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THE SOUTH CAROLINA HUMAN AFFAIRS LAW: TWO STEPS FORWARD, ONE STEP BACK? †

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On June 23, 1972, South Carolina joined the ranks of many of her sister states by enacting a state law against discrimination, the South Carolina Human Affairs Law.[1] In many ways a remark-

† *Editor's Note.* Due to space limitations, this article has been divided into two separate articles: Parts I, II and III appear in this issue; Parts IV and V will appear in a subsequent issue of the *South Carolina Law Review*. This latter division will discuss the substantive "gloss" of title VII as it may be incorporated within the South Carolina Human Affairs Law. Within this context, the subsequent article will specifically examine the use of employment testing, the implications of seniority systems, and the bona fide occupation qualification (BFOQ) exception to the statute's prohibitions. It will also discuss areas in which the Human Affairs Law goes beyond prior civil rights statutes, most notably in the general prohibition against age discrimination. Finally, the subsequent article will describe what constitutes discrimination and the possible approaches, including the use of affirmative action plans, to the elimination of that discrimination, be it structural and systemic or individual.

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The authors would like to express their appreciation to Ellerbe Cole, a recent graduate of the Law School and a member of the South Carolina bar, both for his fine work as a student and primary draftsperson of the Human Affairs Law under trying circumstances (*see* note 5, *infra*) and his considerable post-graduate assistance in reviewing large portions of initial drafts of this article. In addition, we must also acknowledge our great debt to our research assistants: to Craig Davis (whose painstaking work is largely responsible for repeated postponements of our deadlines), now a member of the South Carolina bar, and to Karen Bulmer Cassidy and John F. O'Connor, third year students at the Law School who, despite valiant efforts to emulate Mr. Davis, have not succeeded in graduating before publication of this work.

1. Act No. 1457 (1972), 57 Stat. 2651. The original statute was amended by Act No. 401, 58 Stat. 698, approved and effective June 22, 1973. Subsequent references to the original statute will be to the codified version in S.C. CODE ANN. §§ 1-360.21 to 1-360.30 (Supp. 1972). The amendments will be identified by section of the amending statute.

able statute, whether viewed from a legal or a sociological perspective, it encompasses all the contradictions implicit in the term "New South." On the one hand, many observers were startled that any law purporting to deal with racial discrimination was enacted by the South Carolina Legislature. The state commission against discrimination has not been a typical Southern phenomenon.[2] On the other hand, critics who believe the New South to be merely clever camouflage for the Old, may well find the statute to be in large measure a victory of form over substance. Although broad in scope, it is almost, if not entirely, devoid of explicit enforcement powers. Moreover, those powers that may have been created reach only discriminations by state and local governments. It may be significant that South Carolina acted only after passage by Congress of the 1972 amendments[3] to title VII of the 1964 Civil Rights Act,[4] giving the United States Equal Employment Opportunity Commission jurisdiction and enforcement power over state and local government for the first time. Still, the South Carolina Human Affairs Law will have some impact on the law in the employment discrimination area. This article will consider the extent of the changes that may result.[5]

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2. *But see, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6252-16 (1970), *as amended*, art. 6252-16 (Supp. 1972).

3. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103, *amending* 42 U.S.C. § 2000e (1964).

4. 42 U.S.C. § 2000e (1964). Unless otherwise noted, subsequent references will be by section of the amended statute.

5. In the interest of full disclosure, the authors note that they were involved in the drafting of the Human Affairs Law. In the spring of 1972 Mr. Cole, then a third-year student at the South Carolina Law School, undertook the drafting as a joint project for an Employment Discrimination course taught by Professor Zimmer and a Legislation class conducted by Professor Sullivan, both of whom supervised his work as it progressed. The project was, however, undertaken for the Governor's Advisory Commision on Human Relations in accordance with the wishes of the commission on the larger policy questions. Because the draft bill, as it took shape, was subject to majority vote of the nineteen-member commission, it is a patchwork of numerous compromises, whether based on conviction or on what was perceived to be politically feasible. As a result, the authors find themselves in the curious role of being interpreters and critics of what is, in some degree, their own work, but a work which hardly reflects their notions of an ideal state anti-discrimination statute. How well they have succeeded in freeing themselves from their own pre-conceptions must be left to the reader to judge.

The authors were in no way connected with the drafting of the 1973 amendments.

It should also be noted that problems of confidentiality have necessarily arisen in the preparation of this article. Where these problems could not be satisfactorily resolved, the authors simply avoided discussing the specific problems in any detail. Accordingly, this work may be somewhat incomplete. Hopefully, the sacrifice is justifiable. To obtain what-

This article will proceed in the following fashion: Part I generally describes the new law and its area of operation. Part II inquires into the troublesome question of the relationship between the newly-enacted Human Affairs Law and title VII of the 1964 Civil Rights Act. Part III treats the question of enforcement of state-based rights under the law. Part IV surveys some of the more important substantive provisions of the statute, concentrating on those which are either unclear or of special interest, such as attempts at a legislative resolution of problems that have troubled the courts in interpreting other civil rights acts. Finally, in Part V some conclusions are drawn from the study that will, hopefully, be of use both to attorneys and courts in dealing with the law and to the newly-created State Human Affairs Commission in implementing it.

I. GENERAL DESCRIPTION OF THE HUMAN AFFAIRS LAW

The South Carolina Human Affairs Law commences with the traditional litany that discriminations "against any individual because of race, creed, color, sex, age, or national origin" are contrary to the state's public policy.[6] The inclusion of age dis-

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ever advantages may flow from an insider's insights, one must accept the concomitant handicaps.

Finally, the authors wish to make clear that the views they express are not necessarily those of either the Commission on Human Affairs or its predecessor, the Governor's Advisory Commission on Human Relations.

6. S.C. CODE ANN. § 1-360.22 (Supp. 1972). Several problems lurk in the definitions of these terms. "Creed" is defined by § 1-360.23(b) to mean "any belief regarding religion and any religious practice or observance." The "belief" phrase of the definition is arguably ambiguous: does it encompass discrimination for lack of belief (agnosticism) or for disbelief (atheism)? The second phrase, "religious practice or observance" is even more troublesome, and perhaps more significant. The language is similar to that added to title VII by the 1972 amendments (except that in the federal statute, "practice" and "observance" are inverted), but the failure to adopt the federal provision in its entirety renders the implications unclear. The classic problem underlying both statutes is whether an employer can discriminate against an employee for refusing, for example, to work on a Saturday when the employee's religion forbids him to labor on that day. The 1972 amendments to title VII attempted to compromise:

> The term "religion" includes all aspects of religious observance and practice . . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C.A. § 2000e(j) (1974).

The incorporation into the South Carolina statute of the "religious practice or observance" language *without the qualifications found in title VII* could be read as barring such discrimination even if it would not be unreasonable for the employer to refuse to accommodate the employee. A contrary view might be supported either by arguing that the

crimination in the statute, without definition or qualification, departs from the pattern of federal age discrimination in employment acts and suggests a possible source of future controversy—especially in state retirement practices—the implications of which will be explored below.

The law also creates the State Human Affairs Commission[7] with the broad mandate:

> [T]o encourage fair treatment for, and to eliminate and prevent discrimination against, any member of a group protected by this chapter, and to foster mutual understanding and respect among all people in this state.[8]

The commission is to consist of 19 members appointed by the Governor.[9] The Governor appoints one member as chairman for a term of one year, and may appoint a vice chairman.[10] Limited to a term of three years,[11] a member may not serve more than two consecutive terms.[12] There is apparently no limitation on the number of terms a chairman may serve as such, other than that he must also qualify as a member.[13] The chairman is given little special authority in the commission. As the presiding officer of the commission, he is charged with promoting "the orderly trans-

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"religious practice or observance" language was a kind of shorthand incorporation of the entire title VII test, or simply by contending that, while there is no incorporation at all, the South Carolina courts are free to work out their own accommodation.

The remaining terms are undefined, except for "national origin," which § 1-360.23(c) defines to include "ancestry." Presumably, the previous term covers aliens while "ancestry" reaches native-born issue of such aliens.

7. The original statute in § 1-360.23(a) entitled the agency the South Carolina Commission on Human Affairs. This was changed by § 1 of the 1973 amendments to the present title.

8. S.C. CODE ANN. § 1-360.24(a) (Supp. 1972).

9. S.C. CODE ANN. § 1-360.24(b) (Supp. 1972). The terms of members are staggered so that one-third of the membership will complete their terms each year.

10. S.C. CODE ANN. § 1-360.24(d) (Supp. 1972). Those responsible sheepishly admit to having preserved intact a classic piece of male chauvinism in a statute designed to curb, *inter alia*, sex discrimination, by establishing a "chairman" rather than a "chairperson". This fault cannot be attributed to the Advisory Commission, since the alternative was never presented. At least partial amends have been made by Professor Zimmer. *See*, By-Laws of the University of South Carolina School of Law, enacted 1972.

11. S.C. CODE ANN. § 1-360.24(b) (Supp. 1972).

12. S.C. CODE ANN. § 1-360.24(c) (Supp. 1972).

13. The currently-appointed members are: E.N. Zeigler, Chairman, Joab M. Lesesne, Jr., John A. Hagins, Jr., Malcolm Haven, Andrew Hugine, Lachlan L. Hyatt, Bobby Leach, John Lumpkin, Barbara Paige, William Saunders, Mrs. Charles H. Wickenberg, Arthur Williams, Marian Greene, Guy S. Hutchins, Ray Williams, W.E. Myrick, Jr., Reverend Matthew McCollom, Elliott Franks, III, and Jean Hoefer Toal.

action of its business,"[14] and appointing commission members to various tasks involved in processing complaints.[15]

The law provides only that "[t]he Commission shall meet at such times in such places as it may determine."[16] This section is a change from an original proposal requiring monthly meetings, which, in light of the South Carolina Freedom of Information Act,[17] possessed all the concomitant advantages and disadvantages of keeping the commission in the public eye and subject to whatever pressure may be generated by an interested citizenry. The Advisory Commission removed this requirement, however, largely on the initiative of one member who felt that it might unduly bind the commission beyond the time when monthly meetings were necessary.

The statute also provides for a commissioner to be hired and fired only with the concurrence of the commission and the Governor; the commission, however, must initiate either action.[18] The commissioner's duties are defined only in the broadest of terms:

> The Commissioner shall be the chief administrative officer of the Commission, and shall perform such duties as are incident to such office or are required of him by the Commission.[19]

Accordingly, the commissioner's actual role in implementing the law will depend largely upon the interaction between him and the commission.[20] The extent of his delegated power remains to be seen.

In addition to the routine provisions for the transaction of business,[21] the commission has certain powers of at least potential substantive importance. It may adopt by-laws,[22] promulgate rules

14. S.C. CODE ANN. § 1-360.26 (Supp. 1972).

15. S.C. CODE ANN. § 1-360.29(d)(2) (Supp. 1972). This power may, however, prove crucial, at least in the early stages of implementation when *what* is decided may very well turn on *who* decides.

16. S.C. CODE ANN. § 1-360.24(e) (Supp. 1972).

17. S.C. CODE ANN. §§ 1-20 *et seq.* (Supp. 1972).

18. S.C. CODE ANN. § 1-360.25(a) (Supp. 1972). The original statute denominated the commissioner as "executive director." This was changed to the present, plainly more confusing, title by § 6 of the 1973 amendments.

19. *Id. See also* S.C. CODE ANN. § 1-360.25(c) (Supp. 1972).

20. The first, and present, commissioner is Mr. George Hamilton, who was also executive director for the predecessor Advisory Commission.

21. *See, e.g.*, S.C. CODE ANN. § 1-360.24(a) (Supp. 1972).

22. S.C. CODE ANN. § 1-360.27(b) (Supp. 1972).

and regulations,[23] and formulate policies.[24] While the distinctions among these categories are not sharply defined, the fact that the statute expressly provides for all three may be significant. If "by-laws" refers to rules of internal procedure, and "rules and regulations" to formulating procedures for prosecuting complaints, then the power to "formulate policies" probably relates to substantive matters beyond the expressed provisions of the Act. Accordingly, the commission may establish rules helpful in enforcing the law.[25]

Another potentially important source of power for the commission is its information-gathering capacity. To this end it is authorized to "obtain and utilize upon request the services of all governmental departments and agencies" and to "require from any State agency or department or its local subdivisions such reports and information at such times as it may deem reasonably necessary to effectuate the purpose of this chapter."[26] Further, the commission by the 1973 amendments is given broad powers in a congeries of provisions authorizing it to issue subpoenas and subpoenas duces tecum,[27] to require any party or

23. S.C. CODE ANN. § 1-360.27(c) (Supp. 1972).

24. S.C. CODE ANN. § 1-360.27(d) (Supp. 1972).

25. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). In *Griggs* the Supreme Court accepted and gave great deference to guidelines of the United States Equal Employment Opportunity Commission. *But see* the issue present in National Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972), *rev'd* 482 F.2d 672 (D.C. Cir. 1973) on the difference between procedural and substantive rule making powers.

26. S.C. CODE ANN. §§ 1-360.27(e) and 1-360.27(i) (Supp. 1972). There is some ambiguity about the extent of these powers. Does the phrase "all governmental departments and agencies" refer to local governmental units or only to those of the state itself? Does the power to require reports "from any state agency or department or its local subdivisions" reach cities and counties or only local branches of state departments? The sweeping language of the policy statement suggests an expansive interpretation in answering both questions, but neither is textually free from doubt. At least as to the second question, however, the phrase "of the state or of its local subdivisions" would make clear that the latter encompasses cities and counties rather than merely branches of state agencies. This formulation is retained in the immediately following § 1-360.27(i), *inter alia*, and was in fact in the original draft of 1-360.27(i). Perhaps the "of" ought to be read into § 1-360.27(i) since in all likelihood it was omitted inadvertently. An opinion letter, dated October 11, 1973 from Assistant Attorney General Merry to Commissioner Hamilton states that the commission has jurisdiction to process complaints against municipalities.

27. Section 2 of the 1973 amendments, adding a new subsection (p) to S.C. CODE ANN. § 1-360.27 (Supp. 1972). The amendment also provides that "[t]he power may be exercised only by the joint action of the chairman of the Commission and the Commissioner." The subpoena power applies "to any matter under investigation or in question before the Commission," presumably including all three kinds of commission proceedings. *See* pp. 9 *et seq. infra*.

witness to answer interrogatories,[28] and to take depositions.[29] These powers are made meaningful by a provision (absent in the original statute) that "the Commission may request an order of the court of appropriate jurisdiction requiring discovery and other related good faith compliance."[30]

The amendments do, however, create at least a potential loophole:

> Notwithstanding any other provision of this section, if in the opinion of a department or agency head the information re-

28. Section 2 of the 1973 amendments, adding a new subsection (q) to S.C. CODE ANN. § 1-360.27 (Supp. 1972). The power to require "any party or witness" to answer interrogatories would seem to be broad enough to reach all three kinds of commission proceedings. *See* note 27 *supra*.

29. Section 2 of the 1973 amendments, adding a new subsection (r) to S.C. CODE ANN. § 1-360.27 (Supp. 1972). Arguably, the power to take depositions of "witnesses" is more limited than that power authorizing interrogatories from "any party or witness." *See* note 28 *supra*. If so, the power would not extend to taking depositions in § 1-360.29(d) or (e) proceedings of "parties" (a term which certainly includes the party complained of, but is ambiguous as to the complainant who, because he does not have control of the "plaintiff's" side of the proceedings, may or may not be a party). Perhaps a better interpretation of the provision, however, is to read "witness" to include both complainant and the party complained of since both may be witnesses regardless of whether they are parties. So construed, the statute makes more sense inasmuch as no reason is apparent why either complainant or party complained of should be immunized from being deposed. Admittedly, this reading requires one to ignore differing language in immediately succeeding sections, contrary to the general canon of construction that different language indicates the legislature intended a different result.

30. This authorization to seek court enforcement does *not* extend to the power under § 1-360.27(i) of the original statue to require reports. Presumably this omission was intentional since the amendments do extend such authorization to the § 1-360.27(e) power in the original statute to obtain the services of other agencies. However, the implication of the omission is unclear. One could argue that the power to obtain services includes the power to require reports: the reports are merely one kind of service. The difficulty with this argument is simply that, had the legislature intended that result, the clearest method of achieving it would have been to extend authorization to seek court enforcement to the § 1-360.27(i) power.

Alternatively, it may be that the broad discovery powers of subsections (p), (q) and (r) render the need for requiring reports under § 1-360.27(i) less important. For example, it is difficult to see how an interrogatory differs from a report, unless the distinction lies in the fact that "interrogatories" can be issued only with regard to specific proceedings whereas "reports" can be required on a routine basis. Even if this distinction runs true, no great problem is posed. The commission can exercise its § 1-360.27(i) power to require reports and, in the case of those who do not comply, begin an investigation by complaint of a member of the commission under § 1-360.29. At that point the commission can order the party complained of to answer an interogatory, thus providing essentially the same information required by the report requested under § 1-360.27(i). Again, this interpretation requires one to assume that the legislature took the long way around when it could have achieved the same result by simply including § 1-360.27(i) in the list of provisions which can be judicially enforced.

> quired by way of a subpoena or subpoena duces tecum would be seriously injurious to an individual, a department or agency if made public, the head of the department or agency may appear before a court of competent jurisdiction and request that the subpoena or subpoena duces tecum be quashed, and upon a proper showing of facts as alleged to the presiding judge, the subpoena may be quashed by order of the court.[31]

The main difficulty with this provision is whether, in addition to creating a procedure to challenge commission subpoenas, it also establishes the standard to be applied by the court in deciding on the merits whether to quash. The better view is that it does not. While the provision requires "a proper showing of facts" that the information sought "would be seriously injurious to an individual, a department or agency if made public," it goes on to say that in such circumstances "the subpoena *may* be quashed by order of the court." This language seems to imply discretion on the part of the judge even after the head of the subpoenaed agency certifies the injury.

In addition to these potentially important powers, the commission is empowered to do other things of significance. It may create "advisory agencies and conciliation councils, local, regional or statewide,"[32] cooperate with "existing or later-created councils, agencies, commissions, task forces, institutions or organizations, public or private,"[33] publicize the results of its investigations and research,[34] require posting of information relating to the law "in places conspicuous to employees of agencies or de-

31. Section 2 of the 1973 amendments. Presumably an agency ordered by the commission under section 1-360.27(q) or (r) to answer interrogatories or be deposed could raise the same kinds of objections. In those cases, however, this would be done in the process of resisting the commission's attempt to obtain a court order to that effect. Disobedience of the commission's order would not, per se, subject the agency to a contempt citation. Since this would not be the case for failure to comply with a subpoena—for which a contempt citation could be immediately sought by the commission—the legislature obviously felt it necessary to establish explicitly a procedure to quash. *See generally* S.C. CODE ANN. §§ 26-201 to -206 and §§ 26-701 to -709 (1964).

32. S.C. CODE ANN. § 1-360.27(f) (Supp. 1972). This provision further states that: "Such advisory agencies and conciliation councils shall, as far as practicable, be composed of representative citizens." Interestingly, this paragraph also speaks of the commission creating such agencies "as will aid in effectuating the purposes of this chapter and of § 5 of Article I of the Constitution of this State." The reference must be to the due process-equal protection clause of the South Carolina Constitution, although, as a result of a 1971 revision of article I, that clause is now section 3 instead of section 5.

33. S.C. CODE ANN. § 1-360.27(g) (Supp. 1972).

34. S.C. CODE ANN. § 1-360.27(h) (Supp. 1972).

partments of the state or of its local subdivisions and to applicants for employment therewith,"[35] cooperate with the United States Equal Employment Opportunity Commission[36] and accept reimbursement therefrom,[37] and accept other donations.[38]

Finally, and most importantly, the commission has power to deal with problems in human affairs in the state in three distinct ways. First, it may process complaints of "unfair discriminatory practices," and hold hearings and issue orders to resolve such complaints.[39] Second, it may endeavor to resolve complaints of discriminatory practices, whether in public or private employment, or in non-employment contexts, by "conference, conciliation and persuasion."[40] Third, the commission, apparently on its own initiative, may undertake investigations and hearings on problems in human affairs in the state and issue recommendations.[41] Some elaboration of each of these commission procedures is necessary.

Section 1-360.28 of the law defines "unfair discriminatory practices." Only an "agency or department of the State or of its local subdivisions or . . . any official, employee or agent thereof"[42] may commit such a practice, except that "any person" who assists in the commission of such a practice,[43] or who retaliates against any person who "in good faith . . . has opposed . . . any act declared to be an unfair discriminatory practice,"[44] or

35. S.C. CODE ANN. § 1-360.27(j) (Supp. 1972). The law, as originally drafted, provided that the commission could require the posting of copies of the act, commission rules and regulations, commission policies, and "any other materials designed to promote and effecuat[e] the purposes of this chapter." As passed, the law provides only that the commission may require copies of the *act* to be posted. This alteration apparently took place in the Legislative Council of the General Assembly, which probably did not appreciate the consequences of changing the language. Nevertheless, significant publicity power has thereby been withheld from the commission.

36. S.C. CODE ANN. § 1-360.27(k) (Supp. 1972). The commission may also cooperate with "other Federal, State and local agencies and departments." *Id.*

37. S.C. CODE ANN. § 1-360.27(e) (Supp. 1972).

38. S.C. CODE ANN. § 1-360.27(m) (Supp. 1972).

39. S.C. CODE ANN. §§ 1-360.27(o), 1-360.28, 1-360.29 (Supp. 1972).

40. S.C. CODE ANN. § 1-360.29(e) (Supp. 1972).

41. S.C. CODE ANN. § 1-360.27(n) (Supp. 1972).

42. S.C. CODE ANN. § 1-360.28(a) (Supp. 1972).

43. S.C. CODE ANN. § 1-360.28(b)(1) (Supp. 1972).

44. S.C. CODE ANN. § 1-360.28(b)(2) (Supp. 1972). The language "declared to be an unfair discriminatory practice by § 1-360.28(a)," present in both §§ 1-360.28(b)(1) and (2), may pose some problems. Does use of the word "declared" suggest that the commission must, in fact, have found the act to be within § 1-360.28(a), or will it suffice if the act *would be* within § 1-360.28(a), even though the commission has not yet so

who violates the terms of a conciliation agreement,[45] may also commit such a practice.

The actions proscribed as unfair practices are worth setting out in full:

> (1) To fail or refuse to hire, bar, discharge from employment or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, sex, age or national origin; or
> (2) To publish or cause to be published any notice or advertisement relating to employment by such agency or department indicating any limitation, specification or discrimination based on race, creed, color, sex, age or national origin, except that such a notice or advertisement may indicate a limitation, specification or discrimination based on sex or national origin when sex or national origin is a bona fide occupational qualification for employment; or
> (3) To use any form of application for employment or to make any inquiry of an applicant for employment which expresses, directly or indirectly, any limitation, specification or discrimination based on race, creed, color, sex, age or national origin or any intent to make any such limitation, specification or discrimination, except that such form of application for employment or inquiry made of an applicant for employment may indicate a limitation, specification or discrimination based on sex or national origin when sex or national origin is a bona fide occupational qualification necessary to the normal operation of the particular agency or department concerned; *provided*, however, that it shall not be an unfair discriminatory practice for any party subject to the provisions of this subsection to compile or assemble such information as may be required pursuant to subsection (i) of § 1-360.27 or pursuant to any other law not inconsistent with this chapter.[46]

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determined? The words "declared *by* § 1-360.28(a)" suggest the latter reading, and such an interpretation would certainly be consistent with the thrust of the law to prevent retaliation against complainants. Otherwise, one who filed a complaint and was immediately fired for doing so would have no remedy under § 1-360.28(b)(2).

45. S.C. CODE ANN. § 1-360.28(d) (Supp. 1972).

46. S.C. CODE ANN. § 1-360.28(a) (Supp. 1972). The reference to section 1-360.27(i) in the proviso to section 1-360.28(a)(3) refers to the power of the commission to require "reports and information." Obviously, information collected to satisfy commission requirements ought to be exempt, even if the same information could conceivably be used to discriminate. The commission may, of course, adopt rules for collecting the information it requires so as to minimize the use of such data for discriminatory purposes.

The prohibitions are quite broad. Even the exemption for "bona fide occupational qualification" (BFOQ) is limited to those based on sex and national origin.[47] Further the use of the term BFOQ, also used in title VII in relation to sex, national origin, and religious discrimination,[48] may itself be restrictive rather than expansive of the right to discriminate. The course of federal decisions interpreting the BFOQ clause suggests that very few job requirements qualify.[49] Since it is a commonly accepted canon of statutory construction that a state adopting legislation from another jurisdiction imports with it the decisional law interpreting that legislation,[50] the BFOQ exception might actually permit less discrimination than if the South Carolina courts were left free to fashion their own judicially-created exceptions.[51]

In addition to the BFOQ clause, the law also permits two other "exceptions." It is *not* an unlawful discriminatory practice:

> (2) To apply different standards of compensation, different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations provided that such differences are not the result of an intention to discriminate because of race, creed, color, sex, age or national origin, or
>
> (3) To give and act upon the results of any test; *provided*, that such test, its administration or action upon the results is not designed or intended to discriminate because of race, creed,

47. The term "bona fide occupational qualification" appears in section 1-360.28(a)(2) dealing with advertising for employment; section 1-360.28(a)(3), dealing with employment applications; and section 1-360.28(c)(1), setting forth a general exemption. In sections 1-360.28(a)(3) and 1-360.28(c)(1), the bona fide occupational qualification standard is itself qualified by the words "necessary to the normal operation of the particular agency or department concerned." This qualification is not found in the language of section 1-360.28(a)(2). Since no apparent reason exists for the necessity standard as applied to employment applications and not to employment advertising, this omission appears to be an oversight. Furthermore, the general language of section 1-360.28(c)(1) would appear to encompass all of section 1-360.28(a) so that *its* use of the necessity standard ought to prevail.

48. 42 U.S.C.A. § 2000e-2(e) (1974).

49. This point will be dealt with in the second installment of this article.

50. *See, e.g.*, Melby v. Anderson, 64 S.D. 249, 266 N.W. 135 (1936). *See also* Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202 (1922).

51. The South Carolina statute is, if anything, even more restrictive of the use of BFOQ than title VII. The latter at 42 U.S.C.A. § 2000e-2(e)(1) (1974), speaks of being "reasonably necessary to the normal operation of the business," while the South Carolina Human Affairs Law speaks only of being "necessary"—arguably a more stringent standard.

> color, sex, age or national origin and that such test measures abilities or other factors necessary to successful performance of the job for which an individual has applied and is being tested or of the job next higher in the ordinary line of promotion or of the job to which an employee is being considered for promotion.[52]

To an extent, these "exception" provisions relating to seniority, merit and testing as a basis for employment or promotion, simply codify the federal law as evolved by the federal courts in interpreting the analogous provisions of title VII.[53]

The Human Affairs Law establishes an elaborate procedural mechanism for dealing with complaints of unfair discriminatory practices. Complaints may be made to the commission, but, unlike the swearing requirement of title VII,[54] there are no formalities specified. Indeed, the statute envisions even oral complaints that may be later reduced to writing by commission employees.[55] The commission's rules of practice and procedure, however, presently require a complaint to be sworn and in writing.[56] Even more significantly, the rules require that the complaint be filed "within 90 days after the alleged unlawful employment practice occurs," a requirement which, however, may be waived upon approval by the commission.[57]

The statute permits the complainant to be "any person."[58] This language is exceedingly broad—far broader than the "person aggrieved" language found in the analogous provisions of title VII.[59] Presumably, the intent is to permit persons qualifying merely as "interested citizens" to bring complaints—even if they lack a personal, *pecuniary* stake in the outcome. This intent ob-

52. S.C. CODE ANN. § 1-360.28(c) (Supp. 1972).

53. This point will be dealt with in the second installment of this article.

54. 42 U.S.C.A. § 2000e-5(b) (1974). This is a wise provision since it should obviate some of the non-productive quibbling that surrounded earlier cases brought under title VII as to whether a complaint unsworn when filed became retroactively valid if later sworn to. *See, e.g.*, Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355 (6th Cir. 1969); and Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968). Complaints may be freely amended before hearing; during a hearing a complaint may be amended only upon a majority vote of the panel. S.C. CODE ANN. § 1-360.29(c) (Supp. 1972).

55. S.C. CODE ANN. § 1-360.29(a) (Supp. 1972).

56. S.C. HUMAN AFFAIRS COMM'N, FIRST ANNUAL REPORT X-1 (1973).

57. *Id.*

58. S.C. CODE ANN. § 1-360.29(a) (Supp. 1972).

59. 42 U.S.C.A. § 2000e-5(b) (1974).

viates the need to shoehorn such a complainant into "person aggrieved" language.[60] The members of the commission may also institute complaints, although they are then disqualified from adjudicatory participation as to that complaint,[61] as part of a scrupulous effort to separate the commission investigatory, prosecutorial and adjudicatory functions.

The executive director assigns an employee to investigate each complaint,[62] and the chairman of the commission appoints a commission member "to supervise the processing of the complaint."[63] If the complaint is not sooner resolved by conciliation,[64] the investigating employee submits to the supervisory commission member

> a statement of the facts disclosed by his investigation and recommend[s] either that the complaint be dismissed or that a panel of Commission members be designated to hear the complaint. The supervisory Commission member, after a review of the case file and the statement and recommendation of the investigator, shall issue an order either of dismissal or for a hearing, which order shall not be subject to judicial or other further review.[65]

Unfortunately, the inability of the complainant[66] to challenge the member's decision to dismiss the complaint is not only debatable as a matter of policy, but also raises a constitutional question. The South Carolina Constitution provides that:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall

60. *Cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

61. S.C. CODE ANN. § 1-360.29(b) (Supp. 1972).

62. S.C. CODE ANN. § 1-360.29(d)(1) (Supp. 1972).

63. S.C. CODE ANN. § 1-360.29(d)(2) (Supp. 1972).

64. S.C. CODE ANN. § 1-360.29(d)(3) (Supp. 1972). Conciliation requires the agreement of the complainant and the party complained of, with approval by the supervisory commission member. The use of "may" in section 1-360.29(d)(3), providing that "the complaint may be resolved at any time before a hearing by conference, conciliation and persuasion" apparently envisions that commission attempts at conciliation are optional. Such a provision, although not common in state anti-discrimination statutes, makes sense: conciliation attempts with a recalcitrant employer (perhaps one who has demonstrated his truculence in prior proceedings) may be merely a waste of time and effort.

65. S.C. CODE ANN. § 1-360.29(d)(4) (Supp. 1972).

66. The party complained of does not suffer more than some further inconvenience under the procedure since he has a de novo hearing before the three-member panel if the supervisory member decides to hear the complaint.

> he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, *and he shall have in all such instances the right to judicial review.*[67]

Since the Human Affairs Law, in so many words, deprives the complainant of judicial review, the consistency of the statute with the constitution must be considered.

The threshold question in resolving the potential constitutional conflict is the meaning of section 22: Does the italicized language guaranteeing the right of judicial review modify only the last clause ("nor shall he be deprived of liberty or property . . . .") or does it extend to the first clause as well ("[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights . . . .")? If the latter construction is the case, then the provision in the Human Affairs Law barring judicial review would seem to be unconstitutional,[68] *unless* an adverse determination by the supervisory member does *not* "finally bind" the complainant in a matter affecting his private rights—which would only be true if there is a private right of action even in the absence of a favorable commission determination.[68.1] Grammatically, it would seem that the right to judicial review extends only to deprivations of liberty or property since the italicized language is separated from that clause only by a comma while the liberty and property clause is separated from the other clauses by a semi-colon. Nevertheless, there is good reason to believe that the right to judicial review was intended to be broadly applicable to all of section 22. Linguistically, the preservation of the right "in all such instances" is strange unless that phrase was chosen to reach all the clauses in the provision; it is too obvious to include the phrase if it applies only to deprivations of liberty and property.[68.2] From a policy

67. S.C. CONST. art. I, § 22 (emphasis added).

68. This conclusion may perhaps be challenged on the ground that the determination of the supervisory member is neither "judicial" nor "quasi-judicial." Such a contention is, however, unpersuasive. First, the studied use of the term "quasi-judicial" plainly betrays an intention that section 22 be given a broad scope. Second, it is not clear why the decision of the supervisory member should not be characterized as "judicial" to begin with since it resembles the probable cause determination that precedes the issuance of a search or arrest warrant, a functon that has traditionally, if not exclusively, been exercised by the judiciary.

68.1. *See* pp. 38-41 *infra.*

68.2. One might, of course, argue that "in all such instances" was employed with

viewpoint, there seems no sound reason to distinguish, insofar as creating a right to judicial review is concerned, between the rights to liberty and property and the kinds of "private rights" affected by the first clause to section 22. Indeed, it is a tenable position that all "rights" that are not "liberty" rights are property rights.

This reasoning suggests another related line of analysis of the consistency between the Human Affairs Law's prohibition of judicial review of complaint dismissals and section 22. Even granting that the constitutional language preserving the right to judicial review modifies only the clause dealing with deprivations of "liberty" or "property," it may be that the statutory provision is still unconstitutional if the right to be free of discrimination is either a property right or a liberty—and it is arguably one or the other. On a constitutional level, there should be a right to be free of public agency discrimination under the state's equal protection clause[68.3] and to the extent that the Human Affairs Law may be the only effectual state remedy to vindicate the right,[68.4] denial of that remedy without judicial review would be tantamount to denial of the right without judicial review in direct contravention of section 22.

On a statutory level, the Human Affairs Law itself may be fairly read as creating an expectancy in at least state employees that they will not be subject to discrimination on the statute's prohibited bases. This expectancy itself may give rise to a "lib-

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respect to deprivations of liberty and property, merely to underscore the importance of the right. But if the right of judicial review is that important, it is not obvious why it does not reach the "private rights" that are the subject of the first clause in section 22.

68.3. S.C. CONST. art. 1, § 3.

68.4. It may be that the Human Affairs Law is not the *only* effective state remedy. There may be another avenue of relief available through the State Employee Grievance Committee, established by the State Employee Grievance Procedure Act of 1971. S.C. CODE ANN. §§ 1-49.11 *et seq.* (Supp. 1971). But this is dubious at best since the statute does not explicitly provide for judicial review and in fact terms "final" the decision of the last agency for administrative review, the State Budget and Control Board. Alternatively, a person claiming illegal discrimination by a public agency under the state's equal protection clause may seek mandamus, although a rational way to mesh the two schemes for relief (mandamus and the Human Affairs Law) is to require resort to the commission, and perhaps a favorable determination by it, before permitting court suit. *See* notes 165-66 *infra*. If a favorable commission decision is necessary, we have come full circle, still faced with the problem of the statute barring judicial review when the deprivation of a constitutional right is involved. If, on the other hand, the courts merely require resort to the commission, thus permitting a mandamus action directly against the respondent after the supervisory member has dismissed the complaint, the constitutional difficulty is avoided since the commission action does not result in any deprivation of rights; it merely forecloses one non-exclusive remedy. *See* note 165 *infra*.

erty or property right" that cannot be foreclosed without judicial review.[68.5] It can, of course, be countered that the expectancy so created by the law is itself limited by that statutory provision barring judicial review of complaint dismissals by the supervisory member. While this argument is logically sound, it proves too much for it would permit the legislature to render wholly nugatory the constitutional judicial review provision with respect to rights which it creates or preserves. This logic is clearly contrary to the intent of the constitutional provision which expressly purports to limit the freedom of the legislature to so act. The clause in question provides for deprivation of liberty and property only "by a mode of procedure prescribed by the General Assembly, *and* [with] the right to judicial review."[68.6]

The implications of this constitutional proscription for the powers of the commission and the possibility of a private right of action will be later explored at length.[69] For the present, however, it should be noted that the legislature could eliminate the problem of possible unconstitutionality and at the same time introduce symmetry into the structure of the law at very little cost merely by allowing an appeal by the complainant of the order of dismissal to the three-member panel. Presumably, the party complained of and the complainant both have the right to seek judicial review of a *final* decision by the three-member panel, either of an order dismissing the complaint or of one granting relief from the unfair discriminatory practice. A provision in the original draft barring such review was eliminated by the legislature, perhaps because of the constitutional questions it raised.[70]

If the supervisory member orders a hearing, he so notifies the party complained of, attaching a copy of the complaint and setting a time and place for the answer.[71] The supervisory member may also request the party complained of to bring to the hearing

68.5. *Cf.* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

68.6 S.C. CONST. art. I, § 22.

69. *See* pp. 38-41 and 78 *infra.*

70. The commission's Rules of Practice and Procedure provide a process for reconsideration of complaint dismissals. S.C. HUMAN AFFAIRS COMM'N, FIRST ANNUAL REPORT X-3 (1973). The motives behind this provision are laudable since it is clearly an attempt to mitigate the rigors of a complaint dismissal when the complainant is expressly barred by the Human Affairs Law from judicial review of that agency action. Nevertheless, the provision may not be valid because the statute prohibits "judicial or *other further review*" of that order. S.C. CODE ANN. § 1-360.29(d)(4) (Supp. 1972) (emphasis added).

71. S.C. CODE ANN. § 1-360.29(d)(6) (Supp. 1972).

documents in his custody,[72] and "shall issue appropriate notices to any witnesses or other custodians of documents desired to be present at the hearing."[73] The supervisory commission member may *not* sit on a panel hearing a complaint which he has referred to it.[73.1]

The hearing procedure provides that "the case in support of the complaint shall be presented before the panel by one of the Commission's employees or agents . . . ."[74] This provision completes the separation of adjudicatory and prosecutory roles, since commission *members* may not present cases.[75] It is not clear whether the initial investigator may present the complaint, since the statute sets up a rule of evidence that "endeavors at conciliation by the investigators shall not be received into evidence not [*sic*][76] otherwise made known to members of the panel."[77] Whether merely having the investigator as prosecuting employee would trench upon this provision may, however, be doubted. Presumably the prohibition does not preclude the introduction into evidence of those parts of an investigator's report that do not relate to "endeavors at conciliation by the investigator."

The party complained of is required to submit a written answer to the complaint and to "appear at such hearing in person or otherwise."[78] Both the complainant[79] and the party complained

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72. *Id. See also* note 73 *infra*.

73. S.C. CODE ANN. § 1-360.29(d)(7) (Supp. 1972). Section 4 of the 1973 amendments also provides:

> Upon notice to any witness or custodian of documents and pursuant to [section 1-360.27] subsection (e) the Commission may apply to any court of competent jurisdiction for appropriate process to compel the attendance at a hearing of such witness or the production by such custodian of documents in his custody. S.C. CODE ANN. § 1-360.29(d)(8) (Supp. 1972).

The original statute only allowed the commission to "request the Attorney General" to apply for such process. This created problems of whether the attorney general's application was discretionary or ministerial. Section 4 of the 1973 amendments, however, by eliminating the middleman, rendered the question academic.

73.1. S.C. CODE ANN. § 1-360.29(d)(9) (Supp. 1972).

74. S.C. CODE ANN. § 1-360.29(d)(10) (Supp. 1972).

75. Although members may be complainants (§ 1-360.29(a) and (b)) and may "be present and submit evidence" (§ 1-360.29(d)(12)), member complainants are "disqualified from participation except as the complainant in the processing and resolution of the complaint." S.C. CODE ANN. § 1-360.29(b) (Supp. 1972).

76. "Not" appeared as "nor" in the original draft of the bill, and the proviso makes more sense when so read. It seems certain from the context that the present "not" was a typographical error rather than an attempt to change the meaning of the sentence. The courts should so construe it.

77. S.C. CODE ANN. § 1-360.29(d)(10) (Supp. 1972).

78. S.C. CODE ANN. § 1-360.29(d)(11) (Supp. 1972).

79. S.C. CODE ANN. § 1-360.29(d)(12) (Supp. 1972).

of[80] have the right to submit evidence.[81] All testimony is to be under oath.[82] The ordinary rules of evidence do not apply, but a recording of the proceedings is to be made.[83] Decisions of the panel against the party complained of are to include a statement of findings of fact, an opinion and an order

> requiring that such unfair discriminatory practice be discontinued and requiring such other action including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay to the persons aggrieved by such practice as, in the judgment of the panel, will effectuate the purposes of this chapter.[84]

The problem of enforcing such an order will be explored at length in Part III. Copies of the opinion and order are to be transmitted to the attorney general and are to be available for public inspection.[85]

The law establishes a second, separate procedure for the commission to resolve by "conference, conciliation and persuasion,"[86] the following kinds of cases:

> [C]omplaints of the existence or occurrence of any practice asserted to be discriminatory on the basis of race, creed, color,

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80. S.C. CODE ANN. § 1-360.29(d)(11) (Supp. 1972).

81. The law is liberal regarding amendment of the pleadings. Section 1-360.29(c) permits the complaint to be amended "[a]t any time before a hearing" by the supervisory member upon request of the investigator, the complainant or the party complained of (presumably the request of the latter is the equivalent of a motion to strike). Complaints may be amended during a hearing only upon a majority vote of the panel. Section 1-360.29(d)(11) provides that "[t]he party complained of shall have the power reasonably and fairly to amend his answer." The provisions relating to complaint and answer are, therefore, asymmetrical. This difficulty may be cured by the supervisory member or panel (whichever is applicable) reading the section 1-360.29(c) standards into section 1-360.29(d)(11). *See generally* Comm'n Rules of Practice and Procedure §§ B(7), H(7) and (8), S.C. HUMAN AFFAIRS COMM'N, FIRST ANN. REP. X-2 (1973).

82. S.C. CODE ANN. § 1-360.29(d)(13) (Supp. 1972).

83. *Id.*

84. S.C. CODE ANN. § 1-360.29(d)(14) (Supp. 1972).

85. S.C. CODE ANN. § 1-360.29(d)(16) (Supp. 1972). *See also* Freedom of Information Act, S.C. CODE ANN. §§ 1-20 *et seq.* (Supp. 1972).

86. S.C. Code Ann. § 1-360.29(e) (Supp. 1972). Section 1-360.29(f) as amended also provides:

> If in the course of processing any complaint under the procedure set forth in (e) above sufficient facts shall appear, warranting the processing of the complaint under the procedure provided by § 1-360.29(d) . . . such other procedure shall thereafter be followed for the processing of the complaint.

Section 3 of the 1973 amendments corrected an obvious clerical error in the original enactment which had "(e)" appearing in both references in subsection (f).

> age, sex or national origin, whether in public or private employment, other than those discriminatory practices declared unfair by Section 1-360.28, or of any other practice asserted to be discriminatory on the basis of race, creed, color, age, sex or national origin, or of any other dispute regarding human affairs . . . .[87]

The provision contemplates commission attempts at conciliation in four distinct classes of cases: (1) any discriminatory practices in *public* employment that are *not* unfair discriminatory practices within the meaning of section 1-360.28 (Since it is hard to imagine what acts would so qualify, this provision probably represents an excess of caution more than anything else.); (2) discriminations in *private* employment; (3) all discriminations, without regard to the employment context; and (4) "any other dispute regarding human affairs," a phrasing far more expansive than any of the other classes in that it is *not* limited to discriminations on the prohibited bases: race, creed, color, age, sex or national origin.

Section 1-360.29(e) recognizes the existence of interests which, although not as deserving of legal protection as discriminatory practices in public employment, still pose problems sufficient to invoke the state's interest in making available its "good offices" to resolve them through efforts at conciliation by the commission. The commission's involvement in these areas will also provide it with expertise that may prove useful in recommending amendments to the Human Affairs Law or in making suggestions to agencies of the state government. The procedures established by section 1-360.29(e) are skeletal.[88] The commissioner simply assigns an employee of the commission to attempt conciliation of the complaint. Upon refusal of either party to cooperate, the employee merely withdraws from the case. One draft of section 1-360.29(e) contained a provision allowing the commission conciliator, upon being forced to cease his efforts because of the unwillingness of a party to engage in attempts at conciliation, to issue a statement and recommendations to serve

87. S.C. CODE ANN. § 1-360.29(e) (Supp. 1972).

88. It is not clear how a hybrid complaint—one charging both unfair discriminatory practices and discrimination within § 1-360.29(e)—would be treated. It could be separated into its component parts or processed entirely as an unfair discriminatory practice since the latter course provides the more elaborate procedure. Of course, appropriate adjustment should be made regarding the pleadings, the hearing and the final order so that the commission does not overstep its jurisdiction as to those portions of the complaint which do not constitute a claim of an unfair discriminatory practice.

as a guideline for the parties should they again attempt conciliation. The Advisory Commission's deletion of this provision—an action, which, read together with the language requiring that "the Commission file of the complaint shall be closed"—probably precludes the issuance of a report. The commission apparently felt that such a report might be employed by the party it favored for publicity value. It is questionable whether anything is wrong with such use. It may be that the Advisory Commission was fearful that the commission itself would appear to be taking a position when, in fact, the only action taken was that of an investigator. Perhaps a better solution, however, would have been to permit commission review of the report upon application by either party.

The final commission power relates to its authorization

> [t]o investigate problems in human affairs in the State and in connection therewith, to hold hearings . . . and following any such investigation or hearing to issue such report and recommendations as in its opinion will assist in effectuating the purpose of this chapter.[89]

This power differs from the procedures established in section 1-360.29(d) and (e) both because it is self-starting by the commission without the need for a complaint, and because its aim is more the development of facts than immediate action on them. Furthermore, this device may be preferable to the procedures established in section 1-360.29(e) simply because the commission is permitted to issue a report and recommendations which may have at least some publicity value. Whether, however, the commission could employ section 1-360.27(n) as a means to issue a report on a case originally brought under section 1-360.29(e) is questionable,[90] although certainly an influx of section 1-360.29(d) or (e) complaints against a particular agency, employer or industry could provide the impetus for a section 1-360.27(n) investigatory hearing.

In summary, the statute provides for three separate kinds of commission action: (1) the formal processing of complaints of unfair discriminatory employment practices by state and local

89. S.C. CODE ANN. § 1-360.27(n) (Supp. 1972).

90. One might argue that the failure of the statute to bar explicitly the issuance of a report when conciliation fails under section 1-360.29(e) shows the absence of any strong public policy. Accordingly, the section 1-360.27(n) device might be employed to fill the void left by the section 1-360.29(e) procedures.

agencies under section 1-360.29(d) resulting in commission "orders" in appropriate cases; (2) under section 1-360.29(e), efforts at resolving by conciliation private *employment* discrimination cases; public employment discriminations not defined as unfair discriminatory practices under section 1-360.28; "any other practice," not limited to employment; or "any other dispute regarding human affairs," and (3) the investigation and hearing provisions applicable to all "problems in human affairs" in section 1-360.27(n).

Finally, the statute has a number of provisions relating to its application; it is not retroactive, applying only to practices occurring after June 23, 1972, the effective date of the law.[91] Second, the provisions do not "apply to any matter before the Governor's Advisory Commission on Human Relations."[92] Since the provision barring retroactivity would suffice to cover most matters before the Advisory Commission, this provision must be aimed at questions arising between passage of the law and actual formation of the Commission on Human Affairs. Presumably the Advisory Commission continues to function as to those matters. Third, the statute provides:

> The procedures and remedies provided under this chapter shall not be deemed exclusive, but may be pursued solely or in addition to any other procedure or remedy available at law or in equity; *provided, however*, that no state employee may file a complaint both with the State Employee Grievance Committee and with the Commission created by this chapter.[93]

This provision clearly requires an election of remedies between the Commission on Human Affairs and the State Employee's Grievance Committee.[94] Is there, however, a further significance in the language that the "procedures and remedies provided under this [act] shall not be deemed exclusive?" *Are* there other remedies? These questions will be considered in Part III.

II. THE HUMAN AFFAIRS LAW AND TITLE VII

In addition to creating an avenue of state administrative relief, the enactment of the South Carolina Human Affairs Law

91. S.C. CODE ANN. § 1-360.30(a) (Supp. 1972).
92. S.C. CODE ANN. § 1-360.30(b) (Supp. 1972).
93. S.C. CODE ANN. § 1-360.30(c) (Supp. 1972).
94. State Employee Grievance Procedure Act of 1971, S.C. CODE ANN. §§ 1-49.11 *et seq.* (Supp. 1971).

has at least a potential impact upon the federal right of action for employment discrimination in South Carolina because of the structure of redress under title VII of the 1964 Civil Rights Act. Before examining the interrelationship of federal and state law, however, it will be necessary to review the enforcement scheme of the recently amended federal statute.

Under title VII, a person aggrieved has, with exceptions to be discussed, 180 days from the occurrence of an unfair employment practice to file a charge with the United States Equal Employment Opportunity Commission (EEOC).[95] The Commission must first serve notice of the charge upon the respondent within ten days[96] and then investigate. The next step is to determine if there is reasonable cause to believe that the charge is true.[97] Upon determination of no reasonable cause, the Commission must dismiss the charge and notify the charging party and the respondent;[98] the charging party may then bring a private action within

95. 42 U.S.C.A. § 2000e-5(e) (1974). The period was ninety days prior to the 1972 amendments (hereinafter "amendments").

96. 42 U.S.C.A. § 2000e-5(b) and (c) (1974). The ten day period for notice was added by the amendments. Case law considering the effect of Commission failure to notify respondents under the unamended statute (which merely required the EEOC to "furnish [the respondent] with a copy of such charge") held both ways on the question of whether such service was a prerequisite to suit. *Compare* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967), *rev'd on other grounds sub nom.* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), *with* Pullen v. Otis Elevator Corp., 292 F. Supp. 715 (N.D. Ga. 1968), Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D.N.C. 1969), *and* Holliday v. Railway Express Co., 306 F. Supp. 898 (N.D. Ga. 1969). *See also* Local 5, Int'l Bhd. of Elec. Workers v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied* 393 U.S. 1021 (1969). Unfortunately, the amendments do not resolve the difficulty, and may even compound it. The amendments explicitly require the Commission to serve the person charged within ten days of filing, but do not specify the consequences of EEOC failure to do so. No enlightenment on this question is to be found in the legislative history. The dilemma is similar to that faced by the courts in interpreting the original statute in the cases cited above. To allow a private suit despite EEOC failure to serve the party charged is to render the service provision merely hortatory; to require timely service as a prerequisite to suit is to deprive a private plaintiff of his cause of action merely because of bureaucratic delay. It may be, however, that the amendments permit the courts to avoid both horns of the dilemma since the Commission now has power to institute suit. Perhaps the courts could find that failure by the EEOC to serve timely the party charged would preclude further *Commission* action, still leaving the charging party free to pursue his private remedy. This interpretation would provide a stimulus for Commission compliance with the statutory prescription while preserving private rights from destruction by Commission delay. *See* EEOC v. Container Corp., 352 F. Supp. 262 (M.D. Fla. 1972). Alternatively, the courts may, to use a term of art, find the ten-day language to be "directory" rather than "mandatory." Such an approach would be well-precedented in title VII jurisprudence.

97. 42 U.S.C.A. § 2000e-5(b) (1974).

98. *Id.*

ninety days.[99] If the Commission does, however, find reasonable cause, the statute requires that the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[100] If conciliation fails,[101] the Commission may bring a civil suit against the respondent[102]—except where the respondent is a government, governmental agency or political subdivision. In these instances, the EEOC may only refer the matter to the Attorney General "who may bring a civil action against such respondent."[103] If no suit is brought by either the EEOC or the Attorney General within 180 days after filing of the charge,[104] the governmental agency involved "shall so notify the person aggrieved and within ninety days[105] after the giving of such notice a civil action

99. 42 U.S.C.A. § 2000e-5(f)(1) (1974). This provision, new in the amendments, resolves the question under the original act of whether an EEOC finding of reasonable cause was a prerequisite to private suit. The weight of authority was in the negative, *e.g.*, Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970), a result which has now been codified.

100. 42 U.S.C.A. § 2000e-5(b) (1974).

101. The EEOC is not the sole judge of the success of conciliation. Although section 2000e-5(f)(1), dealing with the Commission's right to sue, speaks of its being "unable to secure from the respondent a conciliation agreement acceptable to the Commission," the provision goes on to permit the charging party to bring suit "[i]f . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party* . . . ." *Id.* (emphasis added).

102. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

103. *Id.*

104. The Commission is required to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge . . . ." 42 U.S.C.A. § 2000e-5(b) (1974). A problem arises if the Commission, presumably acting "as promptly as possible," still fails to make any such determination within 180 days of filing. The private right to sue after that period is seemingly unqualified in section 2000e-5(f)(1) (absent, of course, suit by the EEOC or Attorney General). It would, therefore, appear that failure by the Commission to pass on reasonable cause would not prejudice the charging party's right to redress in the courts. Such a conclusion is consistent with the provision permitting suit by one who has been notified of a Commission finding of no reasonable cause. It would be strange indeed if one whose case had been decided adversely by the EEOC were in a better position than a person whose case had not been decided at all. This result also agrees with the pre-amendment cases holding EEOC failure to conciliate within the then-prescribed period of sixty days no bar to private suit. *See, e.g.*, Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Johnson v. Seaboard Airline R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).

105. The original act provided a thirty-day period in which to bring suit after notice. This time period was *not* directory, but constituted an effective statute of limitations. Goodman v. City Products Corp., Ben Franklin Div., 425 F.2d 702 (6th Cir. 1970); *cf.* Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968). *But see* Grimm v.

may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ."[106] If suit is commenced by either the EEOC or the Attorney General, the charging party has the right to intervene,[107] and thus protect his interest against governmental delays or inadequate representation.

The title VII enforcement scheme changes somewhat when the alleged unlawful employment practice occurs "in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . ."[108] Title VII requires deferral to the state or local agency since no charge may be filed with the EEOC before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated.[109] This added step in the enforcement process, however, gives rise to several complications.

First, when deferral is required a different statute of limitations applies:

> [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . .[110]

This provision must, of course, be read together with the mandate that no charge be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced

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Westinghouse Elec. Corp., 300 F. Supp. 984 (N.D. Cal. 1969); McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881 (E.D. Tex. 1969). The new, longer period should be given the same effect.

106. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

107. *Id.*

108. 42 U.S.C.A. § 2000e-5(c) (1974). Determining the situs of the occurrence of particular unlawful practices, particularly those in multi-state corporations, may pose future problems; however, no cases have as yet arisen on this point.

109. *Id.* There is a proviso that the sixty day period "shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law." This proviso would apply to any complaint which must be filed with the South Carolina Human Affairs Commission prior to June 23, 1973.

110. 42 U.S.C.A. § 2000e-5(e) (1974).

under the State or local law."[111] The question then becomes whether the charge must be filed with the state or local agency within 300 days or within 239 days (239 + 60 = 299) after the alleged discrimination[112] to ensure timely EEOC filing.[113] In *Vigil v. American Telephone and Telegraph Co.*,[114] the Tenth Circuit held that a filing with the EEOC during the period when the state agency had exclusive jurisdiction, satisfied the requirement of filing within 300 days.[115] In so holding the court relied heavily on the recent Supreme Court decision, *Love v. Pullman Co.*,[116] which reversed a prior Tenth Circuit decision[117] on a related but arguably very different question. The *Vigil* court read *Pullman's* "clear import" to be that

> the filing with the EEOC of a complaint within the sixty-day period, when the state agency has exclusive jurisdiction to act, does serve to meet the jurisdictional requirement . . . that the complaint be filed with the EEOC within [300] days from the date of the unfair employment [*sic*] complained of, even though the EEOC may not proceed with its investigation until

111. 42 U.S.C.A. § 2000e-5(c) (1974).

112. The time limitations for initial filing are, of course, only meaningful if the act of discrimination complained of is not continuing. There has developed a considerable, if not consistent, body of title VII law on what constitutes a continuing violation. *See, e.g.*, Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969) (discriminatory layoff as a new discriminatory act at the time of recalls that did not include the charging parties); Norman v. Missouri Pacific R.R., 414 F.2d 73 (8th Cir. 1969) (policy classifying whites as "brakemen", blacks as "porters" was continuing); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970) and Moreman v. Georgia Power Co., 310 F. Supp. 327 (N.D. Ga. 1969) (both suggesting that failure to correct a discrimination renders the act a continuing one); *cf.*, Hutchings v. United States Indus., Inc., 309 F. Supp. 691 (E.D. Tex. 1969), *rev'd and remanded on other grounds*, 428 F.2d 303 (5th Cir. 1970) (discontinuance of a job assignment not a continuing violation, and failure to correct the discrimination cannot render it one); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd and remanded on other grounds*, 421 F.2d 888 (5th Cir. 1970) (failure to promote not a continuing act; failure to remedy an unlawful act not a violation); Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195 (W.D. Va. 1969) (job transfer not a continuing violation, even if the underlying discriminatory motivation continued).

113. It is true that the "unless such proceedings have been earlier terminated" language of section 2000e-5(c) does offer a theoretical avenue of escape for a filing occuring later than 239 days after the violation. In practice, however, state or local proceedings will rarely be closed in less than sixty days. An attorney wishing to pursue his client's federal remedy might be advised to *request* termination of state proceedings if necessary to bring suit within the 300 day period.

114. 455 F.2d 1222 (10th Cir. 1972).

115. The court in *Vigil* was actually dealing with the 210 day counterpart to the present 300 day limitation in the amended act.

116. 404 U.S. 522 (1972).

117. 430 F.2d 49 (10th Cir. 1970).

the state agency has had the complaint for sixty days.[118]

This interpretation is surely an overly broad reading of *Pullman*, perhaps induced by the court's apprehension of being once more reversed. In fact, *Pullman* merely held that a filing with the EEOC, premature by virtue of falling within the sixty day deferral period, may be held in "suspended animation" by the EEOC until the deferral period expires, at which time the complaint may be deemed automatically filed. The rationale stated by the Court was:

> We see no reason why further action by the aggrieved party should be required. The procedure complies with the purpose both of § 706(b), to give state agencies a prior opportunity to consider discrimination complaints, and of § 706(d), to ensure expedition in the filing and handling of those complaints. The respondent makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.[119]

Elimination of an unnecessary step in complaint processing stands on an entirely different footing than holding premature filing effective for purposes of avoiding a statute of limitations. This is not to say that the *Vigil* court was wrong in its result, or even that the "spirit" of the *Pullman* decision does not suggest the Tenth Circuit's result. It is, however, to argue that the *Pullman* holding does not close the question as the *Vigil* opinion intimates.

Pullman is justifiable not merely because it eliminates red tape for both the charging party and the Commission but also because there is no significant prejudice to the respondent. The only loss the respondent suffers is his opportunity to require his opponent and the Commission to shuffle more papers, hardly a substantial interest. This analysis is not applicable, however, to the *Vigil* situation. The respondent does lose something of "legitimate" value to him if the *Vigil* holding is followed—*i.e.*, sixty days' worth of a statute of limitations. This interest, while per-

118. 455 F.2d at 1224.

119. 404 U.S. 526. Statutory references are to the act *prior* to its amendment.

haps not overwhelming, should at least suffice to require analysis rather than unwitting application of *Pullman*.

There is, however, no easy way out of the dilemma. Neither reason nor justice supplies an adequate answer when one is dealing with a statute of limitations. It is, after all, the nature of the beast to be arbitrary, and therefore it is impossible to say whether a 240-day period is more or less arbitrary than 300 days. If this logic throws one back on the wording of the statute, the *Vigil* result is difficult to support, for the language "no charge may be filed" prior to the sixty day deferral period is most naturally read as "no charge is effective"—a result consistent with *Pullman*. Nonetheless, the result in *Vigil*, and the fact that the EEOC takes the same position,[120] may decide which way the law will develop despite arguments, and some weak case support,[121] to the contrary.

Where there is a requirement of deferral, title VII further requires the Commission, in making its determination of reasonable cause, to "accord substantial weight to final findings and orders made by State or local authorities."[122] The EEOC regulations defining "final findings and orders"[123] and "substantial

120. 29 C.F.R. § 1601.12(b)(1)(v) (1973):

> In cases where the document is filed with the Commission [EEOC] more than 240 days following the alleged act of discrimination but less than 300 days therefrom, the case shall be deferred . . . *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 299th day following the alleged discrimination and will commence processing the case.

The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), found EEOC administrative interpretations entitled to "great deference." *But cf.* Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D.N.C. 1972).

121. Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968). This decision may be distinguished on the ground that, when it was rendered, EEOC policy was that a charge was filed when it was received. Arguably, the policy change reflected in the present regulations now justifies a different result. *See also* Local 5, Int'l Bhd. of Elec. Workers v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

122. 42 U.S.C.A. § 2000e-5(b) (1974).

123. 29 C.F.R. § 1601.19b(e)(1) (1973) provides:

> "Final findings and orders" shall mean:
> (i) The findings of fact and order incident thereto issued by a 706 Agency after a public hearing on the merits of a charge; or
> (ii) The consent order or consent decree entered into by the 706 Agency prior to or during a public hearing on the merits of a charge, if such consent order or decree may be enforced by the courts.
> *Provided, however,* That no findings and order of a 706 Agency shall be considered the final findings and order for purposes of this section unless the 706 Agency shall have served a copy of such findings and order upon the Commis-

weight"[124] to include EEOC notions of due process, perhaps reduce the breadth of the statutory provision. One might question whether the regulations are consistent with the statute they purport to implement.[125] The matter is hardly worth pursuing, however, since an EEOC finding of no reasonable cause does not preclude private suit.[126] Additionally, since the suit is on a trial de novo, no real prejudice is likely to result even if a "wrong" state agency finding is transmuted by the "substantial weight" test into a "wrong" EEOC finding. Moreover, the time period involved will make it the rare case when a state agency final determination precedes the EEOC's determination of reasonable cause.[127]

Having explored some of the federal law implications of the deferral requirement, the basic question still remains: When is deferral required? More specifically, when does a state or local agency qualify under title VII as one to which a charge must be

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sion and upon the persons claiming to be aggrieved; and shall have informed such persons of their rights of appeal, or to request reconsideration, or rehearing or similar rights; and the time for such appeal, reconsideration, or rehearing request shall have expired or the issues on such appeal, reconsideration, or rehearing shall have been fully determined.

124. 29 C.F.R. § 1601.19b(e)(2) (1973) provides:

"Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them, when they meet all of the prerequisites set forth below:

(i) The proceedings were fair and regular; and

(ii) The remedies and relief granted are comparable in scope to the remedies and relief required by Federal law; and

(iii) The final findings and order serve the interest of the effective enforcement of title VII.

Provided, That giving "substantial weight to final findings and orders" of a "706 Agency" does not include according weight, for the purposes of applying Federal law, to that agency's conclusions of law.

125. *See* pp. 29-32 *infra*.

126. *See* pp. 22-23 *supra*.

127. Section 2000e-5(b) provides for an EEOC finding of reasonable cause within 120 days from filing "so far as practicable." This period, added to the sixty day period of deferral, means that in the "normal" case, the final state or local agency action must be within 180 days of first filing with the state agency if it is to precede the EEOC determination. It may, of course, be that EEOC action will not be "practicable" within 180 days from filing, so that correspondingly more time will be available for state or local "final orders." Nevertheless, the length of the administrative process, especially if defined (as do the EEOC regulations) to include the expiration of time to appeal or seek rehearing, will often exceed the time within which the EEOC is able to make its determination of reasonable cause. In any event, if the EEOC takes longer than 180 days from the date of filing to determine reasonable cause, the right to bring a private action matures automatically. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

deferred for sixty days before the EEOC can act? The answer to this question is particularly critical for South Carolina since the Commission on Human Affairs may not be a qualified agency because of its weak enforcement powers.

The starting point in our inquiry must, of course, be the relevant title VII statutory provision:

> [When an unlawful employment practice occurs] in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof [deferral is required].[128]

The South Carolina scheme would seem to qualify under one reading of the language since it is a state having a "law prohibiting the unlawful employment practice alleged and . . . authorizing a State . . . authority to grant or seek relief from such practice." This reading is certainly true as to discriminations by state or local governmental agencies, if the "orders" the commission may issue are tantamount to "grant[ing] or seek[ing] relief." Furthermore, if "seeking relief" includes the power to conciliate, the South Carolina Human Affairs Law would seem to qualify even as to discriminations by private employers because the commission can certainly seek to resolve them by conciliation.

The inquiry, then, becomes what is meant by the phrase "grant or seek relief." Perhaps the requirement that the state law "prohibit" the alleged conduct lends meaning to "grant or seek relief," thus implying some coercieve power. A similar inference might be drawn from the fact that the power, for example, of a state attorney general to initiate criminal prosecution would satisfy the deferral requirement under the "or institute criminal proceedings" language. Contrary inferences may also be drawn. The use of the disjunctive in "grant *or* seek" may be indicative of a legislative intent to require deferral even when the state or local agency is wholly powerless, except for any moral suasion it may exercise. Moreover, the term "seek" is redundant if applied to an agency that can "grant" relief. The use of the word "or" underscores the inference that the distinction was purposeful and

128. 42 U.S.C.A. § 2000e-5(c) (1974). *See also* 42 U.S.C.A. § 2000e-5(d) (1974).

not just a flight of rhetoric (as perhaps "seek and grant relief" might be). This argument can be rebutted, however, by arguing that "grant" refers to the ability of a state or local agency to issue cease and desist orders, while "seek" means that the agency simply has the power to sue on behalf of a complainant, as does the EEOC after the 1972 amendments in the federal scheme. Under such a reading, both branches of "grant or seek" would imply coercive power exercised at some point.

The EEOC has issued regulations which attempt to resolve these questions by defining those instances in which deferral is required. The problem, however, is that the regulations themselves may ultimately be of dubious validity since they establish requirements for deferral which are, arguably, less hospitable to deferral than those that can be derived, expressly or by implication, from the statute.

To understand the difficulty, it is necessary to review briefly the EEOC scheme. The Federal Commission will defer to those agencies which it certifies as "706 Agencies."[129] Certification is considered upon application by the agency, with submission of information relating to the agency's governing statute, its rules and regulations, its organizational chart, funding, the name of the agency attorney[130] and:

> A statement, on a form to be provided by the Commission certifying the following:
>
> (i) That the law prohibiting discrimination establishes or authorizes that agency to exercise administrative enforcement authority.
>
> (ii) That the law and administrative practice do not place any excessive burdens on the complainant which might discourage the filing of complaints.
>
> (iii) That the law is comparable in scope to title VII coverage and is administered by the agency so that, in fact, the practices prohibited and remedies required are comparable in scope to the practices prohibited and the remedies required under title VII of the Civil Rights Act of 1964, as interpreted by the United States Supreme Court in the case of "Griggs v. Duke Power," 401 U.S. 424 (1971).[131]

129. 29 C.F.R. § 1601.12(b) (1973) provides that, upon receipt of a charge, the EEOC will transmit a copy to the appropriate 706 agency, notify the aggrieved party of the deferral and advise him that, unless such party notifies it to the contrary, the EEOC will consider the charge filed with it "on the termination of State or local proceedings, or after 60 days have passed, whichever comes first."

130. 29 C.F.R. § 1601.12(e)(1),(2),(3),(4) (1973).

131. 29 C.F.R. § 1601.12(e)(5) (1973).

Furthermore, the regulations establish standards for EEOC application in determining whether to certify a 706 Agency:

> No agency shall be designated or continued as a designated 706 Agency unless the law which it administers:
>
> (1) Protects persons from discrimination on essentially all of the grounds covered by title VII as amended; and
>
> (2) Includes in the practices prohibited essentially all of the practices prohibited by title VII as amended; and
>
> (3) Includes in its coverage of persons by whom such practices are declared illegal, essentially all of the classes of persons as defined under title VII; and
>
> (4) Is administered and interpreted by the agency so that it does, in fact, prohibit the practices prohibited by title VII and does, in fact, require the remedies required by title VII.[132]

And, finally, even after an agency is certified as a 706 Agency by the EEOC, the continued effectiveness of the certification depends upon compliance with EEOC performance standards.[133]

Even cursory consideration of the EEOC regulations reveals that the South Carolina Human Affairs Commission will not be able to qualify as a deferral agency.[134] The Human Affairs Law is *not* "comparable in scope to title VII coverage and . . . administered so that, in fact, the practices prohibited and remedies required are comparable in scope to the practices prohibited and the remedies required under title VII."[135] Further, it is not clear if the law protects the same persons as does title VII from essentially the same practices prohibited by the federal law.[136] Although the same kinds of discriminations are generally declared

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132. 29 C.F.R. § 1601.12(f) (1973). Subsection (2) has a proviso mitigating the rigor of these requirements by allowing certification if the agency "interprets its legislation to prohibit the practices prohibited by section 704(a)."

133. 29 C.F.R. § 1601.12(h) (1973) provides:

> (1) In all cases where the 706 Agency finds cause to credit the allegations of a charge, it shall effectively eliminate the discrimination and, where appropriate, provide for full compensatory and prospective relief consistent with the applicable Federal law.
>
> (2) In all cases where the 706 Agency enters into a conciliation agreement, consent order, or order after public hearing, it shall include in any such agreement or order mechanisms for monitoring compliance in the event any terms thereof are not implemented.

29 C.F.R. §§ 1602.12(i) and (j) establish the procedures for removing certification.

134. At this writing, the EEOC has categorized the South Carolina Commission as being without even provisional 706 status.

135. *See* note 131 *supra*. *See also* pp. 3-21 *supra*.

136. *Id.*

to be against South Carolina's state policy as are made unlawful employment practices by the federal law, it is doubtful that a practice can be said to be "prohibited" by the state statute when it provides neither an administrative remedy beyond attempts at conciliation (discriminations by private persons) nor perhaps any effective remedy (the commission's power to issue "orders" against discrimination by state or local governments without any explicit provision for enforcing them).

It therefore appears that the South Carolina Commission may be a deferral agency under a literal reading of the statute, but may not qualify in the view of the EEOC regulations. Put this way, of course, the outcome is clear: the statute controls the regulations, which are of no effect to the extent they are inconsistent with title VII. The EEOC regulations may, however, express the correct interpretation of the purpose of title VII, so that the regulations are effective as being merely declaratory of existing law. It will be recalled that the Supreme Court has stated that administrative interpretations by the EEOC are entitled to "great deference."[137] Even the "great deference" standard, however, would not seem to justify some of the liberties the EEOC regulations take with the statutory language. For example, the statute explicitly provides that the existence of a state agency authorized "to institute criminal proceedings" with respect to discrimination is sufficient to require deferral.[138] This provision is patently at odds with the EEOC requirement that to qualify for deferral, "the law prohibiting discrimination establishes or authorizes that agency to exercise administrative enforcement power."[139] Another discrepancy between regulation and statute is the EEOC requirement that the law administered by the state agency "[protect persons] from discrimination on essentially all of the grounds covered by title VII."[140] Yet, for example, a statute which bars racial discrimination but not sex discrimination is still a law "prohibiting the employment practice alleged" within the language of the statute when the particular complaint charges only race discrimination.

There is, in fact, a scattering of judicial precedents which in effect indicate that the EEOC regulations are too restrictive. In

137. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

138. 42 U.S.C.A. § 2000e-5(c) (1974).

139. 29 C.F.R. § 1601.12(e)(5)(i) (1973). *But see* General Ins. Co. of America v. EEOC, 7 E.P.D. ¶ 9086 (9th Cir. 1974).

140. 29 C.F.R. § 1602.12(f)(1) (1973).

Edwards v. North American Rockwell Corp.[141] the court required deferral of a charge of race discrimination since the state agency had jurisdiction over that subject matter, but indicated that a charge of sex discrimination need not be deferred since the state law did not reach that conduct. And in *EEOC v. Union Bank*[142] the Ninth Circuit required deferral under a state statute which barred only *wage discrimination* on the basis of sex and set up an administrative scheme of enforcement.[143]

Perhaps the most important decision, however, is *Crosslin v. Mountain States Telephone and Telegraph Co.*,[144] although its implications are ambiguous. In *Crosslin*, the Ninth Circuit reversed the district court and held that deferral to the Arizona Civil Rights Commission was required even though the only remedy available under the Arizona law was a criminal penalty, a fine not to exceed $300.00.[145]

> Since Congress has spoken in terms not of ultimate state remedy but of relief to be sought by a state authority, it may reasonably be supposed to have had in mind the type of relief which it had itself authorized the EEOC to seek: elimination of the unlawful practice by "conference, conciliation and persuasion." § 2000e-5(a). It may reasonably be credited with the desire to afford the states the same opportunity for settlement that it had afforded the EEOC by its requirement that a charge be filed with the EEOC prior to institution of suit. We so construe the Act.[146]

The court found further support for its result in the very shortness of the sixty day period of required deferral:

> The phrase "grant or seek relief," if it is to be sensibly construed, must, then, be read with the sixty-day time period in mind and the relief that the state agency may seek under subsection [(c)] must reasonably be read to encompass those means most likely to produce results in the time allowed. Since the modest grace period for state action is hardly likely to accommodate coerced compliance, the opportunity afforded the states is realistically one to achieve voluntary compliance.[147]

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141. 291 F. Supp. 199 (C.D. Cal. 1968).

142. 408 F. 2d 867 (9th Cir. 1968).

143. CAL. LABOR CODE §§ 1197.5, 1199(d) (West 1971).

144. 422 F. 2d 1028 (9th Cir. 1970) *vacated and remanded*, 400 U.S. 1004 (1971).

145. ARIZ. REV. STAT. ANN. §§ 41-1401 to -1403; 41-1461 to -1466; 41-1481 to -1485 (1972).

146. 422 F.2d at 1030.

147. *Id.* at 1031.

The reasoning is not unpersuasive, especially in view of the arguably de minimis prejudice to the private plaintiff. At worst, another sixty days' delay is added to a procedure which is hardly designed to afford quick redress in any event.[148]

At any rate, however, the authority of the decision has been muddied by the Supreme Court in a memorandum opinion which vacated the judgment and remanded the case to the district court "for reconsideration in light of the suggestions contained in the brief of the Solicitor General, as *amicus curiae* . . . . By this remand this Court intimates no view as to the merits of the Solicitor General's position."[149] That position, derived from the Solicitor General's brief, neatly avoids the essential question:

> The issue of the validity of EEOC's interpretation of Section 706(b) is not, in our view, of sufficient importance to warrant review by this Court at this time. We believe, however, that even if the court of appeals correctly rejected EEOC's interpretation, that court erred in treating the failure to defer to the state agency as a complete bar to judicial relief for the alleged discrimination. We therefore suggest that this Court should grant certiorari for the limited purpose of ordering the case to be remanded to the district court with instructions to retain jurisdiction for a period sufficient to allow petitioner to seek redress through the Arizona Civil Rights Commission.[150]

The brief clearly contemplated that the EEOC could change its deferral practices, so one can argue that the *Crosslin* holding was

148. This is not to argue that as a matter of policy it is wise to pile one delay upon another, but merely to contend that the Ninth Circuit's result in *Crosslin* is a reasonable interpretation of a statutory scheme that puts an emphasis on seeking voluntary compliance—even at the cost of reasonably fast, coercive relief. While "justice delayed is justice denied" to some, few would accuse Congress of acting on this dictum when it passed title VII.

149. 400 U.S. 1004, 1005 (1971). Justice Douglas dissented, writing:

> The proper functioning of the various Civil Rights Acts is of critical importance. This court has recently reemphasized the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law. The court below rejected the administrative interpretation of § 706(b). In so doing it requires pursuing a state remedy classified as inadequate by the EEOC.
>
> The various Civil Rights Acts represent a national commitment to achieve an end to racial discrimination. Forcing an alleged victim of racial discrimination—usually an indigent—first to seek a state remedy classified as inadequate by the federal rights when that state remedy is palpably inadequate presents an issue of considerable importance. I would grant certiorari to decide the question presented in this case. [citations omitted].

150. Brief for the United States as Amicus Curiae at 6-7.

indirectly supported.

> If the right to judicial relief of those complainants who have relied on EEOC's interpretation . . . is properly preserved . . . the court of appeals' holding that EEOC must defer to state agencies whose remedial powers it considers inadequate will not presently create serious difficulties. . . . The Commission presently defers to agencies in 31 States and could, if necessary, employ the same procedure for referring complaints initially filed with it to the appropriate state agency . . . in these seven additional states [which the Commission does not now defer to] to insure that individual complainants do not lose their right under Title VII ultimately to seek relief through the federal courts.[151]

Unfortunately, the implications of the Supreme Court's decision are not yet clear. Despite the Court's plain statement that it "intimate[d] no view as to the merits of the Solicitor General's position" on the appropriateness of post-suit deferral, on remand the district court found that the Supreme Court had approved that very position:

> Since the Supreme Court had almost all of the present arguments before it, and the Supreme Court suggested plaintiffs' action in filing with the Arizona Commission, which defendant now argues came too late, this Court would have to find that the remand by the Supreme Court was a nullity in order to grant defendant's motion [to dismiss].[152]

Although the patent fallaciousness of the district court's analytic approach might suggest that its conclusion will be given little precedential weight, at least one circuit court decision independently implies approval of the Solicitor General's position. In *Mitchell v. Mid-Continent Spring Co. of Kentucky*[153] the court not only remanded for deferral but also wrote that "it is clear that Mrs. Mitchell should not lose her cause of action because of the failure of EEOC to refer her complaint to a state agency."[154] However, the Ninth Circuit, after some initial hesitancy,[155] recently

151. *Id.* at 7.

152. 4 E.P.D. ¶ 7577 (D. Ariz. 1971). There has not yet been any appellate review of this decision. Letter from the Clerk, United States District Court, District of Arizona, to Charles A. Sullivan, November 16, 1973.

153. 466 F.2d 24 (6th Cir. 1972), *cert. denied*, 410 U.S. 928 (1972).

154. 466 F.2d at 27.

155. In Motorola, Inc. v. EEOC, 460 F.2d 1245 (9th Cir. 1972), the court merely

took the opportunity in dicta to cast doubt on the wisdom of the Solicitor General's suggestion:

> The trouble with this procedure is that it permits the Commission, contrary to legislative intent, to roil the waters with its own investigation and conciliatory efforts and defer to state authority only if required by court order to do so and then at a time when its own unsuccessful efforts have rendered any subsequent state efforts meaningless.
>
> The Comission would, we think, be wise to recognize that while the procedure followed in *Motorola* may be appropriate where the Commission's neglect was due to good faith oversight or error of law, it would hardly be appropriate otherwise.[156]

The correctness of the Solicitor General's position that title VII merely requires deferral without regard to the time of such deferral is questionable as a matter both of interpreting the words of the statute and of implementing the purpose underlying the deferral requirement. Title VII in so many words requires a complainant to file with the state or local agency before resorting to the EEOC.[157] It is one thing to read this provision "liberally" in the *Love v. Pullman* sense of allowing a prematurely filed charge to be held in suspended animation while deferral takes place, but quite a more radical position to assert that the EEOC may investigate, make a finding as to probable cause and then issue a suit letter, all prior to deferral.

Indeed, the Solicitor General's position undercuts the whole purpose of the deferral requirement. By permitting post-suit deferral, the congressional policy of meshing federal and state remedies is vitiated by rendering the state remedy almost meaningless. After all, the state agency will rarely, if ever, be able to complete its proceedings within the sixty day period.[158] Further, the fundamental inconsistency of the Solicitor General's position and the enforcement scheme of title VII is revealed by the

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remanded to the district court for deferral without further indicating its position on the question of whether post-suit deferral is timely.

156. General Ins. Co. of America v. EEOC, 7 E.P.D. ¶ 9086, at 6579 (9th Cir. 1974); *accord*, Nueces County Hosp. Dist. v. EEOC, 7 E.P.D. ¶ 9240 (S.D. Tex. 1974).

157. 42 U.S.C.A. § 2000e-5(c) (1974).

158. If, on the other hand, deferral preceded EEOC action, the state agency would usually have at least 240 days (the sixty day period of deferral and the 180 day period for EEOC action, during which the state agency could proceed concurrently) to operate before private suit could be brought. It is quite likely that a good number of complaints could be successfully resolved within this period on the state level. One great advantage is, of course, to remove some of the burden from the federal courts.

statutory provision requiring the EEOC to "accord substantial weight to final findings and orders made by state or local authorities."[159] This provision would be rendered wholly useless if deferral to the state agency were not intended by Congress to take place prior to EEOC action and, a fortiori, prior to suit.[160]

What is perhaps most strange about *Crosslin* and its aftermath is the failure of the EEOC to adjust its procedures to require deferral, or at least to notify charging parties that the courts might require it. However, an attorney representing a private party should be more careful of his client's rights than the commission has been, and, absent the most compelling reasons for avoiding the sixty day delay, ought to file with the State Human Affairs Commission. It might be advisable for the commission to so advise persons inquiring about the matter.

III. ENFORCEMENT OF RIGHTS CREATED BY THE HUMAN AFFAIRS LAW

To assess the probable impact of any statute, it is essential to understand the coercive elements that give the statute its teeth. It is precisely at this point that the South Carolina Human Affairs Law is most obscure. The statute has no explicit enforcement devices (other than the commission's power to issue "orders" against unfair employment practices), but the absence of enforcement provisions does not necessarily mean that sanctions are not available. To determine what sanctions might be available, we must analyze the general scheme of remedies in South Carolina. Part A of the discussion will consider possible remedies against unfair employment practices by state or local governmental agencies, on the initiative of individuals, the commission and the attorney general. Part B will explore a possible private right of action against private employers who discriminate contrary to the policy of the statute. It must be emphasized that discussion is limited to remedies under state law and does not attempt to treat possible avenues of relief under federal law.

159. 42 U.S.C.A. § 2000e-5(b) (1974). *See also* pp. 27-28 *supra*.

160. The "substantial weight" provision was added to title VII by the 1972 amendments. *Crosslin* was decided by the Supreme Court in 1971. Accordingly, it is possible to argue that whatever the merits of the Solicitor General's position at the time the brief was submitted, its validity has certainly been destroyed by the changes in the statute which made clear the repugnance of post-suit deferral to the enforcement scheme of title VII.

A. Remedies Against Public Agencies Committing Unfair Employment Practices.

It will be recalled that the Human Affairs Law establishes a general state policy against discrimination[161] and then defines certain discriminations[162] committed by an "agency or department of the State or of its local subdivisions or . . . any official, employee or agent thereof"[163] as "unfair discriminatory practices."[163.1] An agency which is found, after investigation and hearing, to have committed such a practice may be ordered by the Human Affairs Commission to cease and desist and to take appropriate remedial action.[164] No enforcement problems arise, if as is to be hoped, the public agency voluntarily complies. We must consider, however, what may be done if the public agency refuses to acquiesce in the commission's order. Three separate methods of enforcement will be examined: by the complainant, by the commission itself, and by the attorney general.

1. The Complainant

May a private citizen who has complained to the commission of an unfair discriminatory practice by a public agency, and who has been the beneficiary of a commission order against that agency,[165] obtain the aid of the courts to compel compliance with

161. S.C. CODE ANN. § 1-360.22 (Supp. 1972).

162. S.C. CODE ANN. § 1-360.28 (Supp. 1972). *See also* p. 10 *supra.*

163. S.C. CODE ANN. § 1-360.28(a) (Supp. 1972).

163.1. *Id.*

164. S.C. CODE ANN. § 1-360.29(d)(14) (Supp. 1972). *See also* pp. 17-18 *supra.*

165. One may speculate whether, assuming a right of mandamus exists at all, a commission order is a necessary prerequisite to such relief. There are, of course, good reasons, rooted in primary jurisdiction notions, to support such a position. To the extent that the commission develops an expertise in its area of operation, it is better equipped than a court to decide whether an unfair discriminatory practice has been committed, and what relief may be appropriate. Also, requiring a commission order as a prerequisite to mandamus would encourage a desirable uniformity in the standards applied, since they would be developed by one body, the commission, rather than by a number of courts with possibly varying perceptions of the statute.

Holding a commission order not to be a prerequisite to judicial relief may, however, avoid a possible question of constitutionality. The South Carolina Constitution, art. 1, § 22, arguably requires judicial review in all instances in which a person may "be finally bound by a judicial or quasi-judicial decision of an administrative agency." And the Human Affairs Law provides that the commission may *dismiss complaints* without such action being subject to judicial review. *See* pp. 13-14 *supra.* Plainly, a constitutional difficulty arises if a commission order is a prerequisite to private suit since an order of dismissal would, without being subject to judicial review, "finally bind" a complainant by barring him from access to the courts.

the commission's order, presumably by a writ of mandamus?[166]

The possible conflict with the South Carolina Constitution could, of course, be avoided simply by finding that a favorable commission order is not a prerequisite to suit, but only by sacrificing the advantage of the commission's expertise and the development of uniformity. A compromise position may be reached by requiring *resort* to the commission, but not necessarily favorable commission action. Under this theory, one who complains to the commission but whose complaint is dismissed without a hearing may seek mandamus against the respondent-employer. One who obtains a hearing and subsequently a favorable order, may seek mandamus, having the benefit of a factual finding in his favor. One who is unsuccessful before the commission *after a hearing* may seek court review of the commission order of dismissal (since no statutory provision bars this course). If such review results in reversal of an unfavorable commission decision, the complainant may obtain mandamus against the respondent; if it results in affirmance of an unfavorable order, the matter is put to rest.

This interpretation of the statutory scheme, though it avoids constitutional difficulties, results in what may be perceived as an anomaly. A complainant whose complaint is dismissed by the commission for lacking sufficient merit to even warrant a hearing may seek redress in the courts, while a complainant who lost on the merits after a hearing (either by adverse decision of a commission panel or after subsequent court review) would be barred from such redress. But perhaps the anomaly is more apparent than real. The scheme does assure an opportunity for court review *at some point* in every proceeding.

This solution sacrifices some, but not all, the advantages of uniformity and utilization of commission expertise. While these advantages could be recaptured by holding a favorable commission order to be a prerequisite for relief, this might be done only at the price of finding the provision barring judicial review of commission orders of dismissal unconstitutional as contrary to art. 1, § 22.

There is, however, an alternative way of reaching the same result. The original draft of the statute contained, in addition to the language barring judicial review of a prehearing order of dismissal, a provision barring review of *any* commission order. This latter provision was eliminated by the legislature, perhaps to avoid a similar constitutional problem to that described. The failure also to remove the provision barring review of prehearing dismissal orders may be viewed merely as a legislative oversight to be ignored by the courts. While the judiciary is rightly hesitant to attribute such mistakes to the legislature, this case is an exceptional one. Such a result would enable the courts to avoid a constitutional question and at the same time give full effect to the primary jurisdiction notions of agency expertise and uniform decision making. For an alternative means of obviating the same constitutional difficulty, *see* pp. 13-16 *infra*.

166. Mandamus may be available to a private party, perhaps without resort to the Human Affairs Law, to enforce the obligations of public agencies under the fourteenth amendment of the United States Constitution or under the state's equivalent provision, S.C. CONST. art. 1, § 3. Professor Jaffe apparently believes this to be the case:

> Thus, a petition for mandamus alleging that the relator had been discharged from government employment because he was a Negro would undoubtedly state a good cause of action though it might be more correct today to ask for a declaratory judgment that the ground of discharge was illegal and remit for the exercise of whatever discretion existed. This example suggests that the fact that there may be discretionary elements present does not, or at least should not, exclude judicial review, whether by mandamus or other appropriate remedy, where legally irrelevant or forbidden considerations have determined the decision. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965) (footnote omitted).

Cf. Durkee v. Murphy, 181 Md. 259, 29 A.2d 253 (1942). *Durkee* denied the writ

The South Carolina Supreme Court had occasion in a relatively recent case to restate the governing principles for granting mandamus:

> The writ of mandamus is the highest judicial writ known to the law and according to long approved and well established authorities, only issues in cases where there is a specific legel right to be enforced or where there is a positive duty to be performed, and there is no other specific remedy. When the legal right is doubtful, or when the performance of duty rests in discretion, or when there is other adequate remedy, a writ of mandamus cannot rightfully issue.
>
> The primary purpose or function of a writ of mandamus is to enforce an established right, and to enforce a corresponding imperative duty created or imposed by law. It is designed to promote justice, subject to certain well-defined qualifications. Its principal function is to command and execute; not to inquire and adjudicate; therefore, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established.
>
> An applicant for a writ of mandamus to require performance of some act must show, first, a duty upon Respondent to perform the act; second, that the duty is ministerial in character; third, that the applicant has a specific legal right for which the discharge of the duty is necessary; and, fourth, that he has no other legal remedy.[167]

All requirements for mandamus seem satisfied when a public

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sought by a Negro to open all Baltimore city public golf courses to Negroes, but only because the then-governing decision of Plessy v. Ferguson, 163 U.S. 537 (1896), required *equality* of such facilities, not *integration* of them. The writ simply asked too much. Presumably after Brown v. Board of Education, 347 U.S. 483 (1954), the rationale of *Durkee v. Murphy* would require that mandamus issue. *See also* People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (1971), *cert. denied*, 405 U.S. 1016 (approving the use of mandamus, brought, however, by the Attorney General, to end racial imbalance in certain schools).

This avenue of inquiry will not be further explored since the rights created by the Human Affairs Law are not necessarily coterminous with those presently recognized under the equal protection clause. Thus, age and sex discrimination are, with certain exceptions, prohibited in public employment by the statute when both *may* be consistent with present equal protection law. *See* Cohen v. Chesterfield School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds*, 94 S.Ct. 791 (1974); Weiss v. Walsh, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129, *reh. denied*, 410 U.S. 970 (1973).

167. Willimon v. City of Greenville, 243 S.C. 82, 86-87, 132 S.E.2d 169, 170-71 (1963) (citations omitted). For a collection and discussion of South Carolina mandamus cases see Riggs, *Reviewing Administrative Action by Writ of Mandamus in South Carolina*, 7 S.C.L.Q. 427 (1955).

agency commits an unfair discriminatory practice, at least if the action at issue has been so declared by a decision of the Human Affairs Commission. The Human Affairs Law places a duty upon all public agencies not to engage in the kinds of conduct defined as unfair discriminatory practices, and the duty is plainly ministerial, not discretionary. Difficulties of proof of the violation of that duty may arise, but the function of the commission is precisely to resolve these factual questions. At least upon a commission determination that a violation of the statute has taken place and the issuance of an order to correct it, the duty to obey the commission order must become purely ministerial.[168]

South Carolina law also requires that the petitioner for mandamus have a "specific legal right." This requirement poses no problem for the individual seeking mandamus to enforce a commission order since the primary purpose of the Human Affairs Law is to benefit precisely those employees, or potential employees, who might otherwise be discriminated against on the prohibited basis. The test derived from *Parker v. Brown*[169] in ascertaining whether a particular plaintiff has a right to seek enforcement is simply whether the statutory duty was imposed for his benefit. That test is clearly met should a complainant seek mandamus to enforce a favorable commission order.

Finally, the requirement that mandamus issue only when no other relief is available is also satisfied. The Human Affairs Law fails to provide explicitly for court enforcement of commission orders, thus suggesting that enforcement may result only from mandamus, whether brought by the complainant or by some other proper party.

2. Action by the Commission

Having discussed the possibility of a private right to seek mandamus, it is now appropriate to consider whether the

168. Even if the respondent agency has "discretion" to make personnel decisions, this does not justify it in making arbitrary decisions. Even discretionary actions are subject to control by mandamus when the discretion is exercised arbitrarily. *See, e.g.* James v. State Bd. of Examiners of Public Accountants, 158 S.C. 491, 155 S.E. 830 (1930); State *ex. rel.* Mauldin v. Matthews, 81 S.C. 414, 62 S.E. 695 (1908). *See also* Williams v. Sumter School Dist. No. 2, 255 F. Supp. 397 (D.S.C. 1966). In *Williams* Judge Hemphill held that although the school board had "absolute" discretion under state law to decide whether to renew the plaintiff's teaching contract, it could not exercise that discretion on the basis of plaintiff's constitutionally-protected civil rights activities.

169. 195 S.C. 35, 10 S.E.2d 625 (1940).

commission itself may seek the writ to enforce its orders.[170] As a starting point for our inquiry, the Human Affairs Law plainly envisions a continuing interest by the commission in the enforcement of its orders: "The Commission may retain jurisdiction of any such case until it is satisfied of compliance by the party complained of with its order."[171] This language strongly militates against any interpretation that would make commission decisions merely advisory, an interpretation that is already tenuous in light of the General Assembly's use of the word "order." There is, however, authority for the proposition that the commission has no power to seek court aid because the statute does not expressly provide for it.[172] The leading decision[172.1] on the more general question of defining the powers of an administrative agency stated:

> [Administrative agencies], being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably *necessary* implication, or such as are merely incidental to the powers expressly granted. See 51 C.J. 36, 37, where among other things it is said: "Any reasonable doubt of the existence in the Commission of any

170. It will be recalled that the 1973 amendments do authorize the commission to "request an order of the court of appropriate jurisdiction requiring discovery and other good faith compliance" in exercising the commission's information-gathering powers. Section 2 of the amendments, adding a new subsection (s) to § 1-360.27 of the law. It might be argued that the failure of the amendment to grant explicitly the commission authority to seek court relief to enforce its *final* orders indicates that such power is not to be exercised. Such a contention, however, rests heavily on negative implication—at best a suspect tool in statutory interpretation. It is perhaps no more likely than the argument that the amendments merely made express, out of an excess of caution, some of what was formerly implied—namely, the ability of the agency to vindicate its own powers. Under such an interpretation the failure of the legislature to also make express the implied power to seek court enforcement of its final orders is not at all significant.

171. S.C. CODE ANN. § 1-360.29(d)(14) (Supp. 1972).

172. Apparently the first and only South Carolina case raising the precise question at issue was Railroad Comm'rs v. Railroad Co., 26 S.C. 353, 2 S.E. 127 (1887):

> It is clear that no penalties are provided in section 1457 for a violation of any of its provisions, nor is there any specific mode of enforcing them prescribed therein. *From this it is argued, with much force, by the attorney general, that the court, under its general equity powers, may enforce compliance with the provisions of the section by mandatory injunction*, or other appropriate remedy, upon the ground that there is no plain and adequate remedy at law. *Id.* at 356, 2 S.E. at 129 (emphasis added).

Unfortunately for the purposes of this article, the court avoided the question of whether the absence of express enforcement provisions precluded an enforcement power by finding that general enforcement provisions of the statute covered violations of section 1457.

172.1. Piedmont & N. Ry. v. Scott, 202 S.C. 207, 24 S.E.2d 353 (1943).

> particular power should ordinarily be resolved against its exercise of the power." And purely administrative functions are readily distinguishable from the making of regulations affecting substantial rights, which being in derogation of the common law must be directly derived from constitutional or statutory provisions.[173]

Although this rule is stringent, enforcement by the Human Affairs Commission may be justified even under it on the basis that such a power is conferred by "reasonably *necessary* implication" or is "merely incidental to the powers expressly granted" by the statute. In any event, there is reason to believe that the rule is not as strict as the quotation intimates.

This notion of limiting an administrative agency to the powers conferred by statute originated in South Carolina with *Martin v. Saye*,[174] and is completely unobjectionable, albeit truistic, if it merely means that administrative agencies should have no more powers than the legislature intended to confer. *Martin v. Saye* cannot be said, however, to stand for the principle enunciated in *Piedmont* that the courts will be hesitant to find implied powers in legislation relating to administrative agencies. In fact, the court in *Martin v. Saye* was careful to note that "[t]here is absolutely nothing in the Act from which the authority claimed by the Commission may be even inferred . . . ."[175]

Indeed, if one is to look strictly at its holding, even *Piedmont* does not support the breadth of its language. The case involved a challenge to the validity of an order by the Public Service Commission instituting a statewide official routing system for intrastate freight. One effect of the order was to require higher rates over longer routes. The court, finding the commission without statutory power to issue such an order, relied on a number of factors. First, the commission was vested with power to regulate rates of public utilities, but not those of railroads. It was considered significant that the General Assembly conferred such powers on the Public Service Commission as to one portion of its jurisdiction but failed to do so as to another. Second, the legislature had given to the commission a number of powers relating to railroad rates, but had not included the power in question. Third, the

173. *Id.* at 233, 24 S.E.2d at 360 (emphasis in original). *See also* 1944-45 OP. ATT'Y GEN. 107; 1940-41 OP. ATT'Y GEN. 267.

174. 147 S.C. 433, 145 S.E. 186 (1928).

175. *Id.* at 440, 145 S.E. at 189.

court found that the Public Service Commission had itself ruled in 1933, ten years before *Piedmont* was decided, that it lacked power to make the challenged order. Fourth, the court found significance in the fact that, although the question was much debated, the General Assembly failed to act after the 1933 opinion of the commission. Fifth, the court, although purporting not to rest its decision on this ground, stated "it is difficult to avoid the conclusion that the order is . . . contrary to the true intent and meaning" of other sections of the governing statute. In sum, *Piedmont* was a case where the failure of the legislature to grant expressly to the commission the power at issue seemed intentional, a view which the commission itself had held in the past with at least passive acquiescence by the legislature, and where a finding of such power was contra-indicated since it would violate certain explicit statutory provisions. In such a context, the court can hardly be said to have need of the notion that administrative agency powers are not lightly to be inferred; even were the rule that agency powers were to be liberally construed, the result would have been identical.[176]

The *Piedmont* dictum has been reiterated in a number of cases, including *Calhoun Life Insurance Co. v. Gambrell*[177] which held the Insurance Commission without authority to regulate certain rates. Once again, there existed no sound reason to infer the challenged power from the statute. Conversely, there existed several reasons not to validate the challenged power, including prior administrative interpretation, an attorney general's opinion to

176. The *Piedmont* court relied on *Corpus Juris* as authority for its unwillingness to find implied powers, and, indeed, quoted from it. The quoted portion, however, acquires a different meaning when put in context. The beginning of the paragraph from which the language used by the court was taken is:

> A public utility commission, being unknown to the common law, derives its authority wholly from constitutonal or statutory provisions, and it possesses only such powers as are thereby conferred, expressly, according to some authorities, *or, as it has been held, by necessary or fair implication, and such incidental powers as may be requisite to carry out those granted.* 51 C.J. *Public Utilities* § 78 (1930) (emphasis added).

Corpus Juris Secundum,in the corresponding section, after repeating the *Corpus Juris* sentence about resolving doubts against finding an implied power adds:

> However, where power is clearly conferred or fairly implied, and is consistent with the purposes for which the commission was established by law, the existence of the power should be resolved in favor of the commisioners so as to enable them to perform their proper functions of government. 73 C.J.S. *Public Utilities* § 38 (1951).

See also 73 C.J.S. *Public Admin. Bodies and Procedure* § 50 (1951).

177. 245 S.C. 406, 140 S.E.2d 774 (1965).

the contrary, and passive acquiescence by the General Assembly in that view.

There are, however, decisions indicating a general power of enforcement. In *Beard-Laney, Inc. v. Darby*,[178] the court upheld the approval by the Public Service Commission of a transfer by a motor freight carrier of a portion of its certificate of convenience and necessity to another carrier although there was no statutory provision expressly authorizing such commission action. The court found the power implied from the general power to regulate the operation of motor carriers:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. These laws delimit the *field* [emphasis in original] which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. *But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred on it, but also such power as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it.* To say otherwise would be to nullify the statutory directions that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.[179]

In buttressing its conclusions, the court noted that

> it is very much in the public interests and in line with the legislative policy of regulation, that the Public Service Commission be deemed to have the power to consent to the transfer of a franchise . . . .[180]

The *Darby* court found *Piedmont* inapplicable because, first, the agency action in *Piedmont* was contrary to prior administrative interpretations of the Public Service Commision's power, whereas in *Darby* the action was consistent with such interpretations. Second, the powers exercised in *Piedmont* were inconsistent with the statutory scheme while those in *Darby* were not. Neither distinction is convincing. The consistency of administrative interpretations is, as the court noted in *Darby*, merely advisory. The argument based on the statutory scheme

178. 213 S.C. 380, 49 S.E.2d 564 (1948).
179. *Id.* at 389, 49 S.E.2d at 567 (emphasis added).
180. *Id.* at 390, 49 S.E.2d at 568.

amounts to saying that implied powers should be found only when they *are* implied and not when they are *not*—a perfectly reasonable proposition but one significantly different from the "rule" stated in *Piedmont*.

Also instructive is *Camp v. Board of Public Works*,[181] a case of particular interest in that it was an action between governmental units, although not in a mandamus context. The Supervisors of the Cherokee County Soil Conservation District sought to have invalidated a permit issued by the South Carolina Water Pollution Control Authority to the Board of Public Works of the City of Gaffney allowing enlargement of a sewage disposal plant. The plaintiff obtained relief below, and the defendants appealed, challenging the standing of the plaintiff to attack the action of either the authority or the board. The supreme court agreed with the defendants. Discussing without deciding the general question of the standing of one administrative agency to challenge the action of another,[182] the court resolved the question before it on narrow grounds:

> Assuming under some circumstances one public agency may attack the action of another, the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked. This we do not think respondents have done.
>
> We have only recently held that an administrative agency has "only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to

181. 238 S.C. 461, 120 S.E.2d 681 (1961).

182. The court quoted extensively from the Fourth Circuit's decision in United States *ex. rel.* Chapman v. Federal Power Commission, 191 F.2d 796 (4th Cir. 1951) which denied the Secretary of the Interior standing to seek review of a Federal Power Commission order. The court then noted that the Supreme Court had reversed the Fourth Circuit, 345 U.S. 153 (1953), on this point; "[B]ut since the members of the Supreme Court were divided as to the grounds upon which standing should be based, they concluded not to discuss the question, thus the meaning of the case is left uncertain." *Id.* at 469, 120 S.E.2d at 685. The court was correct, of course, in stating that the *rationale* of the Supreme Court is not "certain"; what is certain, however, is that the Court held that the Secretary had standing to challenge the order absent a statute explicitly authorizing such a challenge. Thus, to the extent that the South Carolina courts find *Chapman* persuasive, the inquiry begins by ascertaining in what circumstances (not "whether") an implied standing will be found on the part of one agency to challenge the decisions of another. Of course, it requires still another leap from *Chapman* to reach the problem considered in this article: When may an administrative agency compel another agency, absent express statutory authorization, to comply with the first agency's orders?

> the powers expressly granted." *Black River Electric Cooperative, Inc. v. Public Service Commission*, 1961, S.C. [238 S.C. 282], 120 S.E.2d 6, 11. Nowhere in the Soil Conservation Act are [plaintiffs] given any jurisdiction over pollution of streams or other waters of the State. Their classification and the regulation of the purity and quality of the water have been committed solely to the Authority, a division of the State Health Department . . . . It is true that [plaintiffs] may "sue and be sued in the name of the district" but this has reference to some matter pertaining to their functions.[183]

This passage is revealing in a number of ways. Although the court indirectly cites *Piedmont* (through the citation to *Black River*, which cites *Piedmont*), it refuses to rest its decision on that rule. Rather, it undertakes an analysis of the legitimate purpose of the plaintiff agency to ascertain whether it would be reasonable to infer such a power. Despite the fact that the court finds no standing, it does so by ascertaining that the question of pollution of water is not within the "jurisdiction" of an agency charged with soil conservation duties. In short, if the *Camp* mode of analysis is applied when the Human Affairs Commission seeks mandamus to enforce its orders, the probable result would be a finding that the implied power to do so exists. Plainly it is within the general purpose of the commission to eliminate discrimination and equally clear that the commission has "jurisdiction" over obtaining compliance with its orders since the statute explicitly so provides.

There is also considerable authority in other jurisdictions which supports finding implied in the statute the right of an administrative agency to enforce powers apparently conferred on it by statute. In *United States v. Feaster*,[184] the United States sought a mandatory injunction that the State of Alabama give the National Mediation Board access to certain records of the Alabama Docks Department. The Board, under the Railway Labor Act, was to resolve representation disputes, and in that connection was to have access to carrier books and records.[185] When such access was refused by the Alabama State Docks Department, the United States brought suit. The court, after disposing of preliminary objections, turned to the question that now

183. 238 S.C. at 469-70, 120 S.E.2d at 685.
184. 330 F.2d 671 (5th Cir. 1964).
185. 45 U.S.C. § 152 Ninth (1971).

concerns us and resolved it in language worth quoting in full:

> The appellees next argue that the complaint fails to set forth a "judiciable" controversy. This argument seems to be based upon the theory announced by the appellees that "administrative agencies do not have the inherent power to require persons to produce documents." Appellees then point to the fact that Congress did not give the Mediation Board subpoena powers and they deduce from this that Congress did not intend that the language quoted above [apparently referring to the statutory provision that "[t]he Board shall have access to . . . the books and records of the carriers . . . ."] was meant to be enforced by an original proceeding brought by the United States.
>
> We think the absence of subpoena power and the absence of a specific enactment in the statute providing that the United States or the Board may file suit to enforce the Board's right to access to the records is not dispositive of the case. The Supreme Court has held heretofore in Steele v. Louisville & N.R.R. Co., 323 U.S. 192 . . . that even "an implied" statutory right of Negroes to be fairly represented by the certified bargaining representative of their craft could be enforced by injunction, although the statute gave no specific remedy of this nature. Also, in Virginian R. Co. v. System Federation, 300 U.S. 515 . . . the Court held that a statutory requirement that the carrier recognize the chosen representative of employees was enforceable by injunction, although no specific right of injunction was stated in the Act.[186]

The court went somewhat beyond the Supreme Court precedents it cited to support its decision since both *Steele* and *Virginian Railway Co.* involved *private* suits for enforcement of a right express or implied in the statute. The court apparently felt, however, that there was simply no good reason for distinguishing between private and public suits. What was critical was the fact that such a right *was* implied and the remedy could be left to the normal processes of the common law.[187]

Likewise, in *Walling v. Brooklyn Braid Co.*,[188] a decision ren-

186. 330 F.2d at 674 (unofficial citations omitted).

187. It is true that *Feaster* was an action brought by the Attorney General and not one initiated by the National Mediation Board. It is therefore arguably more apposite to the discussion dealing with the powers of the Attorney General than to this treatment of the implied power of an administrative agency. *See* p. 53 *infra*. The court, however, did not advert to this distinction.

188. 152 F.2d 938 (2d Cir. 1945).

dered by a panel including two of the most respected jurists of this century, Learned Hand and Jerome Frank, the Second Circuit upheld the right of the Administrator of the Wage and Hour Division of the Department of Labor to obtain an injunction restraining the defendant from violating a wage order. The court wrote on the question at issue:

> Though the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C.A. § 201 et seq., does not expressly provide for enforcement by injunction, that remedy is available to the Administrator. The action taken below was based upon the general powers of the courts of equity to grant injunctions and, as in cases between private litigants, the public interest is always to be considered and protected when such a court in the exercise of its sound discretion grants or withholds injunctive relief. In a case like this it is self-evident that the public interest is directly concerned in the proper enforcement of a valid wage order. Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations when they are about to occur or prevent their continuance after they have begun. The trial court . . . should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted.[189]

In addition, there is federal authority that agencies may, despite the failure of their governing statutes to provide expressly, seek court process to maintain the status quo pending action by the agency.[190] The most recent and authoritative decision on the issue was rendered by the Supreme Court, by a five to four vote, in *FTC v. Dean Foods Co.*[191] The FTC sought a temporary injunction from the Seventh Circuit to bar a merger then being challenged before the Commission. The FTC was concerned that, if the merger were permitted to proceed, it would be difficult or impossible to restore the pre-merger competitive situation should the Commission ultimately find the merger illegal; in short, the Agency was doubtful of its ability to unscramble the eggs. The Supreme Court in resolving the question of whether the FTC had standing to seek such an order met the issue head-on:

189. *Id.* at 940-41 (some citations omitted).

190. *See generally* L. JAFFE, *supra* note 166, at 672-77, and the cases cited therein.

191. 384 U.S. 597 (1966). *See also* Board of Governors of Fed. Reserve Sys. v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950).

> Dean and Bowman insist, however, that as a creature of statute the Commission may exercise only those functions delegated to it by Congress, and that Congress has failed to give the Commission express statutory authority to request preliminary relief under the All Writs Act. But the Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act.[192]

The significance of the Court's willingness to find implied administrative powers to seek preliminary relief is underscored by the fact that the question was not at all free from doubt. There were indications that the Commission itself believed that it did not possess the power to seek preliminary relief and the dissent of Mr. Justice Fortas (joined by Justices White, Harlan and Stewart) makes a not unpersuasive case that the failure of Congress to grant the Commission power expressly to issue or seek preliminary injunctions was intentional.

The policy basis for the Court's decision on the standing question, which can perhaps best be summarized by saying that remedial legislation will be liberally construed, certainly supports inferring from the Human Affairs Law the power of the Human Affairs Commission to seek mandamus to enforce its orders. A failure to infer such a power of enforcement may well leave enforcement to the good will of the party complained of or to the size of the pocket book of the injured party. Neither alternative is a suitable implementation of the intention of the General Assembly to remedy discriminatory practices.

There are also a number of decisions from South Carolina's sister states which squarely support inferring the power of an administrative agency to seek mandamus to enforce its orders. In *Board of Social Welfare v. Los Angeles County*,[193] the State Board of Social Welfare sought mandamus to compel the county to comply with the board's orders to issue warrants for payment of old age aid. The California Supreme Court first conceded that there

192. *Id.* at 605-06.

193. 27 Cal. 2d 98, 162 P.2d 627 (1945).

was no statutory provision permitting the board to issue such orders, but it then noted that the relevant statute made the provision of aid to the needy aged a "matter of State-wide concern" and established the board will "full power to supervise" every phase of the administration of the public assistance plan.

> We are therefore of the opinion that although such board may be without specific authority to directly order the issuance of a duplicate warrant by a county auditor under such circumstances as are here depicted, nevertheless the board is a "party beneficially interested" in the issuance of such warrant within the meaning of [the statutory provision governing mandamus] and is a proper party to maintain mandamus proceedings against county officials who fail or refuse to issue a warrant to a needy aged person who is a member of a class entitled thereto. Persons who are members of such a class are ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf, and to deny them the assistance of the welfare board under such circumstances would tend to defeat the purpose of the legislation which seeks to provide for them during needy old age.[194]

The court summed up by citing approvingly the proposition that "when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same."[195]

Also of considerable interest is *State ex rel. Norris v. Chancey*.[196] In *Chancey*, the court, applying the same principle, held the Civil Service Board of the City of Tampa competent to bring mandamus against the mayor and other city officials to restore certain persons to employment and discharge others. The interest of the board in having the civil service rules enforced was sufficient to permit the action. The analogy from this case to that of the Human Affairs Commission seeking mandamus to enforce its orders is striking. In both cases the administrative agency is seeking to enforce its orders to give public employees rights under a law which is being ignored by another governmental agency. The basic principle of *Board of Social Welfare* and *Chancey* is supported by decisions in a number of jurisdictions.[197]

194. *Id.* at 100, 162 P.2d at 628.

195. *Id.* at 101, 162 P.2d at 629.

196. 129 Fla. 194, 176 So. 78 (1937).

197. *See generally* Annot., 113 A.L.R. 589 (1938); Barry v. Phoenix Union High

In the light of this authority, no sound reason is apparent why the South Carolina courts ought not find that the Human Affairs Commission has the implied power to seek mandamus against other public bodies that fail to comply voluntarily with a commission order. It may be suggested that the absence of explicit statutory authorization to "sue and be sued" cuts against this conclusion. Although this proposition is not without case support,[198] the reasoning underlying such a contention is no more compelling than that supporting the more general proposition that powers of an administrative agency should not be lightly inferred. Indeed, in *Chesterfield County v. State Highway Department*,[199] an action brought by one public agency against another, the court had no trouble in finding such a right implied. Although the holding was not radical, in that it merely inferred a right to sue on contracts from the statute authorizing entrance into such contracts, the language used suggests a broader reading of the case. The court quoted with approval the proposition:

> Where a statute or the Constitution creates a right, but is silent as to remedy, the party entitled to the right may resort to any common-law action which will afford him adequate redress.[200]

It may perhaps be useful to conclude by quoting a passage written on a different, but analogous, point by Professor Jaffe:

> If there has been a question whether the courts have a power to maintain the status quo pending an administrative proceeding, it would seem that there is by this time sufficient authority to establish the existence of such a power. *The doubt has arisen because arguably the failure of the legislature to confer the power on agency or court may imply its negation, particularly in the absence of a firmly established judicial power. But*

School, 67 Ariz. 384, 197 P.2d 533 (1948); Hubbard v. Board of Trustees of Retirement Sys., 315 Mich. 18, 23 N.W.2d 186 (1946) (declaratory judgment sought); Reese v. Dempsey, 48 N.M. 417, 152 P.2d 157 (1944); Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939) (declaratory judgment sought); City of Burlington *ex rel.* Bd. of School Comm'rs v. Mayor of City of Burlington, 98 Vt. 388, 127 A. 892 (1925); State *ex rel.* Bd. of Educ. v. Cavendish, 81 W. Va. 266, 94 S.E. 149 (1917); Sullins v. State *ex rel.* Banard, 33 Okla. 526, 126 P. 731 (1912) (dictum). *Contra*, Board of Educ. of Forrest County v. Sigler, 208 So. 2d 890 (Miss. 1968). In *Sigler*, however, the governing statute required mandamus to be brought by the attorney general or a district attorney.

198. *Cf.* Members of Park Bd. of Fort Worth v. City of Fort Worth, 128 S.W.2d 379 (Tex. Comm. App. 1939).

199. 181 S.C. 323, 187 S.E. 548 (1936).

200. *Id.* at 329, 187 S.E. at 550.

our courts, after their initial hestitations, have been willing to draw upon their historic reservoir of procedural devices, particularly those associated with equity, for the effectuation of legally mandated purposes. In each case it is the statute creating the agency which establishes the substantive goals. The statute to be sure sets up procedures, but it is understood that these procedures are projected against the institutional framework of agencies and courts . . . .[201]

3. Action by the Attorney General

A third possible petitioner for a writ of mandamus to enforce an order of the Human Affairs Commission against a public agency is the attorney general. The Human Affairs Law does not explicitly grant such power to the attorney general, so the question becomes whether it may be found elsewhere. The starting point for our inquiry is the South Carolina Constitution which simply provides: "There shall be an Attorney General for the State, who shall perform such duties as may be prescribed by law."[202] If "prescribed by law" means "prescribed by statute," our inquiry will end quickly. A perusal of the South Carolina Code fails to uncover any statutory provision which, fairly read, authorizes the attorney general to take action such as that under consideration. Indeed, the broadest provisions defining the duties of the attorney general do not include a general power to oversee the enforcement of state laws.[203]

However, the failure of the statutes to expressly provide the attorney general with a general power to enforce the laws is not necessarily fatal to the existence of such power. It may be that the attorney general has an inherent or common law power to enforce the laws. The South Carolina authority on the question is at best unclear. The supreme court apparently resolved the question in *State ex rel. Daniel v. Broad River Power Co.*[204] by stating:

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201. L. JAFFE, *supra* note 166, at 681 (emphasis added).

202. S.C. CONST. art. 5, § 28. *See also* S.C. CONST. art. 4, § 24.

203. S.C. CODE ANN. § 1-233 (1962) provides that:

> [The attorney general] shall appear for the State in the Supreme Court in the trial and argument in such Court of all causes, criminal and civil, in which the State is a party or interested, and in such causes in any other court or tribunal when required by the Governor or either branch of the General Assembly.

204. 157 S.C. 1, 153 S.E. 537 (1929), *appeal dismissed*, 281 U.S. 537, *appeal dismissed after reh.*, 282 U.S. 187 (1930).

> We do not agree with the referee in holding that the Attorney General is not the proper party to institute the proceeding [seeking mandamus against the power company to require it to provide street car service in Columbia]. In our opinion the authorities are opposed to the view expressed by the referee.
>
> "As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority as public interests may from time to time require*, and may institute, conduct and maintain all such suits and *proceedings* as *he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection* of *public rights*." 2 R.C.L., 917.[205]

Resort to *Ruling Case Law*, the authority quoted by the court for its conclusion, strengthens the implication in the quoted language that the court meant to announce a broad rule that the attorney general of South Carolina has common law powers. The several sentences preceeding the portion quoted by the court are as follows:

> Although in a few jurisdictions the attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except insofar as they have been limited by statute. This latter view is favored by the great weight of authority, for the duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them; and it cannot be presumed, therefore, in the absence of an express inhibition, that the attorney-general has not such authority as pertained to his office at common law.[206]

Unfortunately, the authority of *Broad River* may be questioned. *State ex rel. Daniel v. John P. Nutt Co.*[207] does cite *Broad River* as "conclusive that the Attorney General has the authority to commence and maintain this action,"[208] and notes that "[t]he question was clearly presented and carefully considered in that case."[209] But when the issue was subsequently raised in *Cooley v.*

205. *Id.* at 63, 153 S.C. at 560 (emphasis in original).

206. 2 R.C.L. *Attorney General* § 5 (1929).

207. 180 S.C. 19, 185 S.E. 25 (1935), *cert. denied*, 297 U.S. 668 (1936).

208. *Id.* at 26, 185 S.E. at 29. The action was brought by the attorney general, *inter alia*, to enjoin thirteen separate actions brought in five counties by defendants who sought to enjoin enforcement of a statute.

209. *Id.*

South Carolina Tax Commission,[210] the court inexplicably noted that it "[found] no occasion to go into that field of jurisprudence"[211] concerning common law powers of the attorney general, and failed to cite either *Broad River* or *Nutt*. The case avoided a holding on the question of the existence of such powers,[212] so it is unclear whether the failure to rely on recent prior precedent was a mere oversight or a sub silentio retreat from the previous decisions.

In any event the issue has been extensively litigated in other jurisdictions. Limiting our study to jurisdictions governed by constitutional provisions similar to that of South Carolina—*i.e.*, those providing in effect that the attorney general's duties are "prescribed by law,"[213]—the majority clearly recognize common law powers in the attorney general absent express statutory limitations.[214] There are, however, several jurisdictions holding to the

210. 204 S.C. 10, 28 S.E.2d 445 (1943).

211. *Id.* at 22, 28 S.E.2d at 449.

212. The court relied on statutory provisions to decide the case, which turned on whether the attorney general could effect a compromise settlement of a tax case then being litigated, despite the disapproval of two of the three members of the Tax Commission. It is interesting, and perhaps significant, however, that the court did not find any such power expressly granted in the statutes. The closest language found was that giving the attorney general "the direction and management" of suits to which the state is a party—a power which arguably falls somewhat short of authorizing settlement over the objections of the "client" Tax Commission. Accordingly, although *Cooley* may not stand for the proposition that the attorney general of South Carolina has common law powers, it at least indicates a judicial willingness to read his express powers broadly. *Accord*, State v. Corbin & Stone, 16 S.C. 533 (1882).

213. *See generally* Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAY. L. REV. 1 (1955) (discussing the rule in those jurisdictions without any constitutional provision or with a provision differently phrased).

214. *Alabama*: State *ex rel.* Carmichael v. Jones, 252 Ala. 479, 41 So. 2d 280 (1949) (by implication); ALA. CONST. art. 5, § 137; *Florida*: State *ex rel.* Landis v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); FLA. CONST. art. 4, § 4 (1968) (*Cf.* art. 4, § 22, 1885 CONST.); *Illinois*: Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915); ILL. CONST. art. 5, § 15; *Kentucky*: Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 165 S.W.2d 820 (1942); KY. CONST. § 91; *Minnesota*: Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970), *cert. denied*, 404 U.S. 886 (1971) (alternative holding); MINN. CONST. art. 5, § 5; *Missouri*: State *ex rel.* McKittrick v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857 (1943); 1 Mo. CONST. art. V, § 1 (1875); *Montana*: State *ex rel.* Olsen v. Pub. Serv. Comm'n, 129 Mont. 106, 283 P.2d 594 (1955); MONT. CONST. art. VII, § 1; *North Dakota*: State *ex rel.* Miller v. Dist. Court of Burleigh County, 19 N.D. 819, 124 N.W. 417 (1910); N.D. CONST. art. III, § 83; *Texas*: Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926); TEX. CONST. art. 4, § 22; *Utah*: Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969); UTAH CONST. art. VII, § 18; *Washington*: State v. Taylor, 58 Wash. 252, 362 P.2d 247 (1961) and State v. Gattavara, 182 Wash. 325, 47 P.2d 18 (1935); *Cf.* State v. Seattle Gas & Elec. Co., 28 Wash. 488, 68 P. 946 (1902); WASH. CONST. art. 3, § 21; *West Virginia*: State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935 (1909) (possible dictum); W. VA. CONST. art. VII, § 1.

contrary.[215]

Unfortunately, few decisions on either side are analytically satisfying. The cases finding an absence of common law powers content themselves with noting that "prescribed by law" means prescribed by statutory law:

> It is true in this state, as in others, that the office of attorney general, together with the other executive offices created by the constitution, is imbedded in that instrument, but it is equally true that the authority of the legislature to prescribe what the duties and powers of those occupying those offices shall be is imbedded there also, and, this being true, no common-law powers and duties can attach to that office but only those prescribed by statute.[216]

At least one decision, however, adverse to finding common law powers in the office, suggests a different result in a state such as South Carolina. The Supreme Court of Oklahoma in *State ex rel. Haskell v. Huston*[217] distinguished between Oklahoma and those states which were originally colonies and derived the office of attorney general directly from England. South Carolina, of course, is one of the latter, and the office of attorney general dates back to colonial times in this state.[218]

The cases favoring common law powers of the attorney general, under constitutions employing "prescribed by law" or similar language, reveal a greater number of rationales. Perhaps the most typical argument is found in a decision by the Supreme Court of Florida:

> The office of Attorney General has existed both in this

215. *Arizona*: Arizona State Land Dep't v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960); ARIZ. CONST. art. 5, § 9; *Arkansas*: State *ex rel.* Williams v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945) (dictum); ARK. CONST art. 6, § 22; *Georgia*: Walker v. Georgia Ry. & Power Co., 146 Ga. 655, 92 S.E. 57 (1917); GA. CONST. art. VI, § X (2); *Oklahoma*: State *ex rel.* Haskell v. Huston, 21 Okla. 782, 97 P. 982 (1908), *appeal dismissed*, 215 U.S. 592 (1910); OKLA. CONST. art. 6, § 1; *Wisconsin*: State v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 179, 116 N.W. 900 (1908); WIS. CONST. art. 6, § 3.

216. Shute v. Frohmiller, 53 Ariz. 483, 494, 90 P.2d 998, 1003 (1939).

217. 21 Okla. 782, 97 P. 982 (1908), *appeal dismissed*, 215 U.S. 592 (1910).

218. The office appears in the first two constitutions of South Carolina, those of 1776 (art. 22) and of 1778 (art. 29), although neither contains any reference to the powers or duties of the office. It is not mentioned in either the constituion of 1790 or that of 1865, although both refer to "other officers [who] shall be appointed as they hitherto have been, until otherwise directed by law" (1790: art. VI, § 2; 1865: art. VII, § 2). The constitution of 1868 again referred to the attorney general, in language identical to that of the present constitutional provision. S.C. CONST. art. IV, § 28 (1868).

> country and in England for a great while. The office is vested by the common law with a great variety of duties in the administration of the government. It has asserted that the duties of such an office are so numerous and varied that it has not been the policy of the Legislatures of the states to specifically enumerate them; that a grant to the office of some powers by statute does not deprive the Attorney General of those belonging to the office under the common law . . . . As the chief law officer of the state, it is his duty, in the absence of express legislative restrictions to the contrary, to exercise all such powers and authority as public interests may require from time to time.[219]

The Supreme Court of Illinois stated the basis of its reasoning briefly:

> The Constitution provides . . . that the Attorney General shall perform such duties as may be prescribed by law. The common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase.[220]

Interestingly, the Missouri court justified a finding that the attorney general has common law powers in a novel way:

> The Constitution . . . merely provides generally that the Attorney General "shall perform such duties as may be *prescribed by law* . . . ." The italicized phrase, "prescribed by law," by the weight of authority means, prescribed by *statute* law. However, we have long had a statute . . . adopting the common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the Constitution of the United States and the Constitution and *statutes* of this State in force for the time being. This section evidently has been construed as adopting not only the common-law rights and remedies of litigants, but also such common-law *powers* of public officers as were possessed by similar officers in England—either that, or else we view the English common law, statutes and history as aids to interpretation. For it has been held in a majority of the

219. State *ex rel.* Landis v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823, 827 (1934) (citations omitted).

220. Fergus v. Russel, 270 Ill. 304, 337, 110 N.E. 130, 143 (1915). The case goes on to hold that the constitution contemplated that the legislature had power only to *add* to the common law powers of the attorney general, not to detract from them. Apparently, Illinois is the only jurisdiction so holding, at least where such a constitutional provision governs.

> states, including Missouri, that the Attorney General does have common-law powers.[221]

Under this reasoning, there should be no difficulty in reaching the same result in South Carolina. This state also has a reception statute which provides:

> All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this act.[222]

Assuming that the attorney general does have common law powers, it would seem that authority to seek enforcement of the orders of the Human Affairs Commission would fall within them. There are numerous jurisdictions which recognize such powers and whose cases testify to the powers' extensive application. In *State v. Red Owl Stores, Inc.*,[223] for example, the attorney general sought an injunction against Red Owl Stores to compel it to cease selling various drugs[224] without a license from the Minnesota Board of Pharmacy. The relevant statute provided only for a criminal penalty and not an injunction. Nevertheless, the court validated the attorney general's authority to seek injunctive relief:

> While it is true that the legislature has not provided for injunctive relief, that fact should not place the pharmaceutical board in a position where, in the face of organized resistance, it must rely on one prosecution at a time to accomplish enforcement. We think that under the circumstances *it was the duty of the attorney general as an agent of the state to institute injunctive proceedings to accomplish that purpose.*[225]

Likewise, in *People v. San Diego Unified School District*,[226] the

221. State *ex rel.* McKittrick v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 35-36, 175 S.W.2d 857, 861 (1943) (citations omitted).

222. Act. No. 1523 (1972), 57 Stat. 2775. To one who wonders why the 1972 legislature felt it necessary to enact a reception statute, no easy response is available. It may have something to do with rectifying an old oversight'(assuming that is what it was) when the original 1712 reception statute, identical to the present one, was omitted from the Code of 1912. But even that hypothesis seems questionable since State v. Charleston Bridge Co., 113 S.C. 116, 101 S.E. 657 (1919) found the statute to be "merely declaratory in its nature." *Id.* at 126, 101 S.E. at 660.

223. 253 Minn. 236, 92 N.W.2d 103 (1948).

224. *E.g.*, Alka-Seltzer, Anacin, Bromo Seltzer, Bufferin and Pepto-Bismol.

225. 253 Minn. at 249, 92 N.W.2d at 112 (emphasis added).

226. 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Dist. Ct. App. 1971), *cert. denied*, 405

court upheld the right of the attorney general to seek mandamus against a public school district to eliminate racial imbalance.[227]

It may be argued, however, that the statutory duty requiring the attorney general to defend actions against public officers and employees[228] renders it inconsistent for the attorney general to sue, on behalf of the Human Affairs Commission, a respondent represented by the attorney general. This dilemma is more apparent than real.

In *United States v. ICC*,[229] a case which the Supreme Court aptly characterized as "*United States v. United States et. al.*," the Court found no problem of justiciability:

> In support of their contention that Congress did not intend for the Government to press its claim as a shipper, the Commission and railroads emphasize the anomaly of having the Attorney General appear on both sides of the same controversy. However anomalous, this situation results from the statutes defining the Attorney General's duties. The Interstate Commerce Act requires the Attorney General to appear for the Government as a statutory defendant in cases challenging Commission orders. The Attorney General is also under a statutory duty "to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases . . . ."
>
> Although the formal appearance of the Attorney General for the Government as a statutory defendant does create a surface anomaly, his representation of the Government as a shipper does not in any way prevent a full defense of the Commission's order. The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest.[230]

U.S. 1016 (1972).

227. *See also* Don Wilson Builders v. Superior Court, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (Dist. Ct. App. 1963). In this case the court recognized the attorney general's right to seek to enjoin a private party from violating the state Civil Rights Act.

228. S.C. CODE ANN. § 1-234 (1962) provides:

> In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf.

229. 337 U.S. 426 (1949).

230. *Id.* at 431-32 (citations omitted).

It would seem that this reasoning is applicable to a potential suit by the attorney general on behalf of the commission, especially since the defendant need *not* ask the attorney general to represent it.

A similar result was reached in *State ex rel. Dunbar v. State Board of Equalization*[231] where the attorney general of Washington, sought mandamus to compel the defendant to comply with a particular statute. The court first held that it was the duty of the attorney general to prosecute such actions as may be necessary for the execution of the duties of any state officer and then held that the statutory provision requiring the attorney general to defend actions against state officers did not preclude the suit.

> The legitimate conclusion of such an argument is that the Attorney General must, if such a situation arise, sit supinely by [*sic*] and allow state officers to violate their duties and be recreant to their trusts, and that, instead of preventing such actions, it is his duty to defend the delinquents. The law cannot be given any such construction. His paramount duty is made the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.[232]

The court approved of the suggestion that where such irreconcilable conflict existed, "private counsel would have to be employed by those officers whose actions were being questioned."[233]

There are, it must be admitted, cases which seem to take a contrary position. In *Ault v. Unemployment Compensation Board of Review*,[234] the Pennsylvania Superior Court said, "We are of the opinion that [the attorney general] should not have argued [before us] *against* an agency of the Commonwealth which the legislature directed him to defend in litigation."[235] *Ault* involved, however, an employee's claim against the Unemploy-

231. 140 Wash. 433, 249 P. 996 (1926). *See also* Reiker v. Wallgren, 28 Wash. 2d 872, 184 P.2d 571 (1947).

232. 140 Wash. at 440, 249 P. at 999.

233. *Id.* at 441, 249 P. at 999.

234. 188 Pa. Super. 260, 146 A.2d 729 (Super. Ct. 1959), *rev'd on other grounds*, 398 Pa. 250, 157 A.2d 375 (1959).

235. *Id.* at 262 n.1, 146 A.2d at 730 n.1.

ment Compensation Board and not a situation in which the decision of one agency was pitted against that of another. Moreover, the court noted:

> There are occasions where an attorney general is required to represent both sides of a case, as, for example, when the Highway Department appeals from a Public Utility Commission order. In such cases he cannot believe both sides to be right, and yet he is charged by statute with presenting both sides to the court. This, of course, is done through deputies or counsel assigned to the agencies involved, but inasmuch as all of these represent the attorney general himself, the attorney general is on both sides of the case.[236]

Of course, this is not dispositive of the case involving the attorney general seeking mandamus on behalf of the Human Affairs Commission against an agency he is required by statute to defend, for he is not required *by statute* to seek mandamus. Nevertheless, if the attorney general has a common law power to do so, there would seem no sound reason to distinguish this situation from *Ault*.[237]

Accordingly, while the question must still be regarded as unresolved in the State of South Carolina, both the weight of authority and the better reasoning suggest that the attorney general has the common law powers necessary to seek mandamus to enforce orders issued by the Human Affairs Commission against other public agencies for violations of the Human Affairs Law.

B. A Private Right of Action Against Persons Committing Acts of Discrimination

In considering possible state remedies against those engaging in discriminations proscribed by the Human Affairs Law beyond those administrative remedies afforded by resort to the Human Affairs Commission, the first step is to state the question involved.[238] When the legislature enacts what appears to be a rule

236. *Id.* at 263 n.1, 146 A.2d at 731 n.1.

237. *See also* Arizona State Land Dep't v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960).

238. The main treatment in this portion of the article is a possible right of action against *private* acts of discrimination, since the previous section suggests the availability of coercive remedies through commission orders against the public agency discriminations that qualify as "unfair employment practices" under the law. Nevertheless, there may be non-employment discriminations by public agencies to which the present discussion is apposite. Moreover, the theory considered may offer an alternative avenue of relief to

of substantive law, creates an administrative agency with power to enforce that rule in some but not all the situations which it seems to cover, and says nothing about enforcement by the courts, is it the duty of the courts to apply that rule in cases within their jurisdiction?[239] It is precisely this situation which obtains under the South Carolina Human Affairs Law. The legislature has declared in section 2 of the Human Affairs Law that "the practice of discrimination . . . because of race, creed, color, sex, age or national origin [is] a matter of State concern and . . . is in conflict with the ideals of South Carolina and the nation . . . ."[240] At the same time the statute provides that "to alleviate such problems a State agency [the Human Affairs Commission] is created . . ."[241] Is the commission the sole avenue of relief, when, in some situations (mainly those involving private discriminations), the commission has no cease and desist powers at all? Or should a private right to bring a civil action be implied to further the policy declared by the legislature?

There is a dearth of South Carolina authority on both the precise point[242] and on the more general question of implying a civil action from violation of a statute.[243] Accordingly, it is neces-

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resort to the Human Affairs Commission. This theory, however, involves questions significantly different from those arising when the discriminating party is a private person. *See* pp. 77-79 *infra*.

239. As phrased, in an admittedly different context, by Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987, 994 (1949).

240. S.C. CODE ANN. § 1-360.22 (Supp. 1972).

241. *Id.*

242. In Redding v. Railroad Co., 5 S.C. 56 (1873), the state supreme court held insufficient a cause of action alleging the defendants "made a distinction, on account of the color and the supposed race," to the plaintiff's detriment. At most this amounts to a holding that racial discrimination is not actionable at common law, since no statute was involved. In fact, the case probably does not stand for even that limited proposition, since it is best viewed as a pleading decision. The court noted: "If the plaintiff were denied or disturbed in the enjoyment of any right on the ground of her color or race, constituting an actionable injury, the nature of the right, and the wrong and injury done to it, should have been stated." *See also* City of Charleston v. Mitchell, 239 S.C. 376, 123 S.E.2d 512 (1961), *rev'd on other grounds*, 378 U.S. 551 (1961). In *Mitchell* there is dicta that there exists no common law right of action against private discrimination. The court was careful, however, to note that the case arose "[i]n the absence of a statute forbidding discrimination based on race or color." Interestingly, the court did not refer to *Redding v. Railroad Co.* to support its statement, a fact which reinforces the interpretation of *Redding* as turning on a point of pleading.

243. There are a number of South Carolina cases which hold that violations of a motor vehicle statute establish negligence per se on the part of the violator. *See, e.g.*, Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956). In these cases, however, the common law independently recognizes a right to sue for negligence, and the statute is merely viewed as establishing the requisite standard of care. *See generally* Thayer, *Public Wrong and*

sary to search farther afield for our answer. Such an inquiry reveals that the notion of implying a civil cause of action to one injured by the violation of a statute which does not explicitly provide for such relief has had widespread acceptance at the federal level.[244] For example, causes of action grounded on this theory have been recognized in cases ranging from securities law violations[245] to recovery when an airline passenger was unjustifiably "bumped" from his reserved flight;[246] from damages caused by the interception and publication of a telephone message in violation of a provision of the Communications Act[247] to injury suffered by migrant workers hired through an employment system established by federal statute, in violation of regulations issued by the Secretary of Labor under that statute.[248]

The reason for implying a cause of action is probably nowhere better stated than by the Supreme Court in *Texas & Pacific Ry. v. Rigsby*,[249] the case which is generally recognized to have originated the theory in this country. In *Rigsby* the Court, in upholding a private cause of action by an employee injured as a result of the defendant's failure to comply with the Federal Safety Appliance Acts, first noted that the purpose of the Acts, *inter alia*, was to promote employee safety:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, "Action upon Statute" (F), in these words: "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done

Private Action, 27 HARV. L. REV. 317 (1914); Morris, *The Relation of Criminal Statute and Tort Liability*, 46 HARV. L. REV. 453 (1933). This is rather different than implying a right of action, where none exists at common law, from violation of a statute.

244. *See generally* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

245. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

246. Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961). This conduct was held to be in violation of the provision in the Civil Aeronautics Act barring giving "undue or unreasonable preference or advantage to any particular person" or subjecting any person "to any unjust or unreasonable prejudice or disadvantage."

247. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

248. Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

249. 241 U.S. 33 (1916).

> to him contrary to the said law." (*Per* Holt, Ch. J., Anonymous, 6 Mod. 26, 27.)[250]

The theory, or allied notions, has surfaced in Supreme Court decisions with surprising regularity ever since. In *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*,[251] for example, the union sought an injunction against the railroad to prevent it from interfering with employee choice of a bargaining representative. The Court upheld the action because the Railway Labor Act did proscribe such interference and the absence of an express statutory remedy to enforce this prohibition was held to be no bar: "The right is created and the remedy exists."[252] Likewise, the Court, again dealing with the Railway Labor Act, in *Virginian Ry. v. System Federation Local 40*[253] held that the statutory provision that a carrier "treat with" certified representatives was specifically enforceable despite the failure of the statute to provide explicitly.

In *J.I. Case Co. v. Borak*[254] the Court found that section 14(a) of the Securities Exchange Act of 1934 impliedly created a right of action in stockholders for violations of the rules governing proxy solicitation:

> While [the] 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.[255]

Apparently the Court viewed the "necessity" for private suit as arising from the fact that the SEC could not effectively police the more than 2,000 proxy statements then annually submitted to it.

Similarly, the Court in *Wyandotte Transportation Co. v. United States*,[256] which involved an effort by the Government to

250. *Id.* at 39. It is true that there were intimations, other than the mere passage of the criminal statute, of an affirmative congressional intent to create a private right of action. Although the Court cited these intimations to buttress the general principle stated in the quoted language, it apparently did not consider them critical to its result.

251. 281 U.S. 548 (1930).

252. *Id.* at 569-70.

253. 300 U.S. 515 (1937).

254. 377 U.S. 426 (1964).

255. *Id.* at 432. *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). In *Mills* the Court extended *Borak* by indicating that a successful suit by plaintiff stockholders would entitle them to attorneys' fees, despite the absence of any explicit statutory provision to that effect.

256. 389 U.S. 191 (1967).

fix civil liability on owners for removing vessels negligently sunk in navigable waters,[257] found that section 15 of the Rivers and Harbors Act of 1899 allowed the Government suit. That provision declared that it "shall not be lawful" to negligently permit vessels to be sunk in navigable channels, making it the "duty" of the owner to commence removal immediately. While the only penalty explicitly provided in section 15 was that failure of the owner to remove the vessel constituted abandonment, permitting the United States to remove it, the statute generally provided for criminal penalties and even authorized injunctive relief for obstructions to navigation contrary to the Act. Despite this rather elaborate remedial scheme, the Court held that the remedies specified were not exclusive. It pointed out the inadequacy of criminal sanctions because of the "meager monetary penalties," even though it recognized that imprisonment was possible.[258] The Court then wrote:

> Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim. It might in some cases permit the negligent party to benefit from commission of a criminal act. We do not believe that Congress intended to withhold from the Government a remedy that insures the full effectiveness of the Act. We think we correctly divine the congressional intent in inferring the availability of that remedy from the prohibition of §15.[259]

Finally, in a very different context, the Court recently made the same kind of point, holding in *Bivens v. Six Unknown Named Agents of F.B.I.*[260] that there was a private damage action available by implication to injured citizens for violation by federal agents of the fourth amendment's prohibition against unlawful search.[261]

The rationale behind these decisions is simply summarized:

257. The case actually involved two defendants; against one, the government sought an injunction to require it to remove sunken barges; against the other, the Government sought reimbursement of the expenses it had incurred in raising a barge. The Supreme Court upheld the Government's position on both points.

258. "[B]ut this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent ship owner may inflict upon the sovereign." 389 U.S. at 202.

259. 389 U.S. at 204.

260. 403 U.S. 388 (1971).

261. The lower courts have extended the *Bivens* rationale to a violation of fifth amendment rights. *See, e.g.*, United States v. Kuelzer, 457 F.2d 892 (3d Cir. 1972).

(1) the statutory purpose is furthered by implying a private right of action; and (2) the Court had no reason to believe that a congressional failure to provide expressly for a private remedy was an implicit denial of one. In the Railway Labor Act cases[262] the Court's decision was arguably necessary not merely to further the purpose of the statute, but, more critically, to avoid utter frustration of that purpose. These cases were, in short, cases in which a finding of no private right of action would be tantamount to holding that no remedy at all was available since no administrative agency had jurisdiction to enforce the statute. This reason, however, was not present in *Rigsby* and *Wyandotte*, since a criminal penalty was provided, enforceable by the United States attorney. Neither was it true in *Borak* where the SEC, though perhaps overworked, provided some avenue of relief. It is also doubtful whether that reasoning applies to *Bivens* since the exclusionary rule relating to the fruits of forbidden searches provides a "remedy," at least as to defendants in subsequent criminal proceedings. Of course, in *Rigsby, Borak, Wyandotte* and *Bivens*, the remedy is not satisfactory. Only by creating an additional remedy by implying a right to bring a civil suit is the purpose of the statute furthered. The rule to be drawn from the cases is, then, that the implication of a private cause of action is justified not only when it is essential to prevent complete frustration of the purpose of the statute but also in those cases where it would "merely further" the purpose of the statute.

This reasoning, of course, assumes the second point—that failure of the statute to provide a civil action does *not* reflect an affirmative congressional decision that no such remedy should be available. This assumption, in turn, reflects the Court's willingness to ignore in appropriate cases the canon of statutory construction *expressio unius est exclusio alterius*. With the exception of *Bivens*, the cases cited were based on statutes which provided penalties for certain violations, and *Rigsby, Borak*, and *Wyandotte* were each brought under a statute which provided a criminal penalty for the very conduct upon which the claim for relief was based. The decisions, then, demonstrate the Court's judgment that congressional failure to provide explicitly for a civil remedy for the right at issue may be explained as an oversight, correctable by the judiciary through implication.

262. Virginia Ry. v. System Fed'n of AFL, No. 40, 300 U.S. 515 (1937); Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930).

This analysis does not wholly reject the rationale that underlies *expressio unius* for there may well be instances in which the legislature's silence speaks volumes about its intent. Rather, it recognizes that the negative inference from such silence required by the canon is only one of a number of possible inferences, and not always the most likely. The Supreme Court appears disposed to indulge in a presumption that legislative silence is as readily explainable as a matter of oversight—at least in those cases in which implying a private cause of action will further the perceived purpose of the statute. Such a presumption is, of course, rebuttable. The legislative silence can be shown to point the other way by techniques of statutory interpretation, including implication from other statutory language, legislative history, the legal and factual context of the statute, and its own internal scheme or logic.

This general approach has been adopted by several state courts implying a private cause of action from state civil rights laws. Although there are relatively few precedents on the precise point, this paucity of authority is probably attributable to the fact that most state civil rights laws either explicitly provide for a private remedy or explicitly deny the availability of one. In those states where the question is not clearly answered by the statute, the courts, with but a single exception, have found an implied remedy.

The leading case is *Pompey v. General Motors Corp.*[263] In May 1964, plaintiff, a black employee, was demoted, allegedly for having been negligent on the job. At the time, Michigan had in effect a Fair Employment Practices Act[264] prohibiting racial discrimination in employment and creating an administrative agency as a forum for relief which ultimately included a judicially enforceable order. The statutory scheme provided for a ninety day statute of limitations, and the plaintiff failed to file within that period.[265] In 1965 the plaintiff filed a court action claiming his statutory right against employment discrimination had been infringed. The employer moved for dismissal because there was no provision in the Fair Employment Practices Act for a direct

263. 385 Mich. 537, 189 N.W.2d 243 (1971).

264. MICH. COMP. L. ANN. § 423.301 *et seq.* (1967). Presumably the court had in mind § 423.303(a).

265. Plaintiff alleged that his failure to file within the period was due to reasonable, but misplaced, reliance on statements by union representatives that his complaint would be processed under the grievance procedure. In fact, the union dismissed the proceeding.

court action and because plaintiff had failed to avail himself seasonably of the administrative remedy. The Michigan Supreme Court agreed with the employer that the plaintiff was barred from administrative relief because of the running of the limitation period. The court, however, continued:

> [I]t is transparently clear that plaintiff in Count I is asserting a cumulative judicial remedy for redress of his civil right to freedom from discrimination in private employment, rather than any *statutory* remedy.[266]

The Court's inquiry shifted to the source of the civil right which the plaintiff sought to vindicate. That right originated not in the state constitution but rather in the 1955 state Fair Employment Practice Act[267] which also created the administrative remedy from which plaintiff was barred by his failure to file timely! In other words, the question facing the court was precisely that posed at the outset: When a statute creates a right and provides a remedy, is that remedy to be deemed exclusive?

The court, after stating the general rule that a private cause of action will not be implied from a statutory scheme that creates rights and provides an administrative forum as a source of remedy,[268] held that with civil rights statutes such an administrative remedy will not be exclusive:

> Although there is some authority to the contrary, most decisions have held that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the

266. 385 Mich. at 551, 189 N.W.2d at 250 (emphasis in original).

267. MICH. COMP. L. ANN. § 423.301 (1967) provides:

> The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right.

The new Michigan Constitution of 1963 somewhat changed the situation. Art. V, § 29 created a Civil Rights Commission to investigate discriminations, and the legislature in 1963 abolished the Fair Employment Practice Commission replacing it with the Civil Rights Commission to administer the Fair Employment Practice Act. The source of the right, however, remained the same: the declaration in the original 1955 statute. The constitutional creation of the Civil Rights Commission could not otherwise affect rights under the statute because § 29 explicitly provided:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state. MICH. CONST. art. V, § 29.

See generally Cramton, *The Powers of the Michigan Civil Rights Commission*, 63 MICH. L. REV. 5 (1964).

268. 385 Mich. at 552, 189 N.W.2d at 251.

> statute, notwithstanding the statute did not expressly give him such right or remedy.[269]

So the aggrieved plaintiff need not exhaust administrative remedies since these remedies are not exclusive. The prior Michigan authority involved civil rights statutes that provided a criminal penalty but did not provide a private, civil cause of action nor an administrative agency to enforce the statute.[270] The *Pompey* decision goes further, however, in finding the existence of a private cause of action despite a statutory administrative means of enforcement.

The result reached by the Michigan Supreme Court in *Pompey* is also found in other authorities which have passed on the question. In *Everett v. Harron*[271] the Supreme Court of Pennsylvania had no difficulty in affirming the grant of an injunction against conduct contrary to a statute explicitly providing only a criminal penalty:

> Does the statute confer upon persons against whom illegal discrimination is practiced a right of action to redress the grievance thereby suffered? The answer to this question must undoubtedly be in the affirmative. It will be noted that section 654 begins by stating that "All persons within this jurisdiction of this Commonwealth shall be entitled to the full and equal accommodations * * * of any places of public accommodation, resort or amusement, * * *." If, therefore, they are "entitled" to such privileges they are likewise entitled to enforce them, since wherever there is a right there is a remedy. Indeed, the section refers, in another connection, to "presumptive evidence in any civil or criminal action", [*sic*] thus indicating that civil relief was contemplated by the legislature. Nor does the fact that a criminal penalty is provided for in the enactment render such remedy exclusive or supersede the right of action for damages in a civil proceeding, it being generally held that where a

269. *Id.* (footnote omitted).

270. Ferguson v. Gies, 82 Mich. 358, 46 N.W. 718 (1890), recognized a right of action for racial discrimination in public accommodations, despite the fact that the relevant statute only provided criminal penalties. The impact of this decision, however, was somewhat limited by intimations that the statute in question was only declarative of the common law, a right of action for discrimination existing independently. However, the court in Bolden v. Grand Rapids Operation Corp., 239 Mich. 318, 284 N.W. 241 (1927), explicitly rejected the view that *Ferguson* was so limited. *Accord*, St. John v. General Motors Corp., 308 Mich. 333, 13 N.W.2d 840 (1944) (involving a female employee seeking damages for violation of the state's equal pay act).

271. 380 Pa. 123, 110 A.2d 383 (1955).

> statute imposes upon any person a specific duty for the benefit of others, if he neglects or refuses to perform such duty he is liable for any injury caused by such neglect or refusal if such injury is of the kind which the statute was intended to prevent.[272]

Similar reasoning supported the action of the Washington Supreme Court in upholding a damage award to a plaintiff in *Browning v. Slenderella Systems of Seattle*.[273] *Slenderella* is noteworthy because, in addition to a criminal penalty, an administrative procedure for obtaining redress was established by the statute. Despite the dual statutory remedies, the court had no difficulty in finding implied still a third avenue of relief—a civil suit by the injured plaintiff.[274] In only one decision in point,[275] *Bachrach v. 1001 Tenants Corp.*,[276] has a court refused to recognize a private cause of action. *Bachrach* involved an attempt by plaintiff to base a private cause of action for housing discrimination on a violation of the New York City Administrative Code.[277] The First Department found no implied cause of action. The mode of analysis employed, however, was entirely consistent with the approach of those cases utilizing implication:

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272. *Id.* at 127-28, 110 A.2d at 385-86 (citations omitted). Admittedly, *Everett* is not a case of "mere" legislative silence—the reference by the court to the statutory language about "presumptive evidence in any civil . . . action" suggests an affirmative legislative intent. But, as in *Texas & Pacific Ry. v. Rigsby*, the court uses this language to buttress its result, not as the foundation of its reasoning.

273. 54 Wash. 2d 440, 341 P.2d 859 (1959).

274. *See also* Humburd v. Crawford, 128 Iowa 743, 105 N.W. 330 (1905); Joseph v. Bidwell, 28 La. Ann. 382, 26 Am. R. 102 (1876).

275. *See also* Brawner v. Irvin, 169 F. 964 (N.D. Ga. 1909). *Brawner*, however, preceded *Rigsby* and in any event, did not focus closely on the question. In addition, there are decisions, going both ways, on the question of whether either equitable relief or recovery of actual damages is available for violations of a criminal statute where the statute provides that the violator shall forfeit a specified sum to the person aggrieved. *See generally* Annot., 171 A.L.R. 920 (1947). These cases, however, are not really in point since it is easier to infer a legislative intent of *expressio unius est exclusio alterius* when the statute adverts to the question of recovery by the injured party without explicitly creating a general right of action, than when the legislation fails even to touch on the issue. Nevertheless, it is interesting that even in this context, most of the cases favor implying a private right of action.

276. 21 App. Div. 662, 249 N.Y.S.2d 855 (Sup. Ct. 1964), *aff'd without opinion*, 15 N.Y.2d 718, 256 N.Y.S.2d 929, 205 N.E.2d 196 (1965).

277. Presumably the relevant portion of the code had been enacted by the state legislature rather than the city council. This fact is significant since Tynes v. Gogos, 144 A.2d 412 (Mun. Ct. App., D.C. 1958), distinguished between ordinances and statutes, refusing to imply a cause of action in the case of the former. The reason for the distinction, while not well-articulated in *Tynes*, is rooted in notions of sovereignty. This factor, however, is not relevant to the present inquiry.

> In thus holding, the Court does not apply mechanically any rule that a statute creating a new substantive right with provision for a remedy, establishes such remedy as the exclusive one. The test, as with all legislation, is the manifested intention of the legislature, with the purpose of the legislation in mind.[278]

It is, then, not the court's perception of its appointed task with which we must quarrel, but rather its execution of it.

To begin with, the court viewed the case as not one involving "mere" silence; rather, it thought the absence of such a provision significant because "in this field of governmental regulation, there has been careful attention to the provision or exclusion of private or individual remedies. . . . (See, e.g., Executive Law, § 300.)"[279] The *Bachrach* court was simply saying that in the context of extensive antidiscrimination legislation, a failure to create explicitly a right of action in still another statute was significant. This is hardly a ground for refusing to find an implied cause of action in South Carolina, whatever the merits of the argument in New York!

The *Bachrach* contention is not, however, persuasive even on its own terms. Although the present Human Rights Law[280] explicitly provides for a right of civil action for damages for violation of the substantive provisions of the law as an alternative to the administrative remedy created, that was not true when *Bachrach* was decided. The law did bar religious discrimination in housing accommodations, but it was not clear whether court relief was available. Section 300 of the Executive Law, the portion cited by the court in *Bachrach* to demonstrate legislative expertise in this area, could scarcely be more ambiguous:

> Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but, as to acts declared unlawful [herein], the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided

278. 21 App. Div. 2d at 664, 249 N.Y.S.2d at 857.
279. *Id.* at 663, 249 N.Y.S.2d at 856.
280. N.Y. EXECUTIVE LAW §§ 290 *et seq.* (McKinney 1972).

> in this article, he may not subsequently resort to the procedure herein.[281]

This passage plainly means that alternative means of relief are available; however, it is not clear whether this is true only if they would have been available under "other" laws "relating to discrimination" or if it also applies to acts illegal only because the Human Rights Law itself so declared them.[282]

The *Bachrach* court also relied on the argument that implication of a damage action was somehow inconsistent with the enactment's purpose which was "rather to prevent insidious segregation based upon race, creed, color, religion, national origin and ancestry, regardless of the comparative value between obtainable housing and housing segregated on invalid grounds."[283] The court may have been concerned that allowing a damage remedy would result in racial or religious ghettos, with the ghetto residents merely being wealthier because of their recoveries. If this is the court's reasoning, it is rather far-fetched. The implication of a cause of action might deter discriminations as well as compensate its victims even if the damages are computed on a compensatory basis. It is not at all clear that the defendants in *Bachrach* would have been willing to pay the plaintiff $70,000 merely to indulge their anti-Semitic impulses. Nevertheless, whether or not correct, the *Bachrach* decision rests in part on a finding of incongruity between the cause of action and the statutory purpose. In instances where no such incongruity exists, the rationale would seem not to apply. Arguably, no incongruity would exist, for example, in the case of discriminations in private employment where the societal goal of integration may be less important than improving the economic position of presently discriminated-against classes.

A third reason advanced by the *Bachrach* court was that "the procedures for conciliation and confidentiality of proceedings in the first instance suggest that a quite different approach from

281. N.Y. EXECUTIVE LAW § 300 (McKinney 1972).

282. In *Bachrach*, the plaintiffs grounded their action on the New York Administrative Code, rather than by implication from the Human Rights Law, simply because the portion of the Human Rights Law barring discrimination in private housing accommodations had not become effective at the time of the alleged discriminations. Those provisions did not become effective until September 1, 1961, while the alleged discrimination occurred in the spring of 1960. *See* 41 Misc. 2d 512, 245 N.Y.S.2d 912 (Sup. Ct. 1963).

283. 21 App. Div. 664, 249 N.Y.S.2d at 857.

that of damage actions is contemplated."[284] This reasoning has obviously lost its force after the enactment of title VII. No longer can conciliation or confidentiality of conciliation procedure be thought to be fundamentally inconsistent with a civil action for damages.

Even granting *Bachrach* the status of contrary precedent, it is at best a weak one. Most courts are willing to imply a civil remedy for violations of civil rights statutes, regardless of whether such statutes explicitly provide only a criminal penalty, an administrative remedy, or both. The willingness stems from a perception of the importance of the right involved, coupled with the considerations, found in the Supreme Court decisions, that a private remedy will further the purposes of the statute and that the absence of reason to believe that the legislature's failure to provide explicitly a private remedy shows an intention that it is not to be available.

Application of this analysis to the South Carolina Human Affairs Law reveals that the courts may well find the existence of a private cause of action by implication. To begin with, the Human Affairs Law strongly states the importance of the right to be free from discrimination:

> The General Assembly hereby declares the practice of discrimination against any individual because of race, creed, color, sex, age or national origin as a matter of State concern and declares that such discrimination is in conflict with the ideals of South Carolina and the nation, as such discrimination interferes with opportunities of the individual to receive employment and to develop according to his own ability and is degrading to human dignity.[285]

Moreover, there can be little doubt that the implication of a private right of action would further the purposes of the statute. Difficulties with the enforcement of commission orders with regard to public employment discriminations,[286] coupled with the spectrum of private discriminations which are wholly beyond the cease and desist power of the commission, demonstrate that implication of private actions is essential for meaningful progress in attaining the non-discriminatory society which the statute estab-

284. *Id.*
285. S.C. CODE ANN. § 1-360.22 (Supp. 1972).
286. *See* pp. 38-61 *supra.*

lished as the state's ideal.[287]

The question remaining becomes whether the legislature's failure to provide explicitly a private remedy was intentional. In the absence of legislative history, we can seek an answer only by drawing inferences from the statutory language, context and scheme. As will be seen, none of these approaches provides any clear-cut indication of legislative intent; by the same token each fails to demonstrate hostility to the notion of implication.

The statutory language simply does not advert directly to the question, and the guidance to be found by indirection is scanty indeed. After the declaration of state policy against discrimination, section 1-360.22 adds:

> The General Assembly further declares that to alleviate such problems a State agency is created which shall seek to eliminate and prevent discrimination because of race, creed, color, sex, age, or national origin as is hereinafter provided.[288]

This wording might suggest that *the* sole method of alleviating such problems was the Human Affairs Commission. Such an interpretation, however, is strained. It is just as likely that the words mean that *a* (or "the institutional") means of alleviating the problem is to be the commission.

A second possible source of enlightenment in the statute is section 1-360.30(c), which provides:

> The procedures and remedies provided under this chapter shall not be deemed exclusive, but may be pursued solely or in addition to any other procedure or remedy available at law or in equity; *provided, however*, that no State employee may file a complaint both with the State Employee Grievance Committee and with the Commission created by this chapter.[289]

Plainly, the import of this section is to hold open the possibility of an implied cause of action. Does it go further, however, and imply that such a cause of action exists? The answer can only be a firm "maybe." Although this statutory provision is neutral on its face, the setting in which it was enacted may suggest that it favors the existence of a private remedy by implication. It will be

287. Absent such a right, some discrimination would be beyond the reach of *any* coercive remedy, including those available under title VII. For example, a private employment discrimination by an employer of less than 15 employees who, as such, is exempt from the federal statute.

288. S.C. CODE ANN. § 1-360.22 (Supp. 1972).

289. S.C. CODE ANN. § 1-360.30(c) (Supp. 1972).

recalled that no state[290] remedy[291] is available for private or public discriminations other than those associated with the Human Affairs Law itself. Arguably, then, the non-exclusive remedy provision could only be intended either to permit implication or to permit development of a common-law right to be free from discrimination independent of the statute. The latter alternative is so highly unlikely, since no state court has ever created such a right, that the former must have been intended. This reasoning is at least open to the rebuttal that the clause could be intended to permit the state courts to develop private remedies against *public discriminations* under the state constitution's equal protection clause. This possibility, in light of the federal developments under the fourteenth amendment, is not unlikely.

If the statutory language provides no firm indication of legislative intent, the statutory scheme does not advance the inquiry any further. If implication impeded the effectiveness of the commission, it would not be difficult to infer a legislative intent hostile to a civil action. In the case of the Human Affairs Law, this argument could possibly be made along the lines suggested by one commentator:

> The fact that the regulatory statute is administered by an agency may bear on the question of implication in various ways. If the agency has the power to grant the relief sought by the plaintiff and its remedies are available in practice, an additional court-created remedy is generally superfluous. And where the agency has the power but has already refused to grant relief to the plaintiff, a court-created remedy would amount to circumvention of the regular procedure for judicial review of the agency's decisions.[292]

However, careful analysis suggests this objection is not persuasive, or at least not wholly so. First, neither *Pompey* nor *Slenderella* found this objection fatal. Second, the commission does *not* have the power to grant relief with respect to private

290. There is, of course, a panoply of federal remedies. It would make no sense, however, for a state statute to seek to preserve federal remedies by means of a provision like section 1-360.30(c) since federal remedies aill continue to exist regardless of state legislation by virtue of the supremacy clause.

291. *See* note 242 *supra*. There is at least dictum that no common law right to be free of private discrimination exists in South Carolina. There may be a right to be free of public discrimination on some or all of the prohibited bases under the equal protection clause in the state constitution, but no case so holds. *See also* note 166 *supra*.

292. 77 HARV. L. REV. 285, 294 (1963) (footnotes omitted).

discriminations, so that no disruption of the administrative scheme would result.[293] Although it is true that the statute provides a conciliation function for the commission even with respect to private discriminations, no reason exists to deny an aggrieved party a judicial remedy. The statutory scheme can be satisifed by requiring resort to commission conciliation procedure as a prerequisite for judicial relief,[294] perhaps under the doctrine of exhaustion of administrative remedies.[295]

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293. The court in Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961), found good reason to imply a civil action in the inadequacy of the administrative remedy:

> [A]lthough the statute confers upon the administrative agency power to investigate and render prospective relief to protect from impending statutory violation, there is no administrative authority to award damages or other relief to a passenger for past wrongs. *Id.* at 364.

294. The effect of such a rule would be a situation paralleling that obtaining under title VII: Actual efforts at conciliation might not be required, but the commission must be given an opportunity to conciliate. The time periods for such conciliation efforts would also have to be determined by the courts. *See* note 295 *infra*.

295. The doctrine has been recognized in South Carolina, although its contours are not well-charted. In Stanley v. Gary, 237 S.C. 237, 116 S.E.2d 843 (1960), the supreme court sustained a demurrer on the ground that plaintiff did not first exhaust the available administrative procedures established by statute before bringing suit. *Accord*, Berry v. Lindsay, 256 S.C. 282, 182 S.E.2d 78 (1971). It is not clear, however, the extent to which exhaustion is required or whether it is merely discretionary with the court. There are intimations that the courts have leeway. Thus, in DePass v. City of Spartanburg, 234 S.C. 198, 197 S.E.2d 350 (1959), the court took pains to demonstrate the adequacy of the administrative remedy, an exercise that would have been unnecessary should exhaustion be required in any event. And in *Ex parte* Allstate Ins. Co., 248 S.C. 550, 151 S.E.2d 849 (1966), the court held exhaustion to be discretionary when the complaint alleged that the agency was acting beyond its statutory authority. The court also stated that other "situations can exist where failure to exhaust administrative remedies may be excused." *Id.* at 567, 151 S.E.2d at 855.

There are at least two problems with requiring resort to commission conciliation procedures prior to bringing suit against a private discrimination. First, since the commission has no coercive powers, resort may result only in delay when the potential defendant is recalcitrant; it is often said that exhaustion is not necessary where it would be futile. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.07 (1958). Even assuming that such an exception to the exhaustion doctrine would, in an appropriate case, be recognized in South Carolina, it is not clear that the instant problem qualifies. The Human Affairs Law reflects a legislative judgment that conciliation will be a useful tool in resolving conflicts in this area. It would not seem to be the role of the judiciary to decide to the contrary.

Second, it might be argued that exhaustion, at least where conciliation is likely to be futile, should be dispensed with where postponement of court relief will result in irreparable injury. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.03 (1958). The supreme court's decision in *Stanley v. Gary* suggests, but does not hold, that this contention will not receive a sympathetic hearing. In *Stanley* a patently arbitrary dismissal of school children (for refusing to drink a certain brand of milk) was attacked by their parents who sought an injunction against such harassing conduct and one of whom,

With respect to public agencies committing unfair discriminatory practices within the judicially enforceable cease and desist powers of the commission, the question is considerably more difficult. Indeed, it is perhaps best considered as a series of separate questions. First, would it be inconsistent with the statutory scheme to allow the aggrieved party to bypass entirely the commission and go directly to court on his implied cause of action? The court in *Pompey v. General Motors Corp.*[296] sanctioned precisely this approach. Although special circumstances existed in *Pompey*,[297] this is objectionable as a general principle in that the end-run around the commission may result in a de-emphasis of the role and power of the commission. The commission's effectiveness in attaining conciliation in the run-of-the-mill case may rest in part on its ability to compel compliance in a few test cases. While this question is not free from doubt, the statutory scheme should require resort to the commission, at least as a prerequisite to suit, just as it has been suggested that a commission opportunity to conciliate ought to be a prerequisite to suit even in those areas in which the commission has no coercive powers.[298]

Second, if some exhaustion is required, should private suit be allowed after a commission dismissal upon its determination of no probable cause? Allowing a private cause of action in this case provides little basis for complaint by the administrative

in effect, sought to have the principal fired. The complaint did not, however, seek an order reinstating the students, so the question of irreparable injury was not squarely before the court. Nevertheless, it appeared that the children were not in school. The unwillingness of the court to grant a judicial hearing on the merits in these circumstances suggests its belief in the strength of the exhaustion policy.

The dilemma facing the courts may perhaps be resolved by a kind of compromise. The factors of likely futility of conciliation and irreparability of injury could be considered by the court in deciding how long the commission should be given to seek conciliation prior to suit. A very short period, perhaps only a week or ten days, might suffice if attempts to conciliate were demonstrably likely to be futile and the interim injury very great.

296. 385 Mich. 537, 189 N.W.2d 243 (1971).

297. It will be recalled that the plaintiff alleged that he allowed the short (ninety day) statute of limitations for recourse to the Civil Rights Commission to run because he believed that his union representatives were processing his complaint through the normal grievance procedures. *See* note 265 *supra*. This fact would justify the result in *Pompey*, on the analogy to the federal cases holding a 42 U.S.C. § 1981 remedy available to plaintiffs who have justifiably failed to satisfy the procedural requirements of title VII. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970). *Pompey* does not, however, expressly limit the implied right of action to cases in which there was justifiable failure to pursue the administrative remedy.

298. *See* note 294 *supra*.

agency. Since the commission has had an opportunity to consider the case and has rejected it, no legitimate quarrel could result even if the judicial second-guessing might sometimes cause embarrassment to the commission's determinations. A more serious problem may be that of the statutory provision barring judicial review of dismissals of complaints before a hearing.[299] As a matter of interpretation, the question would be whether implying a civil action would create a judicial "review" of the commission decision contrary to the statute. Technically, of course, it would not; but in a broader sense the result might be contrary to the legislature's intent since a plaintiff would recover despite an agency finding of no probable cause. Nevertheless, there is a good reason to imply the action. It will be recalled that there is a serious issue of the constitutionality of the statutory provision barring review, an issue which may turn on whether the commission's action in dismissing the complaint would "finally bind" the complainant or affect his "private rights." If a cause of action is implied, the significance of an adverse agency determination on probable cause is so attenuated that it is doubtful whether the constitutional question remains. Accordingly, the rule that a court should interpret legislation to avoid constitutional issues provides a powerful stimulus to a finding of implication.

Third, if the commission issues a remedial order, should the prevailing party have a private cause of action? Such an action against a public agency after a commission remedial order would seem to further rather than disrupt the legislative purpose underlying the administrative scheme. If plaintiffs merely seek enforcement of the commission order, there is little difficulty since relief is already available by writ of mandamus,[300] and there would seem to be no objection to providing an alternative or cumulative remedy by the implication of a cause of action. Presumably such a suit could be brought free of the strictures governing mandamus. A problem arises, however, if the plaintiff seeks relief beyond that provided in the order. At best, the duplication of litigation involves waste of resources with both agency and court deciding the same issue.[301] At worst, there may well be a disruption of

299. *See* pp. 13-16 *supra*. *See also* note 165 *supra*.

300. *See* note 166 *supra*.

301. Notions of res judicata or collateral estoppel might prevent this from becoming a serious difficulty, but only if the court action is not viewed as a review, in some sense, of the commission decision.

the whole administrative enforcement scheme since the incentives to comply with a commission order (or to conciliate prior to a commission hearing) will be considerably reduced if the public agency is still open to suit for higher penalties after the commission determination.

Finally, should a private cause of action be implied where the commission, *after hearing*, has dismissed the complaint? In that situation, the second-guessing inherent in a subsequent private suit has little to commend it that could not be accomplished by the judicial review that already exists; further, this would waste judicial resources by requiring a de novo trial and reduce incentive to cooperate with the commission.

Several conclusions can be drawn from the statutory scheme with regard to the legislative intent and a private cause of action. First, nothing should bar an action against private discrimination or discriminations by public agencies that are not unfair discriminatory practices, at least if the commission is given an opportunity to conciliate, since as to these classes of conduct the commission has no coercive powers. Second, if an all-or-nothing approach is to be taken, there are various problems with implying a cause of action against unfair discriminatory practices by public agencies. Third, under a more refined analysis, the scheme of the statute would be seriously disrupted in even these cases only by a suit seeking relief beyond that granted by the commission or after the commission after a hearing found no violation of the statute. Accordingly, a private action could be permitted (1) when a complaint was dismissed by the commission after finding of no probable cause, and (2) after a commission order to obtain judicial enforcement of that order.

In short, no strong reasons exist to believe the legislature intended to bar a private cause of action, with the exception of those areas of public discrimination detailed above where such a right might undercut the administrative enforcement scheme. If South Carolina is willing to follow the lead of the federal courts and those in her sister states, the courts should find at least a limited right to bring a private action to redress violations of the South Carolina Human Affairs Law.[302]

302. Parts IV and V of this article will appear in a subsequent issue of the *South Carolina Law Review*. Part IV surveys some of the more important substantive provisions of the statute. In Part V conclusions are drawn from the study that will, hopefully, be of use both to attorneys and courts in dealing with the law and to the newly-created State Human Affairs Commission in implementing it.