Denver Law Review

Volume 57 | Issue 3 Article 5

January 1980

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A PRIVATE RIGHT OF ACTION UNDER TITLE IX: *CANNON V. UNIVERSITY OF CHICAGO*

> "*The search for significance in the silence of Congress is too often the pursuit of a mirage.*"[1]

INTRODUCTION

The doctrine of implication provides a basis for a court to allow an individual who has been injured by another's violation of a federal statute to maintain a private action for vindication of his rights when the statute itself does not expressly authorize such a remedy. The traditional justification for the doctrine has been that it permits a court to fill gaps left by Congress in a statute's enforcement scheme. By insuring complete and comprehensive enforcement a court thus assists in effectuating the purposes underlying the statute.[2]

When it enacted title IX of the Education Amendments of 1972[3] to prohibit discrimination on the basis of sex by federally funded educational programs and activities,[4] Congress left just such a gap. While taking care to authorize the federal departments and agencies that administer educational funds to enforce the statute and regulations promulgated under it,[5] Congress did not explicitly grant similar powers to individuals aggrieved by violations of the statute. It was not until Geraldine Cannon sought and was denied admission to the medical schools of the University of Chicago and Northwestern University that the gap was filled.

This comment will look briefly at the positions taken by federal courts of appeals and district courts that considered whether to allow a private right of action under title IX prior to the United States Supreme Court's

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1. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942) (Frankfurter, J.).

2. A survey of the evolution of and rationale for the implication doctrine is beyond the scope of this comment. For such an examination, see Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *Implication of Private Actions From Federal Statutes: From* Borak *to* Ash, 1 J. CORP. L. 371 (1976); Comment, *Private Rights of Action Under* Amtrak *and* Ash; *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976).

3. 20 U.S.C. §§ 1681-1683 (1976) [hereinafter referred to as title IX].

4. Section 901 of title IX states that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1976).

5. Section 902 of title IX provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders . . . which shall be consistent with achievement of the objectives of the statute . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of . . . assistance . . . to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement, . . . or (2) by any other means authorized by law . . . .

20 U.S.C. § 1682 (1976).

decision in *Cannon v. University of Chicago*.[6] It will then examine the rationale underlying the Court's implication of a private action in *Cannon* and suggest how the Court might have structured an essentially meritorious decision on a firmer foundation.

I. THE BACKGROUND OF THE ACTION

In 1974 Geraldine Cannon applied for admission to the 1975 entering classes of the medical schools at the University of Chicago and Northwestern University. Cannon was thirty-nine years old at the time, and her chances of gaining admission were virtually eliminated by reason of her age. Both schools had express policies against admitting individuals over the age of thirty who did not have advanced degrees.[7] Notwithstanding her purported objective qualifications,[8] Cannon did not receive a place in the entering class at either medical school. She sought reconsideration and explanations from admissions officials. Unsatisfied with their responses, she submitted a complaint to the Chicago office of the Department of Health, Education and Welfare (HEW), alleging that the medical schools, recipients of federal funds, had denied her admission on the basis of her sex in violation of title IX.

In July 1975, having received only an acknowledgment from HEW of its receipt of her complaint, Cannon brought suit in the United States District Court for the Northern District of Illinois.[9] That court dismissed the

6. 441 U.S. 677 (1979).

7. *Id.* at 680 n.2.

8. The complaint filed in the United States District Court for the Northern District of Illinois alleged that the average score on the Medical School Admission Test for applicants admitted to the 1974 entering class was 575 and the average grade point average was 3.2. Cannon stated that her test score was 585 and her grade point average was 3.53. Appendix to Petition for Writ of Certiorari at 6-7.

In an affidavit offered to support the University of Chicago's motion to dismiss the complaint, Joseph Ceithaml, Director of Admissions and member of the medical school's admissions committee, stated that Cannon's grade point average in the basic sciences was 3.17 compared with a science average for the 1974 entering class of 3.7. He stated further that 51% to 60% of the other applicants had scored higher than the plaintiff on the science portion of the Medical School Admission Test and 81% to 90% had achieved higher math scores. Ceithaml concluded with the observation that at least 2,000 applicants better qualified than Cannon were not offered one of the 104 places available in the 1975 entering class. Appendix to Petition for Writ of Certiorari at 26-27. *See also* Cannon v. University of Chicago, 559 F.2d 1063, 1067 & n.2 (1976).

It would appear that there is some basis for challenging the sufficiency of Cannon's objective qualifications.

9. Cannon claimed violations of her rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6, 2000c-8, as amended by title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1683 (1976); the Age Discrimination in Employment Act, 29 U.S.C. § 623 (1976); and the Public Health Service Act, 42 U.S.C. § 292d (1976). Cannon v. University of Chicago, 406 F. Supp. 1257, 1258 (1976).

The original complaint named only the University of Chicago and Northwestern University as defendants. After learning from HEW that there would be some delay in investigating her complaint, Cannon amended her pleading to include the Secretary and Region V Director of HEW as defendants and a request for injunctive relief compelling HEW to complete its investigation. Cannon v. University of Chicago, 441 U.S. at 680-82. The federal defendants ultimately sided with Cannon in her contention that title IX does allow a private right of action. *Id.* at 1952 n.8.

The title IX claim was premised on a theory that the age criterion employed by the medical schools has a disproportionately adverse effect on women, the students whose higher educa-

action for lack of jurisdiction over the subject matter and for failure to state a claim for relief.[10] The Seventh Circuit Court of Appeals affirmed the decision.[11]

On appeal to the Supreme Court, petitioner Cannon confined the issue for resolution to whether a private plaintiff, allegedly discriminated against on the basis of sex by an educational institution receiving federal financial assistance, could maintain an action for relief under title IX. The Supreme Court reversed the two lower courts after finding sufficient grounds for the implication of a private right of action.[12]

II. THE LAW BEFORE *CANNON*

Plaintiff Cannon was not the first to assert the right established in title IX as a basis for relief from alleged sex discrimination. Several individuals had earlier brought suits under the Act, but all were unsuccessful for a reason other than the absence of a private right of action. Following the Seventh Circuit's decision in *Cannon v. University of Chicago*, only two other federal courts had occasion to consider directly the private right of action question.

A. *The Early Decisions*

In *Trent v. Perritt*[13] a young male plaintiff challenged his school's grooming regulations, which restricted male hair styles but not those of females, as discriminatory treatment of similarly situated individuals violative of title IX. The court dismissed the action, declaring that recipients of federal funds are not required to erase all differences between the sexes. It found that the discrimination alleged by the plaintiff did not fall within the purview of section 901 and was unrelated to the educational purposes for which federal money had been allotted.[14]

The plaintiff in *Stewart v. New York University*[15] was a white female who was denied admission to the defendant's law school. She sued to challenge the school's minority admissions policy, basing her claims on title VI of the Civil Rights Act of 1964[16] and on title IX. Her right to maintain an action under these statutes was not challenged. Rather, the court found that she was required to show that the federal funds received by the law school constituted "more than a de minimus" portion of its annual revenue[17] to sup-

tion is more likely to be interrupted. Cannon argued that the age restriction thus had the effect of excluding otherwise qualified female applicants from consideration by the medical schools. 441 U.S. at 680 n.2.

10. 406 F. Supp. at 1260.

11. Cannon v. University of Chicago, 559 F.2d 1063, 1067 (1976), *aff'd on rehearing*, 559 F.2d 1077 (1977).

12. 441 U.S. at 688-89.

13. 391 F. Supp. 171 (S.D. Miss. 1975).

14. *Id.* at 171-73.

15. 430 F. Supp. 1305 (S.D.N.Y. 1976).

16. 42 U.S.C. §§ 2000d to 2000d-4 (1976). Section 2000d states that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

17. Stewart v. New York University, 430 F. Supp. at 1314.

port her contention that the school was a recipient of federal funds. Further, it was incumbent upon her to establish a material connection between the federal assistance and the allegedly discriminatory admissions policy.[18] Not having met these burdens, she failed to state a valid claim under either statute, and her action was dismissed.

Not until the case of *Piascik v. Cleveland Museum of Art*[19] did a court expressly consider the existence of a private right of action under title IX. The question arose in an employment discrimination context and was not raised by either party to the litigation; the court alone explored the issue in a lengthy footnote to its opinion.[20] The plaintiff had charged the defendant with rejecting her application for employment as a museum guard solely because of her sex. The court acknowledged that the plaintiff had an express private remedy for discriminatory hiring practices in title VII of the Civil Rights Act of 1964.[21] Nevertheless, it also concluded that title IX supplied a cause of action. The court reasoned that an implied private right of action would be consistent with the congressional intent, evidenced by its enactment of the statute, to eliminate sex-based discrimination in all facets of educational programs and activities receiving federal funds.[22]

B. *The Impact of the Seventh Circuit's* Cannon *Decision*

After the court of appeals' affirmance of the district court's finding in *Cannon* that no private right of action could be maintained under title IX,

18. *Id.* "[T]he cases indicate that a private claimant must show greater government involvement with the defendant when that defendant is a nongovernmental entity, than when the private claimant sues the governmental entity directly, or when the government itself institutes the action." *Id.* at 1313.

19. 426 F. Supp. 779 (N.D. Ohio 1976).

20. *Id.* at 780 n.1.

21. 42 U.S.C. §§ 2000e-2, 2000e-5 (1976). Section 2000e-5 provides, in pertinent part, that "a civil action may be brought against the respondent named in the charge [filed with the Equal Employment Opportunity Commission] (A) by the person claiming to be aggrieved or (B) . . . by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1) (1976).

22. 426 F. Supp. at 780 n.1. Despite her "well pleaded § 1681 claim," the plaintiff did not succeed in proving herself a victim of discrimination. *Id.* at 781.

Although notable for its consideration of the role of a private action in furthering congressional purposes, *Piascik* now has very little, if any, strength in the wake of several recent decisions. A U.S. district court in Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), declared invalid the employment regulations promulgated by HEW pursuant to the authority granted in 20 U.S.C. § 1682. The court determined that "§ 1681 . . . addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs" and felt "constrained to read this language as a prohibition on sex discrimination against students and only students." *Id.* at 1031, 1032. This position was followed in Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978), *aff'd*, 593 F.2d 424 (1st Cir. 1979).

Likewise, in McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978) the court found that the plaintiff's exclusive remedy for discrimination in employment lay in title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). It also noted that the plaintiff had, in any event, failed to state a claim under title IX for the reasons that she had not joined HEW as a defendant in the action and that she sought damages, a form of relief not provided by the statute. 448 F. Supp. at 43. It appears from the court's analysis that the problem was not with implication of a private right of action under title IX but rather with the plaintiff's standing as an employee.

the federal[23] courts confronted by the question did not uniformly apply the Seventh Circuit's decision.

Female high school basketball players in Tennessee and Oklahoma challenged the game rules issued by their secondary school athletic associations on the grounds that the rules violated both the equal protection clause[24] and title IX.[25] The Tennessee court, relying on *Cannon*, ruled that the plaintiff had no title IX action for the allegedly discriminatory treatment. It also observed that even if a private right of action did exist, the plaintiff would have to exhaust the administrative remedies provided in section 902 before she could seek relief in court.[26] The Oklahoma court conceded that the plaintiff might fall within the scope of section 901 of title IX and would thus be entitled to bring a private action to protect her rights were it not for the "elaborate system of administrative enforcement and judicial review" established in section 902. It concluded by citing *Cannon* for the proposition that no private right of action exists under the Act.[27] Implicit in both rulings is a finding that the statute creates no individual rights deserving protection.

Two other federal courts did not feel constrained to follow the Seventh Circuit's lead, however. In *Alexander v. Yale University*[28] the district court found after a thorough analysis[29] that implication of a private action was not only justified but was necessary to advance the congressional goals underlying title IX. The Ninth Circuit Court of Appeals, on the other hand, merely distinguished *Cannon*, rendering it "an authority of limited significance," in *De La Cruz v. Tormey*.[30] Without directly deciding whether the language and purposes of title IX permit the inference of a private right of action, the court concluded that section 901 does establish in individuals a right to be free from sex discrimination in federally funded educational programs.[31] It found that where discriminatory conduct constitutes state action, that right may be enforced in a suit brought under a section of the Civil

23. *See also* Williams v. Owen, 241 Ga. 363, 245 S.E.2d 638 (1978) (state court, relying on Seventh Circuit's decision, refused to allow plaintiffs to maintain action based on title IX).

24. U.S. CONST. amend. XIV, § 1, cl. 3.

25. Cape v. Tennessee Secondary Schools Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd on other grounds*, 563 F.2d 793 (6th Cir. 1977); Jones v. Oklahoma Secondary Schools Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977).

26. 424 F. Supp. at 738.

27. Jones v. Oklahoma Secondary Schools Activities Ass'n, 453 F. Supp. 150, 153 (W.D. Okla. 1977). *Accord*, Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1120 (E.D. Wisc. 1978) (dictum). *See generally* Carnes v. Tennessee Secondary Schools Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (female athlete brought action for preliminary injunction based on 42 U.S.C. § 1983 and 20 U.S.C. § 1681; no discussion of theory on which court allowed action to proceed).

28. 459 F. Supp. 1 (D. Conn. 1977).

29. The court adopted the prior decision of the magistrate, who had applied the four-pronged test for implication of a private right of action adopted by the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975). *See* text accompanying notes 37-57 *infra*. The Court of Appeals for the Seventh Circuit did not apply the *Cort* analysis in its initial decision in *Cannon* and on rehearing gave it only a cursory consideration.

30. 582 F.2d 45, 60 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

31. 582 F.2d at 60.

Rights Act of 1871.[32] Thus the plaintiffs in *De La Cruz* were able to assert alleged title IX violations in the context of their section 1983 action against a state college system. Although it recognized the existence of a federal right worthy of federal protection, the Ninth Circuit did not suggest how a plaintiff such as Geraldine Cannon might secure that right from invasion by private entities.

With the lower courts divided, it was left for the Supreme Court to determine finally whether title IX does create a cognizable right and, more importantly, whether it affords individual citizens an independent means to enforce that right.

III. A RIGHT OF ACTION UNDER TITLE IX: THE SUPREME COURT'S RATIONALE

In analyzing whether implication of a private right of action under title IX is warranted, the Supreme Court in *Cannon v. University of Chicago* applied the test it had earlier set down in *Cort v. Ash*.[33] *Cort* was the culmination of attempts by the Supreme Court and lower federal courts to limit, without extinguishing, the judiciary's authority to create private remedies by implication.[34] Its four-part test was an effort to define a methodology for a consistent and uniform application by the courts of the implication doctrine.

Although the *Cort* analysis has been frequently used by federal courts to imply private actions under a variety of statutes,[35] only the federal court in Connecticut applied it in a thorough fashion to the title IX implication question.[36] Thus, the Supreme Court's examination of the statute in *Cannon* in the light of the four *Cort* factors was the first and, seemingly, most exhaustive.

The initial inquiry under *Cort* requires a review of the statute in question to determine whether it in fact creates a right. The test asks if the plaintiff is "one of the class for whose especial benefit the statute was enacted"[37] and requires identification of the principal beneficiaries of the act.[38] The

32. 42 U.S.C. § 1983 (1976). Section 1983 states:

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

This section was not available to plaintiff Cannon because she sued private institutions. Cannon v. University of Chicago, 559 F.2d 1063, 1068-71 (7th Cir. 1976).

33. 422 U.S. 66 (1975).

34. *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Calhoon v. Harvey, 379 U.S. 134 (1964); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

35. In his dissenting opinion in *Cannon*, Justice Powell noted that "no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes" in the four short years since the *Cort* decision. 441 U.S. at 741. *See* cases cited therein at 741-42.

36. Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977). *See* text accompanying note 29 *supra*.

37. 422 U.S. at 78 (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)).

38. One commentator has challenged the Court's limitation of the benefited class to principal beneficiaries, finding no reason for so narrow an interpretation as long as the plaintiff does

language itself may clearly state the right, but in the absence of such a declaration, evidence of a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class,"[39] which may be gleaned from the statute as a whole or from its legislative history, will suffice.

Looking at the words of section 901 of title IX,[40] the Supreme Court found in *Cannon* that the law was enacted to benefit persons discriminated against because of their sex and concluded that the petitioner was a member of the class of persons benefited by the Act.[41] In reaching this decision the Court relied upon the "right-creating language"[42] in which section 901 is phrased to identify the persons whom Congress wished to protect or assist by enacting the statute.[43]

Having found that title IX does create a right in favor of private individuals, the Court advanced to the second criterion and scrutinized the statute's legislative history for evidence of congressional intent, "explicit or implicit, either to create . . . a [private] remedy or to deny one."[44] It is not necessary to find explicit indications that Congress intended to allow a private right of action; however, any finding that Congress clearly opposed such a remedy is determinative.[45]

Far from finding a legislative purpose to deny a private action, the Court concluded in *Cannon* that title IX's history "plainly indicates" Congress wished to create such a remedy.[46] The basis for the Court's conclusion was the statute's similarity to title VI of the Civil Rights Act of 1964.[47] Citing comments of title IX's Senate sponsor,[48] the Court found an explicit assumption by the congressional draftsmen that "Title IX . . . would be interpreted and applied as Title VI had been during the preceding eight years."[49] And, title VI had been construed by several federal courts as permitting individuals aggrieved by alleged violations of that statute to maintain an action for appropriate relief.[50] The Court considered it reasonable to assume that the legislators knew of this construction and intended title IX to profit from it. Moreover, the Court pointed to the inclusion in the package of statutes enacted simultaneously with title IX of a section authorizing

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not prove to be merely an incidental beneficiary. Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, *supra* note 2, at 384.

39. 422 U.S. at 80-82.

40. *See* note 4 *supra*.

41. 441 U.S. at 694.

42. *Id.* at 690 n.13.

43. Such language is to be contrasted with the prohibitory language of criminal statutes or the directive language of laws granting authority to agencies or other entities. *Id.* at 690-93.

44. 422 U.S. at 78.

45. 441 U.S. at 694.

46. *Id.*

47. *See* notes 4, 5, 18 *supra*. *Compare* 20 U.S.C. §§ 1681(a), 1682-1683 (1976) *with* 42 U.S.C. §§ 2000d to 2000d-2 (1976).

48. 441 U.S. at 694 n.16, 696 n.19.

49. *Id.* at 696.

50. The principal decision the Court relied on was Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). In that case the court of appeals determined that black school children were entitled to assert their right to equal educational opportunities in a private action under § 601 of title VI, 42 U.S.C. § 2000d (1976). *Id.* at 851, 852. Southern Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971) and Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967) explicitly adopted the position taken by the Fifth Circuit in *Bossier Parish*.

awards of attorney's fees to parties prevailing in suits against governmental educational agencies to compel compliance with, among other laws, title VI. The Court treated this provision[51] as direct evidence that Congress presumed a private action was available for enforcement of title VI. Finally, the Court noted an absence of legislative action to change the prevailing assumption that title VI, and hence title IX, created a private remedy for victims of discrimination as a clear indicator of the requisite congressional intent.[52]

The third inquiry in the *Cort* analysis asks whether it is "consistent with the underlying purposes of the legislative scheme to imply . . . a [private] remedy for the plaintiff."[53] In *Cannon* the Supreme Court counseled against implication if a private remedy would frustrate or interfere with the purpose of the statute. If the remedy would be "at least helpful" in effectuating congressional objectives, however, then implication may be justified.[54]

The Court first identified the purposes for which title IX was enacted. In the history of the statute it found, as a primary aim, a desire on the part of Congress to avoid funding discriminatory activities with federal resources and, as an additional objective, an interest in protecting individuals against sex-based discrimination. The express statutory sanction of termination of funds, while useful in accomplishing the first purpose, is severe, and the Court concluded that it would not be an appropriate means to redress individual grievances. Furthermore, the administrative enforcement mechanism established in title IX and its companion regulations[55] does not include participation by private complainants. No true administrative remedy is available, and the Court determined that an individual may be entirely at the mercy of the funding agency should that agency decide not to investigate a complaint.

The position taken by HEW throughout the *Cannon* litigation also persuaded the Court that implication of a private action would be consistent with title IX's policies and objectives. The agency advocated such a remedy as valuable in assisting federal enforcement and assuring compliance by private institutions.[56]

The fourth *Cort* criterion was easily met by the Court. That inquiry tests whether the cause of action is one "traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely

51. Education Amendments of 1972, § 718, 20 U.S.C. § 1617 (1976). Section 718 provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State . . ., or the United States . . ., for . . . discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment . . . as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

52. 441 U.S. at 703.

53. 422 U.S. at 78.

54. 441 U.S. at 703.

55. *See* 20 U.S.C. § 1682 (1976), 45 C.F.R. §§ 80.6-11, 86.17 (1978).

56. "The availability of a private right of action under Title IX would contribute substantially to effective implementation of the statute's goals." Brief of Federal Respondents at 6. *See also* Cannon v. University of Chicago, 441 U.S. at 708 n.42.

on federal law."[57] Declaring that the federal courts and the federal government have traditionally been the chief guardians against discrimination and noting the involvement of federal monies, the Court concluded that implication of a private action would not conflict with state interests.

Having analyzed title IX in terms of the four *Cort* factors, the Supreme Court was satisfied that individuals allegedly discriminated against by educational institutions receiving federal funds should have their day in court. With a parting admonition that the "far better course" is for Congress to specify its intent with respect to private rights of action, the Court ruled that petitioner Cannon could maintain her lawsuit against the medical schools.[58]

IV. ANALYSIS OF THE COURT'S REASONING

The Supreme Court's holding in *Cannon v. University of Chicago* is significant because it furnishes one more weapon in the arsenal available to women as they pursue equal opportunities in contemporary society. There is, however, a notable lack of precision in the conclusions the Court drew from its evaluation of title IX under the *Cort* criteria. Additionally, certain of its findings rest on weak foundations. Such flaws do not directly affect the result in *Cannon*, but they may well impair the case's value as a precedent for implication of private actions under other civil rights statutes similar in structure and effect to title IX. Finally, the Court neglected some policy considerations respecting application of the implication doctrine which were made necessary by virtue of agency involvement in and congressional activity subsequent to the enactment of title IX.

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57. 422 U.S. at 78.

58. Cannon v. University of Chicago, 441 U.S. at 717. In a concurring opinion, Justice Rehnquist, joined by Justice Stewart, endorsed the majority's closing comments and urged that the Court should in the future be "extremely reluctant" to imply private rights of action in the wake of congressional silence. *Id.* at 718.

Three justices opposed the majority's decision and two filed dissenting opinions. Justice White, joined by Justice Blackmun, found in the legislative history and in the general scheme of title IX clear indications that Congress did not intend to allow a private right of action. He further contended that a private action to enforce title VI could not be justified, and he challenged the holding in Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), as well as the *Cannon* majority's reliance on the attorney's fee provision in § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 (1976). *See* text accompanying note 51 *supra*. Justice White concluded that Congress chose to omit a private enforcement scheme from title IX, and its choice required the Court to abstain from implying one. 441 U.S. at 718-30.

Justice Powell agreed with Justice White that title IX contains no implied private right of action. He also took the opportunity to challenge the doctrine of implication as an unconstitutional exercise of judicial power. "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. [citations omitted] This . . . conflicts with the authority of Congress under Art. III [of the U.S. Constitution] to set the limits of federal jurisdiction." *Id.* at 746. He urged that only the "most compelling evidence" of congressional intent to permit suits by private plaintiffs would justify applying the doctrine of implication, and he voiced great "reluctan[ce] ever to permit a federal court to volunteer its services for enforcement purposes" when a statute expressly provides an enforcement mechanism of some type. *Id.* at 749. In closing, Justice Powell also cited, as support for his attack on the implication doctrine, a need to encourage Congress to anticipate and resolve by itself the policy questions its legislation creates. *Id.*

A. *The Nature of the Right Created*

The Court was singularly imprecise in its analysis of the right created by title IX. The first step in the *Cort* approach,[59] involving identification of a federal right that a potential plaintiff may vindicate in a private lawsuit, subsumes four specific inquiries. First, what is the purpose of the statute? Second, what, if any, is the right it creates? Third, who is intended to enjoy that right? And, finally, does the plaintiff in question come within the class of intended beneficiaries?

In *Cannon* the Court delayed consideration of the purpose of title IX. It did, however, make an oblique reference to a "benefit" the statute confers and identified the beneficiaries of the statute as "persons discriminated against on the basis of sex . . . ."[60] On the strength of these findings the Court concluded that petitioner Cannon was a member of the class benefited by title IX.

The exact nature of the benefit bestowed by title IX is unclear, however. Further, neither the words of the statute nor their peculiar right-creating quality, on which the Court relied,[61] support the Court's definition of the class of persons Congress intended to protect by enacting the statute. If, as the Court suggested, the benefited class consists of victims of sex discrimination, then no need arises for a private right of action under title IX. To come within the Court's characterization of the statute's beneficiaries, one would have to show that discrimination has occurred. In fact, what the typical title IX plaintiff alleges is a violation of a right to equal educational opportunities. What is sought from the statute is a forum in which to prove the violation and obtain relief.[62]

It would seem, after a consideration of the purpose of title IX, as articulated in its legislative history,[63] and from a careful reading of the language in section 901,[64] that the character of the benefited class is not so restricted as the Supreme Court proposed, however inadvertently, in *Cannon*. A narrow interpretation indicates that the statute was designed to assure women pursuing an education of freedom from discrimination on the basis of sex and, therefore, of equal access with men to educational programs and institutions. A broader reading, and one consistent with the words of the act,

59. *See* text accompanying note 37 *supra*.

60. 441 U.S. at 694.

61. *See id.* at 690-93. *See also* text accompanying note 42 *supra*.

62. The Court's reasoning, properly applied, would exclude Geraldine Cannon from the class of persons for whose benefit the statute was enacted. She has not yet had an opportunity to prove that her exclusion from the medical schools at the University of Chicago and Northwestern University was based on her sex.

63. *See, e.g.*, 117 CONG. REC. 30403 (1971) (Sen. Bayh: "Today I am submitting an amendment . . . which will guarantee that women, too, enjoy the educational opportunity every American deserves."); *id.* at 39252 (Rep. Mink: "If we really believe in equality, we must begin to insist that our institutions of higher learning practice it . . . ."); 118 CONG. REC. 5806-07 (1972) (Sen. Bayh: "[Title IX] is a . . . measure which I believe is needed . . . to provide women with solid legal protection as they seek education and training . . . ."); H.R. REP. NO. 554, 92d Cong., 2d Sess. 51-52, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2462, 2511-12.

64. *See* note 4 *supra*.

indicates that this guarantee of equal educational opportunities extends to everyone.

Whatever the benefit it perceived in title IX and whatever the class of persons it intended to designate as recipients of that benefit, what the Court articulated in *Cannon* was an imprecise description of an important right and an inaccurate identification of the holders of that right. Its pronouncement is clearly at odds with the legislative intent it later tried so diligently to discern.

B. *The Search for Congressional Intent*

1. The Intent to Create a Private Right of Action

The Supreme Court's search through the legislative history of title IX for signs of intent either to create or deny a private right of action, the second step in the *Cort* analysis,[65] should have yielded insufficient evidence to support its firm conclusions. This is not to say that the Court's ultimate holding is incorrect. Rather, it is to suggest the Court should not have relied so extensively on meager and often amorphous expressions of intent.

Too much of the Court's analysis of Congress' intent with respect to creation of a private right of action focused on an unexamined conclusion that title VI of the Civil Rights Act of 1964[66] and its history support the implication of such an action. From this premise it was an easy jump to the conclusion that title IX, which was intentionally patterned after title VI,[67] likewise affords a private remedy. The propriety of implying a private cause of action from title VI has never been thoroughly considered in the detailed manner encouraged by the *Cort v. Ash* analysis.[68] On the strength of *Bossier Parish School Board v. Lemon*[69] alone, federal courts have adjudicated violations of title VI rights. If, as several commentators have suggested[70] and as is implicit in the concurring opinion[71] accompanying the *Cannon* decision, the Supreme Court has been moving in a conservative direction and restricting the application of the doctrine of implication, then it should be reluctant to

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65. *See* text accompanying note 44 *supra*.

66. *See* note 16 *supra*.

67. *See* 117 CONG. REC. 30404, 30407-08 (1971).

68. In a separate opinion filed in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978), Justice White had the following to say with respect to a private right of action under title VI:

> I write separately concerning the question of whether Title VI . . . provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer . . . . As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. [citation omitted] Furthermore, . . . it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it.

Id. at 379-80. Justice White ultimately concluded that a private action is consistent with neither the letter nor the spirit of title VI. *Id.* at 387. His is not the prevailing view.

69. *See* note 50 *supra*.

70. Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, *supra* note 2; Note, *Implied Private Actions Under Federal Statutes, supra* note 2.

71. *See* note 58 *supra*.

rely on a largely unscrutinized deduction. Arguably, the existence of a private right of action should not be merely assumed.

Too much of the Court's rationale in *Cannon* also rested on presumptions that the legislators who enacted title IX were aware of the construction placed on title VI favoring an action for private plaintiffs. The committee reports and the debates on title IX furnish little evidence that Congress considered the matter of private lawsuits or anticipated problems that might later arise in that regard.[72] That the Court misconstrued the workings of the collective congressional mind is apparent from the debates precipitated by the Civil Rights Attorney's Fees Awards Act of 1976.[73] Congress itself was uncertain in 1976 about the intentions of its predecessors with respect to private rights of action based on title VI and title IX. It attempted to resolve the dilemma by adopting the attorney's fees act for use in the event that the courts at some future date eliminated the confusion.[74]

Contrary to the Supreme Court's assertion in *Cannon*,[75] the legislative history of title IX does not "plainly indicate" a wish or even a vague intention to create a private right of action under the statute. The record does not give explicit evidence that Congress contemplated the matter, and reliance on a presumed right of action under title VI does not strengthen the Court's conclusion.

Perhaps the Court was trying to avoid relying directly on the legislative history, given its limited utility and its susceptibility to varying interpretations. Rather than straining to interpret the congressional silence and relying on assumptions about the legislators' understanding of title VI, however, the Court would have done better to acknowledge the absence of any expres-

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72. The matter most on the minds of the legislators was the propriety of further involving the federal government in the affairs of private educational institutions. *See, e.g.*, 117 CONG. REC. 30412, 39248-49, 39253-54, 39255 (1971).

There was concern about enforcement mechanisms during the consideration of title VI. The debate focused not on private enforcement actions, however, but on the perceived potential for arbitrary terminations of funds by federal agencies. *See, e.g.*, 110 CONG. REC. 1520, 5252-55, 6544-45, 7059-60, 7076-78, 7103 (1964).

73. 42 U.S.C. § 1988 (1976). The act authorizes courts to award reasonable attorneys' fees to parties prevailing in suits to enforce certain civil rights statutes, including title VI and title IX.

74. Some members of Congress did envision private enforcement of all the civil rights laws. *See, e.g.*, 122 CONG. REC. 31471, 31832, 35118, 35128 (1976). The prevailing attitude is best captured, however, in the following remarks by Representatives Drinan and Railsback:

> Mr. Drinan. We accept preexisting law, whatever it is, and simply state that the routine . . . language on through the U.S. Code giving to the prevailing party . . . reasonable attorneys' fees shall be applied to title IX.
>
> . . . .
>
> Mr. Railsback. I have been informed . . . that under title VI of the Civil Rights Act and title IX of the Education Amendments of 1972 there exists a serious question as to whether an individual complainant . . . has the right to sue as a private plaintiff. [He then referred to the decision of the Seventh Circuit Court of Appeals in Cannon v. University of Chicago].
>
> It has been brought to my attention that by granting attorneys' fees to prevailing parties . . . , Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill [Attorney's Fees Awards Act] merely creates a remedy in the event the courts determine that an individual may sue under these statutes.

Id. at 35116, 35124.

75. 441 U.S. at 694.

sions of intent and then to examine the legislative history of title IX for evidence of the purposes underlying the statute.[76]

2. The Objectives of Title IX

The Supreme Court's analysis in *Cannon*, in conjunction with the third *Cort* inquiry,[77] of the purposes underlying title IX suffers from the same imprecision afflicting the conclusions reached in its evaluation of the right created by the statute. Moreover, in its effort to identify purposes the Court was unnecessarily specific. Those it does articulate are, arguably, too narrow to justify implication of a private right of action, and rather than ends, they seem more to be means for the achievement of some broader goal. A private action under title IX is consistent with the purposes underlying the legislative scheme but not with the purposes perceived by the Court.[78]

Two problems are apparent in the Court's declaration of the objectives of title IX. First, it would seem that creation of a private right of action would do little to assist the government with depriving discriminatory educational programs of federal financial assistance. The typical plaintiff would not be likely to sue to terminate federal funds, a remedy recognized as severe and one to be used after all other attempts to achieve compliance with the statute have failed.[79] Rather, an aggrieved individual would, like Geraldine Cannon, be seeking relief more personal in nature and more appropriate to redress the grievance.

The second problem arises from the Court's statement of the second objective. Had Congress had as a central purpose in enacting title IX the desire to provide protection to individuals, it would probably have been explicit about the means it contemplated to achieve such protection. In other civil rights statutes it took care to detail enforcement mechanisms available to individuals for vindication of their rights.[80] There is little, if any, evidence in title IX that Congress considered specific ways to relieve personal

76. One criticism of the *Cort* approach to implication of private rights of action is that its second criterion encourages exactly the kind of analysis used by the Supreme Court in *Cannon*. *See* Note, *Implied Private Actions, Under Federal Statutes: From* Borak *to* Ash, *supra* note 2, at 450-54.

In Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), decided shortly after *Cannon*, the Court declined to infer that § 17(a) of the Securities Exchange Act, 15 U.S.C. § 78(q)(a)(1) (1976), allows damages actions by individual plaintiffs. After declaring that the four *Cort* factors are not necessarily entitled to "equal weight" in the Court's deliberations, 442 U.S. at 575, the majority's opinion asserted that "the ultimate question is one of congressional intent . . . ." 442 U.S. at 578.

Although the judicial aim is, apparently, to be objective, this relentless quest for congressional intent is likely to yield more strained and inconsistent analyses of federal statutes. Perhaps, as Justice Powell suggested in his *Cannon* dissent, 441 U.S. 742, 749, the *Cort* scheme is not adequate to overcome the problems and hazards inherent in judicial attempts to discern legislative intent.

77. *See* text accompanying note 53 *supra*.

78. *See* text accompanying notes 53-56 *supra*.

79. *See, e.g.*, 110 CONG. REC. 1661, 5254-55, 7067 (1964) (severity of enforcement scheme in title VI).

80. *See, e.g.*, 29 U.S.C. § 216 (1976) (private suits for violations of Equal Pay Act); 42 U.S.C. § 2000a-3 (1976) (private suits for relief from racial discrimination in public accommodations); 42 U.S.C. § 2000c-8 (1976) (private suits for relief from racial discrimination in public

injustices.[81] It appears that the Court created purposes in order to justify implication of a private right of action rather than identifying the principal congressional purposes that motivated the enactment of the statute and then determining whether a private right of action would, at the very least, assist in accomplishing them.

An analysis based on the third *Cort* factor more accurate than that used by the Supreme Court would first ascertain the "broad remedial purposes"[82] behind title IX and then evaluate whether a private right of action would be consistent with them. This approach reveals as a primary goal the elimination of gender-based discrimination, particularly the invidious forms it has taken in *academe*.[83] The language of section 901[84] points to this purpose as do the statutes and amendments the title IX package contained[85] and the legislative history when considered in its entirety and not in isolated segments.[86] These sources further indicate that conditioning use of federal funds in educational activities on assurances of nondiscrimination was viewed as a means to eradicate discrimination based on sex and secure equal academic opportunities for all individuals. The sanction of terminating financial assistance could be effectively supplemented by private lawsuits challenging procedures at educational institutions. Successful actions by individuals would complement title IX's administrative enforcement scheme by giving notice to federal agencies of potentially pervasive discriminatory practices within certain educational programs. The two mechanisms together may have a powerful deterrent effect as well.

Finally, as the Court itself noted, creation of a private right of action may be necessary to achieve the fundamental purpose of the statute. HEW, the agency with primary enforcement responsibilities, has asserted that it is ill-equipped to police the numerous recipients of federal funds.[87] Thus, so long as it operates in addition to and not instead of the administrative

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education); 42 U.S.C. § 2000e-5 (1976) (private suits for violations of Equal Employment Opportunity Act).

Six months after delivering the *Cannon* decision, a majority of the Court refused to find a private right of action for damages in the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (1976). Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979). It is interesting that the Court not only justified the holding on the basis of the statutory means available to the Securities and Exchange Commission for achieving compliance with the Act, *id.* at 247, but it also relied on the provisions for private suits contained in other securities laws. *Id.* & n.10. The latter evidence, the Court reasoned, clearly revealed that Congress knows how to provide individuals with a right of action when it wishes to do so. *Id.* at 248. Borrowing from Justice Powell's dissenting opinion in *Cannon*, the Court concluded that "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action' " in the Investment Advisers Act. *Id.* at 247. *See also* Touche Ross & Co. v. Redington, 442 U.S. at 572.

81. *See* text accompanying note 72 *supra*.

82. J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

83. *See* 117 CONG. REC. 30403, 30405-06 (1971) (excerpts from the Report of the President's Task Force on Women's Rights and Responsibilities).

84. *See* note 4 *supra*; J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964).

85. *See* H.R. REP. NO. 554, *supra* note 62, at 2512, 2566-67; S. CONF. REP. 798, 92d Cong., 2d Sess. 221-22, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2462, 2671-72.

86. *See* 117 CONG. REC. 30399-415, 39248-63 (1971); 118 CONG. REC. 5803-15, 18831-63 (1972).

87. 441 U.S. at 706-07, 708 n.42. Some of this responsibility has been transferred to the new Department of Education which may eventually be better able to handle the burden. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979).

scheme, a private remedy could advance the goal of title IX and, perhaps, promote some efficiency in the implementation of the statutory enforcement mechanism.

Implication of a private right of action from title IX can be justified under the *Cort v. Ash* analysis.[88] The Supreme Court simply failed in *Cannon* to make thorough and effective use of the language and the origins of the statute.

V. THE EFFECT OF *CANNON*

The decision in *Cannon v. University of Chicago* is consistent with the emerging national policy toward eliminating discrimination based on sex. Its role as a civil rights case may even excuse the inexact analysis of the basis for implying a private right of action under title IX.

The Court should, however, have been more attentive to certain problems inherent in its application of the implication doctrine. It is unlikely that Congress is now unaware of the controversies that have arisen over implying private rights of action from its statutes, but various legislative colloquies, as recently as 1976,[89] indicate that Congress is willing to let the courts continue their struggle to interpret its customary silence on the question.[90] At some point Congress will have to accept responsibility for framing legislation complete with clearly articulated rights and comprehensive remedies.[91] While maintaining some degree of flexibility in its schemes, it will have to anticipate the increasingly familiar implication issue.

Given its wider significance, *Cannon* was perhaps not the appropriate case for the Supreme Court to insist that Congress be specific and complete. The federal legislators may do well, however, to heed the subtle warning that concludes the opinion in *Cannon*.[92]

One additional potential problem deserved notice in connection with the Court's decision to imply a private right of action under title IX. Congress is not the only entity that might ignore or overlook its responsibilities as long as courts will fill the gaps it leaves. The federal agencies too can profit when the judiciary creates new rights of action. It is possible that in the wake of the *Cannon* decision HEW will see fit, faced as it is with the crush of other tasks, to abdicate by mere inaction the statutory duties bestowed by title IX, leaving enforcement of the act to private plaintiffs. Lurking, therefore, in the Court's finding of a private right of action may be a concomitant obligation upon individuals to oversee HEW and other agencies that provide financial assistance to educational institutions. The courts likewise should be attentive and responsive to citizens' suits brought to compel agencies to act in accordance with the statutory scheme. In the final analysis, the govern-

88. *See also* Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L. L. REV. 425 (1978).

89. *See* note 73 *supra*.

90. Justice Frankfurter once observed that "[l]oose judicial reading makes for loose legislative writing." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947).

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

92. *See* text accompanying note 58 *supra*.

ment, with its power to terminate funds, wields one of the strongest weapons in the fight against sex-based discrimination.

CONCLUSION

In *Cannon v. University of Chicago*, the Supreme Court used the implication doctrine to find a private right of action under title IX. Its holding followed an ostensibly thorough analysis, which closer scrutiny reveals to be tenuous and inexact. Despite the Court's effort to discern congressional intent so as to effectuate legislative goals, it ultimately succeeded only in embracing a mirage.

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