Title IX: No Longer an Empty Promise - Cannon v. University of Chicago

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Congress, responding to evidence of sex discrimination in education, enacted Title IX of the Education Amendments of 1972 (Title IX). Discrimination on the basis of gender is thereby prohibited in educational programs receiving federal funds. The statute provides for an administrative remedy, but it does not expressly grant a private right of action. In such cases, courts historically have found a civil cause of action to have been implied by the legislature. Commentators have criticized the inference of

2. 20 U.S.C. § 1681(a) (1976) states:

   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.

   Title IX does not apply, however, to private undergraduate institutions, public undergraduate institutions with a continually enforced single-sex admissions program, religious institutions, and military institutions.

3. 20 U.S.C. § 1682 states:

   Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

   Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

4. The concept of the federal court as champion of the private litigant who has been excluded or forgotten by the legislature in the statutory scheme is deeply rooted in history. The doctrine of an implied private right of action first surfaced in Texas & Pac. Ry. v. Rigsby, 241

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a private right of action as amounting to judicial legislation. The better approach recognizes that the implication of a private right of action by the U.S. 33 (1916), in which the Court held that the plaintiff possessed a private right of action under the Safety Appliance Acts, ch. 196, 27 Stat. 531 (1893) (current version at 45 U.S.C. §§ 1-16 (1970)). The plaintiff was permitted to sue and recover damages because the Safety Appliance Act was drafted to protect the employee. 241 U.S. at 43.

The doctrine's genesis is found in common law tort theory, which gives a court the power to imply a cause of action where a statute's intended beneficiary has been injured by an act prohibited by the statute. RESTATEMENT OF TORTS 286 (1934).

The implication of a private right of action in regulatory statutes is based on the principle that the court has a right to effect full enforcement of the statute when necessary. See Bell v. Hood, 327 U.S. 678 (1946), where the Court stated that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Id. at 684.

Private rights of action have been implied in the interpretation of the following statutes (a) through (g): (a) 42 U.S.C. §§ 1981, 1982 (1976). These sections were enacted after the Civil War to protect civil rights, but they expressed no enforcement mechanism. The courts have held that the private litigant can obtain legal and equitable relief in order to enforce §§ 1981 and 1982. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (implied private right of action granted in suit alleging that membership in playground/park was restricted to white persons); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (right to an equitable remedy was implied when respondents allegedly refused to sell home to petitioner because of his race); (b) Safety Appliance Acts, ch. 196, 27 Stat. 531 (1893) (current version at 45 U.S.C. §§ 1-16 (1970)). See, e.g., Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); (c) Railway Labor Act, ch. 139, § 127, 63 Stat. 107 (1949) (current version at 45 U.S.C. §§ 151-188 (1970)). See, e.g., companion cases of Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (railroad employee can sue for injunctive relief and damages for failure of union to represent all employees regardless of race); Turnstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (duty imposed on union to represent all employees without regard to race); (d) Voting Rights Act of 1965, 42 U.S.C. § 1973 (1970). See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544 (1968) (private right of action implied to insure the Voting Rights Act's guarantee that all persons have the right to vote); (e) Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976). See, e.g., Piper v. Chris Craft Indus., Inc., 430 U.S. 1 (1976) (no private right of action granted because of failure to meet the requisite criteria); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (right of action implied only for the buyer or seller of securities); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (stockholder permitted to bring private suit alleging false and misleading proxy statements were given to effectuate a merger); (f) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1970 & Supp. V 1975) (see note 56 and accompanying text infra); (g) Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1976). See, e.g., N.A.A.C.P. v. Wilmington Medical Center, 599 F.2d 1247 (3d Cir. 1979) (see note 107 infra); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (private right of action implied in class action on behalf of disabled persons in northeastern Illinois who could not use the public transportation system); Whittaker v. Board of Higher Educ., 461 F. Supp. 99 (E.D.N.Y. 1978) (private right of action limited to plaintiff's vindication of personal rights and not extended to include right to demand cut-off of federal funds). But cf. Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979) (Court did not decide if a private right of action exists under Rehabilitation Act).

court is the effectuation of the legislative purpose in the form of adjustment of the relief to be granted under the statute.

In Cannon v. University of Chicago, the United States Supreme Court held that Congress had implied a private right of action in Title IX. By finding an implied private civil action, the Cannon Court supplemented the sanction of fund termination and advanced Title IX toward its goal of ending sex discrimination in federally funded educational institutions.

This Note analyzes the structure and reasoning of the Cannon decision to determine the legal propriety of the inference of a private right of action under Title IX. The respective roles of the courts and Congress in the implication of a private right of action, as highlighted in Justice Powell's dissenting opinion, are examined. Cannon's impact on other legislation, Title IX claimants, educational institutions, and the Department of Health, Education, and Welfare (HEW) is analyzed. Finally, it is asserted that, in Cannon, the Supreme Court properly recognized the individual litigant's right to be heard in federal court and thus reinforced a meaningful national commitment to eliminate sex-based discrimination in education.

**FACTS AND PROCEDURE**

Petitioner, a thirty-nine-year-old surgical nurse, applied for admission to medical school while completing her *cum laude* baccalaureate degree. She was denied admission to the 1975 entering classes of each respondent medical school, while students with lesser academic qualifications (as evaluated by grade point average and test scores) were admitted. Cannon alleged that her rejection from medical school was the result of sex-based discrimination in violation of Title IX. She claimed that the federally assisted, private medical schools discriminated against women in their policies to reject applicants over thirty years of age who do not hold an advanced degree. The petitioner argued that because women are more likely than men to postpone their professional education, the medical schools' age and advanced degree policies exclude many women from professional school.

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8. Brief for Petitioner at 3.
9. 441 U.S. at 680 n.2.
10. Id.
11. Petitioner's complaints named two private universities, the University of Chicago and Northwestern University, as defendants. Officials of the medical schools associated with the universities were also named. Both medical schools received some form of federal financial aid, which obligated them under Title IX to cease discriminatory practices based on sex. See note 2 supra.
12. Age is a bar to admission for the applicant over thirty without an advanced degree. Northwestern University Medical School disqualifies all applicants over thirty-five.
13. 441 U.S. at 680 n.2.
In accordance with Title IX, petitioner filed complaints with HEW.\textsuperscript{14} Although the statute was silent as to a private right of action, Cannon sued in the United States District Court for the Northern District of Illinois,\textsuperscript{15} asking the court to declare that the schools' age and advanced degree policies violated Title IX. Cannon additionally requested that her medical school application be reconsidered without regard to that policy.\textsuperscript{16} Alternatively, Cannon petitioned to compel the Secretary of HEW to respond favorably to her administrative complaint.\textsuperscript{17} The district court concluded that no private right of action could be implied under Title IX and sua sponte dismissed that portion of the complaint charging that HEW had failed to investigate promptly and take timely administrative action.\textsuperscript{18} The Court of Appeals for the Seventh Circuit affirmed.\textsuperscript{19}

Subsequent to the court of appeals decision, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976,\textsuperscript{20} which provides for payment of attorneys' fees to a successful civil rights litigant. Title IX was specifically designated as an applicable statute.\textsuperscript{21} In light of the Act, the court of appeals granted a rehearing for consideration of its denial of a private right of action under Title IX.\textsuperscript{22} Nevertheless, the court of appeals concluded that the 1976 Act did not create a private Title IX remedy.\textsuperscript{23} The court reasoned that Title IX was mentioned in the event that a private right of action would be implied in the future.\textsuperscript{24} On appeal, the Supreme Court

\textsuperscript{14} Id.


\textsuperscript{16} Brief for Petitioner at 3-4.

\textsuperscript{17} Brief for Petitioner at 4. Cannon contended that the delay and inactivity of HEW with regard to her complaint amounted to unavailable administrative remedies. She wanted the court to compel HEW to investigate her complaint promptly. Cannon joined the Secretary and Region V Director of the Office of Civil Rights of HEW as additional defendants in the complaint. It is interesting to note that the federal respondents changed their position after prevailing in the lower courts so as to support the petitioner's claim of an implied private right of action under Title IX. See 441 U.S. 687 n.8. The reason for the change in HEW's position is unclear. Perhaps it can be explained by error in the briefs written for the lower courts or the realization that a private right of action would be consistent with HEW's contention that it cannot handle the increasing volume of Title IX complaints efficiently. See Brief for the Federal Respondents at 6 n.9.

\textsuperscript{18} Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976). The district court held that the administrative enforcement scheme authorized under Title IX had not been exhausted by Cannon. The court further asserted that delay on the part of HEW did not justify bypassing the administrative procedure set forth in the statute. \textit{Id.} at 1260.

\textsuperscript{19} Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976). The court characterized the administrative enforcement scheme as "sophisticated" and saw "little to be gained by involving the judiciary in every act of discrimination based upon sex." \textit{Id.} at 1074.


\textsuperscript{22} 559 F.2d at 1077.

\textsuperscript{23} \textit{Id.} at 1079-80.

\textsuperscript{24} \textit{Id.} at 1080.
held that the petitioner could maintain her lawsuit without the express authorization of a private right of action in the statutory scheme. 25

**Case Analysis**

**Background of Title IX**

Congress enacted Title IX in response to evidence of consistent and pervasive sex discrimination in education. 26 Supplanting the ban on discrimination in education based on race, color, or national origin of Title VI of the Civil Rights Act of 1964 (Title VI), 27 Title IX prohibits all sex-based discrimination in educational programs and activities receiving federal financial assistance. 28

Section 1682 expressly provides a federal administrative enforcement scheme that could result in the termination of federal funding for noncompliance. 29 In most cases, the person subjected to sex discrimination must channel the Title IX complaint through HEW. The specified administrative remedy is the termination of funds to the discriminatory institution. Consequently, the complainant must await HEW's action on the complaint.

25. 441 U.S. at 677, 717. Justice Stevens delivered the opinion, in which Justices Brennan, Stewart, Marshall, and Rehnquist joined. Chief Justice Burger also concurred in the judgment. Id. at 716. Justice Powell's dissent focused on the dangers of implication of a private right of action generally. Id. at 730. Justice White, with Justice Blackmun, dissented on the basis that Congress had chosen an administrative remedy. Id. at 729.


28. See note 2 supra.

29. The enforcement scheme is authorized by 20 U.S.C. § 1682 (1972). Section 1682 of Title IX is identical to § 2000d of Title VI with the exceptions of the addition of the word "education" in Title IX and Title IX's substitution of "sex" for "race, color, or national origin." See note 3 supra for relevant sections of Title IX.

Prior to fund termination, a typical Title IX complaint would progress as follows: the school is informed of the Title IX violation; HEW determines if voluntary compliance is possible; there is a finding of noncompliance after adequate opportunity for hearing and review; a full written report of the decision to terminate funds is submitted to the appropriate House and Senate subcommittees; no decision is effective until 30 days has expired from date of filing report. All action under Title IX is subject to judicial review. See Shelton & Berndt, Sex Discrimination in Vocational Education: Title IX and Other Remedies, 62 Cal. L. Rev. 1121, 1141 (1974).
for enforcement of Title IX, and she is generally relegated to the role of amicus curiae in any proceedings resulting from HEW action.

Although Title IX was enacted in June, 1972, HEW did not issue guidelines until June, 1975. The belated regulations have generated controversy, and HEW's handling of complaints brought under Title IX has been described as "grossly deficient" and appears to be unenthusiastic.

30. Following an alleged violation of Title IX, the complainant would write to the regional office of HEW to inquire regarding the educational institution's compliance with Title IX. HEW should acknowledge the complaint and investigate the institution. If, after investigation, HEW decides that no action is warranted, HEW must notify the complainant of that fact in writing. See 45 C.F.R. § 87.71 (1978). If discrimination is found, the agency and the school would work together to achieve compliance. See note 29 supra.

31. See 45 C.F.R. § 81.23 (1978), which states in relevant part: "A person submitting a complaint is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae." The administrative scheme also allows HEW, in exceptional situations, to recommend that the Attorney General bring suit against the offending institution to obtain an order to cease discrimination. See 42 U.S.C. §§ 2000h-2, 2000c-6(a)(2). 45 C.F.R. § 86.71 (1978), one of the Title IX regulations, refers back to the Title VI procedures. For applicable Title VI procedure, see 45 C.F.R. § 80.8 (1978).

32. Perhaps the best indicia of the extent of the controversy over the proposed Title IX regulations is found in the number of formal responses sent to HEW. During the 120 day comment period following the issuance of the regulations, HEW received almost 10,000 written formal comments. 40 Fed. Reg. 24128 (1975).

An area of controversy surrounding the regulations is the exemption of private undergraduate schools but the inclusion of "professional" schools within the scope of Title IX. HEW attempted to clarify the confusion that resulted from some undergraduate schools that are also considered "professional" schools. HEW maintained that admissions to all private undergraduate schools are totally exempt. 40 Fed. Reg. 24130 (1975).

Another area of controversy stemmed from the insistence by some women's organizations that HEW should take affirmative steps, through the Title IX regulations to censor sex stereotyping in educational materials. HEW refused to take this action on constitutional first amendment grounds. See 40 Fed. Reg. 24135 (1975); Hearing on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 183 (1975). A third controversial area is Title IX's impact on employment discrimination. See Junior College Dist. v. Califano, 455 F. Supp. 1212 (E. D. Mo. 1978) (HEW does not have the authority under Title IX to regulate employment discrimination); Brunswick School Bd. v. Califano, 499 F. Supp. 866 (D. Me. 1978) (Title IX limited to prohibition of sex discrimination against students and not teacher-employee); Romeo Community Schools v. United States Dept. of HEW, 438 F. Supp. 1021 (E. D. Mich. 1977) (HEW regulations concerning employment discrimination not within Title IX's purpose). See generally Kroll, Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom, 13 UMB. L. ANN. 107 (1977); Note, Title IX Sex Discrimination Regulations: Impact on Private Education, 65 Ky. L. J. 656 (1977).

34. In Alexander v. Yale Univ., 458 F. Supp. 1 (D. Conn. 1977), the court acknowledged that representations were made that the Title IX enforcement system was "grossly deficient in actual operation." Id. at 6. The Alexander court held that a female student who received a low grade because she rejected a male professor's sexual demands had the right to bring a private action under Title IX. The court openly disagreed with the lower court Cannon decisions and was "unable to agree that the private claim can be summarily dismissed without further inquiry into actual need." Id. at 4.

35. The data received from HEW, telephone interview with Mr. Hal Bonnett, Management and Administration, Office of Civil Rights (OCR), Washington, D.C. (Aug. 27, 1979), regarding
Yet, absent an implied private right of action, the HEW administrative remedy was the only vindication offered a Title IX complainant. Accordingly, frustrated complainants turned to the federal courts for a forum. Although some lower courts recognized an implied right of action under Title IX, the course was often both unpredictable and inconsistent.

Title IX's enforcement, reflects a protracted period of time from date of filing to resolution of the complaint. An average time period was 334 days from 1972-79. The approximate (inaccuracy of the data was stressed by HEW) total number of Title IX complaints received nationally from Jan. 1, 1972, through April 30, 1979, was 3,269. Of these complaints, 2,415 (74%) were considered to be resolved by April 30, 1979. Of these "resolved" complaints, 1,048 (43%) of the complaints, were closed for administrative reasons. The administrative closure category includes the following complaints: (1) those over which the OCR has no jurisdiction, (2) those that the complainant withdrew, and (3) those in which the complainant did not provide enough information for the investigation to proceed.

A second type of case, described in the HEW data and included in the number of cases considered "resolved" by HEW, is the case dubbed "no change." This type of case reflects an investigation by HEW resulting in the finding of no violation on the part of the institution; 652 cases (27%) of the resolved cases are in this category.

The third type of case included in the "resolved" category, as described by HEW, is the "change" type of case. This characterization describes a situation where the complainant was accommodated in some way. It includes those cases where an investigation took place, a violation was found, and the institution corrected the violation. It also includes those cases where an investigation revealed no violation but something was done by the institution to accommodate the complainant; 715 (29.6%) of the resolved cases were in the "change" category. See Todd, Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in the Public Schools, 53 Tex. L. Rev. 103, 120 (1974), where it is suggested that vigorous enforcement of the Title IX regulations is only a remote possibility because of HEW's realization that the fund termination remedy cannot benefit the complainant or the institution. Id. at 120. See also Comment, HEW's Title IX Regulations, 1976 B.Y.U.L. Rev. 133 (1976), where the regulations are criticized for their inability to ensure the goals of Title IX—equal educational opportunities for women and elimination of the sex stereotyping that results from limitations on educational opportunities. See generally Project on Equal Education Rights, NOW (National Organization of Women) Legal Defense and Education Fund, Stalled at the Start; Government Action on Sex Bias in the Schools [hereinafter cited as P.E.E.R.]. The report is critical of HEW's handling of the complaints.

36. See Alexander v. Yale Univ., 459 F. Supp. 1, 6 (D. Conn. 1977) (private right of action under Title IX recognized in student's action resulting from low grade given by professor whose sexual demands were refused); Piasek v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976) (private right to sue recognized in Title IX action against museum). See also McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978) (implied private right of action under Title IX would be based on Title IX's similarity to Title VI of the Civil Rights Act of 1964, but Title IX provided administrative remedy and plaintiff failed to state claim upon which relief could be granted).

37. Courts often avoided the issue of implication of a private right of action under Title IX and found the private claim to be based on some other right. See, e.g., De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), where the court held that the plaintiff-student was deprived of equal educational opportunities because of the lack of child care facilities in the community college district. The court added that the plaintiff was entitled to sue independently of the Title IX claim because of the fulfillment of the requisite state action requirements of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976).
Application of Cort v. Ash

*Cannon* was the first United States Supreme Court case to address directly the implication of a private right of action under Title IX. The *Cannon* court determined that a private right of action exists under Title IX by considering four "relevant" factors it had outlined in *Cort v. Ash*:

1. Whether plaintiff is "one of the class for whose special benefit the statute was enacted";
2. Whether an examination of the legislative history indicates a legislative intent to create or deny a private right of action;
3. Whether an implied right of action is consistent with the legislative purpose; and
4. Whether the cause of action based on federal law should be relegated to the states.

**Benefit to a special class**

The first factor suggested by *Cort* and considered by the *Cannon* Court considers whether Title IX was enacted to benefit a certain class of which plaintiff is a member.

See the cases that denied a private right of action under Title IX: Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 117 (E.D. Wis. 1978) (Title IX created only an administrative remedy); Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977) (Title IX did not create a private right of action but if it had, the plaintiff would have to exhaust administrative remedies first); Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976) (Title IX could not be interpreted as a grant of a private right of action before the exhaustion of administrative remedies in suit by female student objecting to different male/female basketball rules). Compare the decisions that implied a private right of action under Title IX: McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978) (court recognized that a private right of action would be based on Title IX's similarity to Title VI but that this plaintiff failed to state a claim upon which relief could be granted); Alexander v. Yale Univ. 459 F. Supp. 1 (D. Conn. 1977) (female student granted right to bring Title IX private right of action when her refusal of professor's sexual demands resulted in her low grade); Piascik v. Cleveland Museum of Art, 425 F. Supp. 779 (N.D. Ohio 1976) (private right of action under Title IX recognized but no discrimination established in action against museum).

38. 422 U.S. 66 (1975). In *Cort v. Ash*, the Court decided not to imply a private right of action for a stockholder under a criminal statute that restricted corporate contributions and expenditures in connection with certain federal elections.


42. 422 U.S. at 78. See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971) (state cannot limit the exercise of federal authority); J.I. Case v. Borak, 377 U.S. 426, 434 (1964) (state law may be relegated where overriding federal question is at issue); Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (an action must be brought in state court unless there is violation of federal law or basis for federal jurisdiction).

43. 441 U.S. at 689-93.
the statute. Statutory language that focuses on a specific class is distinguishable from a statutory prohibition that is drafted to protect the general public.\textsuperscript{44} If Title IX had been drafted as a bare prohibition against discriminatory activity by educational institutions receiving federal funds, implication of private right of action might not have been consistent with the legislative focus.\textsuperscript{45} The language of the enacted statute confers a benefit on persons who are subjected to sex discrimination in education. The limiting language is found in the statement that "no person in the United States shall, on the basis of sex, . . . be subjected to discrimination."\textsuperscript{46} This language differs from a rejected alternative draft that framed Title IX as a directive to the Secretary of HEW "not [to] make any grant . . . [to any educational institution] unless . . . [the institution] will not discriminate on the basis of sex . . . ."\textsuperscript{47} The rejected Title IX proposal was a bare instruction to HEW; in contrast, the enacted statute is a protective measure for those who may be subjected to sex-based discrimination in education. Language that focuses on a specific group is essential to the first \textit{Cort} factor. A court is justified in implying a private right of action to a statutorily-circumscribed group in order to effectuate the benefit the legislature intended to confer on members of that group.\textsuperscript{48}

The \textit{Cannon} Court concluded that the language of Title IX clearly articulates the Act's purpose to benefit those persons who are subjected to sex discrimination in education.\textsuperscript{49} Therefore, Petitioner, who alleged that she was denied admission to medical school because of her sex, was a member of the special, protected class.\textsuperscript{50}

\textit{Legislative history of Title IX—patterned after Title VI}

The second \textit{Cort} factor that the \textit{Cannon} Court utilized in its analysis of Title IX required the Court to examine the legislative history of the statute.\textsuperscript{51} The \textit{Cannon} Court noted that the legislative history of Title IX does not reveal a congressional intent to deny a private right of action.\textsuperscript{52} The Court went further and found implicit indications, reflected in Title IX's

\begin{itemize}
\item \textsuperscript{44} \textit{Id.} at 690.
\item \textsuperscript{45} \textit{Id.} at 691-93.
\item \textsuperscript{46} 20 U.S.C. § 1681(a) (1976).
\item \textsuperscript{47} 117 CONG. REC. S30411 (1971) (Sen. McGovern's proposal).
\item \textsuperscript{48} 441 U.S. at 694.
\item \textsuperscript{49} \textit{Id.} at 693-94.
\item \textsuperscript{50} \textit{Id.} at 694.
\item \textsuperscript{51} \textit{Id.} at 693-94.
\item \textsuperscript{52} 422 U.S. at 82. The \textit{Cort} test is that the legislative history need not necessarily "show an explicit purpose to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." \textit{Id.} (emphasis in original).\
\end{itemize}
patterning after Title VI, of a congressional assumption that a Title IX private right of action exists. Congress was aware that, at the time of Title IX’s enactment, a private right of action had already been implied or assumed to exist under the companion statute, Title VI. The Cannon Court noted that after the enactment of Title IX, the United States Supreme Court had decided two cases brought by private litigants under Title VI. Neither Lau v. Nichols nor Hills v. Gautreaux explicitly addressed the question of the existence of a Title VI private right of action, but the grant of relief to the individual petitioners further supports the existence of a private right of action under Title VI.

Thus, the Cannon Court reasoned that because Title VI had been interpreted so as to create a private right of action, Congress may have deter-

53. 441 U.S. at 694-96. Title IX is identical to Title VI in its description of the class to be benefited, except for the substitution of Title VI language of "race, color, or national origin" for Title IX language of "sex" and the addition of the word "education". See notes 26 & 27 supra.


55. 441 U.S. at 696-98. See note 26 supra.

56. Id. at 696. See, e.g., Bakke v. Regents of Univ. of Calif., 438 U.S. 265 (1978) (majority assumed private right of action existed under Title VI); Hills v. Gautreaux, 425 U.S. 284 (1976) (note 58 and accompanying text infra); Lau v. Nichols, 414 U.S. 563 (1974) (the first Title VI private right of action case to reach the Supreme Court has been interpreted to imply a private right of action (note 57 and accompanying text infra). An implied cause of action for Title VI has found support in several lower federal court decisions. See Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) (case was before Congress when Title IX was enacted, suggesting that Congress felt it was unnecessary to explicitly provide a private right to sue under Title IX, when its model, Title VI, had already been interpreted as having a private right of action).

Other federal courts have relied on Title VI as the right of action for a victim of discrimination. See Blackshear Residents Organization v. Housing Auth., 347 F. Supp. 1138, 1146 (W.D. Tex. 1972) (procedures of planning and construction of public housing project inadequate to ensure goals of Title VI); Hawthorne v. Kenbridge Recreation Ass’n, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972) (organization ordered to accept members without regard to race); Southern Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940, 943-45 (E.D. Mich. 1971) (private right of action granted under Title VI in suit alleging discrimination against minority-owned businesses). Several cases dealing with Title VI questions assumed that a private right of action existed under the statute. See Jefferson v. Hackney, 406 U.S. 535 (1972) (holding that the Texas welfare system did not violate § 402(a)(23) of the Social Security Act, the equal protection clause of the fourteenth amendment or Title VI); Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974) (holding that Title VI was violated by Housing and Urban Development (HUD) in action by Blacks who were displaced by public housing project); Ottero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (private right of action implied in suit challenging tenant selection process for federal housing unit).

57. 414 U.S. 563 (1974). In Lau, the Court granted private relief to aggrieved students who sued under Title VI, holding that non-English speaking students of Chinese ancestry were denied a meaningful opportunity to participate in public educational programs.

58. 425 U.S. 284 (1976). The Court found that a complaint charging racial discrimination in choosing a site for a housing project amounted to a Title VI cause of action.
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mined that a provision for private right of action under Title IX, its progeny, was unnecessary. In sum, the second Cort factor supported a Title IX private right of action because the legislative history revealed a congressional inference of such a right.

**The purpose of the statute**

The Cannon Court evaluated the third Cort factor, which demands an examination of the purpose of the legislative scheme.\(^{59}\) The directive is clear: the courts must provide an effective remedy to achieve Congress' purpose.\(^{60}\) The Cannon Court interpreted Cort as holding that a private right of action should not be implied if it conflicts with the purpose of the statute. Conversely, if a private right of action is harmonious with the underlying purpose of the statute, its implication is favored.\(^{61}\)

The Cannon Court articulated the purpose of Title IX as two-fold: to end sex discrimination in education\(^{62}\) and to divert federal funds from discriminatory programs.\(^{63}\) At the same time, the Court noted the possible inappropriateness of Title IX's fund termination procedure.\(^{64}\) Specifically, Ms. Cannon sought an order requiring her acceptance into the professional program to remedy the medical school's alleged violation of Title IX. Her objective would be poorly served by a cut-off of funds to the institutions.\(^{65}\) The third Cort factor is therefore satisfied because in this and comparable situations, individual relief is more consistent with fulfilling the statute's purpose than other available remedies.\(^{66}\)

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59. Cort v. Ash, 422 U.S. at 78.
60. Id. at 84, quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964): "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." Id.
61. 441 U.S. at 703.
62. See 118 CONG. REC. S5806-07 (1972) (remarks of Sen. Bayh) ("Title IX is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers.") See also 117 CONG. REC. S30403 (1971) (remarks of Sen. Bayh) ("While over 50 percent of our population is female, there is no effective protection for them as they seek admission to and employment in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.")
63. See 117 CONG. REC. H39252 (1972) where Congressman Mink said that educational institutions which discriminate against women "should not be asking the taxpayers of this country to pay for this kind of discrimination." Id.
64. 441 U.S. at 705.
65. Id. at 705-06.
66. This type of situation is exemplified by Cannon's position. A private right of action is more consistent with her professional goal—admission to medical school—than a remedy of fund termination.
A federal concern

A fourth and final consideration suggested by *Cort* raises a question about the propriety of a federal remedy if the subject matter is traditionally of state concern. It would be inappropriate to imply a federal cause of action where state remedies and interests are involved. The *Cannon* Court briefly considered this factor and recognized that since the Civil War, primarily the federal courts have been concerned with discrimination. Further, Title IX prohibits discrimination in federally funded educational institutions, and, as the *Cannon* Court noted, expenditure of federal funds also concerns the federal courts. No traditional state concerns are involved in examination of Title IX, so the fourth *Cort* factor supports implication of a private right of action under the statutory scheme that prohibits sex-based discrimination. Accordingly, the *Cannon* Court concluded that application of all four *Cort* factors consistently supports a private right of action under Title IX.

The Validity of the *Cort* v. *Ash* Factors

The decision in *Cort* v. *Ash* attempted to articulate comprehensive standards for inferring a civil cause of action from a statute. Justice Powell’s dissent questioned the validity of the *Cort* v. *Ash* criteria and clearly stated his reluctance to imply a private right of action in all but the most compelling situations. The dissent charged that the majority’s analysis encourages Congress to avoid controversial issues and courts to assume legislative powers. Justice Powell urged that *Cort* be overruled or at least critically re-examined, stating that *Cort* fosters an unconstitutional violation of the separation of powers principle of limited jurisdiction.

On the contrary, application of the *Cort* factors does not violate constitutional principles. The separation of powers principle can be logically understood as fostering a division of labor according to expertise. While article III of the constitution concededly grants Congress the power to determine the jurisdiction of the lower federal courts, and as a corollary, empowers Congress to determine the scope and extent of statutory remedies, when the Congress fails to specify the availability of a private right of action, the role

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68. 441 U.S. at 708-09.
69. *Id.*
70. *Id.* at 709.
71. *Id.* at 730 (Powell, J., dissenting).
72. *Id.* at 749.
73. *Id.* at 742-44.
74. *Id.* at 730-31.
75. U.S. CONST. art. III, § 1, cl. 1, states that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
of the judiciary becomes crucial. The judicial role is traditionally distinct from the legislative role; the judiciary should enforce but not enact. To enforce Title IX, the Cannon Court determined that a private right of action was necessary and consistent with the intent of Congress. This determination is best characterized as the Court's acceptance of a congressional delegation of power to effectuate the legislature's intent.

The Cannon Court recognized that the four Cort factors are guidelines and not definitive requirements for implication of a private right of action. The focus of Justice Powell's dissent is not on the majority's use of the Cort factors as guidelines but rather, whether Cort should continue to serve as a framework for the implication of a private right of action.

Examining the development of the four factors set out in Cort, it becomes obvious that the Cort decision did not establish a new test. On the contrary, the clear trend in the years before the Cort decision was toward implication of a private right of action. The Cort decision represents a culmination of years of judicial logic and analysis that came to favor a private right of action under certain defined circumstances. The demand of the Cort analysis to consider all "relevant" criteria has contributed to judicial caution regarding the implication doctrine. More recent decisions have tended to be more restrictive regarding implication of private actions not expressed in the legislative scheme. In this sense, the Cort factors restrain a court's ten-

77. There is a historical and continuing controversy over the role of the judiciary in implying a private right of action under a statute. One side of the controversy, in agreement with Justice Powell's dissent, characterizes implication of any remedy not expressly authorized by Congress as unwarranted. See generally W. Statsky, Legislative Analysis (1975); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 534 (1947).

On the other hand, it has been strenuously urged that courts have authority to imply a private right of action. See generally Seng, Private Rights of Action, 27 DePaul L. Rev. 1117 (1978); Karst, Federal Remedies, 54 J. Urb. L. 1025 (1977); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

78. 441 U.S. at 717.
79. See notes 98-103 and accompanying text supra.
80. 441 U.S. at 688-89.
81. Id. at 742 (Powell, J., dissenting).
83. See notes 38-42 and accompanying text supra.
85. In the same term that Cannon was decided, the Supreme Court was called upon to consider the existence of a private right of action under other statutes. See Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (private right of action denied under Freedom of Information Act, 5 U.S.C. §§ 552-553 (1976) because it is exclusively a disclosure statute and does not mandate suit
dency to imply a private right of action in inappropriate situations. After each Cort factor is carefully analyzed, it is clear that they help to check undisciplined judicial implication of civil actions. The first factor bars everyone from the federal courts except the direct beneficiaries of the statute. The second factor demands that courts refuse to infer a right of action if Congress expressly intended to deny that right. The third factor demands that the private right of action be consistent with the legislative scheme. Finally, unless the right in question is of federal concern, the fourth factor will ensure that the claim is relegated to the states.

Abandonment of the logical structure of Cort could foster disorganized approaches in subsequent litigation, inconsistent decisions, and excessive use of the implication doctrine. For these reasons, the Cort factors should continue to provide a framework for judicial implication of a private right of action.

The Shortcomings of Respondents' Arguments

The majority also considered three of the respondent-universities' contentions. First, the Cannon Court addressed the universities' principal fear that their admission decisions would now be subject to judicial interference. The universities argued that disappointed applicants, with access to the federal courts, could threaten the university's freedom to choose its own student body. As a result, the universities asserted that the courts will be in effect selecting the school's student body. The Court answered that Congress had already addressed the schools' fears and had resolved the argument as speculative. Referring to the case-history of Title VI after a private for nondisclosure. Cort v. Ash was cited as authority for denying private right of action under criminal statute, Trade Secrets Act, 18 U.S.C. § 1905 (1976); Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979) (the claimant under the Rehabilitation Act was denied relief although the express issue of a private right of action under the Rehabilitation Act was not decided) (see notes 113-114 and accompanying text infra); Touche Ross & Co. v. Reddington, 99 S. Ct. 2479 (1979) (failure of broker-dealers to keep reports of financial conditions and to file with SEC as required by § 17(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1976) does not create a private right of action in favor of anyone); Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979) (private right of action implied under § 215 of Investment Advisors Act of 1940, 15 U.S.C. § 80b(1) (1976) for relief associated with contract rescission, injunctive relief, and restitution, but § 206 of the Act is a proscriptive section not conferring a private right of action). These decisions illustrate the Court's movement away from the tendency to imply private rights of action toward a careful consideration of all "relevant" criteria surrounding the statute. As a result, private rights of action have been implied by the Court more infrequently.

86. 441 U.S. at 709.
88. Id. at 15.
89. 441 U.S. at 709. See 117 CONG. REC. H39254 (1971) (remarks of Rep. Wyman) (urging rejection of Title IX proposal because it "unreasonably invades the policy prerogatives of these institutions").
right of action had been applied under that statute, the Court noted that the fears of the schools had not materialized; there had been no undue judicial interference in academic decisions under Title VI.\textsuperscript{90} The schools, therefore, had no reason to fear such interference under Title IX. In any event, this is not a legal but, rather, a policy argument which, in the Court’s opinion, Congress had previously resolved.\textsuperscript{91} The Court briefly acknowledged two additional contentions, both based on the premise that Title IX should be interpreted similarly to Title VI. The respondents first asserted that because Congress created express private remedies in other titles of the Civil Rights Act of 1964, and not in Title VI,\textsuperscript{92} implication of a private right of action under Title VI is unwarranted. Therefore, the respondents reasoned by extension that a Title IX right of action should not be implied. The second assertion, closely related to the first, was that certain passages found in Title VI’s legislative history\textsuperscript{93} foreclose a private right of action under Title VI and analogously under Title IX. The Cannon Court responded that Congress’ understanding of Title VI at the time Title IX was enacted was controlling.\textsuperscript{94} At that time, Congress understood Title VI to be enforceable by a private right of action.\textsuperscript{95} In any event, the Court denied that the mere existence of an express administrative remedy is a sufficient reason to refuse to imply an alternative and more appropriate remedy.\textsuperscript{96}

\textbf{IMPACT}

\textit{The Appropriate Judicial Role}

The creation of a private right of action under Title IX alters the legal options of a person aggrieved by a violation of the statute.\textsuperscript{97} Under Cannon, a private litigant may now enforce Title IX in the federal courts; however, Cannon is also an example of expanding judicial responsibility in the interpretation of statutes. The immediate origins of the judiciary’s shift from emphasis on traditional development of case law to a more activist role may be found in the court’s activity in the school desegregation cases\textsuperscript{98} or in the

\begin{itemize}
\item \textsuperscript{90} 441 U.S. at 709-10. For commentary on the effect of Title VI enforcement on the educational institutions, see Slippen, \textit{Administrative Enforcement of Civil Rights in Public Education: Title VI, HEW, and the Civil Rights Reviewing Authority}, 21 WAYNE L. REV. 931, 941-42 (1975).
\item \textsuperscript{91} 441 U.S. at 710 n.44.
\item \textsuperscript{94} 441 U.S. at 711.
\item \textsuperscript{95} Id. at 710-16. See note 56 supra.
\item \textsuperscript{96} Id. at 711.
\item \textsuperscript{97} See note 115 and accompanying text infra.
\item \textsuperscript{98} \textit{D. Horowitz, The Courts and Social Policy} 10 (1977).
\end{itemize}
loosening of jurisdictional and standing requirements that render judicial remedies a more readily available option.\(^{99}\) Regardless of the impetus for this shift in emphasis, the judiciary’s activity is based on its attempt to resolve a problem unsatisfactorily or incompletely addressed by another branch of government.\(^{100}\)

A court may be accused of judicial law-making\(^{101}\) when it implies a private right of action from a statute. But the theory of implying a right of action from a legislative scheme is founded on the court’s recognition of its duty to effectuate the purposes of the statute.\(^{102}\) Congress enacts legislation to accomplish particular goals and the courts apply the statute on a case-by-case basis in order to effectuate the legislative purpose. In most situations, Congress creates express and exclusive remedies, and judicial analysis of congressional purpose becomes unnecessary. When the express remedy is not also an exclusive remedy, however, the court may find a civil remedy implied in the legislative scheme. In this instance, Congress has effectively delegated to the federal courts the ability to effectuate congressional purpose by providing the appropriate relief. Through their posture of “remedial creativity,”\(^{103}\) the courts accept this congressionally delegated responsibility.

In the instant case, Justice Powell argued that provision of a private right of action is a legislative function, and the courts should not assume that role except in the face of very persuasive evidence of affirmative congressional intent.\(^{104}\) Even under this narrow view of the judicial role, the Cannon Court’s implication of a private right of action under Title IX was appropriate. The analysis of congressional intent employed by the Cannon Court was inductive: (a) the legislative history reveals that Congress patterned Title IX after Title VI; (b) Title VI had been interpreted as providing an implied private right of action; (c) Congress was probably aware of this interpretation; thus (d) Congress intended Title IX to be similarly interpreted.

A statute incapable of furthering its legislative purpose may need to be fortified through its interpretation. A court may find that implication of a private right of action is required to achieve the legislative goals.\(^{105}\) Title IX is such a statute. The express remedy of fund termination did not effec-

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99. Id.
100. Id. at 6.
101. 441 U.S. at 749 (Powell, J., dissenting).
104. 441 U.S. at 742-43.
105. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). Tenants complained of the landlord’s discrimination against nonwhites and the tenants’ loss of the enjoyment of an integrated community. Although the tenants were not held to be “persons aggrieved” under the
tively discourage sex discrimination in educational institutions.\footnote{106} As a result of Cannon, the private claimant has an implied right of action under Title IX. Now the individual may petition for the remedy that is directly responsive to the act of discrimination; the person who complains of discrimination in admission policies may attain the specific goal of admission to the educational institution. To maintain that the termination of federal funds is the exclusive remedy is to offer an incongruous response to this act of discrimination and effectively frustrate congressional purpose.

**Effect on Other Statutes**

The implication of a private right of action under Title IX may serve to clarify the existence of a private right of action under filial statutes.\footnote{107} Although the Cannon opinion relied heavily on judicial and legislative interpretations of Title VI\footnote{108} as a model for Title IX, the Court has never explicitly declared that a private right of action exists under Title VI.\footnote{109} The implication of a private right of action in Title IX reinforces the interpretation that a private right of action exists under Title VI.

The Rehabilitation Act\footnote{110} was not mentioned by the Cannon Court because it was enacted after Title IX and was, therefore, irrelevant to the Title IX framers’ intentions to create a private right of action. The Rehabilitation

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\footnote{106. See note 35 supra.}

\footnote{107. These filial statutes are Title VI and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973). The mutually dependent relationship of the Rehabilitation Act, Title VI, and Title IX is demonstrated in NAACP v. Wilmington Medical Center, 599 F.2d 1247 (3d Cir. 1979) which cited Cannon. The NAACP court demonstrated that an implied right of action was available under Title VI and the Rehabilitation Act for complaints arising out of a proposed relocation of a health care facility.}

\footnote{108. 441 U.S. 694-98.}

\footnote{109. See notes 56-58 and accompanying text supra.}

\footnote{110. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973) [hereinafter cited as Rehabilitation Act] prohibits discrimination in federally assisted programs on the basis of a potential participant’s handicap. The legislative history reveals that § 504 was patterned after Title VI and Title IX, both of which were considered to “permit a judicial remedy through a private action.” S. REP. No. 93-1297, 93d Cong., 2d Sess. 40 (1974), reprinted in [1974] U.S. CODE CONG. & ADMIN. NEWS 6390-91.}

The United States Supreme Court did not explicitly decide whether an implied right of action exists under the Rehabilitation Act in the recent case, Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979). See notes 113-14 and accompanying text infra.

In Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), the Seventh Circuit held that the affirmative rights established by § 504 of the Rehabilitation Act could be vindicated by an implied right of action at a time when no administrative remedy was operative. Lloyd language was limited by Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979) which read Lloyd to grant a private right of action under the Rehabilitation Act if the “proper” defendants are in-
Act was, however, mentioned in the Cannon briefs\textsuperscript{111} as support for a Title IX private right of action because the Rehabilitation Act was patterned after both Title VI and Title IX. It is significant, therefore, that federal courts have interpreted the Rehabilitation Act as guaranteeing a private right of action to its protected class.\textsuperscript{112} Subsequent to Cannon, the Supreme Court, in Southeastern Community College \textit{v. Davis},\textsuperscript{113} denied relief to the individual claimant and found it unnecessary to address explicitly the question of the existence of a private right of action under § 504 of the Rehabilitation Act.\textsuperscript{114} Although Cannon lends support to the implication of a private right of action under Title VI and under the Rehabilitation Act, the Court has never definitively implied private rights of action under these analogous statutes.

The Cannon Court not only implied a private right of action under Title IX but it also guaranteed a right of action for the individual Title IX claimant, as involved. Private right of action was refused because the federal agency defendant was not a "program or activity receiving federal financial assistance" under the Rehabilitation Act. Furthermore, a private right of action has been implied in cases heard after the § 504 regulations (45 C.F.R. § 84.1-84.47 (1978)) were in effect. The basis of the decisions are that individual rights described under the Rehabilitation Act are not condemned to an inefficient and inadequate complaint procedure. See Whittaker \textit{v. Board of Higher Educ.}, 461 F. Supp. 99 (E.D.N.Y. 1978) (alcoholic teacher who had been denied tenure contended that alcoholism was a handicap protected under Rehabilitation Act); Campbell \textit{v. Kruse}, 434 U.S. 808 (1977) (suit remanded to district court to decide private Rehabilitation Act claim); Leary \textit{v. Crapsey}, 566 F.2d 863 (2d Cir. 1977) (private right of action granted for severely handicapped persons who complained that the mass transportation system was inaccessible and in violation of federal regulations).

Every circuit court that considered the existence of a private right of action under the Rehabilitation Act decided that a private action should be implied. See, \textit{e.g.}, Davis \textit{v. Southeastern Community College}, 574 F.2d 1158 (4th Cir. 1978), \textit{rev'd on other grounds}, 99 S. Ct. 2361 (1979) (hearing-impaired licensed practical nurse able to pursue a private right of action for admission into nursing program); Leary \textit{v. Crapsey}, 566 F.2d 863 (2d Cir. 1977); United Handicapped Fed'n \textit{v. Andre}, 558 F.2d 413 (8th Cir. 1977) (plaintiffs granted relief for defendant's failure to make federally funded urban mass transit system accessible to mobility disabled persons); Kammeire \textit{v. Nyquist}, 553 F.2d 296 (2d Cir. 1977) (one-eyed student granted private right of action but denied relief for exclusion from contact sports).

Other cases have recognized a private right of action under § 504 of the Rehabilitation Act. Doe \textit{v. Colautti}, 454 F. Supp. 621 (E.D. Pa. 1978), \textit{aff'd}, 592 F.2d 704 (3d Cir. 1979) (court recognized existence of private right of action for a patient at private psychiatric hospital but noted the failure of plaintiff to exhaust administrative remedies); Vanko \textit{v. Finley}, 440 F. Supp. 656 (N.D. Ohio 1977) (court recognized private right of action in suit alleging defendant's failure to provide access to mass transportation systems for the mobility disabled); Drennon \textit{v. Philadelphia Gen. Hosp.}, 428 F. Supp. 809 (E.D. Pa. 1977) (probable cause of action was noted but the court invoked the doctrine of primary jurisdiction in delaying suit until United States Department of Labor considered plaintiff's claims); Crawford \textit{v. University of N.C.}, 440 F. Supp. 1047 (M. D. N.C. 1977) (on the condition that plaintiff initiate complaint with HEW, preliminary injunction granted to deaf graduate student who alleged that university policy of denying interpreter services violated the Rehabilitation Act).

\textsuperscript{111} Petitioner's Brief at 6-7; Reply Brief for Petitioner at 3; Federal Respondents' Brief at 12, 13, 19, 35, 36, 38, 39, 42, 43.

\textsuperscript{112} See note 110 supra.

\textsuperscript{113} 99 S. Ct. at 2361 (1979).

\textsuperscript{114} Id. at 2366 n.5.
distinguished from a large group of claimants. Inferring a private civil action in a class action is generally considered to be a less severe judicial action than implying a private right of action for an individual claimant.115 Cannon was initiated by a single litigant. It is clear, therefore, that a Title IX private action is not limited to a class action suit. In contrast, earlier decisions construing Title VI and the Rehabilitation Act had been interpreted as allowing a private right of action only when a large number of complainants are involved, as in a class action suit.116 Cannon renders a distinction between a large group of plaintiffs and the individual plaintiff unimportant under these filial statutes as well.

Although the Cannon decision interpreting Title IX suggests that a similar approach would be adopted in interpreting Title VI and the Rehabilitation Act, the Cannon decision directly applies only to Title IX. The Supreme Court's post-Cannon refusal to consider the existence of a Rehabilitation Act private right of action, in Southeastern Community College v. Davis,117 indicates the continued uncertainty of private rights of action under statutes analogous to Title IX.

Social and Educational Impact

The implication of a private right of action in Cannon is socially significant because the Court has granted the individual litigant an alternative to the apparently ineffective administrative enforcement scheme.118 The right of the individual complainant directly to approach the federal courts with charges of sex discrimination in educational institutions is a significant social gain.

Educational institutions are powerful forces in developing skills and attitudes necessary to succeed in professions and employment.119 Sex-based

115. See Cannon v. University of Chicago, 558 F.2d 1063, 1074 n.16 (7th Cir. 1976), where the court said, "We note, but do not decide, that a suit brought by a large group to enforce the national interest against sexual discrimination may be possible under Title IX. Certainly, it was permitted by the Supreme Court under Title VI in Lau v. Nichols." Id.


118. See generally Note, Sex Discrimination—The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make the Title IX Regulations More Effective, 49 TEMP. L.Q. 207 (1975). This commentator discusses the regulations and the delay that is the primary weakness of the enforcement scheme. See note 35 supra.


The Supreme Court noted the value of education at all levels in Brown v. Board of Educ., 347, U.S. 483, 493 (1954), where it stated that "[education] . . . is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Id. at 493.
admission restrictions to professional or technical schools inhibit human potential and prevent women from achieving education and economic equality. The present inequality can be illustrated by comparing the wages of men and women within various occupations. These statistics demonstrate that men and women are most economically equal in the professional and technical fields. Because these fields offer women economic equality with men, it is critical that women be evaluated for admission to professional and technical schools on nonsex-based criteria.

Medical school admission committees have been particularly criticized for prejudice against women applicants. For example, testimony before a special congressional subcommittee charged that medical school admission committees are biased against women. Prior to the implication of a Title IX private right of action, these charges of discrimination could only be filed with HEW and an investigation may have resulted. Professional schools were unable in the past to confront the Title IX complainants. At the same time, the sex discrimination complainants were confined to an administrative enforcement scheme that was unresponsive to the individual complainant. Consequently, without a Title IX private right of action, educational institutions were unable to respond effectively to discrimination charges, and

120. See Women Employed, Closing the Wage Gap: A National Imperative (1979). The "wage gap" is most narrowed in professional and technical fields where women's average salary is 71% of those of the men's in those fields. See also U.S. DEPT. OF LABOR—STATUS OF AVERAGE WEEKLY EARNINGS BY SEX, 1978:

<table>
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<tr>
<th>Occupation</th>
<th>1978 Average Weekly Earnings</th>
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<td>Sales Workers</td>
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<td>$129</td>
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<tr>
<td>Blue Collar Workers</td>
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<tr>
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<td>212</td>
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<tr>
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<td>126</td>
</tr>
<tr>
<td>Professional &amp; Technical Workers</td>
<td>344</td>
<td>246</td>
</tr>
</tbody>
</table>


122. See Discrimination Against Women: Hearings on § 805 of H.R. 16098 Before a Special Subcomm. on Education of the Comm. on Education and Labor, 91st Cong., 2d Sess. 510 (1970). Francis S. Norris, M.D. testified that although women applicants to medical school have increased in the past 36 years, the proportion of women accepted into medical school has fallen. She attributed this trend to discriminating medical school admission policies. Id. at 510.

123. See note 29 supra.

124. Id.
the individuals complaining of sex discrimination were not granted the desired relief of admission to the institution.

Some commentators have argued that the implication of a private right of action will possibly inhibit the academic freedom of educational institutions. Private education is especially fearful of government mandates. In Cannon, Justice Powell warned that the implication of a private right of action under Title IX would disturb the autonomy of the academic community and result in inevitable harm to society.

It is possible, however, that the vitality of Title IX, fortified by the vigor of private enforcement, will free complying educational institutions from the suspicion of discrimination. In any event, those educational institutions with discriminatory policies should not be permitted to cloak them in their concern over entrenchment of academic freedom. Admittedly, the Cannon decision will at times subject nondiscriminatory institutions to vexatious and expensive suits. On the other hand, it has been contended recently that complex regulations and workable enforcement procedures are equally, if not more, vexatious and expensive. The Court had two choices regarding Title IX's future: either imply a private right of action or demand enforcement of the Title IX regulations with unprecedented vigor and commitment. Either alternative would mean the expense of adjustment and compliance for the offending institutions. Regardless of the arena, complainants deserve protection from arbitrary exclusion and discrimination.

**Impact on HEW**

Congress delegated the responsibility for enforcing Title IX to HEW. The Cannon Court's implication of a Title IX private right of action will re-

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126. See Kroll, Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom, 13 URB. L. ANN. 107 (1977); Note, Title IX Sex Discrimination Regulations: Impact on Private Education, 65 KY. L.J. 656 (1977). It is possible that private universities can selectively accept federal financial assistance in lieu of total compliance with Title IX. The Title IX prohibitions are aimed at specific programs within an institution that fails to comply. See note 3 supra for text of § 1682.
127. 441 U.S. at 747-48 (Powell, J., dissenting).
128. See Complaint, Sears, Roebuck & Co. v. Attorney General of the United States, No. 79-244 (filed January 24, 1979 D.D.C.). The complaint alleged that conflicting compliance requirements resulted in difficulty with enforcement and confusion that caused discrimination against all employees. Id. at 19. Sears sought a court order that, inter alia, would require the defendants to issue clear, uniform guidelines instructing employers how to resolve conflicts in the regulations. Id. at 30-31. The district court held, 19 E.P.D. 9164A, 19 F.E.P. Cas. 916 (D.D.C. 1979), that the suit failed to present a case or controversy under art. III of the Constitution and that the plaintiff failed to establish a causal connection between government policies and difficulties outlined in the complaint.
129. 45 C.F.R. § 86 (1976).
lieve HEW of the entire burden of enforcement. The delays involved in
HEW's handling of Title IX complaints, coupled with the incongruence of a
fund termination remedy for an individual seeking admission to medical
school, prompted Ms. Cannon to bring suit. 130 Because HEW's perform-
ance with regard to Title IX complaints was an important element pre-
cipitating the Cannon decision, it is necessary to examine HEW's traditional
treatment of Title IX complaints in order to analyze the impact that the
Cannon decision will have on HEW.

Title IX's prohibition of sex discrimination in education is enforced by
HEW. Sex discrimination, although objectionable, is often considered less
serious than racial discrimination. 131 This priority may have hindered vig-
orous Title IX enforcement by the agency which is also responsible for en-
forcement of Title VI's protections against race discrimination.

Almost two decades ago, integration of southern schools was accomplished
largely through HEW's enthusiasm and commitment to Title VI enforce-
ment. 132 In contrast, since its enactment, Title IX's administrative en-
forcement proceedings have been plagued by delay and inefficiency. 133
Finalized Title IX regulations were not issued until three years after the
effective date of Title IX. 134 The regulations have been criticized for their
inherent unresponsiveness to individual complaints, 135 for compliance re-

130. 441 U.S. at 681 n.2.
131. Some commentators are in agreement. See Buek and Orleans, Sex Discrimination—A
Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972, 6
CONN. L. REV. 1 (1973), where it was stated: "Legislatures and courts at all levels, reflecting
views held in many parts of American society, perceive sex discrimination as less onerous or less
invidious than discrimination based on race, color, or national origin." Id. at 2. See Johnston &
(1971), where the author examines a variety of cases and demonstrates discrimination against
women in judicial reasoning.

Judicial opinions also reveal this attitude that racial discrimination is more odious than sex
discrimination. In Bakke v. Regents of the Univ. of Calif., 438 U.S. 265 (1978), for example, the
Court said: "[T]he perception of racial classifications as inherently odious stems from a lengthy
and tragic history that gender-based classifications do not share. In sum, the Court has never
viewed such classification as inherently suspect or as comparable to racial or ethnic classifications
for the purpose of equal-protection analysis." Id. at 303. See Alexander v. Yale Univ., 459
F. Supp. 1, 5 (D. Conn. 1977) (the court noted that the discrepancy between enforcement
rights of a Title IX victim of sex discrimination and a Title VI victim of race discrimination make
it difficult to follow the lower court Cannon decisions which had denied a private right of
action). It would seem, however, that the inequality between the sexes predates any prejudice
based on race or nationality and is all the more tragic because it cuts across all race groups and
minimizes the potential of half of the population.

132. Between 1966 and 1968, HEW cut off funds to schools in Alabama, Arkansas, Georgia,
Louisiana, Mississippi, South Carolina, and Virginia. See United States Comm'n on Civil Rights,
133. See note 35 supra.

134. Regulations were effective 7-21-75. See 45 C.F.R. § 86 (1978).
135. See Case Developments—An Analysis of H.E.W. Regulations Concerning Sex Discrimina-
tion in Education, 3 WOMEN'S RIGHTS L. REP. 69, 70, n.45 (1976) [hereinafter Case Develop-
ments]. The article discusses the ambiguities and weaknesses of HEW's Title IX regulations.
views that rely heavily on the educational institutions’ initiative and voluntariness, and for the slow pace with which complaints are resolved. These delayed guidelines were the sole guidance given to educational institutions regarding their responsibilities under Title IX. Prior to Cannon, Title IX enforcement depended on these belated regulations which have not been effectively enforced.

While HEW has recognized the inadequacy of its enforcement of Title IX, it initially opposed implication of a private right of action as Cannon rose through lower courts. When Cannon reached the Supreme Court, however, HEW took the position that a private right of action should be implied. The best explanation for HEW’s changed position is inter-departmental confusion. It is this same confusion which has crippled the effective enforcement of Title IX. HEW should support a private right of action because that right palliates HEW’s own inadequacy. To deny that a private right of action under Title IX is needed, HEW must be able to assure that complaints could be handled effectively within the administrative enforcement scheme. Past performance and increasing complaint volume make this assurance improbable.

The Cannon decision is consistent with HEW’s current position that Title IX enforcement procedures must be supplemented to effectuate Title IX. Private litigation may act as a pressure valve to relieve HEW’s ineffective activity with regard to Title IX complaints.

The enforcement procedure is severely criticized as unresponsive to individual complaints. See note 33 supra for discussion of the areas of controversy surrounding Title IX regulations.

136. See Case Developments, supra note 135, at 70. See also 45 C.F.R. § 86.3 (1978).
138. See note 35 supra (HEW statistics).
139. See, e.g., Adams v. Mathews, 536 F.2d 417 (D.C. Cir. 1976) (per curiam), where the Women’s Equity Action League was allowed to intervene as a matter of right. Suit was brought to compel HEW to take action to end racial discrimination in employment and schools in certain southern communities. HEW said that the court order to take more prompt action to end racial discrimination under Title VI would make it impossible to devote any HEW resources to Title IX enforcement.
140. See the lower court Cannon decisions: 406 F. Supp. 1257, 1260 (N.D. Ill. 1976) and 559 F.2d 1063, 1080 (7th Cir. 1976).
141. 441 U.S. 687-88 n.8. See generally Federal Respondents’ Brief.
142. See Federal Respondents’ Brief at 6 n.9, where HEW noted that “the failure of the federal respondents to endorse this position earlier in this litigation is attributable to communication lapses between national and regional HEW offices, not to any eleventh hour policy shift.” Id.
143. See P.E.E.R., note 35 supra, at A-17. In 1973, 46 complaints were filed while in 1976, 262 complaints were filed with HEW, OCR, Elementary and Secondary Education Division. See also Federal Respondents’ Brief at 49-50, where it is stated that Title IX applies to federally funded education programs at approximately 97,000 institutions and affects 55 million participants in these programs. See also Amicus Brief at 9, Ludwig v. Board of Educ., 601 F.2d 589 (6th Cir. 1979) (where a 37% increase in complaints during 1977 over the same period in 1976 was noted).
144. See note 35 supra for statistics regarding number of complaints investigated by HEW.
The recent formation of the Department of Education was based on just this "need for improvement in the management and coordination of Federal education programs." This newly formed department will probably assume the responsibility for Title IX enforcement. The inevitable temporary confusion and delay that will result from the transfer of departments may have some effect on Title IX administrative enforcement, but the effect will have less impact on Title IX enforcement because HEW now shares enforcement power with the individual victim of discrimination.

HEW should welcome the Cannon decision as an opportunity to devote more careful consideration to the grievances of those complainants who elect to pursue the administrative remedy. Moreover, the administrative enforcement scheme should not be abandoned. Rather, complainants should be afforded a meaningful alternative to the administrative procedure when HEW's relief is ineffective or untimely.

CONCLUSION

The impact of the Cannon decision reaches beyond the scope of Title IX. Implication of a private right of action raises questions regarding the proper exercise of the judicial power. The fundamental inquiry is whether the policies and purposes of the legislature are furthered by the implied remedy. The standards elucidated in Cort v. Ash guided the Cannon Court in determining whether a Title IX private right of action should be implied. Cannon not only implied a private right of action for Title IX complainants but may have also clarified the existence of a private right of action under Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.

Cannon recognizes the importance of the individual's role in charging sex discrimination by allowing the Title IX complainant to be heard in federal court. The decision acknowledges the effectiveness of a "back-to-basics" approach to securing equality for everyone by reaffirming the individual lawsuit as the classic vehicle for social progress. As a corollary, the Cannon decision embodies a healthy realization of the limitations of an administrative procedure as a remedy. HEW offered complainants only an empty promise and offending institutions a fiscal threat. It is the individual private litigant who offers the real promise for progress towards sex-based equality.

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146. Id.
147. The private right of action and administrative enforcement scheme can and should complement each other. See, e.g., Terry v. Methodist Hosp., Civ. No. 76-373 (N.D. Ind. 1977), where a federally financed hospital relocation plan was challenged. After the Terry complaint was filed, HEW reviewed the hospital situation in the Gary area and asked the court to stay proceedings until the investigation could be completed. Subsequently, a settlement was reached.