrases "open-ended" and "evolving" may be misleading because they connote the liberal direction which such words have taken in contemporary constitutional law.[290] But title VI is ordinary legislation,[291] and any changing administrative standards may be either more or less protective than constitutional rules of the day. One administration may study a topic and decide that "effects" discrimination poses a serious problem; a different administration may reach a contrary solution in light of new evidence, changed circumstances, or even changed appreciations of wrongs.[292] Justice Stewart's approach in *Lau*

Communications Act of 1934, 47 U.S.C. §§ 303, 307 (1976) (authorizing agency to act for "public convenience, interest or necessity"). *See also* Udall v. Federal Power Comm'n, 387 U.S. 428, 450 (1967) (interpreting Federal Power Act); National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (interpreting Communications Act of 1934).

288. *See* Interstate Commerce Act, 49 U.S.C. § 1074 (Supp. III 1979) (prohibiting "unreasonable discrimination" by common carriers); Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 2(a), 56 Stat. 23 (1942) (agency control of unreasonable prices must be "fair and equitable"). *See also* American Trucking Ass'n v. Atchison, T. & St. F. Ry., 387 U.S. 397, 411 (1967) (intrepreting Interstate Commerce Act); Yakus v. United States, 321 U.S. 414, 423-24 (1944) (interpreting Emergency Price Control Act of 1942).

289. Title VI does not impinge on individual liberties, which could invalidate a broad delegation. *See* Walker v. City of Birmingham, 388 U.S. 307, 317-18 (1967) (dictum) (ordinance delegating to commission broad power to grant or withhold demonstration permits raises substantial constitutional issues and may be void if applied too broadly). Nor does it intrude on powers that the Constitution vests exclusively in Congress and prohibits it from delegating. Field v. Clark, 143 U.S. 649, 692-94 (1892) (statute enabling President to levy tariffs on foreign commerce not unconstitutional because not delegation of legislative power, but only of power to determine facts on which law depends); *cf.* Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (agency may not create new crimes); 1 K. DAVIS, *supra* note 282, § 2.04 (1958) (discussing penal regulations). Title VI does not extend regulatory authority over society as a whole, but only over those who have accepted "government largesse." *Cf.* National Cable Television Ass'n v. United States, 415 U.S. 336, 340-41 (1974) (agency may impose fee on party benefiting from agency regulation). An agency may reasonably expect a benefiting party to conform to its regulations. *Cf.* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (Court will not pass on constitutionality of statute at instance of one who has availed himself of its benefits).

Title VI does not establish any one agency to enforce the statute and to develop special expertise in antidiscrimination efforts. Instead, Congress has chosen to rely on the expertise of each agency in assessing the problems of discrimination within its subject-matter area. Perhaps most important, the range of agency discretion, as Congress understood it, is fairly narrow and intelligible: agencies can choose to focus on either intentional racial discrimination or on "effects" racial discrimination, or on both. These phrases provide a sufficient guide for agencies acting under title VI and its analogues. *See generally* 1 K. DAVIS, *supra* note 282, § 2.01 (discussing doctrine prohibiting delegation of power to agencies without adequate standards).

290. *See* Harper v. Virginia Bd. of Educ., 383 U.S. 663, 669 (1966) (Douglas, J.) ("Notions of what constitutes equal treatment *do* change") (citing *Brown I*).

291. Because Congress has exercised its spending power, rather than fourteenth amendment power, in enacting title VI, there is no occasion to discuss the "ratchet" conception that would invalidate any legislation which is less protective than constitutional standards. *See* Oregon v. Mitchell, 400 U.S. 112, 249 n. 31 (1970); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

292. *Cf.* text accompanying note 136 *supra* (demonstrating that Brennan coalition in *Bakke* recog-

would freeze all initial determinations;[293] the evolutionary model does not.

The evolutionary solution might introduce political elements into title VI. Congress foresaw that possibility, however, and attached primarily political safeguards to the regulatory authority. Replacement of an earlier regulation requires presidential approval,[294] with all the political repercussions from Congress[295] and the public at large which that entails.[296] That the political branches might acquiesce in such a change was the price Congress chose to pay when it decided to allow administrative movement in title VI rather than tying it to judicially fixed—or judicially varying—doctrine.

C. COURTS AND GUIDELINES—AND OTHER INFORMAL DECISIONS

1. Standard of Review

Section 602 authorizes agencies to issue "rules, regulations, and orders of general applicability."[297] Soon after enactment of title VI and the passage of the first regulations under it, federal agencies began to issue "guidelines" and other interpretive memoranda, elaborating on the regulations.[298] The argument that this practice illegally subverts the presidential approval requirement[299] appears untenable. First, in the Stennis Amendment, Congress recognized and condoned the practice.[300] In addition, legislative history reveals that Congress, in the Lindsay Amendment, did not intend to require presidential approval of all agency standards or decisions, but only those of "general applicability."[301] Moreover, if an agency can interstitially interpret a presidentially approved regulation in the process of case-by-case administrative adjudication, it should have the power to declare by advance notice its

---

nized importance of "experience" and "administrative necessity"). In addition, the agency may consider, but is not bound by, "evolving judicial doctrine." 438 U.S. at 337.

293. *See* 414 U.S. at 571 (Stewart, J., with Burger, C.J. & Blackmun, J., concurring) (to be valid, regulations must conform to purpose of act).

294. 42 U.S.C. § 2000d-1 (1976). The authority of an agency merely to rescind a regulation without authority is unclear. *Cf.* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., with Burger, C.J., Stewart & Stevens, JJ., concurring) (unreviewable political question whether President may abrogate treaty ratified by Senate); Adams v. Richardson, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc) (agency may not refuse to enforce title VI). The purpose of Congress' demand for presidential approval, *see* note 217 *supra*, also rules out delegation of authority to less politically visible officers. *See* United States v. Giordano, 416 U.S. 505, 512-25 (1974) (warrant approval power non-delegable).

295. *See* notes 230-53 *supra* and accompanying text (noting previous responses to enforcement changes).

296. *See* Bickel, *"Realistic, Sensible," (II)*, NEW REPUBLIC, April 4 & 11, 1970 (reflecting political commentators' reaction to President Nixon's stand on school desegregation); Osborne, *Paying for Integration*, NEW REPUBLIC, June 6, 1970, at 10 (same); Osborne, *School Statement (I)*, NEW REPUBLIC, April 4 & 11, 1970, at 13 (same).

297. 42 U.S.C. § 2000d-1 (1976).

298. Dunn, *supra* note 68, at 44; *cf.* Lau v. Nichols, 414 U.S. 563, 568 (1974) (illustrating supplementary detail provided by bilingual education guidelines). For a sample of these interpretive materials, see notes 275-76 *supra*.

299. *See* Mayor and City Council of Baltimore v. Matthews, 562 F.2d 914, 926 (4th Cir. 1977) (en banc) (Widener, J., dissenting in part) (HEW guidelines undermining national standard possible only with presidential approval), *vacated and remanded per curiam on other grounds*, 571 F.2d 1273 (4th Cir. 1978) (en banc).

300. *See* 42 U.S.C. § 2000d-6(c) (1976) (section should not be construed to diminish duty to comply with title VI guidelines); note 240 *supra* and accompanying text (discussing passage of Stennis Amendment).

301. 110 CONG. REC. 2499-500 (1963) (remarks of Rep. Lindsay replying to Rep. Poff).

plans for interpretation and application of the regulation.[302] That is what the guidelines and informal opinions purport to do.

Nevertheless, guidelines should not receive the same deference that courts accord to regulations. Absence of presidential approval of guidelines does not invalidate them, but it does leave them without the strong political controls attending promulgation of regulations. More importantly, the legislative history discloses that Congress provided the safeguard of judicial review[303] specifically to ensure that agency action conform to the regulations.[304] The guidelines, therefore, should conform to the standard that Justice Stewart appeared to demand of regulations in *Lau*.[305] Guidelines deserve weight in interpreting ambiguous regulations, but they may not serve, as do regulations, to start the process of substantively defining discrimination.[306] To allow otherwise would defeat the political controls attending promulgation of regulations.[307]

2. Consequences of the Standard of Review

Although guidelines should not serve as substitutes for regulations, it is sometimes difficult to determine whether a guideline is independently introducing new considerations, or is merely elaborating on considerations already present in the underlying regulation. In the context of title VI, however, it is apparent that if a guideline established either an intent or effects test for the first time, it would be invalid as a substitute for regulation.

Congress was well aware that the administration might use its title VI au-

---

302. The Lindsay-Poff colloquy, *id.*, indicates that Congress understood that the general regulations would need to be applied to particular situations. Such specific application would involve by itself a measure of interpretive authority. *See generally* 1 K. DAVIS, *supra* note 282, § 30.11 (application of rules in particularized circumstances).

303. 42 U.S.C. § 2000d-2 (1976).

304. *See House Comm. Hearings, supra* note 51, at 2765-66 (remarks of Rep. Mathias in colloquy with Attorney General Kennedy) (expressing concern with breadth of regulation-making authority).

305. 414 U.S. at 571; *see* Mayor and City Council of Baltimore v. Matthews, 562 F.2d 914, 922 n.6 (4th Cir. 1978) (en banc) (requiring strict agency compliance with own regulations for protection of parties), *vacated and remanded per curiam on other grounds*, 571 F.2d 1273 (en banc); *cf.* Morton v. Ruiz, 415 U.S. 199, 235 (1974) (agencies must follow own regulations affecting individual rights); Service v. Dulles, 354 U.S. 363, 388 (1957) (Secretary of State must act in accordance with own department regulations). This may have been the focus of Justice Stewart's concurrence in *Lau*, a focus blurred by the Justice's collapsing of the tiers of regulation and guidelines. *See* 414 U.S. at 571 (Stewart, J., with Burger, C.J. & Blackmun, J., concurring) (applying HEW guidelines to standard of validity for regulations).

306. The same problem arises in an administrative proceeding when the presiding agency officer must apply a regulation without benefit of published guidelines or other interpretive memoranda. An administrative law judge has no authority, as would the agency at the regulation-making stage, to range widely in defining "discrimination." *See* OFFICE OF STANDARDS, POLICY, AND RESEARCH, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, DIGEST OF SIGNIFICANT CASE-RELATED MEMORANDA (1979) (discussing application of agency regulations to particular situations) (copy on file at *Georgetown Law Journal*). *See also* note 294 *supra* (no delegation permitted).

307. Once guidelines or other policy determinations reveal an agency's specific interpretation and enforcement rules, the only remaining problem is how a court should review an agency's findings of fact. Following common administrative law principles, *see* Steadman v. Securities and Exch. Comm'n, 101 S. Ct. 999, 1004-05, 1008 (1981) (in absence of explicit procedural standards for agency proceedings, courts have discretion to define standard, considering intent of agency and agency practice), the standard of review here should be the "substantial evidence" test. *See* note 206 *supra* (legislative history specifies this standard).

thority to control "racial imbalance."[308] That possibility prompted the sponsors to assure Congress that the executive would exercise its power in compliance with the Administrative Procedure Act, and to accept the Lindsay Amendment requiring presidential approval of proposed regulations. These congressional safeguards can be effective only if the agency makes the crucial choice of which test to use at the regulation stage rather than in the guidelines.[309] Once the agency has adopted a regulatory test for discrimination, the degree of latitude the agency may exercise at the guidelines stage will depend upon which test the agency has chosen.

Intent-Focused Regulations. If the regulations adopt the intentional discrimination standard, one might expect fact-finding to be the agencies' only remaining concern.[310] The mere existence of an intent standard does not indicate, however, what procedures may be used to divine intent. For example, although the Court has at times held that under an intent test the burden is on the plaintiff to prove that the alleged discrimination was intentional,[311] it has failed to apply this approach uniformly in both constitutional[312] and statute-based cases.[313] Indeed, any procedures designed to enforce the intent test would be permissible under the standard of review for guidelines.[314] Accordingly, an agency might specify by guideline that a complainant could use disparate effects to establish a prima facie case of intentional discrimination, placing the burden of rebutting on the grantee.[315]

Under intent-standard regulations, however, the agency could not go further and adopt through guidelines the per se test of impact discrimination. This test uses statistical disparities not as an evidentiary aid to divining intent, but as a substantive definition of the legal wrong.[316] Popularized by Professor

---

308. *See* notes 173-79 *supra* and accompanying text (discussing possibility that title VI could prohibit racial imbalance).

309. If the President should approve a "guideline" and have it published, this decision could be made at the guidelines stage. It is not the label that is important, of course, but what has occurred at the rulemaking stage. *Cf.* note 276 *supra* (same problem).

310. *See* note 307 *supra*.

311. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (burden on complainant to prove that discriminatory intent motivating factor in challenged action).

312. *See* Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (allowing plaintiff to establish prima facie case of intentional discrimination in grand jury selection using statistics; shifting burden to state to rebut presumption).

313. *See, e.g.,* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1093-95 (1981) (after title VII plaintiff makes prima facie case, defendant bears burden of showing possible nondiscriminatory reasons for actions); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 339 (1977) (plaintiff in title VII action bears initial burden of establishing prima facie case of discrimination, shifting to defendant burden of rebutting inference); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (same).

314. *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 372-74 (1973) (remedial administrative rule acceptable if it "implements the objectives of the Act").

315. *See* Texas Dep't. of Community Affairs v. Burdine, 101 S. Ct. 1089, 1093-94 (1981) (similar procedural rules for proving intent, when intent is relevant in title VII cases).

316. The Supreme Court, in Board of Education v. Harris, 444 U.S. 130 (1979), recognized the distinction between an evidentiary effects test and a per se effects test. *Id.* at 143-44. It's subsequent remark that the prima facie case proved under the evidentiary related test could be rebutted by proof of educational necessity, however, showed some confusion concerning exactly what evidence is adduced under that test. *See id.* at 151.

As popularized by Professor Ely, *see* Ely, *supra* note 172, at 1292, and as used in one class of title VII cases, *see* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981) (disparate treatment

Brest in 1970,[317] and apparently read into title VII in *Griggs v. Duke Power Company*,[318] this test is so unconcerned with intent that even non-racial benign intentions are considered irrelevant.[319] Under the test, racial imbalance constitutes discrimination per se.[320] Employment of such a test at the guidelines stage, if the regulations had adopted an intent test, would be unreasonable and ultra vires[321] because it would contradict the intent-focused definition adopred at the presidentially approved level of rulemaking.

Effects-Focused Regulations. In simplest terms, the problems here are identical to those discussed above. If the regulations adopted an effects standard for discrimination, it would appear that agency guidelines using an intent test would be invalid. As noted under the previous subsection, however, the overlap between intent tests and effects tests permits a role for effects anlysis under an intent-focused regulation.[322] Can the same be said for an intent-focused guideline under an effects-type regulation?

Essentially the problems is this: if an agency adopts an effects analysis through proper regulations, the question remains whether it has adopted the evidentiary effects test or the per se effects test.[323] The very phrasing of the semantic problem suggests that the agency should have the power to construe its effects test at the guidelines stage to eliminate any ambiguity, and reviewing courts should accord great deference to that construction.

Equally relevant at this stage, however, is the earlier conclusion that although agencies have wide authority to define, and even periodically to change their definition of, discrimination by regulation, they have no such power

---

case), the evidentiary effects test searches ultimately for evidence of intent. The Court in *Harris*, though, analogizing to the separate *Griggs* line of title VII cases, *see* note 318 *infra*, appeared to understand the test as requiring a court to balance any compelling justifications for discriminatory action against any unintended harm actually caused. 444 U.S. at 141.

This discussion follows the traditional approach and combines the rebuttable effects test with the per se, or irrebuttable, effects test because both tests determine the existence of discrimination through the use of statistics demonstrating that an action has a discriminatory effect. The former incorporates a balancing of competing interests—permitting some interests to outweigh discriminatory effects—while the latter does not. An evidentiary effects test, on the other hand, uses discriminatory effects only as a mechanism for proving discriminatory intent. For purposes of title VI, both the *Harris* version of the evidentiary effects test and the per se test define discrimination by reference to effects; the traditional evidentiary effects test, on the other hand, defines discrimination ultimately by reference to intent.

317. *See* Brest, *supra* note 172, at 110 (impact alone may trigger demand for justification of actions).

318. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employment prerequisite not job related and having discriminatory impact prohibited under title VII).

319. *Id.* at 432.

320. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968) (unintentional discriminatory impact of urban renewal program violates equal protection clause). such discrimination may occasionally be justified, but the court's focus is always on impact as such, not on good intentions. *See* Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971), *aff'd en banc per curiam*, 461 F.2d 1171 (5th Cir. 1972) (compelling state interest may justify state-caused discriminatory effect).

321. One might argue that the per se effects test is permissible here as a mere procedural device establishing a conclusive presumption of intentional discrimination, thus tying the effects test to the implementation of intent-standard regulations. Making the presumption conclusive, however, changes the ultimate focus of the regulation from intent to impact; that choice must be made by the president at the regulationmaking stage. *See* note 309 *supra* and accompanying text.

322. *See* text accompanying note 315 *supra* (use of effects to establish prima facie case of intentional discrimination appropriate).

323. *See* note 316 *supra* (former uses effects as evidence of intent; latter defines discrimination in terms of effects).

when making guidelines. Accordingly, as Justice Stewart observed, the guidelines may only construe the rule of law already announced, not make new law,[324] and as Justice Rehnquist concluded in a related context, agencies may use their power of authoritative construction only once.[325]

These conclusions are important because HEW and its successor departments[326] have construed their wide-ranging regulations to focus on effects per se rather than on effects as evidence of intent.[327] The Court has similarly understood the guidelines as so interpreting the regulations.[328] Thus, any effort to substitute an intent test could be accomplished only by promulgating new presidentially approved regulations.

Silent Regulations. If the regulation is silent on the choice of an intent or impact definition for discrimination,[329] what authority can the agency exercise in adopting a test at the guidelines stage? Because no presidentially approved decision was made by regulation, one conclusion would be that none should be made by guidelines not subject to presidential approval. A preferable approach, however, would be to conclude that because such a regulation proscribes at least some discrimination, and absent a presidential showing of courage, courts should deem the regulations to permit only the less intrusive test of discrimination. Although debate is possible as to which test is less intru-

---

324. *See* Lau v. Nichols, 414 U.S. 563, 571 (1971) (Stewart, J., concurring) (guidelines entitled to great weight because department has "reasonably and consistently" interpreted § 601).

325. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 142-43 (1976) (new title VII guideline, inconsistent with previous agency position, entitled to little weight in construing act).

326. The current regulations of the Department of Health and Human Services (HHS) continue to use an effects-oriented definition of discrimination. *See* 45 C.F.R. § 80.3(b)(2) (1980) (grantees may not "utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination") (emphasis added); *id.* § 80.3(b)(3) (grantee may not "make selections with the *effect*" of subjecting individuals to discrimination) (emphasis added). The same is true of the regulations of the Department of Education. *See* 45 Fed. Reg. 30,802, 30,918-19 (1980) (to be codified in 34 C.F.R. §§ 100.3(b)(2), .3(b)(3) (1981)) (same language as HHS regulations); *cf.* 45 C.F.R. §§ 80.3(b)(2), .3(b)(3) (1979) (original HEW regulations containing same language).

327. *See* 1 OFFICE OF STANDARDS, POLICY AND RESEARCH, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, DIGEST OF SIGNIFICANT CASE-RELATED MEMORANDA 9-13 (December 1981) (closure of hospitals violates title VI if it has "disproportionate adverse [racial] effect" on program beneficiaries unless "necessary" to further program objective and there is no alternative with lesser disproportionate impact); OFFICE OF STANDARDS, POLICY AND RESEARCH, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, DIGEST OF SIGNIFICANT CASE-RELATED MEMORANDA 10-11 (April & May 1979) (admissions tests having "disproportionate impact on minority candidates" unacceptable unless validated).

328. *See* Lau v. Nichols, 414 U.S. 563, 568 (1971) (under bilingual education guidelines discriminatory effect per se discrimination; affirmative duty arises to eliminate adverse effect).

A recognition that *Lau* interpreted the guidelines to establish a per se effects test eliminates some of the confusion regarding how to apply the effects test. In NAACP v. Medical Center, Inc., 50 U.S.L.W. 2032 (3d Cir. June 29, 1981) (en banc), the Third Circuit considered the two different effects theories that can apply to title VII cases in an effort to determine the test for title VI. *Id.* at 2033. The evidentiary effects test employed in some title VII cases is inapposite to a title VI claim because it focuses on intent. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978) (burden on plaintiff to prove prima facie case of intentional discrimination; burden shifts to defendant to justify actions). The per se effects test used in other title VII cases, however, is relevant because it relies primarily on effects. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (dictum) (acknowledging alternative title VII theory in which proof of discriminatory motive unnecessary).

329. Justice Department guidelines have established uniform model standards for regulations under title VI. Dunn, *supra* note 68, at 55. All current regulations appear to adopt an effects test. *See* note 2 *supra* (listing regulations). There may be no current regulations, therefore, that are silent on choice of intent or impact.

sive,[330] the legislative history suggests that in 1964 Congress thought the intent test was less intrusive than the effects test and that adoption of an effects test would demand a stronger display of presidential will.[331] Consequently, agencies whose regulations are silent should have no more authority at the guidelines stage than those whose regulations adopt an intent test for discrimination.[332]

IV. CONCLUSION

This investigation of the history of title VI demonstrates the fundamental misconception of previous arguments as to whether the statute adopts the constitutional "intent" standard or a more probing "effects" test for defining discrimination. Although the path to understanding here is as convoluted as the plot of an Agatha Christie thriller, the evidence suggests that title VI represented a carefully crafted compromise in the House. An essential linchpin of that compromise was the decision to grant executive departments and agencies wide latitude in defining "discrimination." Although later Senate debates contained constitutional rhetoric, the Senate acted, and understood itself to be acting, on no fresh initiatives and only confirmed the House compromise. Indeed, the very political considerations written into the text of title VI negate the idea that the Eighty-Eighth Congress saw the statute as resolutely coterminous with constitutional doctrine. No later Congress has overturned that judgment, and subsequent legislation modeled on title VI and protecting women, handicapped persons, and aged persons, suggests that recent Congresses have understood the statutory language to authorize agency action against forms of discrimination not proscribed by the Constitution.

Title VI specifies no definition of "discrimination"; rather, it authorizes departments and agencies to adopt definitions appropriate for their respective programs. This notion of wide administrative discretion may be unfashionable today,[333] but it was not so regarded by Congress in 1964. In those less cynical days "administrative expertise" was more than a myth and trust in bureaucrats more than a naive and defeated political program.[334] Even the statute's principal check on bureaucratic excess, presidential approval of regu-

---

330. Some might believe that the intent test is very intrusive, because it examines normally sacrosanct mental processes and personal thoughts. *Cf.* Herbert v. Lando, 568 F.2d 974, 984, 995 (2d Cir. 1977) (discovery seeking to establish journalist's motive in libel case impermissible inquiry into thoughts and opinions), *rev'd*, 441 U.S. 153 (1979); FED. R. CIV. P. 26(b)(2) (mental processes of counsel privileged). The effects test, on the other hand, measures objectively verifiable phenomena. The intent test may not be substantially more intrusive than the effects test if effects are used as evidence of intent. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977) (allowing use of objective evidence of effect to prove intent).

331. *See* text accompanying notes 177-91 *supra* (criticism of Celebreeze testimony concerning racial imbalance).

332. *See* text accompanying note 315 *supra* (discussing guideline authority of agencies under intent regulations). The same conclusions would also apply to title IX regulations and guidelines because those regulations are also subject to presidential approval. *See* note 257 *supra* (quoting text of title IX).

333. *See* Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 AD. L. REV. 129, 131 (1980) (explaining erosion of public support for government regulation); *Proceedings of the National Conference on Federal Regulation; Roads to Reform, Panel IV: Improving the Administrative Process—Time for a New APA*, 32 AD. L. REV. 287, 294 (1980) (Judge Leventhal stating that populist mood against technical bureaucrats).

334. *See House Subcomm. Hearings*, *supra* note 43, at 1890 (remarks of Chairman Celler) ("title VI

lations defining discrimination, reflected congressional reliance primarily on political rather than judicial safeguards.

This new investigation into the origins of title VI suggests that solving the problem of how courts should deal with the statute requires a fundamental recasting of the problem. Because Congress adopted a regulatory model for title VI, administrative, rather than constitutional, law provides the framework for analysis. Thus, courts should accord agencies wide definitional power in formulating regulations approved by the President. They should recognize no such power, however, when agencies initially seek to define discrimination by unapproved guidelines or other informal rulemaking. Judicial willingness to enforce the abuse-control mechanism chosen by Congress—presidential approval of regulations—would render unnecessary the courts' attempts to bring agencies to heel by requiring them to echo the court-declared terms of the Constitution.

offers wide discretion . . . . Those who want to give that kind of discretion will vote for title VI"); *id.* at 2164 (remarks of Rep. Rodino) ("administrators have . . . done a superior job").