Civil Rights - Sex Discrimination - Title IX of the Education Amendments of 1972 - Implied Right of Action

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CIVIL RIGHTS—SEX DISCRIMINATION—TITLE IX OF THE EDUCATION AMENDMENTS OF 1972—IMPLIED RIGHT OF ACTION—The Supreme Court of the United States has held that a private right of action can be implied for victims of sex discrimination under Title IX of the Education Amendments of 1972.


After being denied admission to two private, federally funded medical schools,1 Geraldine Cannon, a white, thirty-nine year old female, filed a complaint with the Department of Health, Education and Welfare (HEW) alleging sex discrimination by the universities in violation of section 901 of the Education Amendments of 1972 (Title IX).2 Three months later, she instituted suit in the United States District Court for the Northern District of Illinois against the private universities,3 alleging violations of Title IX. The district court determined that the universities' motion to dismiss the complaint should be granted because no private right of action was expressly authorized by Title IX nor could one be properly inferred.4

1. Cannon was denied admission to medical schools of the University of Chicago and Northwestern University. Both schools had a policy against admitting applicants who were more than thirty years old, at least if they did not have graduate degrees. Northwestern University absolutely disqualified applicants who were more than thirty-five years old. The receipt of federal funds by the medical schools at the time Cannon was denied admission was conceded arguendo by the schools' motion to dismiss the complaints. Cannon v. University of Chicago, 441 U.S. 677, 680 (1979). Cannon alleged that age and advanced degree criteria operated to exclude more women than men from admissions consideration, since the higher education of women is interrupted more frequently than that of men. Id. at 680 n.2.

2. 20 U.S.C. § 1681 (1976). Section 901 of Title IX provides in relevant part that: "No person in the United States 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 . . . .” Id. Section 901 applies to the admissions policies of institutions of vocational education, professional education, graduate higher education, and to public institutions of undergraduate higher education. Institutions run by religious organizations are specifically exempted if application of the section would be inconsistent with their religious tenets. United States military service educational institutions and public institutions of undergraduate higher education which have traditionally and continually had a policy of admitting only one sex are also exempted from the prohibitions of § 901. Special time considerations are given to schools that are in the process of abandoning a single sex admission policy. Id.

3. At the time suit was filed, HEW's only response to Cannon's complaint was an acknowledgment letter. She later amended her complaint to include HEW as a defendant and requested injunctive relief ordering the administrative agency to complete the investigation. 441 U.S. at 680 n.2.

The United States Court of Appeals for the Seventh Circuit agreed with the district court that no private right of action could be implied for a violation of section 901. As mandated by the controlling case of Cort v. Ash, the court of appeals searched for legislative intent to create or deny a private right of action. The court noted that the provisions of Title IX were based on Title VI of the Civil Rights Act of 1964 (Title VI). Because Title VI had not been interpreted to confer a private cause of action, the court reasoned that Congress did not intend to confer such a right under Title IX. The Seventh Circuit also found that the administrative remedies contained in section 902 of Title IX were intended by Congress to be the exclusive means of enforcement.

Act, 29 U.S.C. §§ 621-634 (1976), and the Public Health Services Act, 42 U.S.C. § 295h-9 (1976) (now codified at 42 U.S.C. § 292d (1976)). These counts were also dismissed by the district court. The petitioner sought review only of the Title IX issue in the Supreme Court. 441 U.S. at 680 n.2.

5. 559 F.2d 1063 (7th Cir. 1976).

6. 422 U.S. 66 (1975). The test enunciated in Cort v. Ash required an examination of four factors to determine whether a private cause of action is implied in a statute: 1) whether the statute was enacted to benefit a special class of persons; 2) whether the legislature intended to create or deny a private right of action; 3) whether implying a private right of action would be consistent with the legislative purpose; and 4) whether an implied right of action would interfere with a traditional state concern. Using these criteria, the Court in Cort v. Ash decided that shareholders had no cause of action against corporate directors under 18 U.S.C. § 610 (1976).

7. 42 U.S.C. § 2000d (1976) provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

8. 559 F.2d at 1072. The court of appeals distinguished Lau v. Nichols, 414 U.S. 563 (1974), a class action suit alleging unequal educational opportunities in violation of the fourteenth amendment and Title VI as involving a constitutional right of a large number of plaintiffs. 559 F.2d at 1072. Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) was distinguished on the same ground. 559 F.2d at 1072. Bossier was a class action by black children on an Air Force base against the public school they attended alleging segregation in violation of the fourteenth amendment, Title VI and contractual assurances between the federal government and the school.

9. Section 902 of Title IX, 20 U.S.C. § 1682 (1976), authorizes each federal department and agency that extends federal funds to educational programs to issue regulations effectuating the Act's provisions, and to terminate funds to noncomplying recipients only if attempts to obtain voluntary compliance have been unavailing and an opportunity for a hearing has been afforded. Section 903 of the Act provides for judicial review of a funding termination. 20 U.S.C. § 1983 (1976).

10. 559 F.2d at 1073. See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) for an explanation of the doctrine of expressio unius est exclusio alterius. The doctrine of expressio unius was implicitly rejected by the holding in Cort v. Ash, because if the requisite factors exist, a right of action can be implied even though another remedy is set forth in the statute. 422 U.S. at 79.
Shortly after the court of appeals' decision was announced, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (Attorney's Fees Act),\(^1\) which authorized court-awarded attorney's fees to prevailing parties in actions to enforce Title IX. In light of the enactment, the court of appeals granted a rehearing to consider if its original interpretation of Title IX was correct. The court read the legislative history of the Attorney's Fees Act as demonstrating that the new legislation was not intended to amend Title IX to include an express cause of action. Instead, the court reasoned that the supporters of the enactment meant only to provide attorney's fees in the event that an implied right of action did exist under Title IX.\(^2\) The United States Supreme Court granted certiorari\(^3\) to decide whether a private right of action could be implied under Title IX. Deciding that a private right of action could be implied, the Court reversed and remanded the decision of the court of appeals.\(^4\)

Justice Stevens, writing for the majority,\(^5\) began his analysis by noting that the four factors set forth in *Cort v. Ash*\(^6\) must be examined to determine whether a private cause of action exists under Title IX. The Court looked first to the specific language of Title IX\(^7\) to decide if the statute was enacted for the benefit of a special class of which Cannon was a member. The Court relied heavily on this factor and noted that historically a private right of action has been implied when a particular class is named as the beneficiary in the statute. However, a private right of action is not implied if the statute was

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2. 559 F.2d at 1077-80. At the rehearing, HEW took the position that it would be proper to imply a private cause of action under Title IX. Prior to the rehearing, HEW had argued the contrary position in the *Cannon* suit. 441 U.S. at 687 n.8. The court of appeals rejected the agency's interpretation at rehearing. 559 F.2d at 1077-80. In its brief submitted to the Supreme Court, HEW maintained that it had taken the position as early as 1974 that an implied right of action existed under Title IX in certain circumstances. The agency explained that its inconsistent position in the earlier stages of litigation was due to communication problems between national and regional HEW offices. 441 U.S. at 687 n.8.


4. 441 U.S. at 717.

5. The Court was divided 6-3 in the judgment. Justices Brennan, Stewart, Marshall, and Rehnquist joined in the majority opinion. Justice Rehnquist also filed a concurring statement in which Justice Stewart joined. Chief Justice Burger concurred in the judgment. Justices White, Blackmun and Powell dissented.


7. See note 2 supra for the content of Title IX.
enacted for the protection of the general public. The majority concluded that the first factor of Cort weighed heavily in favor of Cannon, since the language of Title IX explicitly conferred a benefit upon victims of sex discrimination.

The second factor for analysis outlined in Cort, legislative intent, received extensive treatment by Justice Stevens. He noted that legislative histories are typically silent on the question of a private right of action. He pointed out that when the language of the statute shows an intent to benefit a special class of persons, it is not necessary to find evidence of legislative intent to create a private cause of action. Instead, the legislative history should be searched for intent to deny a cause of action. The Cannon majority found no intent to deny a private right of action under Title IX, but did find an intent to create such a right. Justice Stevens noted that Title IX was patterned after Title VI, in that both statutes use identical language to confer the desired benefit and also have the same administrative enforcement schemes. Moreover, the legislative history revealed that Congress intended Title IX to be interpreted in the same manner as Title VI had been interpreted since its passage in 1964. This aspect of the legislative history was very important to Justice Stevens, because he believed that a private right of action had been implied under Title VI prior to the 1972 enactment of Title IX. The Court noted that in 1967, the Fifth Circuit allowed a Title VI class action in Bossier Parish School Board v. Lemon which became the precedent for other federal court decisions involving private actions under Title VI. The majority dismissed

18. 441 U.S. at 698-99. The Court cited Texas & Pac. R.R. v. Rigsby, 241 U.S. 33 (1916), as its primary authority for implying the intent to benefit a class directly from the language of the statute. In Rigsby, the Court implied a private cause of action for employees by looking to the statutory language of railroad safety legislation which referred to "any employee of any such common carrier." Similarly, in Allen v. State Bd. of Elections, 393 U.S. 544 (1969), the Court interpreted statutory language of the Voting Rights Act of 1965 as implying a private right of action for citizens to seek declaratory judgments against a state. The Cannon court noted that the language of the Voting Rights Act of 1965 was similar to Title IX. 441 U.S. at 690.

19. 441 U.S. at 693-94. Justice Stevens observed that the presence of "right-creating" language in a statute virtually insures that a private cause of action will be implied. As support for this view, he noted that with a single exception, the Court has always implied a cause of action when the language of the statute conferred a right on a class of persons that included the plaintiff. Id. at 690 n.13.

20. Id. at 694. See 422 U.S. at 82.

21. 441 U.S. at 694.

22. See notes 2 & 7 supra.

23. 441 U.S. at 696.


25. 441 U.S. at 696 n.20. See, e.g., Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), aff'd sub nom. Hills v. Gautreaux, 425 U.S. 284 (1976); Shannon v. United States Dept. of
the respondents' argument that the pre-Title IX cases were actually based on 42 U.S.C. § 1983 instead of on Title VI. The Court ruled that even though some cases were arguably brought under section 1983, other controversies involving private defendants or the federal government had to have been based upon Title VI. Because Justice Stevens presumed that Congress was aware of the construction given to Title VI, he concluded that Congress wanted Title IX to be construed in the same manner.

The Court next assessed the third factor of Cort, which counsels restraint if the implication of a private remedy would frustrate the underlying legislative purpose. The majority noted, however, that restraint would be improper if a private remedy advanced the purpose of ...


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

27. 441 U.S. at 696 n.21. The Court cited Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382 (E.D. Va. 1972), as an example of a Title VI case involving a private defendant. In Kenbridge, the discriminatory membership practices of a nonprofit corporation, which had received a federally guaranteed loan, were held in violation of Title VI. Id. at 1384. The federal government was a defendant in the following Title VI cases: Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), aff'd sub nom. Hills v. Gautreaux, 425 U.S. 284 (1976) (secretary of HUD violated Title VI and due process clause of fifth amendment by constructing racially discriminatory public housing); Shannon v. United States Dept. of Hous. and Urban Dev., 436 F.2d 809 (3d Cir. 1970) (secretary of HUD violated the Housing Act of 1949, 42 U.S.C. §§ 1450-1469 (1976), Title VI, and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1976), due to segregative effect of housing project location); Southern Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971) (United States Secretary of Treasury violated Title VI and Aid to Small Business Act, 15 U.S.C. §§ 633-647 (1976), by granting loans to "Black Front" corporations); and Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969) (Secretary of HUD violated Title VI and due process clause of the fifth amendment by locating public housing projects in racially segregated neighborhoods).

28. 441 U.S. at 697-98. The court also relied on § 718 of the Education Amendments, 20 U.S.C. § 1617 (1976), as evidence of the congressional assumption that a private right of action was available under Title VI. Section 718 authorizes federal courts to award fees to the prevailing parties in private actions brought against local educational agencies, states, state agencies, and the United States to enforce Title VI in the context of elementary and secondary education. The Court also looked to the legislative history of § 718 which indicated that private actions could be brought when necessary to enforce Title VI. 441 U.S. at 700 n.28.
the statute. Having stated the controlling principles, Justice Stevens identified the two objectives of Title IX. The first purpose, prevention of the expenditure of federal monies to support discriminatory practices, was adequately accomplished by terminating the federal funding of institutions engaged in discriminatory practices.\textsuperscript{29} However, the Court found that Title IX was also intended to protect individuals from discriminatory practices, and the funding termination provision was inadequate to accomplish this purpose. The Court reasoned that the individual victim of sex discrimination prefers an individual remedy, not the complete cutoff of federal monies.\textsuperscript{30} The majority was also influenced by HEW’s position that a private remedy would aid in the enforcement of Title IX without interfering with the agency’s enforcement responsibility under the Act.\textsuperscript{31}

Finally, the Court considered whether a federal remedy for sex discrimination would infringe upon an area of traditional state concern. As it did with the first three inquiries under \textit{Cort}, the majority concluded that the fourth factor weighed in favor of Cannon, because the protection of citizens against invidious discrimination has historically been a federal function, and in this case, a federal power to regulate was derived from the expenditure of federal funds. Justice Stevens concluded his \textit{Cort} analysis by remarking that all relevant factors supported the implication of a private cause of action for the victims of sex discrimination.\textsuperscript{32}

The Court then rejected the respondents’ argument that a private action under Title IX would place an undue burden on educational institutions by necessitating the defense of individual lawsuits brought by unsuccessful applicants. Justice Stevens stated that Congress rejected the same argument when adopting Title VI and Title IX. The majority reasoned that the provision for the cutoff of federal funds in the administrative enforcement scheme was a greater burden to educational institutions than that presented by individual lawsuits.\textsuperscript{33}

The Court concluded by stating that if Congress intends a private right of action, an express provision specifying the right is a far better
course than silence. However, because all the factors identified in *Cort v. Ash* as supportive of an implied remedy weighed in favor of Cannon, the majority held that she could maintain her suit despite the absence of express authorization in the statute.\(^\text{34}\)

In dissent, Justice White attacked the implication of a Title IX right of action in light of what he viewed to be a controlling legislative intent to deny such a right. He maintained that Title VI was not intended to provide a new cause of action against private parties who previously had been under no statutory or constitutional obligation not to discriminate.\(^\text{35}\) Justice White's reading of the legislative history of Title VI convinced him that Congress believed private suits would be brought to enforce the prohibitions against racial discrimination only to the extent that private suits were authorized by 42 U.S.C. § 1983. Private suits, therefore, were authorized solely when the prohibited discrimination was carried out under color of state law. But Justice White found no legislative support for the proposition that lawsuits were contemplated against recipients of federal funds who were not acting under color of state law. Thus, if the discrimination was practiced by private parties or institutions, no private remedy was intended.\(^\text{36}\)

Justice White criticized the majority's position that Congress had reason to believe that the courts had inferred a private cause of action under Title VI when it enacted Title IX.\(^\text{37}\) To him, this rationale perpetuated the confusion engendered by decisions such as *Bossier*. The dissent contended that *Bossier* was a classic example of a court failing to distinguish between a right of action pursuant to section 1983 to vindicate federal rights denied under color of state law and the creation of a new cause of action to remedy purely private acts of discrimination.\(^\text{38}\) *Bossier*, then, was correct only to the extent that a state

\(^{34}\) *Id.* at 717. Justice Rehnquist wrote specially to emphasize his concern about the failure of Congress to expressly identify private causes of action in statutes intended to benefit a designated class of individuals. He stated that in the future, the Court should be extremely reluctant to imply a private cause of action. *Id.* at 717-18 (Rehnquist, J., concurring).

\(^{35}\) *Id.* at 718 (White, J., dissenting). Justice White essentially repeated his dissent in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (White, J., dissenting). In *Bakke*, Justices Burger, Stewart, Rehnquist and Stevens expressly based the white male student's right of action to contest the alleged racially discriminatory admissions program of the university medical school on Title VI. Justices Brennan, Marshall, Blackmun, and Powell assumed for purposes of the case that Title VI was applicable, but found it unnecessary to resolve this question because it was neither argued nor decided in the lower courts.

\(^{36}\) 441 U.S. at 722-24 (White, J., dissenting).

\(^{37}\) *Id.* at 725-26 (White, J., dissenting). See notes 24-25 and accompanying text supra.

\(^{38}\) 441 U.S. at 725-26 (White, J., dissenting). Chief Justice Burger was a member of
entity entitled the plaintiffs in *Bossier* to enforce the prohibition of Title VI because section 1983 authorized such a suit. However, the suggestion in *Bossier* that an individual always has a right to enforce a statute designed for his protection was erroneous. Justice White maintained that a principled reading of the legislative histories of Title VI and Title IX would show that Congress intended to eradicate private acts of discrimination by relying on the authority of the federal government to enforce the terms under which federal funds would be provided.9

Justice Powell also filed a dissenting opinion based on his belief that the majority’s approach endangered the separation of judicial and legislative powers. Justice Powell asserted that federal judges are relatively uninformed and isolated from the political process, and, absent express congressional intent, should not assume the legislative role and create a cause of action.40 He was alarmed that since *Cort v. Ash*, the various courts of appeals had rendered twenty decisions implying private actions from federal statutes.41 To him, this was proof that *Cort* was an open invitation to federal courts to legislate causes of action not authorized by the Congress, because it was unlikely that Congress forgot to mention an intended private action in each of the statutes construed by the lower federal judiciary.42 Because he viewed the implication doctrine of *Cort* as promoting an unconstitutional course of judicial and legislative conduct,43 he suggested that *Cort* be overruled.44 The dissenter also noted his concern about the impact *Cannon* will have on academic freedom. He feared that the threat of burdensome defense litigation might lead institutions to establish more

39. *Id.* at 725-26 (White, J., dissenting). Justice White also refuted the majority’s reasoning that § 718 of the Education Amendments, authorizing attorney’s fees to litigants under Title VI, demonstrated a legislative intent to imply a private right of action under Title VI. In his view, the fees were only intended to cover § 1983 suits, which included suits against state and local educational agencies. *Id.* at 727 (White, J., dissenting). See note 11 and accompanying text supra.

40. 441 U.S. at 730-31 (Powell, J., dissenting).
41. *Id.* at 741 (Powell, J., dissenting).
42. *Id.* at 742 (Powell, J., dissenting).
43. *Id.* Justice Powell maintained that *Cort* subverts the policymaking function of the legislative branch because it provides Congress with an opportunity to avoid resolution of controversial questions by leaving the issue to the courts to decide. *Id.* at 742 (Powell, J., dissenting).
44. *Id.* at 742 (Powell, J., dissenting). As an alternative, Justice Powell stated that a private action should be implied from a federal statute only if shown by the “most compelling evidence” that Congress intended to create such an action. *Id.* at 749 (Powell, J., dissenting).
objective admission procedures in lieu of flexible admissions criteria. Justice Powell contended that such a potentially serious infringement upon academic freedom should be dealt with by the legislature, not the judiciary.\(^45\)

In *Cort v. Ash*, the Supreme Court set out the analytical framework for a judicial determination of whether an implied right of action exists in a statute otherwise silent on the subject.\(^46\) The four factors enumerated in *Cort* were a combination of previously enunciated elements used by the Court to determine the appropriateness of an implied cause of action.\(^47\) Although *Cort* was decided in 1975, the *Cannon* Court had little guidance for the application of the analytical framework to civil rights litigation\(^48\) because the predominant use of the *Cort* analysis has been in cases involving the Securities Exchange Act of 1934.\(^49\) The application of the *Cort* analysis to the securities area

45. *Id.* at 747-48 (Powell, J., dissenting).
46. See note 6 *supra*.
48. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), was the only civil rights case prior to *Cannon* in which the Supreme Court discussed the *Cort* factors. Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1976), was found to confer a special benefit on the class of persons initiating the private suit, but the Court held that implying a private right of action would interfere with the statute’s other purpose of furthering Indian self-government. *Id.* at 66-70.
showed that if the statute lacked special benefit language, the Court was cautious about implying congressional intent from the legislative history. Since the post-Cort litigation had not involved statutes with special benefit language, the question remained whether additional evidence of legislative intent would be required when the statutory language expressly conferred a benefit on a class of persons. Cannon squarely raised this issue since the language of Title IX did confer a special benefit on plaintiff's class. Moreover, Cannon presented the Supreme Court with the opportunity to apply the Cort factors to civil rights statutes and to enhance civil rights enforcement by implying a private cause of action.

The Cannon Court noted that it has never withheld a private remedy when a statute conferred a special benefit on a class of which the plaintiff is a member. The Court's heavy reliance on the special benefit language of the statute bodes well for implication of a private right of action under existing civil rights legislation because, as the Cannon Court stated, the right to be free of discrimination is a personal one and a statute confering such a right will often be phrased in terms of a special benefit. However, Cort requires an examination of

by § 3 of the Williams Act of 1968, 15 U.S.C. § 78n(e) (1976), for unsuccessful tender offerers in a corporate control contest. In discussing the four Cort factors, the Court noted that no special benefit was conferred upon tender offerers by the language of the statute. Therefore, the Court looked to the statute's legislative history to determine whether the statute was intended to benefit the class. The Piper Court warned against injecting judicial policy into legislative provisions, and proposed the cautious use of the legislative histories as a "guide" to congressional intent. 430 U.S. at 26. The Court determined that the purpose of the act was to benefit shareholders, not tender offerers. Id. at 35.

Likewise, in Santa Fe Industries, Inc. v. Green, the Court denied an implied private right of action under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976). In Green, a group of minority shareholders brought suit against majority shareholders for fraud and breach of a corporate fiduciary duty. The Court refused to expand coverage of the statute to include conduct not involving manipulation or deception because the statutory language was specific and the legislative history did not reflect a more expansive intent. 430 U.S. at 473. An implied right of action was found not to be necessary to fulfill the congressional purposes, and the state's traditional role in the corporate area was given deference by the Court. Id. at 477-78.

50. See note 49 supra.
51. See note 2 supra.
52. 441 U.S. at 690 n.13. Santa Clara Pueblo v. Martinez represents the only case in which the Court has refused to imply a private cause of action under a statute with explicit benefit language. The Cannon Court distinguished Martinez, which involved Indian rights, from other civil rights legislation because of the unique characteristics of Indian tribe self-government. Id. See note 48 supra.
53. 441 U.S. at 690 n.13. The Cannon Court reasoned that when Congress patterns the language of a statute after that contained in Title VI, it does so with the intent to create a private right of action. This rationale points favorably to implication of a private
three additional factors before implying a private right of action.54 Only one of these additional inquiries—whether implication of a private right of action under federal law would infringe upon an area of traditional state concern—pointed toward implication of a private action in Cannon.55

Although Cort requires a search for legislative intent to create or deny a private right of action, the Cannon Court specifically noted that when special benefit language is present in the statute, a showing of an intent to create a private action is not necessary.56 This indicates that the Court views the existence of special benefit language as controlling. Despite this presumption, the Court nevertheless engaged in a search for legislative intent to create a private right of action under Title IX. As support for the proposition that Congress intended to have a cause of action implied under Title IX, the Court cited lower court precedents that had implied a cause of action under the similar benefit language of Title VI prior to the enactment of Title IX. To the Court, this meant that Congress selected the special benefit language of Title IX with the understanding that it would also be interpreted as implying a private right of action.57

right under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1976). Section 504 uses language identical to that of Title VI and Title IX, and sets forth the same administrative scheme. The section provides in relevant part: “No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The Seventh Circuit has allowed a private right of action under this Act. Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). However, the future implications of the decision are uncertain because, at the time of the decision, no administrative regulations had been promulgated providing for judicial review of administrative actions. Id. at 1286 n.29. The Lloyd court noted that the question of whether a private suit could be brought after regulations were issued was premature. The court added that, if a meaningful administrative enforcement mechanism existed, judicial review would be limited to a review of the agency’s enforcement activities. Id. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), a case decided after Cannon, the Supreme Court held that an educational institution’s rejection of a hearing-disabled applicant did not violate § 504. However, because the claim was rejected on the merits, the Court found it unnecessary to decide if an implied cause of action existed under § 504. Id. at 404 n.5. The Court of Appeals for the Third Circuit has adopted the Supreme Court’s reasoning in Cannon to find a private right of action under Title VI and § 504, even in the absence of exhaustion of the administrative remedies. NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979).

54. See note 6 supra.

55. As the Court noted, protection against discrimination has long been a function of the federal courts. See Steffel v. Thompson, 415 U.S. 452 (1974). Additionally, Title IX involves the expenditures of federal funds. 441 U.S. at 708-09.

56. 441 U.S. at 694. See text accompanying note 20 supra.

57. 441 U.S. at 696-97. Respondents agreed that, since Title IX was patterned after Title VI, if a private right of action existed under Title VI, one also existed under Title IX. Brief for Respondents at 16.
The Cannon Court relied heavily on Bossier Parish School Board v. Lemon as the first case to imply a private right of action under Title VI. The court in Bossier expressly stated that the plaintiffs could maintain their class action under either section 601 of Title VI or as third party beneficiaries to contractual assurances between the school board and the federal government. Whether the Bossier court based the cause of action on section 601, or on the violation of constitutional rights cognizable by the court under 42 U.S.C. § 1983 is uncertain. The Bossier court referred to the plaintiffs' constitutional rights throughout the opinion. The court also spoke of section 601 as if it were a codification of constitutional principles, stating that "section 601 also states the law as laid down in hundreds of decisions, independent of the statute." Since the defendant in Bossier was a local public school board and the alleged infringement of the black students' rights was an unconstitutional denial of equal protection guaranteed by the fourteenth amendment, the plaintiffs' claim was cognizable under 42 U.S.C. § 1983. Despite this section 1983 basis for the cause of action, the Bossier court stated that in the absence of a procedure through which the protected individuals could assert their rights under section 601, violations of the law were cognizable by the courts on behalf of the plaintiffs.

The confusion of Bossier was repeated in subsequent Title VI decisions. The Cannon majority stated that four cases brought under Title VI against the federal government and one case brought against a private defendant could not have been brought under the auspices of sec-

58. 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).
60. 370 F.2d at 851.
61. Id. at 849, 851, 852.
62. Id. at 852.
63. Id. at 851.
64. Section 1983 is the traditional basis for suits against school boards. See, e.g., McNeeze v. Board of Educ., 373 U.S. 668 (1963). See also 441 U.S. at 725-26 (White, J., dissenting).
65. 370 F.2d at 852. The Bossier court also stated that the plaintiffs, as beneficiaries of the Act, had standing to assert their § 601 rights. Statutory standing involves the question of whether a plaintiff is within the class of persons to whom Congress extended the right to sue under the statute. The issue of whether a plaintiff has standing under article III of the Constitution is reached only after a determination of statutory standing has been made. See Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). The issue of statutory standing is often confused with the question of whether a private right of action exists. See Note, Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View, 87 YALE L.J. 1378 (1978). See also Davis v. Passman, 442 U.S. 228, 239-40 n.18 (1979).
However, the existence of a private cause of action under Title VI was not squarely decided in any of these cases. Furthermore, in two of the cases, it is unclear whether the cause of action was based on Title VI, another statute, or the Administrative Procedure Act. Thus, the Cannon Court's presumption that Congress understood the inconsistent opinion in Bossier and its progeny to imply a private right of action under Title VI is much weaker than the Court's opinion suggests. The absence of a well-reasoned, authoritative decision recognizing an implied right of action under Title VI would seem to indicate that Congress most likely considered the status of an implied right of action under Title VI to be an open question.


67. Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), was based on the interrelationship between the Housing Act of 1949, 42 U.S.C. §§ 1450-1469 (1976), Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1976), and Title VI. The case involved a challenge to the adequacy of HUD procedures under the Housing Act. Title VI was discussed in terms of its substantive effect on the Housing Act. Because the administrative remedies under Title VI had no bearing on HUD's practices under the Housing Act, the court held that Title VI remedies did not have to be exhausted. 436 F.2d at 820.

In Southern Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971), a suit against the federal government was brought under the Small Business Act, 15 U.S.C. §§ 631-647 (1976), and Title VI. The court allowed the claims to be brought under Title VI because an effective disposition of the plaintiff's claim under the Small Business Act could not be made without consideration of the underlying discrimination. The court referred to 42 U.S.C. § 2000d-2 (1976) as authorizing any person aggrieved by agency action under Title VI to obtain judicial review. However, this section authorizes suits only against agencies, not against a private party. The court, citing Bossier, noted that the strong federal policy favoring judicial resolution of racial discrimination claims had led other courts to give plaintiffs standing to challenge alleged violations of Title VI. 331 F. Supp. at 944-45. In light of the interplay between the Small Business Act, Title VI, and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1976), and because Southern Christian Leadership Conference was a suit to review agency action, this statement by the court lends little support to the implication of private right of action under Title VI.

68. 5 U.S.C. §§ 551-559, 701-706 (1976). In Shannon, the court determined that HUD's action under the Housing Act was reviewable under the Administrative Procedure Act. In Southern Christian Leadership Conference, the court determined that the Small Business Administration's action was reviewable under the Administrative Procedure Act. See note 67 supra.

69. The Cannon court also assumed a legislative presumption of the availability of Title VI private suits from the language of § 718 of the Education Amendments enacted in 1972. See note 11 supra. The Court noted that because there was no cause of action available for many suits covered by § 718, Congress must have assumed that one could be implied under Title VI. 441 U.S. at 699-700. Although there is precedent for giving weight to subsequent legislative interpretations of statutes, see, e.g., Sioux Tribe v. United States, 316 U.S. 317 (1942); New York, P. & N.R.R. v. Peninsula Produce Exch., 240 U.S.
The Court engaged in these weak assumptions about legislative intent to create a right of action despite its statement that *Cort* requires no such showing when the statute contains special benefit language. This may be due to the Court's desire to avoid criticism for overstepping proper judicial bounds in implying a Title IX private right of action. However, the twisted attempt to find legislative intent raises the very problem the Court presumably was attempting to avoid. The majority contravened the Court's own proscription in *Piper v. Chris Craft Industries, Inc.* against injecting Court policy into legislative provisions. Nevertheless, the *Cannon* Court's reasoning is significant, since right or wrong, the Court went out of its way to show that Congress understood the language of Title VI as creating a private right of action.

The Court rejected the respondents' argument that the legislative history of Title VI demonstrated an intent to deny a Title VI private right of action. Additionally, the heavy emphasis that the Court placed on the special benefit language of Title IX would also apply to an interpretation of Title VI, lending even more weight to the implication of a Title VI right of action. Therefore, by its reasoning, *Cannon* seems to establish that a private right of action exists under both Titles VI and IX.

In addition to an examination of legislative intent, *Cort v. Ash* also necessitates a determination of the underlying purpose of the legislative scheme. The *Cannon* Court found that the purposes of Title IX are to avoid the use of federal funds to support discriminatory practices and to protect individuals against these practices. The majority framed the issue as whether the legislative purpose was to protect individuals from discrimination rather than whether the purpose was to protect individuals from discrimination through private suits. The need articulated by the Court for a private remedy was based on their own perceptions about what would constitute an adequate remedy for vic-

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34 (1916), nothing in § 718 expressly supports the contention that Congress assumed that Title VI implied a private right of action. Section 1983 can provide a basis for many private causes of action brought under Title VI. Therefore, it is not clear that in providing attorney's fees to Title VI litigants, Congress necessarily assumed that Title VI implied a private right of action.


71. 430 U.S. at 26.

72. The Supreme Court discussed the issue of a Title VI right of action in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), but did not decide the question since it had not been addressed in the lower courts. *Id.* at 283-84. See note 35 and accompanying text *supra*.

73. 441 U.S. at 710-16.

74. *Id.* at 704.
tims of prohibited discrimination. Additionally, the Court emphasized the importance of HEW's contention that there is no inconsistency between the administrative enforcement scheme of the statute and a private right of action. Thus, in examining the Cort factor addressed to determining legislative purpose the Court relied upon its own perceptions and those of the executive branch that a private remedy was necessary.

An examination of the Cannon opinion reveals that the Court was swayed by the special benefit language and the perceived inadequacy of the statutory remedy. Because the statutory remedy was viewed as inadequate, the Court not only implied a private right of action but also dispensed with the traditional requirement that administrative remedies be exhausted prior to the initiation of a private suit. A primary purpose of the exhaustion requirement is to avoid premature interruption of the administrative process, especially when the administrative function and ruling involve congressionally granted agency discretion based on a developed expertise. The requirement of exhaustion of administrative remedies also encourages autonomy and judicial efficiency and avoids weakening the effectiveness of agency enforcement. Exhaustion has, therefore, been ordered when an available administrative remedy has not been pursued, and when the administrative remedy was perceived as adequate. None of these traditional factors militating in favor of exhaustion were found to exist by the Cannon Court. HEW was not actively investigating Cannon's claim at the time of the suit, thereby eliminating the potential for judicial interruption of an administrative process. Furthermore, HEW was not

75. See text accompanying note 30 supra.
76. 441 U.S. at 706-07.
77. In a decision subsequent to Cannon, the Supreme Court stated that the first three factors in the Cort analysis are merely tools to determine legislative intent. See Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979).
78. 441 U.S. 706 n.41.
83. In April, 1975, Cannon filed a complaint with the local office of HEW. Three months later, she had received only an acknowledgment that her letter had been received by HEW. She then filed suit in district court. She was later informed that HEW would not begin its investigation until early 1976. In June, 1976, HEW informed her that the local stages of its investigation had been completed but that its national headquarters planned to conduct a further study. At the time of the Supreme Court appeal, HEW had taken no further action in the case. 441 U.S. at 680 n.2.
advocating administrative autonomy, but rather was asking for the implication of a private right of action to help in enforcement.64 Cannon pursued the express Title IX administrative remedy, found it inadequate, then sought judicial relief. The Supreme Court agreed that Cannon's administrative remedy was inadequate because she could not participate in the enforcement action nor be granted individual relief.65 The Court's emphasis on Cannon's inability to participate in the administrative process clarifies its previous position in Rosado v. Wyman66 that exhaustion is not required when the aggrieved party can neither initiate nor participate in the administrative enforcement action. After Rosado, the question remained whether exhaustion would be required if the aggrieved party could initiate, but not participate in, the enforcement action.67 The Cannon Court's answer is that exhaustion is not required if the individual cannot participate in the administrative process. Participation, then, is an indispensable component of an adequate administrative remedy, because it ensures that a thorough investigation will be made.

Taken as a whole, Cannon indicates that when a statute creates a right to be free of discrimination, but does not also provide a mechanism that is sufficient to ensure vindication of that right, the Court will imply a private action in order to protect the statutory beneficiaries. The majority's suggestion that Congress clearly specify an intended private cause of action in the future68 indicates that the Court may be hesitant to imply private rights of action under statutes enacted in the future. However, for civil rights legislation existing prior to the decision, Cannon v. University of Chicago is a victory for civil rights proponents convinced of the necessity for judicial vindication of the rights of injured statutory beneficiaries.

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84. Id. at 687 n.8.
85. Id. at 706 n.41.
86. 397 U.S. 397 (1970). Rosado involved a class action by New York welfare recipients challenging the constitutionality of a New York statute which provided disparate welfare payments to recipients from different counties. An HEW administrative procedure for reviewing state plans under the welfare program was required by statute. This procedure included notice to the noncomplying state and an opportunity for a hearing, with the ultimate sanction being a partial or total funding cutoff. The state could seek judicial review of any HEW action. Id. at 406 n.8. The Rosado court noted that a court should solicit an administrative agency's views concerning the application of the agency's standards to a particular state regulation or program. Id. at 406-07.
87. In Cannon, the individual plaintiff could initiate the administrative process through a complaint procedure adopted by HEW. 441 U.S. at 706 n.41.
88. Id. at 717.