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Prima Facie Case and Remedies in Title VI Hospital Relocation Cases

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THE PRIMA FACIE CASE AND REMEDIES IN TITLE VI HOSPITAL RELOCATION CASES

As a byproduct of the decay of urban centers, many health care facilities have attempted to relocate in greener suburban pastures.[1] This trend at best condemns inner city residents—often minorities and the poor—to dilapidated medical facilities and inferior medical care. At worst it may completely deny health care

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[1] *See, e.g.*, NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); *Residents Seek to Block Closing of Hospital Serving Their Community*, 13 CLEARINGHOUSE REV. 114 (1979) (citing Sylvester v. Southwestern Ill. Health Facilities, Inc., No. 78-0178-H-082 (Ill. Health Facilities Planning Bd. 1979)); *Class Action Suit by Minority Patients Challenges Inner City Hospital's Move to Suburbs of San Centorio, Texas*, 13 CLEARINGHOUSE REV. 531 (1979) (citing United States v. Bexar County, No. SA78CA419 (W.D. Tex. June 22, 1979)). *See also County Must Reopen Rural Health Clinic or Must Comply with Notice and Hearing Requirements Applicable to County Hospital and Other Facilities*, 11 CLEARINGHOUSE REV. 740 (1977) (citing Huron Community Health Comm. v. Fresno County Bd. of Supervisors, No. 217737-6 (Cal. Super. Ct., Sept. 2, 1977); *Proposed Closing of Portion of County Hospital Allegedly Does Not Comply with California Law; Petitioners Seek Injunctive Relief*, 11 CLEARINGHOUSE REV. 387 (1977) (citing Concerned Citizens Comm. Interested in the Tehama Gen. Hosp. v. Tehama County Bd. of Supervisors, No. 19452 (Cal. Super. Ct., June 1, 1977)). The limited access of the poor to health care is well documented. *See* Schneider & Stern, *Health Maintenance Organizations and the Poor: Problems and Prospects*, 70 NW. U.L. REV. 90, 90-97 (1975); Schwartz & Rose, *Opening the Doors of the Non-Profit Hospital to the Poor*, 7 CLEARINGHOUSE REV. 655 (1974); Rose, *Recent Gains for the Poor in Obtaining Access into Hill-Burton Hospitals*, 7 CLEARINGHOUSE REV. 145 (1973). The limited access of poor and rural Americans is sometimes cited as justification for a national health insurance program. *See Public Ways and Means*, 94th Cong., Ist Sess. 113-17 (Nov. 5, 1975) (testimony of Ronald Brown). *See also* 125 CONG. REC. S12,048 (daily ed. Sept. 6, 1979) (Health Care for All Americans Act introduced by Sen. Kennedy).
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The problem of adequate access to hospitals and health care is at the heart of Senator Kennedy's proposed Health Care for All Americans Act. The purpose of the Act is:

> (I) to make comprehensive, high quality health-care services available to all Americans, through the expertise of private health insurers and providers and the assistance of government;
>
> (2) to provide health-care services of the same quality to all Americans, regardless of their economic condition and without discrimination on the grounds of race, religion, or national origin;
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> ....
>
> (4) to improve the organization and delivery of health-care services;
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> ....
>
> (6) to distribute equitably the total cost of the health-care service provided in the United States;
>
> (7) to enhance the quality of health-care services and the practical availability of such services in every area of the United States ....

125 CONG. REC. S12,049 (daily ed. Sept. 6, 1979).

to urban neighborhoods by ceding all facilities to distant areas inaccessible to inner city residents.[2]

The most powerful legal weapon against this migration may be the private discrimination suit under Title VI of the Civil Rights Act of 1964.[3] Unfortunately, the boundaries of this theory of relief remain indistinct. Two crucial questions remain unanswered: what standard of proof must the plaintiff satisfy in making out his prima facie case, and what remedies are available in a private suit for violation of Title VI. If the Title VI suit is to remain an effective measure against inequitable allocation of medical resources, courts should apply the Title VII disproportionate impact standard to the Title VI prima facie case, and should allow injunctive relief.

I

HISTORICAL BACKGROUND

The history of antidiscrimination law necessarily revolves around the landmark decision in *Brown v. Board of Education*,[4] where the Supreme Court invalidated the "separate but equal" doctrine and held that segregated school systems violate the fourteenth amendment equal protection clause.[5] The decision, however, was merely a starting point; federal courts encountered strong resistance from the states in implementing *Brown's* broad mandate of desegregation.[6] Recognizing the need for a comprehensive federal enforcement mechanism to combat discrimination,[7] Congress passed the Civil Rights Act of 1964. In

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[2] *See generally* D. HUNTER, THE SLUMS 8-9 (1968); F. KRISTOF, URBAN HOUSING NEEDS THROUGH THE 1980's, at xii, 45-46 (1968); SOCIAL WELFARE AND URBAN PROBLEMS (T. Sherrand ed. 1968).

[3] 42 U.S.C. §§ 2000d to 2000d-4 (1976).

[4] 347 U.S. 483 (1954). For a discussion of Title VI and its relationship to early problems with school desegregation, see Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 42-45 (1967). *See also* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 887-970 (1968).

[5] 347 U.S. at 495.

[6] Dunn, *supra* note 4, at 42: "[N]ine years after [*Brown*], . . . only 1.17 percent of the Negro children in the eleven states of the Confederacy were attending desegregated schools."

[7] H.R. REP. No. 914, 88th Cong., 1st Sess. 2 (1963):

> The bill is a comprehensive measure, but it cannot, nor should we expect it to, be a panacea for all our ills. . . .
>
> But this bill can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice. This is of paramount importance and is long overdue. . . . The entire Nation must meet this challenge, and it must do it now.

Title VI of the Act, Congress specifically attacked the use of federal funds to support discriminatory programs. Section 601 provides that "[n]o 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."[8] Congress authorized federal administrative agencies to promulgate and enforce regulations effectuating the provisions of Title VI,[9] subject to judicial review.[10]

[8] 42 U.S.C. § 2000d (1976).

> Federal assistance covered by Title VI includes grants and loans; donations of equipment and property; detail of Federal personnel; sale, lease of, or permission to use Federal property for nominal consideration; and any other arrangement by which Federal benefits are provided. . . . Title VI [generally] applies only to Federal assistance which is received indirectly by the intended beneficiaries, through intermediaries such as State and local governments.

VI UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 1 (1975) (footnotes omitted) [hereinafter cited as VI ENFORCEMENT EFFORT—1974]. Most hospitals or other health care facilities receive Medicare or Medicaid funds. *See* 45 C.F.R. 80.13(f), (g) (1979); notes 15-18 and accompanying text *infra*.

[9] 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 . . . is authorized and directed to effectuate the provisions of section 2000d 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 . . . . 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 . . . 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 . . . .

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

Pursuant to § 602, various departments and agencies, including HEW, promulgated extensive and basically identical regulations for implementing the broad proscription of § 601. *See* 7 C.F.R. §§ 15.1-.143 (1979) (Dep't of Agriculture); 15 C.F.R. §§ 8.1-.15 (1979) (Dep't of Commerce); 22 C.F.R. §§ 141.1-.12 (1979) (Dep't of State); 24 C.F.R. §§ 1.1-.12 (1979) (Dep't of Housing & Urban Development); 28 C.F.R. §§ 42.101-.112, 50.3 (1979) (Dep't of Justice); 32 C.F.R. §§ 300.1-.14 (1979) (Dep't of Defense); 45 C.F.R. §§ 80.1-.13 (1979) (Dep't of Health, Education & Welfare); 49 C.F.R. §§ 21.1-.23 (1979) (Dep't of Transportation).

Title VI agencies modeled their regulations after the initial set of regulations drafted for HEW in 1964. U.S. COMMISSION ON CIVIL RIGHTS, HEW AND TITLE VI, A REPORT ON THE DEVELOPMENT OF THE ORGANIZATION, POLICIES, AND COMPLIANCE PROCEDURES OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 6-7 (1970) [hereinafter cited as HEW AND TITLE VI].

[10] Section 603 of Title VI provides:

> Any department or agency action taken pursuant to section 2000d-1 of this

Although an important goal in enacting Title VI was the prevention of discrimination in education,[11] Congress also sought to eliminate health care discrimination.[12] The Department of Health, Education, and Welfare (HEW) attempted to enforce Title VI in health care institutions,[13] but its early efforts were largely unsuccessful.[14] The creation of the Medicare[15] and

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title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-I of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5 [5 U.S.C. §§ 701-706] and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

42 U.S.C. § 2000d-2 (1976).

[11] *See* 110 CONG. REC. 6545 (1964) (remarks of Sen. Humphrey);

> Title VI would have a substantial and eminently desirable impact on programs of assistance to education. Title VI would require elimination of racial discrimination and segregation in all "impacted area" schools receiving Federal grants under Public Laws 815 and 874.

See also 110 CONG. REC. 6546 (1964) (remarks of Sen. Humphrey).

[12] One celebrated example of discrimination was the program developed under the Hill-Burton Act, 42 U.S.C. §§ 291 to 291o-1 (1976). *See* 110 CONG. REC. 7054 (1964) (remarks of Sen. Pastore); 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey). The Hill-Burton program, launched in 1944, was the first major federal investment in health care delivery. Originally, it was designed to alleviate the problem of bed shortages in hospitals and other facilities. The program required little from the facility beyond an assurance that it would provide a reasonable volume of care to people unable to pay and that services would be available to all persons in the area without regard to race, creed, or color. There was, however, a "separate but equal" exception to the nondiscrimination requirement. HEW eventually issued new regulations that made such segregation a violation of the program, but that was only after judicial resolution of the issue. *See* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc) (participation in Hill-Burton program sufficient state action to invoke fourteenth amendment), *cert. denied*, 376 U.S. 938 (1964).

[13] Title VI was approved on July 2, 1964. On November 27, 1964, HEW issued its first set of regulations for Title VI enforcement. *See* 29 Fed. Reg. 16,298-16,303 (1964) (now codified at 45 C.F.R. §§ 80.1-80.13 (1979)).

[14] In 1965, the United States Commission on Civil Rights conducted a survey of health and welfare services in the South. It found that although written agreements to comply with Title VI had been obtained from most recipients of federal funds, there still continued

> widespread segregation or exclusion of Negroes in federally assisted programs at the State and local levels .... Discriminatory practices included: (a) assignment to wards or rooms by race (b) exclusion of Negroes from many child care institutions, nursing homes, and training facilities (c) segregation of patients in doctors' offices and referral of patients to hospitals on the basis of race (d) segregation in some State operated hospitals and training facilities and some federally assisted local health programs.

HEW AND TITLE VI, *supra* note 9, at 19-20.

Medicaid[16] programs increased HEW's burden by making virtually all hospitals and nursing homes recipients of federal funds, and thus subject to Title VI.[17] In the case of Medicare, HEW required all potential recipient facilities to sign assurances of nondiscrimination with the Office of Equal Health Opportunity (OEHO).[18] But many hospitals and nursing homes that signed assurances were later found to be in violation of Title VI; one hospital, for example, segregated its patients by assigning rooms

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[15] 42 U.S.C. §§ 1395-1395qq (1976). The Medicare program is a federally financed and administered health insurance program for social security recipients. There are actually two parts to the program: Part A is the basic section providing hospital insurance, while Part B "is a voluntary supplementary program covering the costs of physicians' services and a number of other items and services not covered [by Part A]." COMMERCE CLEARING HOUSE, 1978 SOCIAL SECURITY AND MEDICARE EXPLAINED ¶ 601 (1978). Although hospitals are subject to Title VI, physicians covered by Part B are not. VI ENFORCEMENT EFFORT—1974, *supra* note 8, at 118-19.

Medicare reimbursement was, however, "a substantial financial inducement to hospitals and other health facilities to comply with Title VI." HEW AND TITLE VI, *supra* note 9, at 44.

[16] 42 U.S.C. §§ 1396-1396j (1976). Under this program, Congress made federal funds available to those states that chose to provide health benefit programs to the poor. As originally enacted, "the federal Medicaid law left the selection of health care providers primarily to the discretion of each participating state." Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 HASTINGS L.J. 137, 158 (1978). As a practical matter, however, most of the Medicaid facilities were subject to HEW review because they also received Medicare reimbursement. *See* VI ENFORCEMENT EFFORT—1974, *supra* note 8, at 164. For the regulations promulgated by HEW with respect to Medicaid, see 42 C.F.R. §§ 430, 431, 433, 435, 436, 440, 441, 442, 447, 455, 456 (1978).

[17] "HEW was faced with the prospect of administering a program that would reimburse nearly 20,000 health facilities . . . ." Wing, *supra* note 16, at 158. Prior to the passage of the Medicare Act, Hill-Burton funds (*see* note 12 *supra*) were the major source of federal funds to health care facilities. The Hill-Burton program, however, only affected about 500-600 hospitals each year—about 6% of the total subsequently covered by Medicare. HEW AND TITLE VI, *supra* note 9, at 44 n.121.

[18] By signing HEW Form 441 (PHS 12/64), entitled "Assurance of Compliance with the Department of Health, Education, and Welfare Regulation Under Title VI of the Civil Rights Act of 1964," the applicant agreed to observe Title VI "and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) issued pursuant to that title. . . ." In addition, the applicant expressly recognized that "Federal Financial assistance will be extended in reliance on the representations and agreements made in this assurance and that the United States shall have the right to seek judicial enforcement of this assurance." HEW AND TITLE VI, *supra* note 9, at 18-19.

HEW also developed facility compliance report forms to seek information in about a dozen areas for each category of health care provider. Some questions pertained to nondiscriminatory use of facilities. Others involved staff privileges of black physicians and dentists. The most important item of the form however, was the "patient census," a breakdown by race and by occupancy of the patients in the facility. HEW officials used the patient census to determine which facilities required compliance reviews. HEW AND TITLE VI, *supra* note 9, at 28 n.72, 29 n.74.

on the basis of race.[19] Moreover, OEHO rarely denied hospitals clearance for Medicare, and it eventually reinstated most of the facilities it found ineligible.[20] Critics charged that the understaffed OEHO investigated institutions sporadically[21] and inadequately,[22] and that its efforts achieved only "paper compliance."[23]

Since 1967, HEW enforcement efforts in the health care industry have steadily declined.[24] Although HEW increased the number of officers handling Title VI and Medicare, and centralized enforcement in the Office of Civil Rights (OCR), compliance by health care facilities has become a second priority.[25]

[19] VI ENFORCEMENT EFFORT—1974, *supra* note 8, at 116:

> [A]s late as the 1970's, HEW found such blatant discrimination as segregated waiting rooms and different hours for black and white patients by physicians receiving HEW funds, inadequate minority representations on a State health planning council, the use of "Mr.," "Mrs.," and "Miss" to address white but not black patients, and segregation in HEW-funded day care centers.

[20] For example, by January 1968, HEW had cleared 7,400 hospitals and 6,300 extended care facilities for Medicare participation. Thus, 97% of all hospitals were officially committed to nondiscriminatory provision of services. Only 12 hospitals had lost federal funds because of failure to comply with Title VI. HEW AND TITLE VI, *supra* note 9, at 46-47.

All of the 16 hospitals that lost funding during the late 1960's and early 1970's regained the assistance after HEW found they had come into compliance. VI ENFORCEMENT EFFORT—1974, *supra* note 8, at 206 n.540. For an example of a case where HEW terminated funds but later rescinded the order, see *id.* at 206-09 (California Odd Fellows Infirmary).

[21] HEW did not periodically review the institutions if cleared for Medicare. As one report stated in 1970:

> [I]n the absence of periodic compliance review or, at a minimum, a follow-up study, it would be premature to assume that medical facilities have attained complete and lasting compliance with Title VI. Since most extended care facilities and nursing homes also have never been subject to filed review, their current status with respect to Title VI can only be a matter of conjecture.

HEW AND TITLE VI, *supra* note 9, at 47.

[22] In the spring of 1966, OEHO launched a major effort to review hospitals for Medicare certification, including a "crash" effort to train hospital compliance officers. In February, when OEHO was established, there were five permanent staff members; by July, almost 500 persons were engaged in the hospital compliance program. Most of those persons, however, were temporary summer employees and staff on detail from Public Health Service regional offices. Consequently, OEHO shrank from 500 persons to 30 by the fall. HEW AND TITLE VI, *supra* note 9, at 44-46. In addition, one report has criticized the allegedly inadequate training received by the investigators. *Id.* at 16.

[23] *See id.* at 71-72:

> Reliance on paper compliance which characterized the Title VI enforcement effort several years ago is still much too prevalent. Many primary recipients of Federal assistance never have been reviewed and most vendors of service to State agencies also have escaped review.

[24] *See id.* at 45.

[25] By mid-1967, the number of complaints of Title VI violations began to decline and thereafter HEW spent less time investigating health care facilities. HEW AND TITLE VI,

OCR has increased its staff and funding since its early days,[26] but has nonetheless adopted a bureaucratic rather than an enforcement role: it now processes Title VI assurances from institutions certified for Medicare, requires state agencies to submit state enforcement plans, investigates complaints against recipients, and only occasionally conducts special studies.[27] It has largely ignored the discriminatory effects resulting from the relocation of medical facilities.

Recognizing the inadequacy of HEW's enforcement efforts, private plaintiffs have brought their own Title VI suits, even though the statute does not explicitly authorize a private cause of action. From the beginning, most lower courts recognized the private cause of action,[28] and the Supreme Court finally implied its approval of the majority view in *Cannon v. University of Chicago*.[29]

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supra note 9, at 30. The United States Commission on Civil Rights reported that OCR received only 300 complaints against health facilities during fiscal year 1974. VI ENFORCEMENT EFFORT—1974, *supra* note 8, at 180. By comparison, OCR had a backlog of approximately 3,025 complaints, primarily against educational institutions, in 1977. 42 Fed. Reg. 39,824 (1977).

There are perhaps two reasons why educational facilities demanded more attention than medical institutions. First, problems with school desegregation had been at the heart of the Civil Rights Act, and problems implementing *Brown* had put schools in the limelight. Second, medical care was a less controversial topic during the 1960's when the cost was still somewhat contained. The recently skyrocketing cost of medical care, however, has focused attention on medical institutions. *See* SUBCOMM. ON HEALTH, COMM. ON WAYS AND MEANS, & SUBCOMM. ON HEALTH AND THE ENVIRONMENT, 96TH CONG., 1ST SESS., HOSPITAL COST CONTAINMENT 1-7 (Comm. Print 1979); STAFF OF SUBCOMM. ON HEALTH AND THE ENVIRONMENT OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., HOSPITAL COST CONTAINMENT 1-4 (Comm. Print 1977).

[26] OCR was budgeted for 1,102 positions in 1978. 42 Fed. Reg. 39,824 (1977). When the OEHO was handling Title VI enforcement in late 1966, its staff numbered 30. *See* note 22 *supra*.

[27] Wing, *supra* note 16, at 163.

[28] *See* NAACP v. Medical Center, Inc., 599 F.2d 1247, 1254 (3d Cir. 1979); Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.) *cert. denied* 388 U.S. 911 (1967); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn. 1979); Guardians Ass'n v. Civil Serv. Comm., 466 F. Supp. 1273, 1285 (S.D.N.Y. 1979); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146, 1150 (W.D. Tex. 1972) (by implication); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972) (by implication); Gautreaux v. Chicago Housing Auth., 265 F. Supp. 582, 583-84 (N.D. Ill. 1967). *But see* Clark v. Louisa County School Bd., 472 F. Supp. 321, 323 (E.D. Va. 1979).

[29] 441 U.S. 677 (1979). In *Cannon*, an unsuccessful applicant for admission on two medical schools alleged that the schools had discriminated against her on the basis of sex, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1683 (1976). Although the Court did not have before it a Title VI claim, its holding that Title IX allowed a private cause of action relied in part on the fact that "Title IX was patterned after Title VI of the Civil Rights Act of 1964" (*id.* at 694), and that "[i]n 1972 when Title IX was enacted, *the critical language in Title VI had already been construed as creating a private*

Because the private Title VI suit, unlike suits under the fourteenth amendment and 42 U.S.C. § 1983,[30] can be brought against any recipient of federal funds regardless of state action,[31] Title VI offers the plaintiff the broadest, and most promising, avenue of redress.[32]

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remedy" (id. at 696) (emphasis added). The Court thus suggested that Congress had sanctioned implied private actions under Title VI by using it as a model in constructing Title IX.

The Court also interpreted two of its own prior holdings as implicitly recognizing a private cause of action for Title VI:

> Although in neither case [Lau v. Nichols, 414 U.S. 563, 566, 569 (1974) and Hills v. Gautreaux, 425 U.S. 284, 286 (1976)] did the Court in terms address the question of whether Title VI provides a cause of action, in both the issue had been explicitly raised by the parties at one level of the litigation or another. These cases are accordingly consistent, at least, with the widely accepted assumption that Title VI creates a private cause of action.

441 U.S. at 702 n.33.

[30] Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976) (emphasis added).

[31] The source of congressional power to enact Title VI is article I, § 8 of the Constitution—not the enforcement clause of the fourteenth amendment. Section 8 authorizes Congress to lay and collect taxes in order to provide for the general welfare. "The power to tax . . . includes the power to spend and . . . the power to lay down the conditions upon which federal funds are to be dispensed." *See* II STATUTORY HISTORY OF THE UNITED STATES 1019 (B. Schwartz ed. 1970).

[32] Mere regulation of or involvement with a private entity does not constitute state action under the fourteenth amendment or 42 U.S.C. § 1983. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). There must be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. Mere state funding of the injurious private activity, without more express fostering or encouragement, is not a sufficiently close nexus. For cases where courts have refused to find state action despite the receipt of Hill-Burton funds, Medicare and Medicaid payments, tax exemptions, and state regulation, see Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 313 (9th Cir. 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761 (7th Cir. 1973); Ward v. St. Anthony Hosp., 476 F.2d 671, 675 (10th Cir. 1973); Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Jackson v. Norton-Children's Hosp., Inc., 487 F.2d 502-03 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974). *But see* Downs v. Sawtelle, 574 F.2d 1, 7 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (state action exists under § 1983 where hospital relied on Medicare funds for at least 30% of its operating budget, was subject to significant governmental regulation, and most importantly, had its entire board of directors appointed by the town board).

II

NAACP v. WILMINGTON MEDICAL CENTER

The ongoing litigation in *NAACP v. Wilmington Medical Center*[33] exemplifies private plaintiffs' attacks on planned hospital relocations. The dispute arose from the Center's[34] decision to move major components of its system from existing inner-city divisions to an outlying suburban location. Under its proposed "Plan Omega," the Center would close two of its three inner-city hospitals,[35] renovate the third,[36] and open a new $60 million, 800 bed hospital in a suburb eight miles from downtown Wilmington.[37]

The Fourth Circuit, however, has consistently found state action based solely on the receipt of Hill-Burton funds. *See* Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 515 (4th Cir. 1974); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174, 178 (4th Cir. 1974); Sams v. Ohio Valley General Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Harron v. United Hosp. Center, Inc., 384 F. Supp. 194, 197 (N.D. W. Va.), *rev'd on other grounds*, 522 F.2d 1133 (4th Cir. 1974), *cert. denied*, 424 U.S. 916 (1976).

[33] This case stretches across seven reported decisions. In chronological order, they are: NAACP v. Wilmington Medical Center, Inc. (WMC), 426 F. Supp. 919 (D. Del. Jan. 19, 1977); NAACP v. WMC, 436 F. Supp. 1194 (D. Del. Aug. 16, 1977); NAACP v. WMC, 453 F. Supp. 280 (D. Del. Apr. 7, 1978); NAACP v. WMC, 453 F. Supp. 330 (D. Del. June 21, 1978); NAACP v. Medical Center, Inc., 584 F.2d 619 (3d Cir. Aug. 18, 1978); Wilmington United Neighborhoods v. United States, 458 F. Supp. 628 (D. Del. Sept. 22, 1978); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. June 4, 1979). This note uses the name *"Wilmington"* to refer to the litigation as a whole.

[34] [The Center is] a privately owned, nonprofit general hospital organized and incorporated [in Delaware]. . . . As a multi-unit hospital system, [it] is . . . the principal health care resource for the State of Delaware and especially for the city of Wilmington and the surrounding metropolitan area. Of the eight general hospitals in the state, four are controlled hy [the Center]. Its three major divisions, moreover, operate about 1,100 beds or nearly 75 percent of the available acute care heds in the city and New Castle County.

NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280, 285 (D. Del. 1978). Obviously, the Center's plan will critically affect the allocation of medical resources in Delaware.

[35] The Center controls three major hospitals and a smaller rehabilitation facility in Wilmington. Plan Omega would close the General Division hospital (280 beds) and the Memorial Division hospital (282 beds). *Id.* at 285 & n.10.

[36] Under the plan, the Delaware Division hospital would be restored and modernized, and would be the Center's only sophisticated health care resource in that city. The Delaware Division hospital now has 542 beds, but under the plan it would be reduced in size to 250 beds. NAACP v. Medical Center, Inc., 453 F. Supp. at 286-87. In effect, the plan would decrease the number of available beds in Wilmington from 1,104 to 250. 599 F.2d 1247, 1249 n.5 (3d Cir. 1979).

[37] The Court cited a variety of factors favoring the relocation plan. Most significant was a population shift from the city to the suburbs. Relocation would facilitate the development of a "doughnut" shaped health care system—with the acute tertiary care center occupying the hole of the doughnut and satellite facilities located on the periphery. 453 F. Supp. at 286.

The program would remove most special pediatric, obstetric, tertiary care, and sophisticated services from Wilmington, but would retain emergency room services.[38]

The plaintiffs contended that Plan Omega would "result in a segregated, dual hospital system, in violation of . . . Title VI and section 504"[39] of the Rehabilitation Act of 1973.[40] They predicted that the Center's remaining urban facility would become a "ghetto" hospital serving primarily minorities and the poor, elderly, or handicapped, while the proposed suburban hospital would treat only the more affluent white population. The plaintiffs also feared that the relocation of certain acute care services exclusively at the new suburban hospital would make them virtually inaccessible to many handicapped and minority residents.

The legal battle began with the plaintiffs' attempt to invalidate the HEW Secretary's approval of the plan.[41] The court ordered an HEW investigation,[42] which discovered potential vio-

[38] *Id.* at 286-87 n.14.

[39] *Id.* at 289.

[40] 29 U.S.C. § 794 (1976) (amended 1978). Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The section is similar to § 601 of Title VI. *See* note 8 and accompanying text *supra*. In their first suit, the plaintiffs put particular emphasis on HEW's regulations. In seeking review of the Secretary's decision approving Plan Omega, they pointed out that the predecessor to 45 C.F.R. § 80.3(b)(3) (1979) specifically proscribes site selections that would have a discriminatory effect. 426 F. Supp. at 925 n.18. *See also* notes 106-115 and accompanying text *infra*.

[41] *See* 426 F. Supp. 919 (D. Del. 1977). On March 16, 1976, the Center applied to the Bureau of Comprehensive Health Planning (BCHP) for approval of Plan Omega under § 1122 of the Social Security Act, 42 U.S.C. § 1320a-I (1976) (amended 1979). Such approval would assure the Center that federal compensation for Medicare, Medicaid and programs for maternal and child health services would not be reduced on the ground that its capital expenditure program (Plan Omega) was "unreasonable" or "unnecessary." 453 F. Supp. at 288. Congress expressly enacted § 1122 to prevent the use of federal funds for unnecessary capital expenditures. At the same time, Congress wanted to encourage planning activities with respect to health services and facilities in the various states.

The BCHP, with the help of a local health planning group known as the Health Planning Council, Inc. (HPC), reviewed the Center's application for § 1122 approval, conducted public hearings, and ultimately approved Plan Omega in June 1976. About two months later, HEW, after receiving the reports from BCHP and HPC, approved the plan. 426 F. Supp. at 923.

[42] 426 F. Supp. at 925. The district court directed the Secretary to investigate whether the proposed relocation violated either Title VI or § 504, and to file a report describing the method he planned to use to proceed on the complaint. The court managed to avoid the question of whether or not a private cause of action existed, electing to treat the plaintiffs' complaint as "information" sufficient to trigger a Title VI investigation under the Secretary's regulations. *Id.* at 924.

lations of Title VI and section 504, and led to plan changes designed to achieve compliance.[43] The plaintiffs then argued that both the investigation and the plan changes were inadequate. The court, however, found that HEW's determinations were not arbitrary and capricious, and upheld the investigation and plan changes.[44]

The plaintiffs' other gambits fared no better. They argued that the Center could not build the proposed hospital because the Secretary had failed to file an environmental impact statement[45] as required by the National Environmental Policy Act of 1969.[46] The courts, however, found that the Act did not apply since the Secretary's approval was not "major federal action."[47] Undaunted, the plaintiffs tried another tack and challenged the constitutionality of the administrative regulations promulgated by the Secretary under Title VI and section 504. But the court found no due process violation in HEW's failure to accord plaintiffs a trial-type hearing on their dissatisfaction with the Secretary's voluntary settlement of their complaint. It also rejected an equal protection challenge of the differing procedural protections afforded recipients and complainants.[48]

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[43] 453 F. Supp. at 310-30. Following the court's directive, OCR carried out an extensive investigation that lasted more than six months and produced a record exceeding 6,000 pages. In July 1977, OCR concluded that Plan Omega would violate both Title VI and § 504, and enumerated twelve areas in which the plan would have to be "modified to achieve compliance with the statutes and the Secretary's regulations." *Id.* at 291-92.

Several months of serious negotiations between the Center and OCR followed OCR's determination that Plan Omega would violate Federal law. On November 1, 1977, the Center signed a contract of assurances that obligated it to make certain changes in the plan in order to achieve compliance. These changes included a comprehensive transportation plan featuring bus service between the inner-city hospital and the suburban hospital. *Id.* at 312.

[44] The court also found that the administrative remedy provided under § 602 was exclusive and that plaintiffs therefore did not have a private cause of action under Title VI or § 504. This holding was later reversed. *See* 599 F.2d 1247 (3d Cir. 1979).

In another suit, the plaintiffs unsuccessfully claimed that the § 1122 approval had expired due to the Center's failure to incur "an enforcement contract" within 18 months, as required by 42 C.F.R. § 100.109(a) (1979). 458 F. Supp. at 642-43 & n.66 (D. Del. 1978).

[45] 426 F. Supp. at 425.

[46] 42 U.S.C. § 4332(2)(c) (1976). The district court had ordered the Secretary to reconsider his decision not to file a statement. 426 F. Supp. at 926. The Secretary reconsidered and again refused to file even though he recognized that Plan Omega would significantly affect the quality of the human environment.

[47] See 436 F. Supp. at 1202. The court of appeals held that § 1122 approval did not amount to a direct financial commitment that would require an environmental impact statement. Morever, the court noted that HEW's sole participation in the project was the Secretary's ministerial approval of a capital expenditure proposal. 584 F.2d at 634.

[48] *See* 453 F. Supp. 330 (D. Del. 1978). The regulations in issue were 45 C.F.R. §§ 80.7-.12 (1979). Specifically, the equal protection argument centered on the fact that

Finally, plaintiffs alleged that the planned relocation violated Title VI. Of all the theories of recovery, only the Title VI claim survived summary proceedings at the outset of the litigation.[49] But even though the plaintiffs were allowed to proceed to trial on the merits,[50] two crucial yet unresolved issues cloud the future of *Wilmington* and all other Title VI suits.

III

THE TITLE VI SUIT

A. *Establishing a Prima Facie Case Under Title VI*

1. *The Current Split of Authority*

The private Title VI suit may prove a potent weapon for plaintiffs challenging discriminatory hospital relocations. Its utility, however, will largely depend on the standard of proof required to establish a prima facie case of discrimination. Faced with vague statutory language,[51] inconclusive legislative history,[52] and ambiguous Supreme Court interpretations,[53] lower courts have applied three different standards.

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applicants for, or recipients of, federal asistance were accorded a hearing before a grant of assistance to them was withheld or terminated, whereas persons charging a particular recipient with discrimination received no hearing on the merits of their claims. 453 F. Supp. at 347.

[49] *See* 599 F.2d 1247 (3d Cir. 1979). This appeal followed the Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979), authorizing a private remedy under Title IX and Title VI. Reversing the district court, the Third Circuit held that a private cause of action was implicit in § 601 of Title VI and § 504 of the Rebabilitation Act of 1973 for plaintiffs who seek declaratory and injunctive relief. It remanded the case for a trial on the merits.

[50] At the time this Note was written, the trial court had not rendered a final decision on the merits of the *Wilmington* case.

[51] The broad language of Title VI does not explicitly define discrimination or indicate the standard of proof necessary for a prima facie case. *See* notes 8-10 and accompanying text *supra*. On its face, the statute prohibits any discrimination, intentional or unintentional, that denies, on the basis of race, color or national origin, "the benefits of . . . any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976).

[52] Congress clearly meant to prevent federal funds from supporting discriminatory programs. *See, e.g.*, 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey). But whether or not Congress intended Title VI to cover programs that only have a discriminatory impact—as opposed to those with a discriminatory purpose—is unclear. Congress simply did not define "discrimination." In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 286-87, 340, the Supreme Court inferred from Congress' refusal to define "discrimination" an intent to use the constitutional definition under the equal protection clause of the fifth amendment. *See* notes 81-86 and accompanying text *infra*.

[53] *See* notes 79-103 and accompanying text *infra*.

a. *The "Irrebuttable Effects" Standard.* An "irrebuttable effects" standard creates the lightest burden for plaintiffs. Under this model, the plaintiff establishes a prima facie case simply by showing that the policy or practice in question has a discriminatory impact. The defendant cannot rebut with any nondiscriminatory justification; he prevails only by showing that his actions did not cause the discriminatory impact.

In *Lora v. Board of Education*,[54] the court apparently applied this standard in a suit challenging New York City's procedures and facilities for the placement of education of emotionally disturbed children.[55] The plaintiffs claimed that the defendants' "special day school"[56] system perpetuated a racially segregated school system in violation of Title VI and various constitutional and statutory provisions.[57] They contended that the city based the referral and assignment of students to special day schools on "vague and subjective criteria"[58] which had a racially discriminatory impact on black and Hispanic children.[59] The court held that evidence of discriminatory impact sufficed to establish a prima facie violation of Title VI and that "[n]o intent to discriminate need be demonstrated."[60] Once the plaintiffs established a prima facie violation, the court added, the burden would shift to the "defendants to rebut the inference that their actions are a substantial cause of the racial disparity . . . ."[61] The court did not recognize any other defenses to the plaintiffs' Title VI claim.[62]

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[54] 456 F. Supp. 1211 (E.D.N.Y. 1978).

[55] The plaintiffs' allegations included: vague and subjective placement criteria; excessive class size; inadequate support services; deficiencies in the curriculum, extra-curricular activities, and special programs; and racial and economic discrimination in private institutional placement. *Id.* at 1245-56.

[56] The special day schools are designed to provide a therapeutic atmosphere for children whose emotional problems manifest themselves in severe aggression. *Id.* at 1213-14.

[57] The plaintiffs' original complaint alleged violations of the fourth, eighth, thirteenth, and fourteenth amendments, as well as infringements of their rights under the Civil Rights Statutes, 42 U.S.C. §§ 1981, 1983, 2000d (1976). Later, the plaintiffs amended their pleadings with claims based on the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1976) and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976). *Id.* at 1215.

[58] 456 F. Supp. at 1216.

[59] *Id.*

[60] 456 F. Supp. at 1277.

[61] *Id.*

[62] The Court later explained in detail the burdens of proof for *constitutional* claims, but again it failed to specify what, if any, steps the defendant could take (other than the causation defense) to rebut a Title VI prima facie case. *Id.* at 1277, 1284.

b. *The Title VII Standards.* Several courts[63] have erected a more formidable barrier to plaintiffs by applying the standards developed in Title VII[64] employment discrimination cases. Title VII plaintiffs may proceed by showing either "disproportionate impact" or "disparate treatment." Both theories allow the defendant to counter the plaintiff's prima facie showing of discriminatory effects with nondiscriminatory justifications.[65]

Under the disproportionate impact standard, the plaintiff establishes a prima facie case by proving that the employer's policy, although fair on its face, has a substantially disproportionate impact on his class, that is, "that the tests in question select applicants for hire or promotion in a . . . pattern significantly different from that of the pool of applicants."[66] The burden then shifts to the employer to prove that its policy is job-related.[67] If the employer meets that burden, the plaintiff may still prevail by showing that other less discriminatory "tests or selection devices . . . would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[68] By demonstrating other alternatives, the plaintiff shows that the defendant's choice of testing device was probably motivated by discriminatory intent.[69]

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[63] *See* Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal. Oct. 16, 1979); Guardians Ass'n v. Civil Serv. Comm'n, 466 F. Supp. 1273, 1285-86 (S.D.N.Y. 1979), *See also* Gilliam v. Omaha, 388 F. Supp. 842, 847-48 (D. Neb. 1975).

[64] 42 U.S.C. §§ 2000e to 2000e-17 (1976). This title of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, sex, religion, and national origin by public and private employers. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976 & Supp. 1979).

[65] For a thorough discussion of the two standards, see Friedman, *The Burger Court and the Prima Facie Case in Employment Litigation: A Critique*, 65 CORNELL L. REV. 1, 3-15 (1979). The Supreme Court has never specified the quantum of adverse impact sufficient to establish a prima facie case. B. SCHLEI & P. GROSSMAN, *supra* note 64, at 73-74. Consequently, lower courts have differed on what is "substantial adverse impact." A number of courts have used a guideline prescribed by the Office of Federal Contract Compliance (OFCC). Under the OFCC rule, "adverse effect" occurs when the acceptance rate of the protected group is less than 80% of the acceptance rate of the remaining group. *See* cases cited in B. SCHLEI & P. GROSSMAN, *supra* note 64, at 35 n.28 (Supp. 1979).

[66] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[67] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[68] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

[69] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). "Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Id.*

Under Title VII's disparate treatment standard, the plaintiff makes out a prima facie case by showing that he belongs to a class protected by Title VI;[70] that he applied for a job he was qualified to perform and was nevertheless rejected; and that the position remained open and the employer continued to seek applicants with the plaintiff's qualifications.[71] The defendant must then "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[72] If the defendant meets that burden, the plaintiff may show that the defendant's justification is merely a pretext camouflaging a discriminatory purpose.[73] This third stage focuses on the defendant's subjective motivation.

Although both Title VII theories allow a claimant to establish a prima facie case with evidence of discriminatory impact, the disproportionate impact standard probably places a heavier prima facie burden on the plaintiff because it often requires a complicated statistical showing of effects.[74] On the other hand, the disproportionate impact standard also makes it more difficult for the defendant to rebut at the second stage. It is surely harder for the employer to prove job-relatedness—a showing that frequently entails complicated statistical proof of the validity of testing procedures[75]—than to present "some credible evidence"[76] of a

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[70] Title VII protects against discrimination in employment on the basis of race, color, sex, religion, and national origin. 42 U.S.C. §§ 2000e to 2000e-17 (1976) (Title VI prohibits only discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d (1976)).

[71] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted).

[72] *Id.* As one commentator has noted, this apparently straightforward language contains a dual ambiguity:

> First, the Court's use of "articulate" as opposed to "prove" perhaps implied that the defendant bears only a light burden after the plaintiff establishes a prima facie case. Second, the Court failed to indicate clearly whether the defendant's evidence must show the existence of a single, nondiscriminatory justification or must help negate the presence of *any* discriminatory motive, [emphasis in original].

Friedman, *supra* note 65, at 4. Two later Supreme Court decisions also failed to define the defendant's burden, beyond saying that an employer need not prove the absence of discriminatory purpose. *See* Board of Trustees v. Sweeney, 439 U.S. 24, 24 n.1 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 64, at 314.

[73] Board of Trustees v. Sweeney, 439 U.S. 24 n.1 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

[74] *See* B. SCHLEI & P. GROSSMAN, *supra* note 64, at 1161-93 (1976); *id.* at 318-30 (Supp. 1979).

[75] *See* B. SCHLEI & P. GROSSMAN, *supra* note 64, at 75-126 (1976); *id.* at 36-38 (Supp. 1979).

[76] Friedman, *supra* note 65, at 7.

nondiscriminatory reason for the employee's rejection.[77] Moreover, by decreasing the chances of a successful rebuttal by the defendant, the disproportionate impact standard tends to dispose of litigation without forcing the plaintiff to demonstrate the defendant's intent.[78]

The plaintiff's response to the defendant's rebuttal may also differ under the two standards. The disproportionate impact plaintiff need only show that a less discriminatory selection device would serve the employer's legitimate interest. In contrast, the disparate treatment plaintiff must prevail on the issue of pretext, a question relating much more directly to the defendant's state of mind.

c. *The Constitutional Standard.* Recently, a number of courts[79] have applied the very strict discriminatory purpose test originally developed in suits alleging constitutional violations.[80] The Supreme Court's opinion in *Regents of the University of California v. Bakke*[81] is responsible for this trend. In *Bakke*, a Title VI suit challenging a medical school's affirmative action admissions program, five members of the Court, in two separate opinions, concluded that Title VI proscribed only discrimination that the fourteenth or fifth amendments would prohibit if state action were present.[82] Citing "clear" legislative intent, Justice Powell asserted that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amend-

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[77] *See* note 72 *supra*.

[78] B. SCHLEI & P. GROSSMAN, *supra* note 64, at 1156.

[79] *See* Baker v. City of Detroit, Nos. 5-71937, 5-72264 (E.D. Mich. Oct. 1, 1979); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn. 1979); Valadez v. Graham, 474 F. Supp. 149, 159 (M.D. Fla. 1979); Harris v. White, 21 F.E.P. Cases 389, 392 (D. Mass. 1979).

[80] In Washington v. Davis, 426 U.S. 229 (1976), the Court held that proof of disproportionate impact did not suffice to prove unconstitutional racial discrimination. To prevail on a constitutional claim of racial discrimination, the plaintiff must prove discriminatory intent. *Id.* at 238-39, 242, 245.

[81] 438 U.S. 265 (1978). For a discussion of *Bakke* and the issues it left unresolved, see Motley, *From Brown to Bakke: The Long Road to Equality*, 14 HARV. C.R.-C.L. L. REV. 315, 325-27 (1979).

[82] 438 U.S. at 287, 328. The five justices were Powell, Brennan, Marshall, Blackmun, and White. *See* notes 83-86 and accompanying text, *infra*. The remaining four justices declined to consider "the congruence—or lack of congruence—of the controlling statute and the Constitution." *Id.* at 417.

ment."[83] In a concurring opinion joined by three other justices,[84] Justice Brennan reached the same conclusion.[85] He reasoned that "Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution."[86]

Lower courts have split over the proper interpretation of *Bakke*. Some courts read *Bakke*'s equation of Title VI's scope with that of the Constitution to imply that Title VI plaintiffs must meet the constitutional standard of proof and show discriminatory purpose as part of the prima facie case.[87] Other courts, finding no specific holding in *Bakke* bearing on standards of proof, rely on the Court's decision in *Lau v. Nichols*[88] and require only a showing of discriminatory effects.[89] In *Lau*, the Court held that a school system's failure to provide English instruction to approximately eighteen hundred Chinese-speaking children violated Title VI by denying them a meaningful education.[90] Citing HEW regulations that clearly defined an effects test, the Court required no proof of discriminatory intent.[91]

The Supreme Court recently passed up a chance to clarify the *Bakke* language in *Board of Education v. Harris*.[92] In *Harris*, a school board sued to enjoin HEW from holding it ineligible for assistance under the Emergency School Aid Act (ESAA).[93] HEW

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[83] 438 U.S. at 287. Justice Powell admitted that "isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme," but said that "these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates." *Id.* at 284-85 (footnote omitted).

[84] Justice Brennan wrote for Justice White, Marshall, and Blackmun.

[85] 438 U.S. at 328.

[86] *Id.* at 340.

[87] *See* Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn. 1979); Valadez v. Graham, 474 F. Supp. 149, 159 (M.D. Fla. 1979); Harris v. White, 21 F.E.P. Cases 389, 397 (D. Mass. 1979).

[88] 414 U.S. 563 (1974).

[89] *See* Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal. Oct. 16, 1979); Jackson v. Conway, 476 F. Supp. 896, 903 (E.D. Mo. 1979) (citing Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978) and *Lau*); Guardians Ass'n v. Civil Serv. Comm'n, 466 F. Supp. 1273, 1285 (S.D.N.Y. 1979).

[90] 414 U.S. at 568-69.

[91] *Id.* at 567-68. The Court relied on 45 C.F.R. §§ 80.3(b)(1), 80.3(b)(2), 80.5(b) (1979).

[92] 100 S. Ct. 363 (1979).

[93] 20 U.S.C. §§ 1601-1619 (1976). The Act was repealed and simultaneously re-enacted with amendments by Title VI of the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2252, 2268 (effective Sept. 30, 1979). The reenactment is recodified as 20 U.S.C. §§ 3191-3207 (1979). Under the ESAA, an educational agency is ineligible for assistance if, after the date of the Act, it

had based its ineligibility determination upon a finding by its Office of Civil Rights that the Board's school system violated Title VI.[94] The Court concluded that evidence of impact was sufficient for a prima facie case under the ESAA, citing statutory language expressly proscribing discriminatory effects.[95] It left the issue open with respect to Title VI.[96]

The majority, however, hinted that it preferred a purpose test for Title VI. In dicta, Justice Blackmun noted the severity of the cut-off remedy under Title VI and speculated the "Congress would wish this drastic result only when the discrimination is intentional."[97] In a footnote, the Court added that the similarity of remedies under Title VI and the ESAA did not necessarily imply that Title VI had as broad a scope as the ESAA.[98]

Justice Stewart, writing for the three dissenters,[99] directly confronted the Title VI issue. He observed that *Bakke* construed Title VI to prohibit only discrimination violative of the fifth amendment or the equal protection clause of the fourteenth amendment.[100] Because those constitutional provisions prohibit only purposeful discrimination, he reasoned that Title VI "contain[s] not a mere disparate impact standard, but a standard of intentional discrimination."[101]

The state of the law after *Bakke* and *Harris* is far from clear. Four members of the *Bakke* Court expressed "serious doubts" about *Lau's* "implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI."[102] An

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had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency.

20 U.S.C. § 3196(c)(1)(B) (Supp. II 1978) (formerly 20 U.S.C. § 1605(d)(1)(B)).

[94] HEW found that the school district had discriminated on the basis of race in the assignment of teachers and maintained a segregated system in violation of the fourteenth amendment, the ESAA, and Title VI. Board of Educ. v. Califano, 584 F.2d 576, 587 (2d Cir. 1978), *aff'd sub nom.* Board of Educ. v. Harris, 100 S. Ct. 363 (1979).

[95] 100 S. Ct. at 366.

[96] *Id.* at 374.

[97] *Id.*

[98] *Id.* at 374 n.13.

[99] Justices Powell and Rehnquist joined in the dissent.

[100] 100 S. Ct. at 379 (dissenting opinion, Stewart, J.).

[101] *Id.*

[102] 438 U.S. at 352 (concurring and dissenting opinion, Brennan, J.).

equal number of justices, however, did not question *Lau*'s precedential value.[103] The ninth member, Justice Powell, concluded that Title VI tracks the Constitution in scope but nevertheless managed to distinguish *Lau*.[104] Arguably, *Lau* and its effects standard therefore survive *Bakke*.

All nine members of the *Harris* Court suggested that Title VI prohibits only intentional discrimination,[105] but these views are dicta. The majority did not, however, indicate that the plaintiff must show intent as part of his prima facie case. The Title VII standards, which permit courts to infer intent from showings of pretext or less discriminatory alternatives, may satisfy the *Harris* intent requirement. In short, neither *Bakke* nor *Harris* conclusively establishes a standard of proof for Title VI.

2. *The Appropriate Standard for Hospital Relocation Cases*

In selecting the proper standard for hospital relocation cases, the first question is whether a purpose test or an effects test is more appropriate. Traditional judicial deference to agency constructions of federal statutes and strong public policy support an effects test.

Two HEW regulations, one promulgated in 1964[106] and the other in 1973,[107] expressly prohibit recipients of federal funds from adopting program administration and site selection policies which have discriminatory effects. The Supreme Court articulated

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[103] *See id.* at 408-21 (concurring and dissenting opinion, Stevens, J.).

[104] *See id.* at 303-04.

[105] *See* 100 S. Ct. at 374 (majority opinion, Blackmun, J.); *id.* at 379 (dissenting opinion, Stewart, J.).

[106] The first prohibits recipients of federal financial assistance from utilizing "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(2) (1979) (emphasis added) (originally promulgated at 29 Fed. Reg. 16,298 (1964)).

[107] The second regulation, even more pertinent to hospital relocations, states in relevant part:

> In determining the site or location of a facilities [sic], an applicant or recipient may not make selections with the *effect* of excluding individuals from, denying tbem the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose *or effect* of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

45 C.F.R. § 80.3(b)(3) (1979) (emphasis added) (originally promulgated at 38 Fed. Reg. 17,979 (1973)).

the proper standard of review of agency regulations in *Unemployment Compensation Commission v. Aragon*.[108] In deferring to a territorial commission's interpretation of a statute, Justice Vinson observed:

> To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. . . . All that is needed to support the Commission's interpretation is that it has "warrant in the record and "a reasonable basis in law".[109]

In other decisions, the Court has emphasized that such deference is particularly appropriate when the regulation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion."[110]

Given the absence of clear legislative intent,[111] courts should follow *Aragon* and defer to HEW's regulations. As the Supreme Court implicitly recognized in *Lau*,[112] an effects interpretation is certainly reasonable in light of the antidiscriminatory policies of Title VI; indeed, such a standard would most effectively eliminate discrimination by recipients of federal funds.[113] Moreover, at the time of the statute's adoption, the Supreme Court appeared to apply an effects test even to allegations of constitutionally proscribed discrimination,[114] and it was not until 1976 that the Court

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[108] 329 U.S. 143 (1946).

[109] *Id.* at 153-54.

[110] Power Reactor Dev. Co. v. Electricians, 367 U.S. 396, 408 (1961).

In Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 280-81 (1969), the Court stated that a regulation will be sustained so long as "it is reasonably related to the purposes of the enabling legislation under which it was promulgated." *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[111] *See* note 52 and accompanying text *supra*.

[112] 414 U.S. 563 (1974). In a concurring opinion joined by Chief Justice Burger and Justice Blackmun, Justice Stewart observed that "the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI [*sic*] 'will be sustained so long as it is reasonably related to the purposes of the enabling legislation.'" *Id.* at 571 (citing Mourning v. Family Publications Serv., 411 U.S. 356, 369 (1973) and Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 280-81 (1969)).

[113] *See* notes 118-24 and accompanying text *infra*.

[114] *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (state redistricting ruled unconstitutional deprivation of fifteenth amendment right to vote because its "inevitable effect" was to disenfranchise black voters); *cf.* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (courts should decide constitutionality of statute on basis of its "social content or effect," not on basis of legislature's motivation); United States v. O'Brien, 391 U.S. 367, 384 (1968) ("inevitable effect" of statute on its face may render it inconstitutional, regardless of legislative motive); Friedman, *supra* note 65, at 17-23.

expressly rejected an effects test in favor of a purpose test.[115] Thus, when HEW promulgated its regulations, there was considerable support for the view that Congress intended an effects test for Title VI. Congress' failure to specify a different standard after the agency promulgated the regulations may indicate tacit congressional approval of an effects test. Finally, one regulation was promulgated in 1964 and thus represents a contemporaneous construction of the statute.

Courts should also consider the policy ramifications of the purpose test. Proof of intent is a formidable obstacle for civil rights plaintiffs to overcome, and courts that require such proof may eviscerate Title VI as a weapon for private litigants and enforcement agencies. As one commentator has observed:

> Intent, like all states of mind, is a subjective condition that does not lend itself to clear and persuasive proof. The inherent difficulty in demonstrating any subjective motivation will often prove unsurmountable.[116]

The burden of proving intent weighs particularly heavily on plaintiffs alleging discriminatory hospital relocations. The multiplicity of decisionmakers involved in site selection may frustrate a plaintiff's efforts to gather evidence probative of intent.[117] Further, the plaintiff's discovery may not yield documents or records that contain bold statements indicative of discriminatory purpose; decisionmakers will undoubtedly seek to camouflage such intent.

By facilitating successful challenges of discriminatory site selections, an effects standard would encourage decisionmakers to consider possible discriminatory effects of any proposed plan, and deter them from implementing discriminatory relocations. In addition, by preserving the statute's value for private redress, an effects test would comport with the Supreme Court's tolerant attitude toward the Title VI private cause of action.[118]

Advocates of the purpose standard claim that Congress could only have intended the harsh cut-off remedy for cases of intentional discrimination.[119] But this argument is misleading. Con-

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[115] *See* Washington v. Davis, 426 U.S. 229 (1976).

[116] Friedman, *supra* note 65, at 24.

[117] For example, in NAACP v. Wilmington Medical Center, 453 F. Supp. 280 (D. Del. 1978), *numerous* agencies were involved in the hospital site selection process. *Id.* at 288.

[118] *See* Cannon v. University of Chicago, 441 U.S. 677 (1979); note 29 and accompanying text *supra*.

[119] *See, e.g.*, Board of Educ. v. Harris, 100 S. Ct. 363, 374 (1979) (dicta).

gress intended fund cut-off to be a remedy of last resort[120]—the statute and the relevant regulations require agencies to attempt to secure voluntary compliance before imposing this sanction.[121] Moreover, the statute authorizes effecting compliance "by any other means authorized by law."[122] This broad provision permits courts to redress Title VI violations without cutting off funds.[123]

It remains to determine which of the three effects tests is most appropriate to hospital relocation actions. The rebuttable effects test[124] is, of course, most desirable for plaintiffs, but its denial of nondiscriminatory justifications works excessive hardship on defendants and the general populace. Even the most careful planners may find it difficult to implement a relocation without causing some discriminatory impact on some group. Moreover, hospital relocations will often reflect a legitimate cost-benefit analysis. A generally more efficient and equitable allocation of health care resources may well justify some discriminatory impact. The irrebuttable effects standard therefore fails to take into account defendants' administrative needs and society's interest in effective delivery of health care.

The disparate treatment standard[125] for Title VII actions seems inappropriate for different reasons. Closely tailored to employment discrimination cases, the disparate treatment standard applies best where the victim of discrimination is an individual.[126] Hospital relocations, however, generally affect entire neighborhoods. In addition, the disparate treatment standard requires the plaintiff to show pretext after the defendant has met a minimal burden of rebuttal of the prima facie case.[127] This stan-

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[120] *See, e.g.*, 110 CONG. REC. 7067 (1964) (remarks of Sen. Ribicoff).

[121] *See* 45 C.F.R. § 80.8 (1979).

[122] 42 U.S.C. § 2000d-1(2) (1976).

[123] *See, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211, 1293-95 (E.D.N.Y. 1978). *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1247-50 (1977). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

[124] *See* notes 54-62 and accompanying text *supra*.

[125] *See* notes 70-73 and accompanying text *supra*.

[126] To establish a prima facie case of racial discrimination under the disparate treatment standard, a plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that be applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[127] *See* notes 70-73 and accompanying text *supra*.

dard thus raises the same obstacle the purpose standard imposes: the plaintiff must demonstrate the defendant's state of mind before the defendant offers any substantial evidence of a nondiscriminatory justification.

The Title VII disproportionate impact standard[128] is most appropriate for hospital site selection cases; it allows the defendant to present some justification without foreclosing most plaintiffs from judicial relief. The three stages of the Title VII analysis easily translate into the hospital site location context. First, as in employment disproportionate impact cases, the plaintiff should show that the planned site and proposed policies—although neutral on their face—will have a substantially disproportionate impact on his class. The burden should then shift to the medical center to show that the challenged policy relates to the functioning of the hospital—in the same way that employers must show job-relatedness.[129] The hospital could sustain its burden by showing, for example, that the proposed move or policy would serve a greater number of people more efficiently and economically. If the defendant meets that burden, the plaintiff should be allowed to prevail by showing that another less discriminatory site or policy would equally well serve the hospital's legitimate interests.

B. *Appropriate Relief*

Courts have not yet fully defined what constitutes appropriate relief in the private Title VI suit. Injunctive and declaratory relief find strong support both in lower court opinions[130] and in the Supreme Court's decision in *Lau v. Nichols*.[131] The propriety of the damage remedy, however, remains an open question.[132]

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[128] *See* notes 67-69 and accompanying text *supra*.

[129] In Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal. Oct. 16, 1979), the court could not translate the job-relatedness requirement into the educational context, since IQ tests were dissimilar to employment-related tests.

[130] *See, e.g.*, Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978).

[131] 414 U.S. 563 (1974). *See* notes 88-91 and accompanying text *supra*.

[132] *Compare* Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979) (dicta) (damages not allowed in Title VI suits) *and* Rendon v. Utah State Dep't of Empl. Security, 454 F. Supp. 534, 536 (D. Utah 1979) (damages not allowed in Title VI suits) *with* Gilliam v. City of Omaha, 388 F. Supp. 842, 847 (D. Neb. 1975) (court has subject-matter jurisdiction over Title VI suit for damages); Flanagan v. President & Dtrs. of Georgetown College, 417 F. Supp. 377, 385 (D.D.C. 1976) (assuming that damages would be appropriate) *and* Chambers v. Omaha Public School Dist., 536 F.2d 222, 225 n.2 (8th Cir. 1976) (court expressed no view about damages relief).

In the *Wilmington* setting—a suit challenging a discriminatory hospital relocation plan—courts should not hesitate to impose an injunction. The administrative scheme for enforcing Title VI entails a federal agency investigation of a discrimination claim, followed by efforts to secure the offender's voluntary compliance. If the violator refuses to comply with Title VI, the agency may cut off federal funding.[133] Similarly, a suit for injunctive relief involves a court "investigation" of a plaintiff's discrimination claim, followed by a prohibition of the unlawful activity. The defendant must either comply or remove himself from the ambit of Title VI by giving up federal funds. In short, the private suit for an injunction closely parallels the administrative remedy. Both provide the offender with a choice: stop discriminating or stop using federal funds.

A more troublesome question arises when the plaintiff seeks damages for a prior hospital relocation that has had a discriminatory impact. The damage remedy arguably provides a direct monetary incentive for parties to sue, and hence aids in the overall enforcement of Title VI. In addition, the threat of liability may deter potential Title VI offenders and encourage present offenders to mend their ways.

On the other hand, awarding damages against defendants like the Wilmington Medical Center may eventually diminish the quality and accessibility of health care. Hospitals forced to pay damages out of limited resources may be unable to afford new construction or improvements, and plans for better facilities may remain on the drawing board. An award of damages to the *Wilmington* plaintiffs, for example, may condemn the entire inner-city population to the status quo—deteriorating downtown facilities. Alternatively, hospitals may simply pass on the costs of damage

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The issue of damages for Title VI suits has been discussed frequently in suits claiming violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (popularly referred to as § 504). *E.g.*, Meiner v. Missouri, No. 79-1050C(2) (E.D. Mo. filed Jan. 21, 1980) (no cause of action for damages under § 504). Section 504 was modelled almost verbatim after Title VI and complaints are administratively handled through the same procedures and regulations. *See* 45 C.F.R. §§ 80.6-80.10, 81, 84.61 (1979).

As one court recently noted, "Though a few cases have dealt with this issue [awarding damages] in the context of Title VI, the law is equally unclear with respect to that statute." Meiner v. Missouri, No. 79-1050(C)(2) (C.D. Mo. Jan. 25, 1980). One other case recognized the possibility of Title VI damage suits, but did not decide the issue. *See* Chambers v. Omaha Public School Dist., 536 F.2d 222, 225 n.2 (8th Cir. 1976).

[133] *See* 45 C.F.R. §§ 80.7, 80.8 (1979).

awards to their patients. In an era of skyrocketing medical expenses,[134] this is an unattractive prospect.

Moreover, courts should not allow a remedy that strives primarily toward a goal of compensation. The Title VI administrative scheme evidences no congressional intent to *compensate* victims of prior discrimination. Congress sought to induce future compliance, not remedy past wrongs. Unlike injunctive relief, the damage remedy affects a hospital's future behavior only indirectly through deterrence. To the extent that the facility simply passes its costs on to society or foregoes improvements, the damage remedy does not encourage compliance.

Finally, damage awards may cause facilities that depend heavily on federal funds[135] to give up that aid. As one court recently noted, "[a] recipient of federal funds might well decide to forego such assistance when faced with the possibility of liabilities approaching or exceeding the funds received."[136] If so, the ultimate victims will be the beneficiaries of federally-funded programs, not the perpetrators of discrimination.

CONCLUSION

Private Title VI suits can be an effective method of assuring accessibility to adequate health care. The utility of such suits, however, may depend upon what standard of proof courts ultimately require for a prima facie case of discrimination and upon what types of relief courts are willing to grant.

Traditional judicial deference to administrative regulations and strong public policy support an effects test for Title VI. Of the various formulations of the effects test, the Title VII disproportionate impact standard is most appropriate for hospital relocation cases. It prescribes a shifting of burdens that would allow defendants to present some justification without foreclosing most plaintiffs from judicial relief. Moreover, the Title VII terminology could be easily translated into the Title VI context.

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[134] *See* note 25 and accompanying text *supra*.

[135] Whether or not an institution would be willing to forego federal funds would necessarily be related to the degree of dependence on federal funding. In a case such as *Wilmington*, for example, where the institution receives 35% of its operating revenue (*see* 427 F. Supp. at 923 n.13) from federal sources, an institution would probably decide to comply rather than lose funding.

[136] Meiner v. Missouri, No. 79-1050(C)(2) (E.D. Mo. Jan. 25, 1980).

Courts should hestitate to give damage awards in private Title VI suits, however. Injunctive relief is more appropriate in light of the congressional purpose underlying the statute, the administrative regulations, and the goal of providing better health care.

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