MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*,provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action Page 438 U. S. 380 exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If, in fact, no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. *See United States v. Griffin*, 303 U. S. 226, 303 U. S. 229 (1938). [Footnote 3/1] Furthermore, just as it is inappropriate to address constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

A private cause of action under Title VI, in terms both of Page 438 U. S. 381 the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme," and would be contrary to the legislative intent. *Cort v. Ash*, 422 U. S. 66, 422 U. S. 78 (1975). Title II, 42 U.S.C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), dealing with employment, proscribe private discriminatory conduct that, as of 1964, neither the Constitution nor other federal statutes had been construed to forbid. Both Titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U.S.C. § 2000b *et seq.*, and Title IV, 42 U.S.C. § 2000c *et seq.* (1970 ed and Supp. V), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U.S.C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect preexisting private remedies. § § 2000b-2 and 2000c-8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U.S.C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U.S.C. § 2000d-1, that Congress intended the departments and agencies Page 438 U. S. 382 to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a

sanction for noncompliance is authorized, but only after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted. [Footnote 3/2] To allow a private Page 438 U. S. 383 individual to sue to cut off funds under Title VI would compromise these assurances and short-circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private, as well as public, agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was Page 438 U. S. 384 unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 059 (CA4 1963), *cert. denied,* 376 U.S. 938 (1964), throughout the congressional deliberations.*See, e.g.,* 110 Cong.Rec. 654 (1964) (Sen. Humphrey). *Simkins* held that, under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. 323 F.2d at 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not -- and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in *state action,'" ibid. [Footnote 3/3] -- it is difficult Page 438 U. S. 385 to believe that Congress silently created a private remedy to terminate conduct that previously had been entirely beyond the reach of federal law.*

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of colorblindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case, Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before

confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances, legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist. [Footnote 3/4] Page 438 U. S. 386

As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort v. Ash*, 422 U.S. at 422 U. S. 78, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to deny such cause of action [is] controlling." *Id.* at 422 U. S. 82. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced. [Footnote 3/5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as MR. JUSTICE STEVENS and the three Justices who join his opinion apparently would. *See post* at438 U. S. 419-420, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds, and thereby escaping from the statute's jurisdictional predicate. [Footnote 3/6] This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law. Page 438 U. S. 387

This Court has always required "that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U. S. 453, 414 U. S. 458 (1974). *See also Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412, 421 U. S. 418 420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN and I have filed. [Footnote 3/7]

[Footnote 3/1]

It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U.S. at 303 U. S. 229. *See also Mount Healthy City Bd. of Ed. v. Doyle*, 429 U. S. 274, 429 U. S. 278 (1977); *Louisville & Nashville R.*

Co. v. Mottley, 211 U. S. 149, 211 U. S. 152 (1908); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379,111 U. S. 382 (1884).

In *Lau v. Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. *Id.* at 414 U. S. 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U.S.C. § 1983, rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

[Footnote 3/2]

"Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President."

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final, because it is subject to judicial review, and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards to incorporate in such a procedure."

110 Cong.Rec. 6749 (1964) (Sen. Moss).

"[T]he authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]"

"In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action."

Id. at 6544 (Sen. Humphrey).

"Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed."

Id. at 1519 (Rep. Celler) (emphasis added). *See also* remarks of Sen. Ribicoff (*id.* at 7066-7067); Sen. Proxmire (*id.* at 8345); en. Kuchel (*id.* at 6562). These safeguards were incorporated into 42 U.S.C. § 2000d-1.

[Footnote 3/3]

This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood v. Harrison*, 413 U. S. 455 (1973), private schools that received state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 413 U. S. 466. The mandate of *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 365 U. S. 722 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin v. School Board*, 377 U. S. 218 (1964). Tuition grants and tax concessions were provided for parents of students in private schools which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented:

"[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."

Id. at 377 U. S. 232.

Hence, neither at the time of the enactment of Title VI nor at the present time, to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals. *See* cases cited in *Greco v. Orange Memorial Hospital Corp.*, 423 U. S. 1000, 1004 (1975) (WHITE, J., dissenting from denial of certiorari).

[Footnote 3/4]

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964) (Rep. Gill).

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.* at 6562 (Sen. Kuchel).

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

Id. at 7065 (Sen. Keating).

[Footnote 3/5]

Ibid.

[Footnote 3/6]

As Senator Ribicoff stated:

"Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs."

Id. at 7067.

[Footnote 3/7]

I also join Parts I, III-A, and V-C of MR. JUSTICE POWELL's opinion.