Constraints on Damage Claims Under Title VI of the Civil Rights Act

Daniel Solomon*

I. Introduction

The legal system's response to racial discrimination has focused almost exclusively on stopping its effects on the victimized group rather than compensating individual victims for their injuries.[1] Recent discussion questions the extent to which the legal system should affirmatively act to end racial discrimination. Two views of remedies predominate the dialogue.

The most prominent view is that racial discrimination results from the discrete acts of identifiable perpetrators.[2] Accordingly, a remedy must restrict the perpetrator's activity to prevent future racially discriminatory behavior.[3] The other view adopts a victim's perspective. By this definition, discrimination is historically perpetuated by society and the condition of the class of victims indicates its presence. Thus, appropriate remedies must both provide specific opportunities for the victim class as a whole and change the social and institutional behavior of the perpetrators. The condition of the victim class is the standard against which the success

---

* B.A. 1981, University of Michigan; J.D. 1985, University of Minnesota.

1. Professor Abram Chayes observed that the judiciary's view of remedies is generally different in common law and statutory disputes. In statutory or "public law" litigation

> [r]elief is not conceived as compensation for past wrong in a form logically derived from the substantive liablity and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976). These remedial initiatives of the judiciary have been characterized as legitimate, although counter-majoritarian, especially in the context of civil rights. Chayes, 1313-16; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635 (1982); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287 (1982).

2. Phillip B. Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U. L. Rev. 1, 18.

3. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979).

of a remedy should be measured.[4]

Despite obvious differences, these two views share much. Both agree that there is a relationship between the conditions or events which give rise to legally cognizable rights and the appropriateness of various remedies. The nature of the discrimination determines the nature of the remedy. Moreover, both views are oriented towards the future. Although they disagree on the scope of discrimination's effects, both assume that offering victims their wrongfully denied opportunities is a more desirable remedy than granting compensatory damages.[5] Past discriminatory acts only serve as the impetus initiating a process, which, if successful, will benefit the victims. The victims' loss from the discriminatory act and its individual consequences are not the measure of the remedy.

When it ignores the victims' personal experience of discrimination, the legal system fails to provide a complete remedy for the injury. Essential to Anglo-American jurisprudence is the belief that injuries should be compensated.[6] A compensatory award is substitutional relief for the loss endured. Racial discrimination injures people. Quite simply, therefore, those injured by racial discrimination should be individually compensated for their losses, not merely collectively compensated as members of a disadvantaged group.[7] There are system-wide justifications for compensation. For example, compensation economically discourages

4. J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213 (1980). Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Catharine MacKinnon, Sexual Harassment of Working Women (1979).

5. The legal system's antagonism toward compensatory relief reflects at least two conditions. First, civil rights attorneys have not always worked in the best interests of their clients. Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 Ariz. L. Rev. 805 (1971); Derrick Bell, *Serving Two Masters: Integration, Ideals, and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976); Leroy Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 U. Kan. L. Rev. 459 (1971); Comment, *The New Public Interest Lawyers*, 79 Yale L.J. 1069 (1970). Second, whites cannot be expected to give up the favorable positions which they have obtained in part through discrimination. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735 (1974). Compensatory awards pose a more immediate threat to whites' social position than do future-oriented remedies. While future-oriented remedies merely reduce the opportunities, compensatory awards require disgorgement of gained wealth or position.

6. *See* Dan Dobbs, Handbook on the Law of Remedies 135 (1973).

7. This is a neutral standard. If either a white or a Black person was found to have been discriminated against on the basis of race, s/he would be compensated. I am uncomfortable, however, with the notion that all race-conscious acts should be considered impermissibly "discriminatory," as the Supreme Court held in *Bakke*. 438 U.S. 265 (1978).

discrimination and provides an incentive to the injured to seek judicial redress. But these reasons are secondary. Primarily, compensation expresses a commitment to provide justice to the individual.

Judicial interpretation of Title VI of the Civil Rights Act of 1964[8] reflects this disregard for compensating discrimination victims for their injuries. Title VI explicitly prohibits recipients of federal funds from discriminating on the basis of race.[9] Although the Act expressly provides for administrative enforcement only, courts have implied a statutory cause of action for private individuals. Thus, individuals have been able to sue their schools,[10] employers,[11] managers of housing projects[12] and other federal fund recipients under Title VI.[13] However, this individual right to recover has been restricted by substantial judicial limitations on the availability of remedies.

In *Guardians Association v. Civil Service Comm'n of New York*,[14] the Supreme Court addressed the issues involved in an implied statutory cause of action under Title VI. Besides formally recognizing the private statutory action for the first time,[15] the *Guardians* Court defined a recipient's standard of liability.[16] Most significantly, the Court limited the availability of compensatory awards to those cases in which the plaintiff proves that the federal fund recipient discriminated intentionally.[17] Because of the difficulty of proving discriminatory intent,[18] the *Guardians* decision has effectively foreclosed compensatory awards to individuals whom Title VI was intended to protect. This article discusses the *Guardians* opinion focusing on its remedial limitation. The article also discusses a contractually based cause of action that private

8. 42 U.S.C. §§ 2000d-2000d-4 (1982).

9. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1982).

10. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

11. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

12. *See* Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974).

13. The Supreme Court recently defined "recipient" in Grove City College v. Bell, 104 S. Ct. 1211, 1216-20 (1984). One court has not allowed a corporate plaintiff to bring suit as a "recipient." *See* Org. of Minority Vendors v. Ill. Cent. Gulf R.R., 579 F. Supp. 574 (N.D. Ill. 1983).

14. 463 U.S. 582 (1983).

15. *See infra* note 54 and accompanying text.

16. *See infra* notes 56-61 and accompanying text.

17. *See infra* note 62 and accompanying text.

18. Barbara Schlei and Paul Grossman, Employment Discrimination Law (1983).

parties can bring in order to obtain compensatory damages for unintentional discrimination.

II. Implied Statutory Cause of Action: *Guardians Association v. Civil Service Comm'n of New York*

Guardians involved an employment dispute between the New York City police department and Black and Hispanic police officers.[19] The department hired officers according to applicants' scores on a written examination.[20] Black and Hispanic applicants as a group received lower scores than did whites.[21] Although they received sufficiently high scores to be hired,[22] the plaintiffs, by virtue of their lower scores, were hired after white officers. As a result, Black and Hispanic officers received less seniority rights than white officers. In June, 1975, responding to budget cuts affecting all of New York City,[23] the police department laid off officers on a "last-hired, first-fired" basis. Because they had less seniority, Black and Hispanic officers were laid off in disproportionate numbers.[24] The officers challenged the validity of the department's employment policies under Title VI of the Civil Rights Act of 1964 and Title VII of the Act.[25]

---

19. The cause of the dispute was the layoff of police officers in June of 1977. The police department's employment examinations had been the subject of controversy prior to the layoff. The Second Circuit Court of Appeals upheld the state court's refusal to enjoin use of the examinations. Guardians Ass'n v. Civil Service Comm'n of New York, 490 F.2d 400 (2d Cir. 1973).

20. Guardians Ass'n v. Civil Service Comm'n, 431 F. Supp. 526, 533 (S.D.N.Y. 1977).

21. Judge Robert Carter concluded from a review of a Rand Institute study of the racial distribution of scores on the police department's examination that "[w]hites consistently passed at higher rates than minorities and consistently comprised the overwhelming majority of individuals in the top deciles." *Id.* at 540.

22. *Id.* at 549.

23. *Id.* at 531.

24. *Id.* at 549 n.45 ("In the recent layoffs, 9.8% of the white police officers were laid-off. In sharp contrast, 18% of the black officers were laid-off, and 22% of the Hispanic officers were laid-off.").

25. Dual claims under both Title VI and Title VII are likely to occur when employees of a federally-funded employer allege racially-based employment discrimination. Title VII provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

The dispute endured a complex course of litigation before reaching the Supreme Court. In 1977, the district court found that the department's entry examination had a racially discriminatory impact and therefore violated Title VII's prohibition on race discrimination in employment.[26] The court issued a preliminary injunction restraining the department from firing or recalling any police officers until the examination's discriminatory effects were removed from the department's seniority list.[27] In order to remove the discriminatory effects of the examination, the department was to improve the position of Black and Hispanic officers on the list, thereby changing their lay-off and recall priority in relation to white officers. In effect, the court required the department to place Black and Hispanic officers in the position on the seniority list that they would have had but for the examination's discriminatory effects.

On appeal, the Second Circuit Court of Appeals remanded the case[28] for reconsideration in light of the then-recent Supreme Court decision in *Teamsters v. United States*.[29] In *Teamsters*, the Court held that a bona fide seniority system does not violate Title VII simply because it perpetuates the effects of pre-Act discrimination.[30].

On remand, the district court found that the police department's use of examination scores had caused discriminatory refusals to hire after March 24, 1972.[31] Consequently, the court limited application of its previous Title VII decision to plaintiffs hired after March 24, 1972.[32] The court, however, went on to find a Title

26. *Guardians*, 431 F. Supp. 526, 542 (S.D.N.Y. 1977). Through the use of statistical evidence, the officers sustained their burden of establishing that the entry examination had a discriminatory impact. The burden then shifted to the city to show the entry examination's job-relatedness. The city was unable to show that the tests were job-related, thus failing to rebut the presumption of discrimination established by the plaintiffs. *Id*. at 538-49. In addition, the court found that the department's former minimum height requirement, for which there was no job-related justification, had a discriminatory impact, thus violating Title VII. *Id*. at 550-51. No further discussion of this part of the court's holding has been included because on remand the district court found, in light of United Airlines v. Evans, 431 U.S. 553 (1977), the height requirement claim was time-barred. 466 F. Supp. 1273, 1278 n.7 (S.D.N.Y. 1979). Consequently, this claim never reached the Supreme Court.

27. 431 F. Supp. 530, 551.

28. 562 F.2d 38 (2d Cir. 1977).

29. 466 F. Supp. 1273, 1276 (S.D.N.Y. 1979). *See also Guardians*, 103 S. Ct. 3221, 3224.

30. 431 U.S. 324, 348-56 (1977).

31. 466 F. Supp. 1273, 1277.

32. *Id*. at 1278. It was of no consequence that at the time of the rehearing all officers previously laid off had either been rehired or refused reemployment. The Court reasoned that "[t]he previously furloughed patrolmen still need retroactive seniority to protect against possible future discriminatory layoffs." *Id*.

VI violation and reinstated the full injunction previously issued under Title VII.[33] In arriving at this conclusion, the district court decided three legal issues related to Title VI. The court held that private parties may bring statutory claims;[34] ruled that both discriminatory impact and intent can serve as the basis for a violation;[35] and held that compensatory remedies are appropriate for any Title VI violation.[36] Therefore, all plaintiffs were awarded full compensatory seniority under Title VI, that is, extending the seniority of Black and Hispanic police officers back to the date upon which they would have been hired but for the department's discriminatory practices.

On appeal by the police department, the Second Circuit affirmed the district court's Title VII holding,[37] but unanimously overturned the district court's compensatory award under Title VI.[38] The circuit court judges, however, did not agree on the basis for this decision. The majority of the three-judge panel held that a Title VI violation requires proof of discriminatory intent.[39] Because the Black and Hispanic officers had not shown that the police department discriminated intentionally, the majority concluded that the police officers' Title VI claim failed.[40] The remaining judge based his decision on the legal conclusion that Title VI does not provide private parties compensatory remedies regardless of the discriminator's intent.[41] In other words, although the police officers had a valid claim, they were not entitled to compensatory damages under Title VI.

The division within the Second Circuit mirrored the confusion among federal courts regarding Title VI's substantive standards.[42] This disarray resulted from conflicting signals given by

---

33. *Id*. at 1287.

34. *Id*. at 1285.

35. *Id*. at 1285-87.

36. *Id*. at 1287.

37. 633 F.2d 232, 254 (2d Cir. 1980). The Court agreed that compensatory awards were appropriate under Title VII, and remanded the case to the district court to determine the terms of the award. *Id*. at 269.

38. *Id*. at 254.

39. *Id*. at 274-75 (Coffrin, J., concurring).

40. *Id*. at 275.

41. *Id*. at 257-63 (Meskill, J.). The other judges criticized this approach. They argued that the existence of a private cause of action does not depend on the remedy sought. *Id*. at 273-74. They claimed the approach would lead to needless litigation on the question of the compensatory nature of remedies. Finally, they noted that the logical consequence of Meskill's holding would be reversal of the lower court's Title VI relief, but affirmance of its non-compensatory elements. *Id*. at 273-74.

42. *Compare* Cannon v. Univ. of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 460 U.S. 1013 (1983); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Lora

the Supreme Court in two decisions: *Lau v. Nichols*[43] and *Regents of the University of California v. Bakke*.[44] Both cases involved a Title VI action brought by private parties. In *Lau*, non-English speaking Chinese students challenged the San Francisco school system's failure to provide English instruction.[45] In *Bakke*, a white male who was denied admission to medical school attacked the school's affirmative action program.[46] Although the Court decided the merits in both cases,[47] it neither explicitly recognized the existence of a private cause of action nor identified parties who could bring such an action. Thus, the lower courts were left to define the private action's availability. Moreover, the two decisions seemed to contradict each other as to the standard of liability for a statutory violation. While the *Lau* Court applied the disparate impact test,[48] the *Bakke* Court held that Title VI incorporated a discriminatory intent standard.[49]

In *Guardians*, the Supreme Court neither adequately clarified the legal standards under Title VI nor availed itself of the fertile opportunity the dispute presented. Six Justices voted to affirm the Second Circuit decision, thereby denying the police officers constructive seniority and other compensatory relief under Title VI.[50] Much disagreement underlies their decision as reflected by

---

v. Board of Educ. of New York, 623 F.2d 248 (2d Cir. 1980); Harris v. White, 479 F. Supp. 996 (D. Mass. 1979) (all three cases adopt an intent standard) *with* NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (en banc); Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978); Jackson v. Conway, 476 F. Supp. 896 (E.D. Mo. 1979), *aff'd on other grounds*, 620 F.2d 680 (8th Cir. 1980); Johnson v. City of Arcadia, Fla., 450 F. Supp. 1363 (M.D. Fla. 1978) (adopting a disparate impact test).

The intent requirement has been a subject of extensive scholarly comment. *See, e.g.*, Rosemary C. Salomone, *Title VI and the Intent/Impact Debate: A Critical Look at "Coextensiveness,"* 10 Hastings Const. L.Q. 15 (1982); Note, *Intent or Impact: Proving Discrimination Under Title VI of the Civil Rights Act of 1964*, 80 Mich. L. Rev. 1095 (1982).

43. 414 U.S. 563 (1974).

44. 438 U.S. 265 (1978).

45. 414 U.S. at 564 (White, J., concurring).

46. 438 U.S. at 269-70 (Powell, J.).

47. In *Lau*, the Supreme Court held that the school system violated Title VI. 414 U.S. at 565-69. In *Bakke*, the medical school's admission program was held to violate Title VI. 438 U.S. at 287, 320.

48. 414 U.S. at 568.

49. 438 U.S. at 287 (Powell, J.); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ.). The Court held that Title VI was "coextensive" with the 14th amendment prohibition. 438 U.S. at 352. The standard of liability under the 14th amendment was set forth in Washington v. Davis, 426 U.S. 229, 247-48 (1976). *See generally* Salomone, *supra* note 42 at 35-42.

50. Chief Justice Burger and Justices White, Rehnquist, Powell, and O'Connor formed the majority to affirm. 103 S. Ct. at 3221.

the five separate opinions in the case.[51] No reasoning is shared by the majority. The designations in the opinion reflect this divisiveness. In most decisions, one Justice delivers the opinion of the Court.[52] But in *Guardians*, Justice White "announced the judgment of the Court" and it is clear that his written opinion was not adopted by a majority.[53] Nonetheless, because of its comprehensiveness and its essential agreement with other Justices, Justice White's opinion will come to represent the Court's reasoning on most issues.

Guardians defines private parties' rights under Title VI. First, the Court clarified its decisions in *Lau* and *Bakke* by explicitly affirming a private party's right to bring a cause of action under Title VI.[54] Justice White relied solely upon the weight of precedent to support his decision.[55]

---

51. Opinions were written by Justices Powell, Rehnquist, O'Connor, Marshall, and Stevens. *Id.* at 3221.

52. Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201, 3204 (1983) ("Justice BRENNAN delivered the opinion of the Court."); Dirks v. S.E.C., 103 S. Ct. 3255, 3258 (1983) ("Justice POWELL delivered the opinion of the Court.").

53. 103 S. Ct. at 3222 ("Justice WHITE announced the judgment of the Court and delivered the following opinion. . . .").

54. 103 S. Ct. at 3227-28 (White, J., joined by Rehnquist, J.); *id.* at 3252 (Stevens, Brennan, and Blackmun, J.J.); *id.* at 3245 (Marshall, J.).

55. The momentum of its previous decisions in *Lau*, *Bakke*, and *Cannon*, in which the Court implied a private action in Title IX, provided sufficient grounds for the Court to imply a private cause of action in Title VI. 103 S. Ct. at 3227-28. The opinion completely disregarded the formal standards for implying a private cause of action set out in *Cort v. Ash*:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law. . .?

422 U.S. 66, 78 (1975) (citations omitted) (emphasis in original). Neither *Lau* nor *Bakke* discusses the basis for implying a private cause of action. *Cannon* contains an extensive, although unprincipled, analysis of supportive legislative intent. 441 U.S. at 712-16. Nonetheless, the Court has never applied a *Cort* analysis to Title VI although there is authority for the proposition that such an analysis would be successful. *See, e.g., Bakke*, 438 U.S. at 420-21 n.28 (1977) (Stevens, J.); Comment, *Civil Rights: Title VI—Is a Private Right of Action Intended?*, 19 Washburn L. Rev. 565, 566 (1980); Comment, *An Implied Private Right of Action Under Title VI*, 37 Wash. & Lee L. Rev. 297, 300 (1980).

In avoiding a *Cort* analysis, *Guardians* reflects several judicial attitudes. First, it indicates Justice White's ambivalence about inferring a private cause of action under Title VI. In *Bakke*, Justice White frankly stated that Title VI did *not* provide a private remedy. 438 U.S. 265, 380-81, 387. He relied upon a *Cort* analysis for his finding. In *Guardians*, however, Justice White wrote the majority opinion *supporting* implication. His belief that a *Cort* analysis compelled a contrary conclusion forced Justice White to use an inconsistent approach in *Guardians*.

The failure to rely upon *Cort* also reflects the entire Court's increasing displea-

Second, the Court held that discriminatory impact alone can

sure with that method. This displeasure may have resulted from the ease with which private causes of action came to be implied. Prior to 1975, courts facing an implication question focused on whether the plaintiff belonged to the class of persons for whose special benefit the statute had been enacted. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) ("While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."). Implication, as a result, was commonplace. But since the adoption of *Cort*, the Court has been reluctant to imply private rights. *See, e.g.*, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21 (1981); California v. Sierra Club, 451 U.S. 287, 297-98 (1981); Universities Research Ass'n v. Contee, 450 U.S. 754, 771-73 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 578-79 (1979). In Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1980), the Court indicated that it would emphasize congressional intent to provide a private cause of action to a greater extent than it had in its previous implication analyses. Behind this shift existed a clear concern that "[i]n recent years, . . . a Court that is properly concerned about the burdens imposed upon a 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." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 24-25 (1981) (Stevens, J.). *See also* Stephen Ronfeldt, *Implying Rights of Action for Minorities and the Poor Through Presumptions of Legislative Intent*, 34 Hastings L.J. 969 (1983). Civil rights cases have been, however, a noticeable exception from this restrictive trend. *See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677 (1979). Unfortunately, because it lacks a clear analytical focus, the *Guardians* decision does not clarify *Cort*'s remaining vitality. *See also* Thomas Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation and Beyond*, 33 Vand. L. Rev. 1333 (1980).

Justice White intimated in *Guardians* that the 11th amendment might affect private actions against states. 103 S. Ct. at 3223. The 11th amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amendment XI. The amendment was intended to prohibit a federal determination of a "contractually rooted" right flowing between a citizen and the state. Warner v. Bd. of Trustees of Police Pension Fund of New Orleans, 277 F. Supp. 736, 739 (E.D. La. 1967). The scope of its protection has been strictly limited to the states themselves. *See, e.g.*, Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) (actions against a county can be maintained in federal courts in order to vindicate federally guaranteed rights); Graham v. Folsom, 200 U.S. 248 (1906) (suit against county officers appointed by the state to require them to assess and collect a tax to pay a judgment on township bonds is not a suit against the state); Markham v. City of Newport News, 292 F.2d 711, 716 (4th Cir. 1961) ("[T]he Eleventh Amendment does not extend to cities."). More accurately, the 11th amendment's prohibition applies if state funds will pay for any liability. *See, e.g.*, Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459 (1945); Great Northern Life Ins. v. Read, 322 U.S. 47 (1944); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946). *But see*, Ex Parte Young, 209 U.S. 123 (1908) (the 11th amendment does not bar an action in federal court seeking to redress a 14th amendment claim).

Absent waiver of immunity, the 11th amendment would be an absolute bar to a private Title VI action against a state. *See, e.g.*, Cannon v. Univ. Health Sciences/ The Chicago Medical School, 710 F.2d 351 (7th Cir. 1983). The threshold question becomes whether a state which accepts federal funds with the Title VI condition waives the state's 11th amendment defenses. Under *Edelman v. Jordan*, the Court will find such a waiver "only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other rea-

support a finding that behavior violates Title VI.[56] The Court avoided resolving the conflict between *Lau* and *Bakke* by not defining the standard of liability the statute itself imposes on fund recipients.[57] Instead, the *Guardians* decision relied upon the disparate impact standard codified in Title VI's administrative regulations.[58] In Title VI, Congress granted agencies power to promulgate regulations to enforce the statute.[59] The *Guardians* decision has made a violation of the regulatory standard equivalent to a violation of the statute.[60] Thus, the Court rejected *Lau* as a broad statement of Title VI liability. Instead, the Court interpreted *Lau* for the proposition that administrative regulations establish the standards for statutory causes of action.[61]

Third, *Guardians* identified the remedies available to private parties.[62] The Court upheld that part of the district court's order

---

sonable construction.' " 415 U.S. 651, 673 (1974) quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). The compliance agreements which all recipients of federal funds must sign should be held to satisfy the *Edelman* criteria. It is unclear whether courts will accept this argument. Unfortunately, *Guardians* failed to explore the force of the 11th amendment defense as fully as it did other obstacles to a private claim under Title VI.

56. 103 S. Ct. at 3226-27 (White, J.); *id*. at 3240-43 (Marshall, J.); *id*. at 3254-55 (Stevens, Brennan, Blackmun, JJ.).

57. 103 S. Ct. at 3236-37 (Powell, J., concurring in the judgment with Burger, C.J. and Rehnquist, J.); *id*. at 3237 (O'Connor, J.); *id*. at 3253 (Stevens, Brennan, Blackmun, JJ.). Four members of the Court wrote that *Bakke* overturned *Lau*. 103 S. Ct. 3221, 3237 (Powell, J., joined by Burger and Rehnquist); *id*. at 3239 (O'Connor, J.). Justice White wrote that *Bakke* did not overturn *Lau*. *Id*. at 3226.

58. 103 S. Ct. at 3226-27 (White, J.); *id*. at 3240-43 (Marshall, J.); *id*. at 3254-55 (Stevens, Brennan, Blackmun, JJ.).

59. 42 U.S.C. § 2000d-1.

60. *See, e.g.*, Mourning v. Family Publications Service Inc., 411 U.S. 356, 376 n.41 (1973).

While the *Lau* Court gave complete deference to the administrative interpretation of Title VI, 414 U.S. at 570, the *Guardians* Court examined the relationship between the regulations and the statute. 103 S. Ct. at 3227. However, the Justices did not agree on the standard of review. Justice White applied a "clearly inconsistent" standard. *Id*. at 3221, 3227. Justice Marshall upheld the regulations because they "reasonably and contemporaneously" interpret the statute. *Id*. at 3243. Justice Stevens applied a nexus test: whether the regulations are "reasonably related to the purpose of the enabling legislation." *Id*. at 3254. Nonetheless, a relationship test is the usual criterion applied when a plaintiff challenges administrative regulations interpreting the statute under which he or she claims.

61. In holding that administrative regulations are authority for establishing the standard for a prima facie case, the Court did not identify which particular regulations establish the cause of action. Instead, Justice White wrote generally of all agencies promulgating rules under Title VI. 103 S. Ct. at 3226-27. Justice Marshall based his conclusions on "the background of administrative regulations." *Id*. at 3240. Justices Stevens, Brennan, and Blackmun referred specifically to the rules promulgated by the three agencies involved in *Guardians*. *Id*. at 3253-54. The majority's vagueness would allow a lower court to borrow a liability standard from an agency which had not even granted funds to the defendant.

62. The Court necessarily decided the issue of remedies. While the Court in

requiring the city to remove discriminatory effects from future examinations.[63] Yet, the Court denied the plaintiff police officers any personal recovery under Title VI, including back pay and benefits.[64] The Court also refused to grant minority officers the seniority rights they would have had but for the examination's discriminatory effects.[65] Under *Guardians*, private parties injured by practices with an impermissible disparate impact on racial minorities may only obtain declaratory or prospective injunctive relief calculated to change the discriminating party's future behavior.[66] Justice White reasoned that to grant compensatory damages as well as injunctive relief would hinder efforts to achieve statutory compliance and would not respect a fund recipient's choice to discontinue its obligations under the statute. Therefore, *Guardians* limited compensatory relief to those violations based on discriminatory intent.[67]

The Court's remedial holding can be criticized on several

Guardians disagreed with the Eleventh Circuit on the issue of liability, *see supra* text accompanying notes 39 and 56, it affirmed the lower court's holding that the New York City police department was not required to compensate the plaintiffs on their Title VI claim. *Id.* at 3222. Therefore, the decision affirming the appeals court turned on the issue of the remedy available.

When members of the Court disagree, the narrowest position represents the Court's holding. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). Justice White's opinion represents the majority in *Guardians*. Justice White wrote, with Justice Rehnquist concurring, that a private party is limited to prospective injunctive relief when liability has been established by satisfying a disparate impact test. 103 S. Ct. 3221, 3232. Justice O'Connor would provide plaintiffs both prospective and retroactive equitable relief. *Id.* at 3237. *See also* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1252 n.9 (1984); *Guardians*, 103 S. Ct. at 3235 n.27 (White, J.) ("Justice O'Connor would hold that all relief should be denied unless discriminatory intent is proven."). Justice Marshall states, *id.* at 3239, and Justices Stevens, Brennan and Blackmun also write, *id.* at 3251-52, that all remedies should be available for any Title VI violation. A majority of the Court agrees that private parties should receive a remedy for a successful disparate impact claim. Because Justices White and Rehnquist would give the least amount of remedy, their opinion represents the majority of the Court. Justice Powell and Chief Justice Burger would not provide any relief to parties relying upon a disparate impact claim. *Id.* at 3237.

63. *Id.*

64. *Id.* at 3233-34.

65. *Id.* at 3234.

66. *Id.*

67. Justice White wrote, with Justice Rehnquist concurring, that compensatory relief could be granted upon a showing of discriminatory intent. *Guardians*, 103 S. Ct. 3221, 3229-30:

> In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the state continues ith the program.

Justices Marshall, Stevens, Brennan, and Blackmun would agree with this view,

grounds. The concern of the *Guardians* Court is to promote compliance with Title VI. The Court permitted remedies that would change violators' behavior so that their actions comply with the statute.[68] By limiting the federal fund recipient's compensatory liability for a statutory violation to cases of intentional discrimination, however, the Court removed important incentives for achieving statutory compliance.

Moreover, the Court feared that the possibility of monetary damages for unintentional discrimination would discourage participation in federal funding programs and thereby hinder achievement of the statute's objectives.[69] Even if some recipients forgo federal funding to avoid the possibility of liability for compensatory damages, statutory compliance will not be improved by limiting liability for compensatory remedies for two reasons. First, the reduced risk of liability takes away incentives for recipients to review their procedures for policies or practices with discriminatory effects. A decrease in self-policing increases burdens on administrative and judicial forums, thereby delaying compliance. Second, private parties need the incentive of compensatory awards to bring suits to enforce compliance.[70] Administrative enforcement of Title VI has been woefully inadequate.[71] In other contexts, the courts have cited lack of administrative enforcement as a reason to ex-

---

having stated in their opinions that all remedies should be available for any successful Title VI claim.

Technically, because the Court did not find discriminatory intent, the Justice's statements concerning the availability of compensatory awards in cases involving discriminatory intent are mere dicta. *See Guardians*, 103 S. Ct. at 3229 (White, J.) ("I put aside for present purposes those situations involving a private plaintiff who . . . has been intentionally discriminated against. . . ."); id. at 3237 n.1 (O'Connor, J., concurring in the judgment) ("Because . . . petitioners have failed to prove intentional discrimination, I have no occasion to address the question whether there is a private cause of action under Title VI for damages relief."). Some courts have already interpreted this dicta as an authoritative holding. *See, e.g.*, Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1357 (5th Cir. 1983); Carter v. Orleans Parish Pub. Schools, 725 F.2d 261, 264 (5th Cir. 1984), Wilder v. City of New York, 568 F. Supp. 1132, 1135 (E.D.N.Y. 1983), Org. of Minority Vendors v. Ill. Cent. Gulf R.R., 579 F. Supp. 574, 594-595 n.10 (N.D. Ill. 1983). In a subsequent decision, the Supreme Court confirmed the lower courts' interpretation. Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1252 (1984).

One court has introduced the notion that the 11th amendment may bar damage claims against the state regardless of the standard used to find a violation. Moreno v. Texas Southern Univ., 573 F. Supp. 73, 76-77 (S.D. Tex. 1983).

68. 103 S. Ct. at 3231.

69. *Id.* at 3232.

70. Joseph Page, *State Law and the Damages Remedy Under The Civil Rights Act: Some Problems in Federalism*, 43 Den. L.J. 480, 481 (1966); Marshall Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277, 325-26 n.249 (1965).

71. Joseph Witherspoon, Administrative Implementation of Civil Rights 17 (1968).

pand private parties' rights.[72] In short, although the *Guardians* Court sought to promote statutory compliance, it significantly limited the incentives to do so. Moreover, the *Guardians* decision reflects a theme in civil rights law that the measuring standard for remedies is the culpability of the discriminator rather than the condition of the victim.[73] *Guardians* used the discriminator's knowledge or intent to determine the availability of compensatory damages.[74] An additional basis for *Guardians'* denial of constructive seniority to the plaintiff police officers was the Court's concern that such a compensatory remedy "directly implicate[s] the rights and expectations of perfectly innocent employees. . . ."[75]

This view of remedies is wrong for three reasons. First, basing civil rights remedies on the discriminator's state of mind is unprecedented. State of mind does provide an important limitation to finding liability under other anti-discrimination prohibitions.[76] Once a violation is found, however, courts have traditionally had great flexibility in determining the appropriate remedy.[77] Second, the Court's characterization of the other workers as "innocent" reflects too narrow a view of discrimination's effects. Although the white officers did not directly "cause" the discrimination, they certainly benefited from it by receiving higher test scores and consequently greater seniority rights. Restitution, the duty to repay unjustly received gain, is a core principle of our jurisprudential system.[78] The white officers therefore owe a portion of their seniority rights to those officers injured by discrimination. By denying compensatory awards, *Guardians* subordinated the interests of the victims of discrimination to the interests of the unjustly enriched third parties.

Third, the *Guardians* remedial scheme effectively favors white plaintiffs who allege that they are victims of discrimination on the basis of race over minority plaintiffs. In most cases, it is difficult to prove an employer's intent to discriminate. Discrimination against Blacks and other minorities is easier to prove by showing the disparate impact of policies or regulations. Ironically, proving discriminatory intent is easier when employers institute affirmative action programs giving open preference to minorities

72. Monroe v. Pape, 365 U.S. 167, 240 (Frankfurter, J., dissenting) (1961); Hardwick v. Hurley, 289 F.2d 529, 530 (7th Cir. 1961).

73. Freeman, *supra* note 4, at 1049.

74. 103 S. Ct. at 3230 n.20.

75. *Id.* at 3234 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 788 (1976)).

76. Washington v. Davis, 426 U.S. 229 (1976).

77. Bell v. Hood, 327 U.S. 678, 684 (1945).

78. George E. Palmer, The Law of Restitution 2 (1978).

over whites in an effort to rectify past discriminatory patterns, as in *Bakke*. Thus, *Guardians* gives more comprehensive relief to whites than to those whom Title VI was intended to protect.

To some extent, *Guardians* broke new ground in civil rights enforcement. By recognizing a private cause of action under Title VI and identifying a broad scope of liability, the Court has provided an important tool to use against racial discrimination. By restricting the availability of compensatory awards, however, the Court has perpetuated an incomplete perception of the causes of discrimination and has worked a fundamental injustice.

III. Third-Party Beneficiaries: A Contractual Cause of Action

Because it is difficult to demonstrate intent to discriminate against racial minorities, the private action under Title VI will not readily provide compensatory awards to most victims of discrimination. Under a common law theory of third-party beneficiary contracts, however, those injured parties may be able to recover compensatory remedies.[79]

Generally, a third-party beneficiary is one who, although not a party to a contract, can enforce the parties' contractual duties and obligations.[80] As a condition precedent to the receipt of federal funds, federal contractors must sign[81] an assurance to comply with Title VI.[82] The assurance of compliance is part of an enforce-

79. *See, e.g.*, Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 850-51 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); N.A.A.C.P. v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978). *But see* Todd v. Jt. Apprenticeship Comm. of Steel Workers of Chicago, 223 F. Supp. 12, 16 (N.D. Ill. 1963), *vacated*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965). Commentators have discussed third-party contractual rights in federal contracts. *See, e.g.*, Kay Bruce, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights*, 27 Hastings L.J. 137 (1975). Some commentary has specifically suggested a third-party contractual claim for a Title VI cause of action, focusing on the creation of rights and not the explicit achievement of a compensatory remedy. *See, e.g.*, Arthur Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 Harv. C.R.-C.L. L. Rev. 1 (1983) [hereinafter cited as *Title VI Compliance Agreements*). *See also* Michael Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 St. Louis U.L.J. 25, 58-60 (1978).

80. Ratzlaff v. Franz Foods, 250 Ark. 1003, 468 S.W.2d 239 (1971); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Tenn. Coal, Iron & R.R. v. Sizemore, 258 Ark. 344, 62 So. 2d 459 (1952); Commercial Ins. Co. v. Pacific-Peru Construction Corp., 558 F.2d 948 (9th Cir. 1977).

81. *See, e.g.*, 7 C.F.R. § 15.4 (1984) (Dept. of Agriculture).

82. An agency can make funding contingent upon the signing of a compliance form. Gardner v. State of Alabama, 385 F.2d 804, 813-17 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968); United States v. El Camino Community College Dist., 600 F.2d 1258, 1259-60 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); Grove City College v. Bell, 687 F.2d 684, 703 (3d Cir. 1982) (Title IX); Hillsdale College v. Dep't of HEW, 698 F.2d 418, 430 (6th Cir. 1982) (Title IX).

able contract.[83] Discrimination based on race[84] is a breach.[85] Breach of the assurance of compliance may provide the basis for a third-party claim by the victims of discrimination. Such a claim is contractual rather than statutory and compensatory remedies are appropriate.[86] Whether a third-party beneficiary cause of action is viable depends upon three unresolved legal issues: first, whether the assurance of compliance vests contractual rights in third parties; second, if rights are vested, whether courts can grant damages to remedy violations of those rights; and finally, whether Title VI

---

83. *See, e.g.*, Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69 (9th Cir. 1981); U.S. v. Marion County School Dist., 625 F.2d 607 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981).

Defendants often cite *U.S. v. Madison County Bd. of Educ.*, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964), for the proposition that assurances given in return for federal funds cannot be enforced to remedy discriminatory practices. The case, however, pre-dates adoption of the 1964 Civil Rights Act. The Fifth Circuit distinguished the case twice in cases dealing with the enforcement of Title VI assurances of compliance. *See* Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 851 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); U.S. v. Marion County School Dist., 625 F.2d 607, 610 n.5 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981) ("In *Madison*, the government's complaints were dismissed not because the court found that the United States had no authority to sue to enforce contractual assurances of nondiscrimination but rather because the court found it clear that the school boards had made no such assurances.")

84. Discrimination constituting a breach can be proved either by showing intent to discriminate or acts which have a disparate impact upon a racial minority. Relevant governmental regulations incorporating the disparate impact standard determine the contract terms.

85. Brown v. Califano, 627 F.2d 1221, 1232 n.67 (D.C. Cir. 1980); U.S. v. Marin County School Dist., 625 F.2d 607, 609, 617 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); U.S. v. Phoenix Union High School Dist., 681 F.2d 1235, 1237 (9th Cir. 1982), *cert. denied*, 459 U.S. 1191 (1983); U.S. v. El Camino Community College Dist., 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

In addition to assuring compliance, federal fund recipients often enter into "compliance agreements." Essentially, compliance agreements are out-of-court settlements made by a recipient and an agency after a Title VI violation has been found. These agreements set forth remedial organizational actions the recipient must take to insure continued federal financial support. Block argued that these agreements rather than the assurance of compliance should serve as the basis for a third-party beneficiary cause of action. *Title VI Compliance Agreements*, *supra* note 79, at 14. Block admitted, however, that courts will award successful third-party beneficiaries little more than remedies which they could claim in an implied statutory cause of action. *Id.* at 38. Given the judicial predilection to avoid actions which might interfere with a congressionally sanctioned regulatory action, a private compensatory remedy is unlikely. Furthermore, compliance agreements are executed only after administrative agencies have found a violation and taken action. In addition, administrative enforcement of Title VI has not been comprehensive. *See supra* note 71. Therefore, few private parties have the opportunity to rely upon compliance agreements for their claims.

86. Restatement (Second) Contracts § 346, comment a (1977) ("Every breach of contract gives the injured party a right to damages against the party in breach. . . .").

itself does not preempt such an action.[87] The need to compensate those injured by discrimination should encourage courts to resolve these issues affirmatively and uphold third-party claims.

A. The Basis for Third-Party Contractual Claims for Damages

Third-party rights based upon Title VI assurances of compliance have not received significant judicial attention. The Supreme Court has made cursory statements about the common law contract action in the context of Title VI but has not expressly ruled on the issue. In *Lau*, the school board recognized the non-English speaking Chinese students as beneficiaries of the board's contract with the federal government in order to bring suit under Title VI. But because standing was not contested, the *Lau* Court did not have the opportunity to validate the students' status as third-party beneficiaries.[88] In *Guardians*, Justice Marshall seemingly approved the third-party claim.[89] Justice White explicitly rejected this approach.[90] Lower federal courts have directly addressed the issue and in some circumstances have sustained third-party claims for injunctive relief.[91] These decisions, however, have not been widely accepted or even noticed by the courts. Consequently, the existence of third-party contractual rights and remedies under Title VI remain unsettled.

Courts use different approaches to determine the existence of third-party contractual rights.[92] Traditionally, courts rely on one of three theories: an intention test;[93] the donee-creditor-incidental

87. A fourth issue, whether a breach occurred, will be resolved individually in each case.

88. Lau v. Nichols, 414 U.S. 563, 571, n.2 (1974) (Stewart, J., concurring in result).

89. 103 S. Ct. 3221, 3248 (1983) (Marshall, J., dissenting).

90. *Id.* at 3232 n.24 (Rehnquist, J., joining). Because they disapproved of any private statutory cause of action, Justice Powell and Chief Justice Burger might also disapprove of the third-party contractual claims.

91. *See* Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Concerned Tenants Assoc. of Indian Trails Apts. v. Indian Trails Apts., 496 F. Supp. 522 (N.D. Ill. 1980); N.A.A.C.P. v. Wilmington Medical Center, Inc., 453 F. Supp. 280, 329 (D. Del. 1978). *But see* Nabkey v. U.S. Dep't of HUD, No. 81-1184, (6th Cir. January 4, 1983) (available July 1, 1985, on LEXIS, GENFED library, USAPP file) (not recommended for full-text publication; Sixth Circuit Rule 24 limits citation to specific situations).

92. Miree v. DeKalb County, Ga., 433 U.S. 25, 32-33 (1977), held that state law determines third-party rights when the obligations of the United States are not at issue.

93. "In order that a third party may sue upon a contract made by others he must show that he was intended by them to have an enforceable right or at least that the performance of the contract must necessarily be of benefit to him and such benefit must have been within the contemplation and purpose of the contracting

beneficiary approach of section 133 of the Restatement of Contracts;[94] or the intended-incidental beneficiary approach of the Second Restatement.[95] Other courts refuse to rely upon any single theory and look instead to all of the circumstances surrounding the particular claim.[96] Categorization of the underlying theories, however, clarifies little.[97] Courts themselves are perplexed by the doctrines,[98] and decisions often reflect underlying equitable con-

---

parties." Arthur Corbin, *Contracts for the Benefit Of Third Persons*, 27 Yale L.J. 1008, 1017 (1917). *See also* Ernest Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. Cinn. L.R. 313, 315 (1977).

94.(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3):

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;

(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;

(c) an incidental beneficary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty.

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.

Restatement of Contracts § 133 (1932).

95.(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1979).

96. Annot., 81 A.L.R. 1271, 1284 (1932).

97. It is beyond the scope of this article to replicate the scholarly explanation and criticism of these tests. For more complete discussions see Comment, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' and the Intention Standard: A Search for Rational Contract Decision Making*, 54 Va. L. Rev. 1166 (1968).

98. *See, e.g.*, Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974) ("[I]t is not always clear as to just what is meant when the courts say that there must be an intent to benefit the third person

cerns more than principled legal reasoning.

The narrower question of third-party rights under federal contracts has been the object of substantial judicial inquiry. For example, many courts have addressed a federal contract signator's obligations to third parties. While doctrinally these decisions reflect the general disarray of third-party beneficiary law,[99] they identify special considerations which provide some guidance in deciding whether Title VI assurances of compliance vest third-party rights.

Courts have resisted allowing third-party claims under federal contracts when the statute does not expressly or impliedly provide a private cause of action.[100] Some courts conclude that when a statute does not expressly provide a statutory cause of action, Congress intended to disallow all private actions. To allow private actions, they reason, would circumvent congressionally provided administrative prerogatives.[101] Other courts apply the recognized standard for implying private statutory actions and im-

---

or that the intention of the parties is controlling.") (quoting 17 Am. Jur. 2d Contracts, § 304, pp. 727-30).

99. *See* Jones, *supra* note 93, at 316; Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Government Intent*, 94 Yale L.J. 875 (1985); Comment, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights*, 48 Hastings L.J. 137, 138 (1975).

100. *See, e.g.*, U.S. v. Lonknit Mfg. Co., 189 F.2d 454, 457 (5th Cir. 1951); Johnson v. Redevelopment Agency of Oakland, Ca., 317 F.2d 872, 874 (9th Cir. 1963) ("We find no indication that Congress intended this section of the Housing Act to give a right of action to those not a party to the contract between the Redevelopment Agency and the United States."); Falzarano v. U.S., 607 F.2d 506, 511 (1st Cir. 1979); Control Data Corp. v. I.B.M., 306 F. Supp. 839, 847 (D. Minn. 1969), *aff'd*, 430 F.2d 1277 (8th Cir. 1970); Martinez v. Phillips Petroleum Co., 283 F. Supp. 314, 321 (E.D. Id. 1968); Port of New York Auth. v. Eastern Airlines, Inc., 259 F. Supp. 745, 750 (E.D.N.Y. 1966); City and County of San Francisco v. Western Airlines, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962), *cert. denied*, 371 U.S. 953 (1963); Carson v. Pierce, 546 F. Supp. 80, 87 (E.D. Mo. 1982); Boston Pub. Hous. Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (D. Mass. 1974); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Perry v. Housing Auth., 664 F.2d at 1210, 1218 (4th Cir. 1981); Fenner v. Bruce Manor, Inc., 409 F. Supp. 1332, 1349 (D. Md. 1976); Murphy v. Villanova Univ., 547 F. Supp. 512 (E.D. Pa. 1982); Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 946 (C.D. Cal. 1979). *But see* Bethune v. U.S. Dep't of HUD, 376 F. Supp. 1074, 1078 (W.D. Mo. 1972) (court found third-party rights because the statute did not provide an adequate remedy); Fuzie v. Manor Care, Inc., 461 F. Supp. 689, 697-98 (N.D. Ohio 1977) (court found third-party contractual rights under state law even though a federal implied statutory action did not exist); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979). In some cases, the contract or statute explicitly forbids third-party actions. *See, e.g.*, East Bay Mun. Utility Dist. v. Richmond Agency, 93 Cal. App. 3d 346, 155 Cal. Rptr. 636 (1979).

101. *See, e.g.*, New York Stock Exchange, Inc. v. Sloan, 394 F. Supp. 1303, 1316 (S.D.N.Y. 1975) ("It would be anomalous to hold that the statute provides greater relief indirectly than it provides directly. . . ."); Fenner v. Bruce Manor, Inc., 409 F. Supp. 1332, 1349 (D. Md. 1976) (rights asserted would be inconsistent with need for administrative flexibility).

ply third-party contractual rights as well.[102] The result, however, is often the same; where there are no statutory rights, courts are unlikely to find third-party rights.

Courts generally rely upon statutory, regulatory or contractual references to specific third parties to vest in them the right to enforce the contract. Some courts require only that the language evince an intent to permit third-party actions.[103] Most courts, however, require explicit language that the third party was intended to benefit from the contract's performance.[104] For example, in *Owens v. Haas*, a prisoner recovered damages from the county for injuries resulting from a beating by prison guards.[105] The court held the county liable by characterizing the prisoner as a beneficiary of the county's contract with the federal government for the safekeeping and protection of prisoners.[106] In *Fuzie v. Manor Care, Inc.*, a Medicaid recipient sued her nursing home for transferring and discharging patients who were supported by Medicaid.[107] A contract between the federal government and the nursing home provided for a certain minimum level of care for Medicaid patients. Because Medicaid patients explicitly benefited from the contract, the court held that the plaintiff had standing as a third-party beneficiary to sue the nursing home.[108]

Courts are even more reluctant to find third-party rights when the contract has a public purpose. Contracts have a public purpose when their execution necessarily benefits a defined group. They do not evince a specific intention to convey third-party rights to particular individuals. For example, one court held that neighbors of a planned redevelopment project lacked standing to sue

---

102. The Supreme Court defined the recognized standard for implication in *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See, e.g.*, Ngoyen v. U.S. Catholic Conf., 719 F.2d 52 (3d Cir. 1983); Robinson v. McGovern, 456 F. Supp. 1000 (W.D. Pa. 1978).

103. *See supra* note 93.

104. Although significantly narrower in scope, the concept of third-party rights is akin to the test for standing to bring a suit under a statute. *See* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). The similarity can be seen in cases in which the plaintiffs brought both statutory and third-party claims. *See, e.g.*, Kennedy Park Homes v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970), *cert. denied*, 401 U.S. 1010 (1971); Blackshore Residents Org. v. Hous. Auth., 347 F. Supp. 1138 (W.D. Tex. 1972). *But see* Holbrook v. Pitt, 643 F.2d 1261, 1273 (7th Cir. 1981) ("Subsidiary purposes . . . do not defeat plaintiff's status as protected beneficiaries. In contrast, many courts which have not found third-party rights essentially assume that statutory purposes are mutually exclusive.").

105. 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

106. *Id.* at 1250-51.

107. 461 F. Supp. 689 (N.D. Ohio).

108. *Id.* at 697-98. *See also* Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981); Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572 (S.D. Ala. 1976); Org. of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R., 579 F. Supp. 574, 598-605 (N.D. Ill. 1983).

when the developer failed to comply with the open-bidding provision of its federal contract.[109] The contract required the developer to conduct open bidding for property sold as part of the project. The court held that this provision "seem[ed] designed to protect not the interests of landowners or tenants in a redevelopment area, but those of the public at large."[110] As a result, the contract vested special rights in no one.

In *Bailey v. Iowa Beef Processors, Inc.*, the court rejected a third-party claim by workers based on a consent decree that their employer had entered into in a federal anti-trust suit.[111] In the consent decree, the employer, a meat packer, had agreed to divest itself of two packing plants it had recently acquired.[112] The consent decree provided that the employer could not take action in regard to those plants' employees.[113] Subsequently, one of the plants was temporarily closed and the employees were laid off for two months.[114] The affected employees sued as third-party beneficiaries to enforce the terms of the consent decree. In denying the employees' claim, the court stated that the contract provision's primary purpose was public—to keep the assets of the company "attractive to potential purchasers."[115] The court also interpreted the contract in light of the Clayton Anti-Trust Act's general purpose: "to give each citizen whatever protection it can against the monopolistic concentration of economic power."[116] The court went on to conclude that "[n]o special protections are accorded plaintiff's class or any other class."[117]

Some courts have extended the public purpose basis for rejecting third-party claims further to contracts with mixed purposes or which contain ambiguous language. In *Martinez v. Socoma Companies*, the court held that residents of East Los Angeles were

---

109. Gart v. Cole, 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959).

110. *Id.* at 250.

111. 213 N.W.2d 642 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974).

112. *Id.* at 643.

113. *Id.* at 643 ("[Defendant]. . .shall take no action with respect to the personnel or assets of Blue Ribbon which would impair [defendant's] ability to accomplish the divestiture.").

114. *Id.* at 644.

115. *Id.* at 646.

116. *Id.* at 647.

117. *Id.* *See also* City & County of San Francisco v. Western Airlines, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962), *cert. denied*, 371 U.S. 953 (1963). In denying an airline third-party rights under a federal contract made pursuant to the Federal Airport Act, the court held that "[t]he various documents and agreements were part of a federal aid program directed to the promoting of a national transportation system." *Id.* at 120. *See also* Control Data Corp. v. I.B.M., 306 F. Supp. 839, 846-48 (D. Minn. 1969) (competitor was not a third-party beneficiary to a consent decree which settled an anti-trust case).

not third-party beneficiaries to federal contracts to provide training and employment.[118] The 1967 amendments to the Economic Opportunity Act of 1964 authorized the U.S. Department of Labor to make these contracts.[119] The statute's express purpose was to "establish special programs which (1) are directed to the solution of the critical problems existing in particular communities or neighborhoods . . ., and (2) are of sufficient size and scope to have an appreciable impact in such communities and neighborhoods in arresting tendencies toward dependency, chronic unemployment, and rising community tensions."[120] The court observed that the government intended to benefit the neighbors through the contract's performance.[121] Nonetheless, the court found this intention insufficient to grant the plaintiff's third-party rights because of the contract's purpose to improve the neighborhood rather than to benefit individuals.[122] Although courts have not widely followed *Martinez*,[123] other courts interpret a contract's public purpose broadly as a justification for denying third-party claims.[124]

To summarize, the courts will generally find third-party rights in federal contracts in two situations. First, third-party rights will vest if the governing statute expressly or implicitly recognizes private causes of action.[125] Second, courts will recognize third-party rights if the contract explicitly singles out the claimant's class to receive benefits.[126]

---

118. 11 Cal. 3d 394, 113 Cal. Rptr. 585, 521 P.2d 841 (1974).

119. Amendments to the Economic Opportunity Act of 1964, Pub. L. No. 90-222, §§ 150-155, 81 Stat. 688-90, 42 U.S.C. §§ 2763-2768 (1967), *repealed by* 86 Stat. 763 (1972).

120. Pub. L. No. 90-222, § 150, 81 Stat. 688.

121. 11 Cal. 3d at 397, 113 Cal. Rptr. at 587, 521 P.2d at 843.

122. 11 Cal. 3d at 406, 113 Cal. Rptr. at 592-93, 521 P.2d at 848-49. "([T]he contracts were designed not to benefit individuals as such but to utilize the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighborhood.")

123. *Martinez* has been criticized. *See* Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision Making*, 54 Va. L. Rev. 1166 (1968).

124. *See, e.g.*, Port of New York Auth. v. Eastern Airlines, 259 F. Supp. 745 (E.D.N.Y. 1966). The court rejected an airline's third-party claim that the Authority breached an agreement with the Federal Aviation Act of 1958, § 101 *et. seq.*, 49 U.S.C.A. § 1301 *et seq*. Among other purposes, the statute directs the Secretary of Transportation to promote, encourage, and develop civil aeronautics. 49 U.S.C.A. § 1303(b). The court held that the agreements "were not made expressly for the benefit of the airlines." 259 F. Supp. at 750. But civil aeronautics cannot improve without benefiting particular airlines, albeit incidentally. Thus, as in *Martinez*, the necessary result of a contract's express purpose is not a sufficient basis to find third-party rights. *See also* City & County of San Francisco v. Western Airlines, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962), *cert. denied*, 371 U.S. 953 (1963).

125. *See supra* note 100 and accompanying text.

126. *See supra* notes 103-108 and accompanying text.

Title VI assurances of compliance satisfy these conditions. Thus, courts should recognize third-party rights to enforce these assurances. The *Guardians* court firmly held that private parties can bring a statutory claim under Title VI.[127] Although the statute's prohibitory language does vitiate its beneficial nature, Title VI explicitly protects racial groups by protecting individuals.[128] Further, administrative regulations make explicit that Title VI is not intended primarily to serve a public purpose.[129] All the traditional requirements are met and courts should recognize third-party contractual rights allowing private parties to receive compensatory damages for a federal fund recipient's breach of its agreement to comply with Title VI.[130]

B. Federal Preemption of State Contract Claim

Because the two causes of action regulate the same discriminatory behavior, the private cause of action under Title VI could preempt enforcement of the state third-party contractual claim. Congress' power to preempt state law derives from the supremacy clause of the United States Constitution.[131] If Congress acts

---

127. *Guardians*, 103 S. Ct. at 3223.

128. 42 U.S.C. § 2000d ["No person . . . ."] Some courts have held that the purpose of Title VI compels affirmative remedies. These courts have awarded tangible benefits to individual groups. *See, e.g.*, Bossier Parish School Bd.v. Lemon, 370 F.2d 847, 850-51 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); N.A.A.C.P. v. Wilmington Medical Center, Inc. 453 F. Supp. 330 (D. Del. 1978). *But see* Todd v. Jt. Apprenticeship Comm. of Steel Workers of Chicago, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated*, 332 F.2d 243 (7th Cir. 1964). In other circumstances, Title VI requires that discriminatory tests or regulations be reformed or rescinded. *See, e.g., Guardians*, 103 S. Ct. 3221. These remedies provide the benefit of increased opportunity to individuals in the protected group.

129. *See, e.g.*, 34 C.F.R. § 100 (1983) (Department of Education).

130. Ernst v. Manhattan Constr. Co., 387 F. Supp. 1001 (S.D. Ala. 1974), *cert. denied*, 434 U.S. 1067 (1978); U.S. v. Thomas Bourne Assoc., 367 F. Supp. 919 (E.D. Pa. 1973); First Granite City Nat'l Bank v. Champion, 130 Ill. App. 2d 970, 268 N.E.2d 35 (1970); Khabbaz v. Swartz, 319 N.W.2d 279 (Iowa 1982); E. Allan Farnsworth, Contracts 734 (1982).

Of course, whether compensatory damages will actually be awarded requires more than just recognition of the right to bring the claim. A third-party claimant must demonstrate that the defendant breached the contract, causing a compensable injury.

131. Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 152 (1982) ("The pre-emption doctrine . . . has its roots in the Supremacy Clause, U.S. Const., art. VI cl. 2."); Comment, *Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law*, 34 Hastings L.J. 685, 686 (1983) ("The supremacy clause mandates preemption of state laws which conflict with the Congressional exercise of an enumerated power."). *But see* Harrop A. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 De Paul L. Rev. 630, 634-37 ("The most common misconception found in the cases and the literature is that the doctrine of preemption must hinge on the supremacy clause."); Comment, *Constitutional Law: Congressional Preemption Held to Prevent State from Enforcing*

within the scope of its powers, state law is preempted in the same area to the extent Congress intended its enactment to be exclusive.[132] The Eleventh Circuit has held that a federal civil rights statute may thus preempt a third-party contractual claim.[133]

In *Howard v. Uniroyal, Inc.*, the Eleventh Circuit held that section 503 of the Rehabilitation Act of 1973[134] preempted a state third-party claim based upon contractual assurances to comply with that section.[135] The statute requires federal contracts to contain a provision mandating employers to affirmatively hire and promote handicapped individuals[136] and provides for the administrative enforcement of the provisions.[137] Uniroyal's contract with the federal government provided in part that it "take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices."[138] Joel Howard sought damages and injunctive relief because he was demoted "from a salaried position to a more physically strenuous hourly position."[139] Howard argued that because he was handicapped, his demotion constituted a breach of Uniroyal's agreement which he had a right to enforce as a third-party beneficiary. In rejecting Howard's contractual claim, the Eleventh Circuit concluded that "the remedy provided in precise detail by Congress in enacting section 503(b) was intended to be the plaintiff's sole means of enforcing the affirmative action clause contained in the contract between his employer and the federal government."[140]

Because it found no express congressional intent regarding

Stricter Pollution Standards Against Electrical Power Plant, 55 Minn. L. Rev. 1223, 1224 (1971) ("Preemption is a doctrine of statutory construction.").

132. Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, *reh'g denied*, 104 S. Ct. 1430 (1984); Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev., 103 S. Ct. 1713, 1722 (1983); Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 152-53 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) ("[San Diego Council v. Garmon, 359 U.S. 236 (1959)], however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes. . . .The purpose of Congress is the ultimate touchstone.").

133. Howard v. Uniroyal, 719 F.2d 1552 (11th Cir. 1983).

134. 29 U.S.C.A. § 793 (1973).

135. 719 F.2d at 1562.

136. 29 U.S.C.A. § 793(a).

137. 29 U.S.C.A. § 793(b).

138. 719 F.2d at 1554 n.2.

139. *Id.* at 1555.

140. *Id.*

preemption,[141] the Eleventh Circuit relied on standards articulated by the Supreme Court in *Pennsylvania v. Nelson* to imply the statute's preemptive scope.[142] In *Nelson*, the Supreme Court defined three tests to imply the preemptive force of federal statutes.[143] Federal law will preempt state law if: " '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' "[144] or, " 'the federal statutes touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject,' "[145] or, "enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program."[146] The *Howard* court found section 503's administrative enforcement scheme both comprehensive and pervasive.[147] It also found that the federal interest in promoting uniform enforcement of federal contracts outweighed the state's traditional interest in preserving contracts.[148] Finally, the court reasoned that third-party beneficiary actions would "conflict" with a uniform federal scheme to enforce the contracts.[149]

Generally, preemption cases have not provided "precise guidelines"[150] for determining the preemptive scope of other federal statutes. Rather, each case turns on the peculiar statute in question and the asserted state claim.[151] Therefore, because *How-*

---

141. *Id.* at 1559.

142. Although *Howard* broadly accepts the *Nelson* framework, *id.* at 1555, the tests are employed after no explicit congressional intent to preempt can be found. *Id.* at 1559. *Nelson* provides, therefore, standards for implicating congressional intent.

143. 350 U.S. 497 (1956).

144. *Id.* at 502 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

145. *Id.* at 504 (quoting *Rice*, 331 U.S. at 230).

146. *Id.* at 505.

147. 719 F.2d at 1559.

148. *Id.* at 1560.

149. *Id.* at 1561.

150. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973) ("[P]rior cases on preemption are not precise guidelines . . ., for each case turns on the peculiarities and special features of the federal regulatory scheme in question."); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 624 (1975) ("The Supreme Court, however, has not developed a uniform approach to preemption; its decisions in this area take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis.").

151. Two recent Supreme Court decisions illustrate this principle. In Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983), the Court held that the Atomic Energy Act of 1954, 42 U.S.C.A. §§ 2011-2296, did not preempt a California statute regulating nuclear power plant construction. California conditions its permission to construct nuclear power plants on findings by the State Energy Resources Conservation and Development Commission

ard concerned the Rehabilitation Act of 1973, it does not have stare decisis effect on the issue of whether Title VI preempts a third-party contract claim. Nonetheless, read broadly, *Howard* suggests that federal civil rights statutes can preempt third-party claims and is precedent with which a private party seeking to enforce civil rights conditions on federal grants must contend.

Even if the broad preemption method used in *Howard* applies,[152] Title VI would not preempt a state contract claim to en-

---

that adequate storage facilities and means of disposal are available. Cal. Pub. Res. Code §§ 25524.1(b) and 2554.2 (West 1977). The Court held that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Pacific Gas*, 461 U.S. at 212. Because it was enacted for economic purposes, the California statute "lies outside the occupied field of nuclear safety regulation" and therefore is not preempted by the federal law. *Id*. at 216. In Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1983), the Court held that the Atomic Energy Act did not preempt a state award of punitive damages to a victim of radiation hazards. The Court based its decision on the lack of congressional intent to disallow state remedies for personal injuries. *Id*. at 623-26. The dissenters, however, observed that "the purpose of punitive damages is to regulate safety." *Id*. at 629 (Blackmun, J., dissenting). "Punitive damages . . . are 'regulatory' in nature rather than compensatory." *Id*. at 635 (Powell, J., dissenting). They concluded that in light of the holding in *Pacific Gas* such state regulation of safety is preempted by the Atomic Energy Act. *Id*. at 629 (Blackmun, J., dissenting), *id*. at 636 (Powell, J., dissenting). These two cases demonstrate the fluidity of precedent in the context of preemption decisions.

152. Preemption doctrine is both confusing and overbroad. The confusion results from the Supreme Court's continual redefinition of preemption standards in ambiguous terms. *Compare* Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1968), *with* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). An observation made by Justice Black remains true:

> [T]his Court, in considering the validity of state laws in light of . . . federal laws touching the same subject has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive yardstick. In the final analysis, there can be no one crystal clear, distinctly marked formula.

Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 624 (1975) ("The Supreme Court, however, has not developed a uniform approach to preemption.")

Indeed, although they articulate standards similar to those in *Nelson*, recent Supreme Court decisions have not been as doctrinal in their reasoning as *Howard* nor have they expressly relied upon *Nelson*. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984); Pacific Gas and Elec. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190 (1983); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). The modern Court has taken "a state directed" posture. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 653 (1975). Recent decisions reflect a bias for preserving state action absent strong contrary congressional intent. *Silkwood*, 104 S. Ct. 615 (1984); *Pacific Gas*, 461 U.S. 190 (1983). Because it ignores the modern prediliction of the Supreme Court, *Howard* may not provide useful standards for determining the preemptive relationship between Title VI and third-party contract claims.

force assurances of compliance. In *Howard*, the court found that the statute preempted the state action because of the comprehensiveness of the federal administrative regulation and the need for national uniformity.[153] Title VI, however, expressly authorizes agencies to use state or local law to enforce its provisions.[154] In allowing state law to enforce Title VI, Congress indicated that uniformity was not essential to its enforcement scheme. Thus, private parties can enforce Title VI assurances of compliance as third-party beneficiaries to those agreements.

IV. Summary

By restricting the availability of compensatory remedies for Title VI violations, the *Guardians* decision ignored the individual experience of discrimination. This perspective offends concepts of justice and remedial purpose central to our jurisprudential system. As third-party beneficiaries, victims of racial discrimination should be able to bring a cause of action for compensatory awards based on the federal fund recipients' breach of its agreement to comply with Title VI. Only compensatory damages fully acknowledge the injury discrimination victims experience as individuals. Law is an effective and appropriate means by which to engineer social progress. However, law has another, equally fundamental purpose—to do justice for individuals. The entire legal system's treatment of racial discrimination must expand beyond attempts to stop future wrongs. It must include compensation for individual victims as well.

---

153. 719 F.2d at 1559-61.

154. 42 U.S.C. § 2000d(1) ("Compliance with any requirements adopted pursuant to this section may be effected . . . (2) by any other means authorized by law.") The statute is vague as to who may seek compliance by such means. The legislative history, however, makes it clear that administrative remedies may use such means. H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2401. The administrative regulations provide for enforcement under "any applicable proceeding under State or local law." 34 C.F.R. § 100.8(a)(2).