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IMPLYING A PRIVATE CAUSE OF ACTION UNDER TITLE VI

*Sheldon Joel Tepler**

The 1964 Civil Rights Act¹ was an attempt to quickly end racial discrimination in the United States. It affected the right to vote, receive an education, and engage in gainful employment. Title VI of that Act² signalled American outrage that federally funded programs and institutions, drawing their resources from the monies of taxpayers of all colors, discriminated on the basis of race.³

Title VI proscribes racial discrimination in the administration of federally funded programs and requires that funding agencies act against discriminating parties by, if necessary, cutting off the supporting federal funds. The statute places the burden of forcing compliance with the Constitution and Civil Rights statutes squarely on the shoulders of the federal government. It does not state how a discriminatee might effect a remedy for a lack of compliance with the law—nor does it explicitly confer a private cause of action.⁴

This article does not attempt to divine whether the Supreme Court would imply a private cause of action for a Title VI litigant. Rather, I propose to show that if the Supreme Court were to apply the relevant test for implying private causes of action to Title VI, none could be implied, but this result would be at odds with eighteen years of federal case law, the Supreme Court's prior guidance on the issue, and Congress' post-1964 interpretation of the statute.

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1. 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a- 1975d, 2000a - 2000h-6 (1976, Supp. II 1978 & Supp. III 1979).

2. 42 U.S.C. §§ 2000d - 2000d-6 (1976 & Supp. III 1979). The text of Title VI is reproduced in Appendix A.

3. President Kennedy, in his June 19, 1963 message to Congress said:

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

Senator Humphrey quoting President Kennedy, 110 Cong. Rec. 6543 (1964).

4. Implied private causes of action are judicially inferred rights to relief from injuries caused by another's violation of a federal statute. *Cannon v. University of Chicago*, 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting).

Initially, the proper test for implying a private cause of action will be addressed. In Part II this test is applied to Title VI to demonstrate that no cause of action would be implied. The final section of the paper suggests that this result is inconsistent with the law that has developed around this issue in the intervening years since passage of the Act. The Supreme Court should not apply the test to Title VI, and it should continue to allow litigants to imply a private cause of action under Title VI.

I

The Supreme Court first implied a private cause of action in *Texas & Pacific R. Co. v. Rigsby*.⁵ The Court held that when a statute enacts or prohibits conduct for the benefit of a person, the right to recover damages is implied—*ubi jus ibi remedium*, where there's a law there's a remedy.

Subsequently the Court allowed plaintiffs to imply private causes of action in several cases⁶ addressing the plaintiffs' rights under the Railway Labor Act.⁷ It was apparent in those cases that if a private cause of action had not been implied plaintiffs would have had *no* remedy to enforce the statutory commands which Congress had written into the Act. This result would have robbed the Act of its vitality and thwarted its purpose.⁸ However, for a half century the Court seemed to suggest that no cause of action could be implied when the statutory scheme already provided an alternative remedy or when it expressly allowed private suits for a different version—*expressio unius est exclusio alterius*, the expression of the one (remedy) means the exclusion of others.⁹

In *J.I. Case Co. v. Borak*,¹⁰ however, the Court held that a shareholder could maintain a private cause of action under Section 14(a) of the Securities Exchange Act of 1934,¹¹ despite Congress' express creation of an administrative mechanism for enforcing that statute. The Court reached this result because private suits would effectuate Congress' intent to eliminate deceitful corporate practices

5. 241 U.S. 33 (1916).

6. *Tunstall v. Brotherhood of Locomotive Fireman & Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Virginian R. Co. v. Railway Employees*, 300 U.S. 515 (1937); *Texas & New Orleans R. Co. v. Clerks*, 281 U.S. 548 (1930).

7. 45 U.S.C. §§ 151-163, 181-188 (1976 & Supp. 1978).

8. *Switchmen's Union v. Board*, 320 U.S. 297, 300 (1943).

9. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

10. 377 U.S. 426 (1964).

11. 15 U.S.C. § 78n (a) (1976).

and protect investors.¹² *Borak* inaugurated a decade of greater willingness on the part of the Court to imply private causes of action.¹³

The Court in *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers* (Amtrak)¹⁴ reversed that trend when it rejected the plaintiffs' efforts to imply a private cause of action under the Railroad Passenger Service Act of 1970¹⁵ to prevent the defendant from discontinuing a particular intercity train line. The Court looked to the statute's language, to Congress' intent,¹⁶ and to whether the private cause of action would effectuate the purpose of the statute.¹⁷ It acknowledged that the statute was enacted for the especial benefit of passengers, but revived the *expressio unius est exclusio alterius* doctrine, and found its application dispositive in determining that no private suits should be permitted.¹⁸ The Act's legislative history supported this decision—Congress had explicitly rejected a proposal which would have allowed a private cause of action, and during the committee hearing the Secretary of Transportation and labor representatives observed that as the statute was written none could be implied.¹⁹

12. *Borak*, 377 U.S. at 432-33.

13. See *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

14. 414 U.S. 453 (1974).

15. 45 U.S.C. § 547 (1976).

16. Although now a court must look to the statute's structure solely for the purpose of determining congressional intent, this was not always the case. See *infra* text accompanying note 55. Under *Cort v. Ash*, 422 U.S. 66 (1975), the statute's language was a factor to be considered independent from Congress' intent. See *infra* text accompanying note 22. Theoretically a cause of action could have been implied based on the language of the statute even if a close look at the legislative history indicated that none was intended.

17. See *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975). But cf. *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454, 460 (1975) (without explaining why the Court held that 42 U.S.C. § 1981 (1976) "affords (the plaintiff) a federal remedy against discrimination in private employment on the basis of race.")

18. A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Borany Mills v. United States*, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim - *expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

414 U.S. at 458.

19. *Id.* at 459-60.

The Court announced a test for implying a private cause of action in *Cort v. Ash*.²⁰ There, the issue was whether a private suit for damages against corporate directors could be implied in favor of a corporate stockholder under a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors . . . are to be voted for."²¹ The Court asked 1) Is the plaintiff a member of the class for whose benefit the statute was enacted; 2) Is there any indication of legislative intent, explicit or implicit, either to create or deny such a remedy; 3) Is a private cause of action consistent with the underlying purposes of the legislative scheme; 4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the State, so that it would be inappropriate to imply a cause of action based solely on federal law?²² The Supreme Court reversed the Court of Appeals and found no private cause of action in that case.²³

The *Cort* test, however, quickly proved inadequate, and the Supreme Court has had to reverse the Court of Appeals repeatedly.²⁴ It now appears that the Court has abandoned the *Cort* test in favor of a test that focuses primarily on congressional intent.

The movement away from *Cort* first became apparent in *Cannon v. University of Chicago*.²⁵ In that case the Court applied the

20. 422 U.S. 66 (1975).

21. 18 U.S.C. § 610 (1970 and Supp. III 1973) (repealed 1976).

22. 422 U.S. at 78.

23. *Id.* at 85. It has been said that the *Cort* decision illustrates the significant philosophical differences between the Warren and Burger Courts. Whereas "[u]nder the judicially active Warren Court the absence of express legislative intent was interpreted to permit the judiciary to fashion remedies to further social and statutory policies . . . [u]nder the Burger Court . . . the absence of express legislative intent militates against implication." McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167, 191 (1976). This observation though true of later cases is not true of *Cort*. *Cort* was a unanimous decision. Four of the Justices who voted in *Cort* voted in the unanimous *Borak* decision. *Cort* is of course restrictive to the extent that it establishes criteria, but at least some members of the Court merely intended for it to guide the lower courts on when and when not to imply private causes of action. Subsequently many lower courts continued to imply private actions. *Cannon v. University of Chicago*, 441 U.S. 677, 741-42 (1979) (Powell, J., dissenting).

Moreover, *Cort* did not intimate which of the four factors, if any, were of greater significance. This allowed lower courts to rely on that factor under which it would be easiest to imply private causes of action. *But see* Piper v. Chris Craft Indus., 430 U.S. 1, 25-26 (1977) (the Court refused to imply a private cause of action mainly because it would not effectuate the statute's purpose).

24. *See* California v. Sierra Club, 451 U.S. 287, 302-03 (1981) (Rehnquist, J., concurring).

25. 441 U.S. 677 (1979).

four-pronged *Cort* test for the purpose of determining whether Congress intended to create a private cause of action under Section 901(a) of Title IX of the Education Amendments of 1972.²⁶ The petitioner alleged that the University of Chicago and Northwestern University Medical Schools had admissions policies which discriminated against women in violation of Title IX. The Court held that a private cause of action could be implied.

The Court began its analysis by first observing that "before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent?"²⁷ It then looked at the language of Title IX to see whether the statute was enacted for the benefit of a special class of which the plaintiff was a member. The Court concluded that whereas the statute in *Cort* was enacted for the protection of the general public, Title IX was drafted "with an unmistakable focus on the benefitted class."²⁸ The majority laid great emphasis on this.²⁹ Thereafter it considered the legislative history of Title IX and determined that it was Congress' intent to create a private cause of action. The Court believed that the dual purpose of Title IX was to stop the government from supporting institutions which discriminated unfairly and to provide individual citizens effective protection against those practices. Private remedies would effectuate the latter goal. Finally, discrimination was not primarily a state issue for which a private remedy in the federal courts would not be appropriate. The Court allowed the plaintiff to imply a private action but indicated extreme reluctance to do so, and though applying the test, it stressed that its result had to comport with Congress' intent.³⁰

26. 20 U.S.C. § 1681(a)(1976).

27. 441 U.S. at 688.

28. *Id.* at 691.

29. *Id.* at 690 n.13.

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

Id. at 717. In dicta, *Cannon* further limited a plaintiff's chances to imply a private cause of action. In *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916), the plaintiff merely had to show that he was a member of the class for whose especial benefit the statute was enacted.

Cannon was decided by a deeply divided Court. Chief Justice Burger concurred in the judgment but wrote no opinion.³¹ Justices Stewart and Rehnquist also concurred, and while lauding the Court's movement away from *Borak*, they suggested that the Court's analysis should focus even more on Congress' intent. They also intimated that in the future they would less readily allow plaintiffs to imply a right to private suits.

It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.³²

Justice White, in a dissent joined by Justice Blackmun, contended that the majority had incorrectly construed Title VI's legislative history, and that Congress did not intend for it to provide a private cause of action.³³

Justice Powell dissented, arguing that the *Cort* analysis had to be reappraised because it was an open invitation for federal courts to legislate causes of action not authorized by Congress, in violation of article III of the Constitution.³⁴ He suggested, moreover, the

Borak suggested that the protection of that class had to be one of the chief purposes of the statute. *Cort* required that the protection of that plaintiff be the *primary* purpose of the statute. In *Cannon*, 441 U.S. at 691, the Court indicated that it would be necessary to show that the statute was drafted "with an unmistakable focus on the benefitted class" More recently the issue of whether the statute was meant to protect a particular class has become secondary, though it may be illustrative of legislative intent. See *infra* text accompanying note 55.

31. Chief Justice Burger's cryptic concurrence may suggest that he is no longer comfortable with his position in *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), that Title VI does provide litigants with a private cause of action. *Cannon*, to a large degree, was based on the assumption that a private cause of action could be implied under Title VI. See *infra* text accompanying notes 97-8.

32. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring). Commentators have argued that the realities of legislation make it impractical to restrict federal courts from implying private causes of action. "Legislative is often ambiguous because compromise with the attendant loss of clarity is required for passage of the legislation. Such a result may be unfortunate, but at least frequently in our system, it is the nature of the legislative process." Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 41 (1979). Justice Rehnquist now speaks for a majority and his view forecloses this argument.

33. *Id.* at 718 (White, J., dissenting).

34. *Id.* at 731 (Powell, J., dissenting). Under a *Cort* analysis it would be possible to imply a private cause of action even if Congress intended none, if doing so would effectuate the purpose of the statute. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

existence of one statutory remedy should in most cases preclude the implication of another.³⁵

The Court in *Touche Ross & Co. v. Redington*³⁶ reaffirmed the primacy of congressional intent. The issue was whether customers of securities brokerage firms required to file financial reports with regulatory authorities under section 17(a) of the Securities Exchange Act of 1934³⁷ have an implied cause of action for damages under section 17(a) against accountants who audit such reports, based on misstatements contained therein. The Court focused on the statute's language. But whereas previously it had done so for the purpose of showing whether the statute was enacted for the benefit of a particular class, in this case the Court limited its task solely to determining Congress' intent.³⁸ The statute merely required that broker-dealers keep records and file such reports as the Commission might order. It neither conferred rights on private parties nor proscribed any particular conduct. Without explicitly saying so the Court recalled the *expressio unius est exclusio alterius* maxim. Section 17(a) is flanked by provisions of the Act which expressly provide private causes of action. This indicated that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."³⁹ Having found that neither the statutory language nor legislative history of the Act supported finding a private cause of action, the inquiry ended without an examination of whether a private remedy would effectuate the purpose of the statute or whether the enforcement of section 17(a) was a matter of federal or state concern. The four-pronged *Cort* test was discarded. If the first two *Cort* factors showed Congress' intent to deny a cause of action the Court would not look any further.⁴⁰

In *Transamerica Mortgage Advisors, Inc. v. Lewis*⁴¹ plaintiffs attempted to imply a private cause of action under sections 80b-15⁴² and 80b-6⁴³ of the Investments Advisers Act of 1940. Once again the Court looked to Congress' intent and analyzed it in light of the

35. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

36. 442 U.S. 560 (1979).

37. 15 U.S.C. § 78q(a) (1976).

38. *Touche Ross*, 442 U.S. at 568.

39. *Id.* at 572.

40. *Id.* at 575-76. See *Northwest Airlines Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94 n.31 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

41. 444 U.S. 11 (1979).

42. 15 U.S.C. § 80b-15 (1976).

43. 15 U.S.C. § 80b-6 (1976).

statute's structure and legislative history. Though holding that section 80b-15 allowed private suits, the Court expressly relied on the *expressio unius est exclusio alterius* maxim to hold that section 80b-6 did not.⁴⁴ The Court held as it did even though the plaintiff was a member of the class for whose especial benefit the statute was enacted. This factor shows an intent to create private suits, but the Court evidently does not believe that it alone will help litigants. As in *Touche Ross*, the Court ended its inquiry after determining that under the first two *Cort* factors no private cause of action could be implied.⁴⁵

The Court in *Middlesex County Sewerage Authority v. National*

44. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States*, 278 U.S. 282, 289. See *Amtrak*, 414 U.S. at 458; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471. Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217, 15 U.S.C. § 80b-17, willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206.

444 U.S. at 20.

45. During the 1980 term the Court decided *Texas Indus., Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77 (1981), and *California v. Sierra Club*, 451 U.S. 287 (1981). In each of these cases the Court rebuffed attempts to imply a private cause of action. However, despite *Touche Ross* and *Transamerica* the Court adhered closely to the *Cort* analysis. Though reiterating that the ultimate issue was congressional intent, the *four factors* specified in *Cort* remained the criteria through which intent could be discerned. Justice Rehnquist, concurring in *Sierra Club*, attacked this analysis:

My only difference, and the difference which leads me to write this separate concurrence in the judgement, is that I think the Court's opinion places somewhat more emphasis on *Cort v. Ash*, 422 U.S. 66 (1975), than is warranted in light of several more recent "implied right of action" decisions which limit it. These decisions make clear that the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent . . . that they are not of equal weight . . . and that in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved . . . Surely it cannot be seriously argued that a mechanical application of the *Cort* analysis lends "predictability" to implied-right-of-action jurisprudence: including today's decision, five of the last six statutory implied-right-of-action cases in which we have reviewed analysis by the Courts of Appeals after *Cort* have resulted in reversal of erroneous Court of Appeals decisions . . . While this may be predictability of a sort, it is not the sort which the Court in *Cort v. Ash*, *supra*, or in any other case seeking to afford guidance to statutory construction intended.

451 U.S. at 302-03 (citations omitted) Justice Rehnquist's view has prevailed. See *infra* text accompanying notes 51 and 55.

Sea Clammers Association,⁴⁶ reiterated that the more comprehensive a statute's remedial scheme, the more difficult it is to imply a private cause of action; it also came very close to abandoning the *Cort* analysis altogether. The plaintiffs brought a suit under the Federal Water Pollution Control Act (FWPCA)⁴⁷ and the Marine Protection Research and Sanctuaries Act of 1972 (MPRSA)⁴⁸ seeking damages and injunctive relief for pollution of the Hudson River estuary and the Atlantic Ocean by New York and New Jersey sewage authorities. The Court made the following analysis:

These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act, with compliance orders and civil suits. § 309, 33 U.S.C. § 1319. He may seek a civil penalty of up to \$10,000 per day, *id.*, § 309(d), 33 U.S.C. § 1319(d), and criminal penalties also are available, *id.* at § 309(c), 33 U.S.C. § 1319(c). States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402, 33 U.S.C. § 1342(b)(7). *Id.* . . . In addition, under § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States Courts of Appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. *Id.* at § 1369(b)(2).

These enforcement mechanisms, most of which have their counterpart under the MPRSA, are supplemented by the express citizen-suit provisions in § 505(a) of the FWPCA, 33 U.S.C. § 1365(a), and § 105(g) of the MPRSA, 33 U.S.C. § 1415(g). See nn. 9, 11, *supra*. These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures—which respondents here ignored—including in most cases 60 days' prior notice to potential defendants.

In view of these elaborate enforcements provisions it cannot

46. 453 U.S. 1 (1981).

47. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified, as amended, in scattered sections of 12, 15, 31 and 33 U.S.C.).

48. Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified, as amended, in scattered sections of 16 and 13 U.S.C.).

be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA.⁴⁹

When the structure of the statute—in this case the broad remedial scheme—evidences an intent to deny a private cause of action, none will be implied absent legislative history showing a contrary intent.⁵⁰ The Court added that there was nothing in the legislative history suggesting that the statute was meant to provide for private suits. The Court's analysis merely adverted to *Cort*.⁵¹

The issue in *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*⁵² was whether a private party could maintain a cause of action under Title VII, section 6b of the Commodities Exchange Act (CEA) as it had been amended in 1974.⁵³ The Court acknowledged that Congress' intent was the test for implying a private cause of action, but instead of applying the *Cort* factors for guidance, it focused on the state of the law at the time the legislation was enacted and particularly on Congress' perception of the law it was shaping. It observed that prior to the 1974 amendments to the CEA federal courts had routinely implied private causes of action and that "[i]n that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."⁵⁴ The legislative history of the CEA supported that conclusion. The Court explicitly recognized that congressional intent was the sole test for implying a private cause of action and implicitly recognized for the first time that the *Cort* factors are merely indices of Congress' intent and need not be trudged through if the intent can otherwise be discerned.⁵⁵

49. 453 U.S. at 13-14 (citations omitted).

50. Like *Amtrak*, *Touche Ross* and *Transamerica, Middlesex* derives sustenance from the *expressio unius est exclusio alterius* rule. See also *Texas Indus.*, 451 U.S. at 640 n.11. None of these cases, however, provide guidance on what degree of comprehensiveness will preclude the implication of another remedy.

51. 453 U.S. at 32-33 (Stevens, J., concurring in part, dissenting in part).

52. 102 S. Ct. 1825 (1982).

53. 7 U.S.C. § 6b(A)(C)(1976).

54. 102 S. Ct. at 1841.

55. *Id.* at 1844, 1848 n.1 (Powell, J., dissenting).

In *Jackson Transit Auth. v. Local Div. 1285 Amalgamated Transit Union*, 102 S. Ct. 2202 (1982), the issue was whether litigants could sue in federal court rather than a state court. The Court observed that the private right of action decisions were instructive and that "[w]henver we determine the scope of rights and remedies under a federal statute, the critical factor is the congressional intent behind the particular provision at issue." *Id.* at 2207.

In sum, the Supreme Court has made it clear that the current test for implying a private cause of action is congressional intent. To the extent that *Cort* may have suggested something else, it has been overruled. This means that litigants will now bear a greater burden when trying to imply a private cause of action. It is no longer enough to show that a private suit would effectuate the purpose of the statute or that it is suggested by the language of the statute. These factors are helpful but not dispositive. A plaintiff must go further and show Congress intended a cause of action. This will be difficult because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize an action not mentioned in the statute itself.⁵⁶ Moreover, congressional intent to deny a private cause of action will be readily inferred where the statute contains a broad and complex remedial scheme.

II

With the above principles in mind, I turn now to Title VI to determine whether Congress intended to create through it a private cause of action. The implementing section of Title VI elaborately states the procedures for preventing federally funded programs from discriminating on the basis of race. Each federal department and agency empowered to expend federal funds bears the burden of enforcing compliance with Title VI.⁵⁷ They may do so by terminating federal assistance or by any other already existing means authorized by law.⁵⁸ The rest of the statute deals exclusively with what procedures the agency must follow before effecting an action. If the *ex-*

56. In recent years, however, a Court that is properly concerned about the burdens imposed upon the Federal Judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen. In 1975, in *Cort v. Ash*, 422 U.S. 66, the Court cut back on the simple common-law presumption by fashioning a four-factor formula that led to the denial of relief in that case. Although multi-factor balancing tests generally tend to produce negative answers, more recently some Members of the Court have been inclined to deny relief with little more than a perfunctory nod to the *Cort v. Ash* factors. The touchstone now is congressional intent. See ante, at 13. *Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention, that touchstone will further restrict the availability of private remedies.*

(citations and footnotes omitted). *Middlesex*, 453 U.S. at 24-25 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

57. 42 U.S.C. § 2000d-1 (1976).

58. The statute says "by any other means authorized by law." During the congressional debates Senators Pastore and Ribicoff explicitly noted that it refers to *existing* means. See *infra* text accompanying notes 72 and 74.

pressio unius est exclusio alterius maxim has the force which the Supreme Court suggests it has, then a negative inference for implying a private cause of action has been created by Title VI's language.

A comparison of Title VI with other titles of the 1964 Civil Rights Act supports this negative inference. Titles II⁵⁹ and VII⁶⁰ of the 1964 Civil Rights Act explicitly provide for private causes of action. Title VI was enacted at the same time and like them it addressed race discrimination. Obviously Congress knew how to provide a private cause of action but chose not to when it enacted Title VI. Moreover the legislative history of Title VI indicates that Congress believed the *expressio unius* doctrine was a significant rule of statutory construction and that by providing Title VI with one remedy and not another it was creating a negative inference.⁶¹ To imply a private cause of action would be going against Congress' intent.⁶²

The legislative history of Title VI gives every indication that Congress did not intend to create any remedies beyond those which were explicitly promulgated. Neither its opponents nor advocates viewed it as a self-help statute, but as a paternalistic one through which the *government* could protect discriminates. There were attempts made to include within it an express right to initiate private suits, but they were defeated. On several occasions its proponents

59. 42 U.S.C. § 2000a-3 (1976).

60. 42 U.S.C. § 2000e-5 (1976).

61. Mr. ERVIN. Does not the Senator from Tennessee know as a lawyer that when the courts undertake to ascertain the intent of a legislative body from the language of an act, one of the chief rules they rely upon is that the expression of one thing is the exclusion of another?

Mr. GORE. That is one of the rules of construction, as I understand it Mr. President, the distinguished senior Senator from North Carolina is a far abler lawyer than I. He has a great deal of experience, both in the practice of law and as a member of the Supreme Court of North Carolina. I would not be in a position, therefore, to match knowledge or wits with him with respect to rules of construction.

It is my general view and recollection that one of the rules of construction with respect to legislative intent is that the inclusion of one to the exclusion of the other is for a purpose, and that the exclusion is given due weight in undertaking to reach the intent and purpose of the act.

110 Cong. Rec. 9087 (1964).

62. This barrier did not exist when the Supreme Court analyzed Title IX in *Cannon*, although like Title VI it does not expressly allow a private cause of action. Whereas Titles II, VI and VII all address race discrimination and were enacted contemporaneously in 1964, Title IX addressed gender discrimination and was passed in 1972. When Congress passes a series of statutes addressing a particular issue, *e.g.*, race discrimination, but includes a right to private suits in one statute but not the other, a negative inference is created. This was not the case with Title IX.

expressly stated that Title VI did not provide a private cause of action. The attacks leveled against Title VI also shed light on Congress' intent. Though bitterly criticized as vesting unprecedented power in the *executive branch* of the government and as overly broad in its remedial scope, no one suggested that it gave the federal judiciary too much power or that its passage would spawn voluminous litigation.

Opponents of Title VI attacked it for giving the federal government new and unprecedented powers of coercion. They believed it was "the most expansive blueprint for governmental tyranny which has ever been conceived in the mind of any man on the North American Continent," allowing the government to enforce its race policy by threatening to cut off funds.⁶³ It was bitterly criticized for allowing the federal government to interfere with the operation of public schools⁶⁴ as well as private institutions.⁶⁵ They contended it would allow any federal bureaucrat to withhold funds arbitrarily.⁶⁶ No one suggested that it authorized litigants to sue in federal courts, and would thereby give the federal courts new power. Nor did anyone advert to the voluminous and costly litigation a new private cause of action would engender.⁶⁷ When, as in this case, the scope

63. 109 Cong. Rec. 15422 (1963).

64. 110 Cong. Rec. 5874 (1964).

65. The following exchange shows what was perceived as the outer limits of remediation.

Mr. ERVIN. This illustrates the extent of the tyrannical power which the bill would vest in the President, acting either in person or through any designated Federal executive agency. It is the most tyrannical proposal made to Congress during our lifetime.

Mr. HOLLAND. I thank the Senator from North Carolina.

Now I should like to ask my next question: In my State and also in the State so ably represented by the Senator from North Carolina, and also in the States represented by other Senators now in the Chamber, as the Senator from North Carolina well knows, there are educational institutions organized and operated by Negro churches or Negro private groups. They are operated exclusively for the education of the youth of that race. Am I correct in my understanding that under title VI of the bill, if that course as determined upon long prior to the time when these various colleges were founded—were pursued, they, too, could lose their entire power of borrowing from Federal funds set up to aid them on a self-liquidating basis to build on their campuses needed dormitories and other facilities?

Mr. ERVIN. There would be no question of the power of the President to do that if the bill should pass and be adjudged constitutional. The bill would be broad enough to empower the Federal Government even to deprive the libraries of such colleges of the benefit of the law under which certain Federal publications are given to such libraries.

109 Cong. Rec. 15421 (1963).

66. 110 Cong. Rec. 6049 (1964).

67. The Court, in *Cannon*, suggests that this precise argument was made by Senator

of the remedy was extensively debated and bitterly attacked, the absence of any reference to a private cause of action certainly suggests it was not at issue.

Title VI inaugurated sweeping changes: by conditioning funds upon the equal treatment of black and white citizens it amended every federal statute appropriating funds.⁶⁸ Precisely, however, because of Title VI's obvious impact, its proponents carefully pointed out that it was not intended to affect anything beyond that which it

Talmadge of Georgia. However, a close look at the legislative history shows that Senator Talmadge was referring to the right of judicial review to which a discriminating agency is entitled under section 603 of Title VI, 42 U.S.C. 2000d-2 (1976 & Supp. III 1979) and not to the litigation which may arise from private suits. His argument, moreover, was that the independence of various entities would be threatened by the *federal government*, not by *federal courts*.

Mr. TALMADGE. If the Senator will turn to page 26, section 602, he will see that it reads:

Sec. 602. 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, shall take action to effectuate the provisions of section 601 with respect to such program or activity.

I say to the Senator that the House had the good judgment to eliminate savings and loan associations.

Mr. HUMPHREY. Yes.

Mr. TALMADGE. I continue to read:

Such action may be taken by or pursuant to rule, regulation, or order of general applicability and shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Never in the history of our Republic, in my judgment, has any language so broad, so barbarous, so completely in disregard of the coequal, separate, and coordinate branches of Government, been handed to Congress.

This proposal would authorize a Federal official to disregard the acts of Congress from the beginning of Congress to the present time, and disregard, in totality, appropriations, and say, "I am the law; I am the rule; you must do it my way." . . . If the Senator will look at page 27, section 603, he will find that any *judicial review* would come only after the money had been cut off, not before. Let me point out that this provision is so broad that if two people, person A and person B, applied for a job to cut weeds in the State of New Mexico, on the shoulders of a road, and the highway department employed B, *the Federal Bureau of Roads would be involved in the question of whether or not the State followed a correct policy in hiring B to the exclusion of A*, and would be empowered to withhold every dime of the appropriation for highway aid to the State of New Mexico.

The Senator from Minnesota, able and eloquent as he is, cannot argue that a Federal agency should have such power.

110 Cong. Rec. 5253 (1964) (emphasis added).

68. Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, H.R. No. 914, 88th Cong., 1st sess., (1964), *reprinted in* 1964 U.S. Code Cong. & Ad News 2431, 2453.

explicitly stated. Senator Ribicoff, one of its sponsors,⁶⁹ noted that Title VI did not confer any new federal rights but was merely an exercise of the government's power to condition the disbursement of funds.⁷⁰ He also stated that backers of the bill advocated a narrow and strict interpretation of its contents.⁷¹

The statute provides for a right to enforce it "by any other means authorized by law." This broad statement could have been viewed as creating a private cause of action, but Title VI's advocates flatly rejected this interpretation. Senator Pastore said the language meant that Title VI does not repeal existing law. He expressly stated that that particular phrase does not confer any new rights.⁷²

Throughout the proceedings Senator Ribicoff reiterated that fund cutoffs were a last resort and that lawsuits were preferable because they were less drastic. Given the opportunity, he would have allowed the statute to create a private cause of action.⁷³ He did not, however, interpret the language that way. He agreed with the view that it merely meant that the Attorney General could initiate a lawsuit under Title IV⁷⁴ of the Civil Rights Act if the alleged offender was a school district or public college or that a funding agency could force compliance by promulgating rules and regulations conditioning funding upon a contractual agreement not to discriminate.⁷⁵ It did not create a private cause of action.

Senators Ribicoff and Pastore believed that the full sweep of Title VI would be curtailed by its many procedural safeguards.⁷⁶ Prior to suit the government has to confer formally and informally with the alleged violator. The statute provides that the offending party be advised of his failure to comply and that the government attempt to secure voluntary compliance.⁷⁷ These procedures are designed to avoid litigation.⁷⁸ If private suits were permitted, these expressly mandated procedural safeguards could be bypassed and Congress' express intent to allow offenders to avoid litigation undermined.

69. Remarks made by a sponsor of an act are particularly useful in determining legislative intent. *E.g.*, *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1920-21 (1982).

70. 110 Cong. Rec. 6546 (1964).

71. *Id.* at 8427.

72. *Id.* at 7060.

73. *See infra* text accompanying notes 85-86.

74. 42 U.S.C. § 2000c-6 (1976).

75. 110 Cong. Rec. 7060 (1964).

76. *Id.*

77. 42 U.S.C. § 2000d-1 (1976).

78. 110 Cong. Rec. 7060 (1964).

Title VI's advocates intended for it to be a paternalistic remedy through which the government could protect individuals who could not shield themselves from discrimination; it was not intended to be a self-help statute providing discriminatees with a right to litigate. Congress did not believe that a new statutory right to sue would end discrimination. It recognized that discriminatees were poor and could not afford the high costs of litigation.⁷⁹ There was, moreover, no guarantee that a court order would be universally followed, and possibly every victim of discrimination would have to litigate his claim.⁸⁰ The forces of discrimination were simply more powerful than the individuals whose rights were being abridged.⁸¹ Congress had to devise a remedy other than a right to sue. Title VI is such a remedy. It enables discriminatees to complain to the government and require it to bear the burden of forcing at least federal agencies to comply with the law.⁸²

Representative Gill and Senators Keating, Kuchel and Ribicoff explicitly stated that the statute as it was passed did not provide a

79. 110 Cong. Rec. 6050 (1964).

80. Senator Pastore noted that although *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), held that portions of the Hill-Burton Hospital and Survey and Reconstruction Act, 42 U.S.C. §§ 291-291o (1976), tolerating separate but equal facilities, were unconstitutional under the due process and equal protection clauses, that ruling was not being followed.

The Supreme Court declined to review that decision; so it is the law of our land. Yet, despite the effort of the court of appeals to strike down discrimination in the *Simkins* case, the same court was forced last week to rule again in a *Wilmington, N.C.*, suit.

That is why we need Title VI of the Civil Rights Act, H.R. 7152—to prevent such discrimination where Federal funds are involved.

110 Cong. Rec. 7054 (1964).

Those who opposed Title VI also viewed it primarily as a club with which the federal government could enforce the rights of discriminatees. Senator Robertson protested that under it, if an employer refused to hire a black man, the black man could say the following.

"I am going to the Attorney General and complain." What does title III provide? It provides that the Attorney General may say, "Start a suit." Once you start it, let me know, and I will be there with all the Federal Government behind me."

That is the title III, which was defeated overwhelmingly only a few years ago—in 1957. Yet it is in the present bill.

Id. at 8425.

81. *Id.* at 1540.

82. An examination of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-6 (1976 & Supp. V 1979), suggests why Congress did not intend Title VI to provide a private cause of action. Whereas Title VI makes government action mandatory, the enforcement provision of the Voting Rights Act provides that the Attorney General "may institute . . . an action . . ." 42 U.S.C. 1973j (d)(1976). In the latter instance it is necessary to imply a private cause of action to supplement discretionary government suits. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969). This is not true of Title VI.

private cause of action. Representative Gill and Senator Kuchel noted that the statute, far from being radical and coercive, protected all discriminators from an overzealous federal government seeking to cut off funds, but gave the discriminatee no new rights.⁸³

Senators Keating and Ribicoff believed that cutting off federal funds was a radical measure to be used only as a last resort.⁸⁴ For that reason they proposed an amendment which would have explicitly allowed private suits as an alternative remedy:

Whenever any person has engaged . . . in any act or practice which would deprive any other person of any right or privilege secured by the nondiscrimination requirement of section 601 of the Civil Rights Act of 1963, a civil action or other proper proceeding for preventive relief . . . may be instituted (1) by the person aggrieved

"(b) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedy that may be provided by law."⁸⁵

After the amendment was defeated Senator Keating reiterated that he and Senator Ribicoff wanted the statute to contain a private cause of action, but that their proposal was rejected.⁸⁶ He noted that he was speaking in order to clarify the legislative history of Title VI,⁸⁷ and evidently to indicate that Congress did not intend to create a new private cause of action. Senators Keating's and Ribicoff's re-

83. Representative Gill said:

Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim.

110 Cong. Rec. 2467 (1964). Senator Kuchel observed:

[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of that discrimination.

Id. at 6562.

84. *Id.* at 7065.

85. 109 Cong. Rec. 15375 (1963).

86. Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department.

110 Cong. Rec. 7065 (1964).

87. *Id.*

marks, as those of the sponsors of some of the language ultimately enacted, are an authoritative guide to the statute's construction.⁸⁸

There is additional evidence that members of Congress considered including a private cause of action while Title VI was still before the House Subcommittee. Between May 8, and August 2, 1963, Subcommittee No. 5 of the Committee of the Judiciary conducted hearings on the administration's proposed civil rights bills. It listened to other proposals and rewrote the Act. Its version of Title VI was, in part, the following:

Compliance with any requirement adopted pursuant to this section may be effected (1) by suit under section 703 of this title, (2) by the termination of or refusal to grant or to continue assistance upon an express finding that there has been a failure to comply with such requirement, or (3) by any other means authorized by law.⁸⁹

The Committee, however, deleted section 703 and the private suits remedy.⁹⁰ This suggests that the committee which finally drafted the statute intended to preclude a right to a private cause of action.⁹¹

III

The touchstone for implying a private cause of action is congressional intent, and Title VI's language and legislative history indicate that Congress did not intend to create a private cause of action. This conclusion, however, is at war with eighteen years of federal court decisions and Congress' postenactment understanding of the statute.

The Supreme Court has on three separate occasions intimated that Title VI does provide litigants with a private cause of action. In *Lau v. Nichols*⁹² the Court held that the San Francisco public school system violated Title VI by failing to provide English language instruction to approximately one thousand students of Chinese ancestry. The Court noted that it did "not reach the Equal Protection Clause argument which has been advanced but rely solely on 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to reverse the Court

88. *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982).

89. Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, H.R. No. 914 1st Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad News 2431, 2454.

90. *Id.*

91. See *Bell*, 102 S. Ct. 1912 (1982).

92. 414 U.S. 563 (1974).

of Appeals.”⁹³ It did not inquire whether a private cause of action could be implied, but merely assumed this to be the case.⁹⁴

In *Regents of the University of California v. Bakke*⁹⁵ Justices Powell, Brennan, Marshall, and Blackmun assumed for the purposes of that case that Title VI did create a private cause of action. Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart held that Title VI does create a private cause of action.

Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. . . .

Even if it were, petitioner’s original assumption is in accord with the federal courts’ consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. The United States has taken the same position; in its amicus curiae brief directed to this specific issue, it concluded that such a remedy is clearly available, and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action. The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself. In short, a fair consideration of petitioner’s tardy attack on the propriety of Bakke’s suit under Title VI requires that it be rejected.⁹⁶

Justice White was the lone dissenter on this issue.

The Court next addressed this issue in *Cannon*, and though again shying away from a holding, it provided the lower courts with guidance. Title IX, it noted, is patterned after Title VI and to a certain degree its holding that Title IX provides a private cause of action was based on its view that Title VI contained a private cause of action. In response to defendant’s arguments “(1) that a comparison of Title VI with other Titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable; and (2) that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy,”⁹⁷ a plurality (Justices Stevens, Brennan and Marshall)

93. *Id.* at 566.

94. *Id.* at 571 n.2.

The issue of whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided. *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979).

95. 438 U.S. 265 (1978).

96. *Id.* at 419-21 (Stevens, J., concurring in part and dissenting in part) (footnotes and citations omitted).

97. *Cannon*, 441 U.S. at 710.

responded:

Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable. See *supra*, at 696-699. "For the relevant inquiry is not whether Congress correctly perceived the then state of law, but rather what its perception of the state of the law was." *Brown v. GSA*, 425 U.S. 820, 828. *But each of respondents' arguments is, in any event unpersuasive.*⁹⁸

The lower courts have unanimously perceived the Supreme Court's message to be that there is a private cause of action under Title VI. Every court that has addressed this issue since *Lau*, *Bakke* and *Cannon* has held that private litigants can sue under Title VI; previously most courts had held the same.⁹⁹

98. *Id.* at 710-11 (emphasis added). As noted above, Chief Justice Burger, while a circuit court of appeals judge had already held that Title VI creates a private cause of action. *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). He concurred in *Cannon*.

Recent Supreme Court opinions suggest that Titles VI and IX may not always be treated alike, and concomitantly the fact that Title IX provides a cause of action does not necessarily mean that Title VI does. In *Curran* the Court noted the following:

When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the preexisting remedy.

102 S. Ct. 1825, 1839 (1982). This is precisely the distinction between Title VI and IX. When Congress enacted Title VI the question was whether it intended to create a private cause of action. When it passed Title IX, using the same language which courts had held to have provided a cause of action, the question was whether Congress intended to acquiesce to the judicial interpretation. See *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982) (the court discounted the importance of Title VI to the proper interpretation of Title IX and held that though Title VI did not normally cover employees, employment discrimination does come within Title IX's prohibition). These cases, notwithstanding, the Court's clearest signals, have been that Title VI does provide a private cause of action.

99. *Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1982); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *N.A.A.C.P. v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Uzzell v. Friday*, 547 F.2d 801, *aff'd en banc*, 558 F.2d 727 (4th Cir. 1977), *vacated on other grounds*, 438 U.S. 912 (1978); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Hatton v. County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943 (D. Kan. 1981); *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981); *Coleman v. Casey City Bd. of Educ.*, 510 F. Supp. 301 (W.D. Ky. 1980); *Yakin v.*

Nor has Congress corrected the Courts. On the contrary it has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private suit.

Section 504 of the 1973 Rehabilitation Act,¹⁰⁰ and Section 901(a) of Title IX,¹⁰¹ promulgated in 1972, are patterned after Title VI.¹⁰² When enacting those statutes Congress never indicated that they should be interpreted any differently than the way the courts had been interpreting Title VI.¹⁰³ The enactment of section 718 of the 1972 Education Amendments supports this conclusion.¹⁰⁴ It provided that "[u]pon the entry of a final order . . . for failure to comply with any provision of this chapter or for discrimination on the basis of race, color or national origin in violation of title VI of the Civil Rights Act of 1964 . . . the court . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." This language explicitly presumed the availability of private suits to enforce Title VI.¹⁰⁵ Although post-enactment developments are not accorded the weight of contemporary legislative history they nonetheless are authoritative expressions determining the scope of Title VI.¹⁰⁶

As noted above, if the test for implying a private cause of action—congressional intent—were applied to Title VI, no cause of action could be found. The courts and Congress have reached the opposite result because this test is new. Title VI has in the past been analyzed by the Supreme Court and derivatively by the lower courts under more liberal standards for implying private causes of action.

University of Illinois, 508 F. Supp. 848 (N.D. Ill. 1981); *Patton v. Dumpson*, 498 F. Supp. 933, 937 n.11 (S.D.N.Y. 1980); *Tayyani v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979); *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978); *Association Against Discrimination in Employment Inc. v. City of Bridgeport*, 479 F. Supp. 101 (D. Conn., 1979), *aff'd in part and vacated in part*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1611 (1982); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D. Neb. 1975), *aff'd*, 524 F.2d 1013 (8th Cir. 1975). *But see*, *Green St. Ass'n v. Daley*, 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967) (Title VI does not allow a private cause of action). *Cf.* *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Auth.*, 523 F. Supp. 779 (D. Mass. 1981); *Clark v. Louisa County School Bd.*, 472 F. Supp. 321, 323 n.1 (E.D. Va. 1979).

100. 29 U.S.C. § 794 (1976).

101. 20 U.S.C. § 1681(a)(1976).

102. All three statutes use almost the same language. The main difference is that Title VI prohibits discrimination on the basis of race, while Title IX prohibits it on the basis of gender and section 504 proscribes discrimination against the handicapped.

103. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 420 n.27 (1978).

104. 20 U.S.C. § 1617 (1976) (repealed 1978).

105. *Cannon*, 441 U.S. at 699.

106. *See North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1925 (1982).

Congress did not know the burden was on it to express an intent to allow or deny private suits, and it deferred to the Court's analyses of the statute.¹⁰⁷

Our legal system is not a stagnant institution; it undergoes constant flux. The Supreme Court has overruled itself in the past, and it could indeed retreat from its prior statements in *Lau*, *Bakke*, and *Cannon* and hold that Title VI does not create a private cause of action. This would be a drastic step, however, overruling the vast body of law which has emerged in the last eighteen years and Congress' implicit acquiescence therein. In past analogous situations the Court has refused to take this step, and it should show the same restraint here.

Title VI would then stand on the same footing as section 10(b) of the Securities Exchange Act of 1934.¹⁰⁸ A private cause of action was first implied under section 10(b) in *Kardon v. National Gypsum Co.*, over thirty years ago.¹⁰⁹ Since then a substantial body of case law and commentary has arisen explicitly and implicitly finding a private cause of action under that statute. Section 10(b) did not by its terms create one, and there is no indication that Congress contemplated such a remedy. Nonetheless, the Supreme Court confirmed that "the existence of a private cause of action for violations of the statute . . . is now well established."¹¹⁰ The Court seemed to acknowledge that long-standing federal court precedent uniformly recognizing an implied right should weigh in favor of implication.¹¹¹

By forging a new test which relies on congressional intent the Court restructured the process through which private causes of action are recognized. To be sure, Congress is now on notice that if it wants to include a private cause of action it should make its intentions clear; in the absence of clear congressional intent none will be

107. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

108. 15 U.S.C. § 78j(b)(1976).

109. 69 F. Supp. 512 (E.D. Pa. 1946).

110. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (citations omitted).

111. Nor has the Court's espousal of the congressional intent analysis undermined its deference to practical considerations. In *Cannon*, 441 U.S. at 706 n.40 the Court observed the following:

This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication. *E.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S., at 730; *Machinists v. Central Airlines*, *supra*, at 690; *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. at 39.

In *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 102 S. Ct. 1825, 1845 n.88 (1982), the Court reaffirmed that it would imply a private cause of action where over a long period of time all other courts had been doing so. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 577-78 n.19 (1979).

implied. The message to the lower courts is equally clear. They cannot legislate a cause of action, but must look solely to Congress' intent. However, this would apply only to statutes which are now promulgated or which have never or seldom been ruled upon. The Supreme Court should refrain from casting aside eighteen years of law, which it itself propagated. If faced with the decision, it should acquiesce in the vast body of law which has allowed litigants to imply a private cause of action under Title VI.¹¹²

112. This would be consistent with what Justice Rehnquist said in his concurrence in *Cannon*, 441 U.S. at 718.

It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

He seems to have suggested that the new test for implying a private cause of action, congressional intent, be applied prospectively.

