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

Congress enacted Title IX of the Education Amendments of 1972[1] to prevent sex discrimination in federally funded education programs.[2] In ruling on Title IX,[3] lower federal courts have had to determine whether it affords a private cause of action for alleged violations[4] in addition to the disciplinary procedure explicitly established under the Act.[5] Recently, in *Cannon v. University of Chi-*

1. Emergency School Aid Act, §§ 901-907, 20 U.S.C. §§ 1681-1686 (1976).

2. Section 901(a) provides: "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 funds. . . ." 20 U.S.C. § 1681 (1976).

3. For cases construing Title IX, see Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976) (application for employment as security guard), *disapproved in* Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, Harris v. Islesboro School Comm., 444 U.S. 972 (1979) (concerning maternity leave policy in public schools); Trent v. Perritt, 391 F. Supp. 171 (S.D. Miss. 1975) (school regulation prohibiting male students from wearing long hair styles); McCarthy v. Burkholder, 15 E.P.D. § 7926 (D. Kan. 1977), *modified on reconsideration*, 448 F. Supp. 41 (D. Kan. 1978) (maternity leave practices).

4. *See* Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976). In ruling on Title IX, the court held that an implied right of action existed for vindicating violations of statutes prohibiting sex discrimination under any federally funded educational program. *Id.* at 780.

5. The former Department of Health, Education, and Welfare (HEW) established a complaint procedure involving the following:

> 1) The person subjected to discrimination files a complaint with HEW within 180 days of the alleged discrimination, a period which may be extended by HEW,
> 2) HEW is to promptly investigate, and must attempt to resolve the matter by informal means,
> 3) The complainant is notified if the investigation does not warrant action,
> 4) If the matter proceeds to hearing the complainant shall be advised of the time and place of the hearing, and may petition for participation in the hearing as amicus.

45 C.F.R. §§ 80.7 to 81.23 (1979). Once a plaintiff alleges a valid claim, § 902 provides:

> 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

cago,[6] the Supreme Court confronted this issue for the first time,[7] holding in favor of a private cause of action under Title IX.[8]

The plaintiff, Cannon, applied to the University of Chicago and Northwestern University Medical Schools.[9] After being rejected from both,[10] she submitted a complaint to the former Department of

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finding on the record, after opportunity for hearing, for failure to comply with such requirement . . . or (2) by any other means authorized by law.

20 U.S.C. § 1682 (1976).

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

7. *Id.* Plaintiffs alleging sex discrimination may also bring an action under § 1983 which gives a private cause of action to any individual who has been deprived of a Constitutional right, privilege, or immunity by any person "under *color of any statute, ordinance, regulation, custom or usage of any State*." (Emphasis added.) 42 U.S.C. § 1983 (1976).

A plaintiff is severely limited by this provision, however, because of the difficulty involved in proving "state action" on the part of the accused violator. The Seventh Circuit, when discussing *Cannon*, held "there is no indication that the state exercises any control over the medical school admissions policies" in finding against a § 1983 violation. Cannon v. University of Chicago, 559 F.2d 1063, 1070 (7th Cir. 1978). The court went on to say, "federal aid and assistance is insufficient for jurisdiction under § 1983 unless it can be shown that the state has affirmatively supported the conduct challenged here." *Id.* at 1071.

This concern with affirmative support by the state and the corresponding difficulty in proving "state action" arose in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The *Moose Lodge* Court outlined a test for determination of state action; it ruled on the basis of whether "the State 'significantly involved itself with invidious discriminations,'" citing Reitman v. Mulkey, 387 U.S. 369, 380 (1967). 407 U.S. at 173.

The affirmative support test makes bringing § 1983 actions in cases of discrimination by educational institutions extremely difficult. The receipt of state funds will not normally affect the private nature of the institution without some additional form of state control. Comment, *Implication of a Private Right of Action under Title IX of the Education Amendments of 1972*, 73 NW. U. L. REV. 772, 773 n.10 (1978).

8. 441 U.S. at 677.

9. Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *modified on rehearing*, 559 F.2d 1077 (7th Cir. 1976).

10. 559 F.2d at 1067. Statistics for the 1975 entering class of the University of Chicago (the statistics for Northwestern being very similar) indicate that admittance was extremely competitive: 5,427 persons applied for 104 positions; 1,173 were women while 4,154 were men. Of the 104 admitted, 19 were female and 85 were male. Over a recent four year period, 18.1% of the applicants to the University of Chicago Medical School have been female; over the same period, 18.3% of the entering class have been female. *Id.*

Both medical schools receive federal aid and both have policies against admitting applicants who are more than 30 years old unless they have advanced degrees. Brief for Petitioner at 3, Cannon v. University of Chicago, 441 U.S. 677 (1979). Petitioner was 39 years old when she applied. Because the incidence of interrupted higher education is higher among women than men, she claimed that the age and advanced degree criteria operate to exclude women from consideration. *Id.* at 5 n.1.

Health, Education and Welfare (HEW),[11] alleging discriminatory conduct by both schools in violation of Title IX.[12] When HEW failed to effectively act on her complaint,[13] Cannon filed suit in federal district court.[14] Neither the district court[15] nor the Seventh Circuit[16] found that Title IX provided a private cause of action. The United States Supreme Court reversed,[17] declaring that the plaintiff had asserted a viable claim.[18] Using the four-pronged test developed in *Cort v. Ash*,[19] the *Cannon* Court found there was an implied cause

11. Petitioner filed a complaint with the local office of HEW in April 1975, alleging, *inter alia*, violations of Title IX. *See* Brief for Petitioner, *supra* note 10, at 3.

12. *Id.*

13. In June 1976, HEW informed petitioner that the local stages of its investigation were completed but that its national headquarters planned to conduct a further "in-depth study of the issues raised" because those issues were "of first impression and national in scope." Appendix to Petition for Certiorari at A-35, Cannon v. University of Chicago, 441 U.S. 677 (1979).

14. Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976). Plaintiff alleges that she was "denied admission on the basis of her age, sex, and lack of an advanced degree." *Id.* at 1258. The plaintiff sought redress under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6 and 2000c-8, as amended by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976); the Public Health Service Act, formerly 42 U.S.C. § 295h-9, now 42 U.S.C. § 292d (1976); and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c) (Supp. III 1979).

15. 406 F. Supp. at 1259. The court held that the sole disciplinary procedure under Title IX allows HEW to enforce all claims. 406 F. Supp. at 1259. The court stated that although the statute provides for judicial review of agency action, it does not authorize a private right of action against a university. *Id.*

16. The Seventh Circuit ruled that the plaintiff improperly relied on Title VI cases in alleging a complaint under Title IX. Cannon v. University of Chicago, 559 F.2d 1063, 1072 (7th Cir. 1976). *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) *and* Bossier Parish School v. Lemon, 370 F.2d 847 (5th Cir. 1967) (desegregation cases involving attempts to deprive large groups of minorities of their rights to equal education opportunities). The *Cannon* court held that *Bossier* and *Lau* did not support plaintiff's argument for implying an individual private remedy, given the large numbers of students involved in those cases. 559 F.2d at 1072. On rehearing, the court conceded that private actions *may not* be restricted to cases involving large numbers of students, but once more concluded plaintiff did not have a private cause of action. *Id.* at 1083. The court based its modified ruling on several factors; its primary rationale was that under the *Cort v. Ash* analysis, implication of a private remedy would be inconsistent with the legislative purpose and intent, given the HEW enforcement procedure that already exists. *Id.* at 1081.

17. Cannon v. University of Chicago, 441 U.S. 677 (1979).

18. *Id.* at 717. The Court then remanded the case to determine whether Cannon was discriminated against. *Id.*

19. 422 U.S. 66 (1975).

of action under Title IX.[20] In addition, the Court recognized that Title IX paralleled Title VI of the Civil Rights Act of 1964 which prevents racial discrimination.[21] Since the majority determined there was an implied cause of action under Title VI,[22] it analogized an implied cause of action under Title IX.[23]

Since the early 1970's,[24] the Supreme Court has grown increasingly

20. 441 U.S. at 709.

21. *Id.* at 693-94.

22. *Id.*

23. *Id.* at 694-96.

24. The Court's newly developed restrictive approach to implied remedies corresponds to the ascent of the Burger Court. Prior to the Burger Court, the Warren Court, from 1959-1971, utilized the doctrine *ubi jus, ibi remedium*—where there is a right, there is a remedy—to create private remedies for violations of a broad spectrum of regulatory legislation. "[T]he *Warren* Court evinced an inclination to involve the judiciary in the formulation of remedies to effectuate . . . social policy." McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICKINSON L. REV. 167, 175-76 (1976).

The new judicial attitude towards implication, embodied in Cort v. Ash, 422 U.S. 66 (1975); Security Investment Protection Corp. v. Barbour, 421 U.S. 412 (1975); and National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), "reflects a philosophy of judicial restraint and reluctance to broaden the jurisdiction of the federal judiciary." McMahon & Rodos, *supra*, at 167-68.

The conflict between the contrasting philosophies of the two courts surfaced in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). This case represents the last of the Warren Court decisions. Although Burger was Chief Justice, neither Justice Powell nor Justice Rehnquist had been appointed by 1971. In *Bivens*, the plaintiff alleged that respondent narcotic agents made a warrantless entry and search in violation of the Fourth Amendment. *Id.* at 389. The Supreme Court held that plaintiff had stated a federal cause of action from which he could recover damages. *Id.* at 397. Justice Harlan's concurring opinion effectively illustrates the liberal attitude of the Warren Court. He maintained that the Court may authorize relief based on violations of federal statutes in order to effectuate the underlying congressional policy. *Id.* at 402. In addition, Justice Harlan's opinion demonstrates just how far the Court was willing to go in the way of judicial lawmaking. He said that the Court may contemplate the same range of policy considerations in determining whether a private remedy exists as Congress does when enacting the statute. *Id.* at 407. Justice Harlan's statement diametrically opposed Chief Justice Burger's dissent, which foreshadowed the restrictive approach the Burger Court later developed. The Chief Justice stated:

> I dissent from today's holding which judically creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—*as we do not*.

Id. at 411-12 (Burger, C.J., dissenting). (Emphasis added.)

conservative in finding private causes of action.[25] Rather than emphasizing the need to provide a remedy wherever possible, the Court

25. *See* note 26 *infra*. The implication doctrine can be traced to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall posed the question: "If [Marbury] has a right, and that right has been violated, do the laws of this country afford him a remedy?" *Id.* at 162. After *Marbury*, however, the issue of implied remedies remained unexplored until 1916. In that year, the Supreme Court decided Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). The *Rigsby* case involved the Federal Safety Appliance Act ch. 196, 27 Stat. 531, (1893) *as amended by* Act of March 2, 1903, ch. 976, 32 Stat. 943; Act of April 14, 1910, ch. 160, 36 Stat. 298. The *Rigsby* Court had to decide whether § 1 of the Act, which extended protection to all employees involved with trains and other vehicles engaged in interstate commerce, allowed recovery where the vehicle in question was not engaged in commerce at the time of injury. The Court held that the scope of the statute was broad enough to include all employees thus injured, regardless of the characterization as commerce. 241 U.S. at 39. The Court then introduced the following principle of implication: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied." *Id.* The Court concluded by adding that "in every case where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy. . . ." *Id.*

Several lower courts subsequently viewed the *Rigsby* test as the only requirement for implying a private right of action. *See, e.g.*, Howard v. Furst, 140 F. Supp. 507, 510 (S.D.N.Y. 1956), *aff'd*, 238 F.2d 790 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (criminal statute enacted for the benefit of class implies private right of action in class member absent evidence to contrary); Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946) (ignoring the requirements of a statute is "a wrongful act and a tort" permitting a private right of action absent clear legislative intent to the contrary).

In 1946, the Supreme Court affirmed this liberal approach in *Bell v. Hood*, wherein it held: "[W]here 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." 327 U.S.678, 684 (1946). In 1957, the Court once more upheld the notion that it is common "for federal courts to *fashion* federal law where federal rights are concerned." Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957). (Emphasis added.) In 1964, the Court in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), had to determine whether it should allow a private cause of action under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979). The Court stated it would grant the necessary relief in cases involving federally secured rights. 377 US. at 433.

In the 1960's, as a corollary to the idea of "fashioning federal law" to protect federal rights, the Supreme Court started examining the sufficiency of the enforcement procedure contained within the statute. If the procedure did not guarantee adequate protection for an injured party, the Court would rule in favor of a private cause of action. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 555 (1969) (Court concluded that if each citizen were required to rely solely on the Attorney General to enforce the Voting Rights Act, the goal of the Act—to prevent discriminatory practices in voter eligibility procedures—would not be achieved).

has begun to focus more on legislative intent.[26] In 1974, the Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*[27] held that an express statutory provision for one form of enforcement proceeding ordinarily implies that Congress did not intend another means of disciplinary action.[28] It was against this restrictive backdrop that the Court articulated the following four-pronged test, in *Cort v. Ash*,[29] for deciding whether to imply a private remedy from a given statute.[30]

First, the reviewing court must determine whether the plaintiff is a member of the class for whose special benefit Congress created the

26. In 1974, the Supreme Court consciously applied legislative intent to deny a private cause of action in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). The plaintiff Association, which represented railroad passengers, challenged the discontinuance by the Central of Georgia Railway Company of several passenger trains, claiming the reduction of passenger service violated the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-547 (1976 & Supp. III 1979) (Amtrak Act). The district court dismissed the action, finding that plaintiff lacked standing to sue since § 307 provided enforcement by the Attorney General. *See* 45 U.S.C. § 547(a) (1976) (the district court opinion was not reported). The appellate court reversed, holding the plaintiff could bring a private cause of action. Potomac Passenger Ass'n v. Chesapeake & O. Ry., 475 F.2d 325 (D.C. Cir. 1973). The Supreme Court reversed, holding that a private remedy "must be consistent with the evident legislative intent and . . . effectuation of the purposes intended to be served by the Act." 414 U.S. at 458. The significance of this decision is that by using the intent test, the Court began its evaluation of legislative history with a presumption against implication. *See* Note, *Implied Private Actions under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 W. & M. L. REV., 429, 438 (1976).

In Security Investor Corp. v. Barbour, 421 U.S. 412 (1975), the Supreme Court continued this restrictive approach. In ruling on whether the Security Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78lll (1976 & Supp. III 1979), created a private cause of action, the Court affirmed its holding in *National R.R. Passenger Corp.* 421 U.S. at 418. Cort v. Ash, 422 U.S. 66 (1975), followed with the development of an elaborate test for determining whether to imply a remedy. *See* note 31 *infra*. It is clear from these decisions the Burger Court intended to evaluate carefully whether a private right of action exists before granting a remedy, thereby respecting its role as an interpreter and not a creator of laws. *See* McMahon & Rodos, *supra* note 24, at 184.

27. 414 U.S. 453 (1974), *rehearing denied*, 415 U.S. 952 (1974). *See* note 26 *supra*.

28. *Id.* at 458. *See* note 26 *supra*.

29. 422 U.S. 66 (1975).

30. *Id.* There is confusion over how many of the *Cort* factors have to be satisfied before the Court will imply a remedy. It is possible that if one factor is missing, a court will not find a remedy. Petersen, *Implied Remedies under Federal Statutes: A New Look*, 80 COM. L.J. 480, 483 (1975). The degree of the test's restrictiveness will not be ascertained until it is determined how many criteria must be satisfied.

statute.[31] Next, the court must decide whether there is any indication of legislative intent, explicit or implicit, to create or deny such a remedy.[32] Third, the court has to evaluate the underlying legislative purpose and assess whether implying a remedy is consistent with it.[33] Finally, the court must consider whether the cause of action is traditionally a state concern,[34] making a federal remedy inappropriate.[35] Employing the *Cort* analysis in an extremely restrictive fashion, the Supreme Court has generally refused to grant private causes of action under federal statutes.[36] Lower courts have similarly used the *Cort*

31. 422 U.S. at 78. The *Cort* case involved a stockholder derivative suit against a corporation alleging violations of a federal act which prohibited corporations from making contributions or expenditures in connection with specified federal elections. 18 U.S.C. § 610 (1970) (repealed 1976). The first factor stems from the Court's holding in Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916). *See* note 25 *supra*. In *Cort*, the Court decided that the primary concern of the statute was to ensure against the control of federal elections by big business. 422 U.S. at 82. It stated that protection of ordinary stockholders was at best a secondary concern. *Id.* at 81. The Court then concluded there was not a clearly articulated federal right in favor of the plaintiff. *Id.* at 82. The plaintiff, therefore, failed to satisfy the first prong of the analysis.

32. 422 U.S. at 82. The Court qualified its evaluation of legislative intent by stipulating that where "federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Id.* at 83. The Court then declared it was doubtful that Congress intended to vest the plaintiff class with rights broader than those provided by state regulation of corporations. *Id.* The Court stated that only an intent to deny a remedy would be controlling. *Id.* This appears to directly modify the presumption against the implication the Court elucidated in *National R.R. Passenger Corp.* and *Barbour*. If it does not change the presumption then it at least shifts the burden from the complainant under the statute to the respondent.

33. *Id.* at 84. In considering legislative purpose, the Court held that allowing private stockholder suits would not effectuate the goal of the statute, which the Court identified as curing the influence which the use of corporate funds would have on federal elections. *Id.*

34. *Id.* at 78. The Court ruled that corporations are creatures of state law and, with certain exceptions, investors commit their funds with the understanding that state law will govern the internal affairs of the corporation. *Id.* at 84.

35. *Id.* at 78. In this case, since state law normally governs corporate activity, and laws governing the corporation may put the shareholder on notice that he has no recourse under federal statutes, the Court found that providing a federal right of action would have been inappropriate. *Id.* at 85.

The Court's application of the four-pronged test indicates that private remedies will not be lightly implied. Note, *supra* note 25, at 1381. *See also* Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, 1 J. CORP. L. 371, 371-72, 380-89 (1976).

36. Since its opinion in *Cort*, the Supreme Court has twice discussed the *Cort* factors in denying a private remedy. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477-79 (1977) (Court denied a private remedy to minority shareholders seeking dam-

test to deny federal private rights of action.[37]

The issue of an implied remedy has frequently arisen under the Civil Rights Act of 1964. In *Bossier Parish School Board v. Lemon*,[38] the Fifth Circuit decided in favor of an implied cause of action under Title VI[39] of the Act. The court held that individuals may bring claims under Title VI when there is no other procedure through which they may protect their rights.[40] Several courts have cited *Bossier* in ruling on a private cause of action under Title VI.[41] These cases do not, however, provide strong precedent for an individual asserting a private claim under Title VI. They usually involved class action suits[42] and, frequently, these courts have based their decisions

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ages or injunctive relief in federal court for respondent's merger, holding this was a cause of action "traditionally relegated to the states"); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41 (1977), *rehearing denied*, 430 U.S. 976 (1977) (Court denied private remedy to plaintiff, an unsuccessful bidder for control of a corporation, holding that all four *Cort* factors weighed against a private cause of action). For an analysis of the implied remedies doctrine and its relation to the *Chris-Craft* case, see Pitt, *Standing to Sue under the Williams Act after* Chris-Craft: *A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117, 120, 162 (1978).

37. *See* Lopez v. Arrowhead Ranches, 523 F.2d 924, 926 (9th Cir. 1975) (court applied the *Cort* test to deny a private action under the Immigration and Naturalization Act, 8 U.S.C. § 1324 (1976)); People's House Dev. Corp. v. City of Poughkeepsie, 425 F. Supp. 482, 490-94 (S.D.N.Y. 1976) (denying private right under Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5319 (1976 & Supp. III 1979)); Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732, 738 (E.D. Tenn. 1976), *rev'd on other grounds*, 563 F.2d 793 (6th Cir. 1977) (private right under Title IX denied).

38. 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

39. *Id.* at 852.

40. *Id.*

41. *See, e.g.*, Boykins v. Fairfield, Alabama Bd. of Educ., 399 F.2d 11 (5th Cir. 1968) (class action suit involving desegregation of public school system); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 579 (C.D. Cal. 1974) (class action suit brought to enjoin discriminatory practices in Oxnard School District); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138 (W.D. Tex. 1972) (class action suit brought by black and Mexican-Americans to halt further construction of alleged racially segregational public housing project).

42. *See* note 41 *supra*. *But see* Gilliam v. City of Omaha, 524 F.2d 1013, 1014 (8th Cir. 1975), where an individual plaintiff brought suit under Title VI, alleging racial discrimination by a community athletic organization. The court ruled there was no discrimination, thus never considering whether Title VI afforded a private remedy. *Id.* at 1015.

The importance of the distinction between individual and class action suits lies in both the numbers involved and the threat of increased litigation. *See, e.g.*, Cannon v. University of Chicago, 559 F.2d 1063, 1074 (7th Cir. 1976). It would seem that where a large group of individuals are involved, the deprivation of rights would more read-

on alternate grounds.[43]

In *Lau v. Nichols*,[44] the Supreme Court ruled in favor of a plaintiff bringing a private claim under Title VI without addressing the question of whether an implied remedy exists, since the parties failed to raise the issue on appeal.[45] Because the Supreme Court did not confront the question of an implied remedy directly, lower courts have not universally regarded the *Lau* holding as providing a private remedy under Title VI.[46]

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ily justify an implied remedy. In addition, the subject of most Title VI suits is the discriminatory practices of relatively large organizations. Class action suits not only insure the rights of many, they generally involve less time, money, and effort when compared to individual suits. Frequently, one class action will necessarily foreclose potential litigants. Finally, in some instances, Title VI litigation will result in the interruption of federal assistance. It is unlikely that courts would be willing to rule in favor of an injunction resulting in loss of funds in an individual action.

43. *See, e.g.*, Kelly v. Altheimer, Arkansas Pub. School Dist. No. 22, 378 F.2d 483, 485 (8th Cir. 1967) (although plaintiff cited Title VI violations, suit was initiated pursuant to 42 U.S.C. § 1983); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1382 (E.D. Va. 1972) (the basis for the cause of action was never mentioned); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1139 (W.D. Tex. 1972) (Court held plaintiffs had standing to sue under Title VI, but never addressed the issue of whether a private cause of action existed); Gautreaux v. Chicago Housing Auth., 265 F. Supp. 582, 584 (N.D. Ill. 1967) (plaintiffs had standing to sue under 42 U.S.C. § 1983 and therefore the court never decided whether Title VI allowed an independent private cause of action). *But see* Cypress v. Newport News General and Nonsectarian Hosp. Ass'n, 375 F.2d 648, 660 (4th Cir. 1967) (Court awarded a private remedy under Title VI, holding, "It would be fatuous to abstain where the right to relief has been abundantly proved."

44. 414 U.S. 563 (1970).

45. *Id.*

46. The issue plaintiffs raised in *Lau* was whether a large number of Chinese students could bring a class action suit to compel the availability of bilingual education programs. *Id.* at 564. The Court wondered whether the alleged violation came under Title VI, the Equal Protection Clause, or both. It did not reach the equal protection argument, however, as it relied solely on Title VI. *Id.* at 566. This ruling, coupled with the fact that the issue of an implied remedy was raised in the lower courts, led the Supreme Court in *Cannon* to cite *Lau* as upholding a private cause of action under Title VI. 441 U.S. at 702 n.33. *See* note 53 and accompanying text *infra*.

The problem with this assertion rests with the Court's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice Powell, when confronted with the issue of an implied right under Title VI, declined to rule, averring, "We assume only for purposes of this case that there exists a private cause of action under Title VI." *Id.* at 284. If the question had been resolved in *Lau*, then why does he assume "only for purposes of this case" that there exists an implied remedy? This hesitation raises serious doubt, expecially since Justice White, in his dissent in *Bakke*, insisted emphatically that Title VI does not convey a private cause of action. *Id.* at 381 (White, J.,

The Supreme Court in *Cannon* applied the *Cort* analysis[47] to find an implied remedy under Title IX.[48] As support for its analysis, the Court concluded there was available an implied cause of action under Title VI.[49] The Court began by identifying the plaintiff as a member of the special class for whom the statute was enacted.[50] It

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dissenting). Justice White stated, "A private cause of action . . . would not be 'consistent with the underlying purposes of the legislative scheme.' " *Id.* at 380-81 (White, J. dissenting), *quoting* Cort v. Ash, 422 U.S. 66, 78 (1975).

The Court's failure to take an affirmative stance in *Lau* led to subsequent Title VI decisions which were dependent upon Justice Blackmun's concurring opinion in *Lau*. Justice Blackmun qualified the Court's holding in favor of a Title VI violation by asserting:

> [I] stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group. [If] we [were] concerned with just a single child . . . I would not regard today's decision as conclusive. . . . For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

414 U.S. at 571-72 (Blackmun, J., concurring).

This "numbers theory" has been adopted by several jurisdictions as their understanding of *Lau*. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974) (citing Blackmun, J.). The *Serna* court held, "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." *Id.* at 1154. *Accord*, Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *modified on rehearing*, 559 F.2d 1077 (7th Cir. 1976); Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162 (D. Colo. 1975), *vacated on other grounds*, 568 F.2d 1312 (10th Cir. 1977).

An alternative explanation of Justice Blackmun's opinion might be that he was concerned with the unavailability of this type of remedy to a smaller class of plaintiffs, and that his reasoning thus had nothing to do with an implied remedy under Title VI. Comment, *supra* note 7, at 776 n.35.

The Seventh Circuit in *Cannon* conceded on rehearing that it might have misinterpreted Justice Blackmun's opinion. 559 F.2d at 1083. But the court went on to say that even assuming a misinterpretation of his opinion, "the right of action in *Lau* was brought under 42 U.S.C. § 1983 and the issue of whether an implied cause of action lay directly under the provisions of Title VI was never presented to the Supreme Court." *Id.*

47. *See* notes 31-35 and accompanying text *supra*.

48. 441 U.S. at 709.

49. In ruling that Title VI afforded a private remedy, the *Cannon* Court relied heavily on *Bossier* and the cases following it. 441 U.S. at 696-97. *See* note 41 *supra*. In addition, the Court cited *Lau v. Nichols* as a case where it had ruled in favor of an implied remedy under Title VI. 441 U.S. at 702 n.33. *See* note 46 *supra*.

50. 441 U.S. at 694. The Court concluded that to resolve this question, one must look to the statutory language. If the language expressly identifies the class Congress intended to benefit, a court can imply a cause of action for a member of that class. *Id.* at 690. In *Cannon*, the Court held that the Title IX language, "no person shall, on the basis of sex, be excluded from participation in . . . ," focuses on the concept of a benefited class, of which the plaintiff is a member. *Id.* at 694. The Court went on to

then decided that Congress intended to create a private action under Title IX,[51] looking to the legislative history behind Title VI.[52] The Court ruled that Congress has assumed there would be private actions brought under Title VI[53] and further, that Congress equated

distinguish the above language from a general ban on discriminatory conduct. *Id.* at 694-95.

51. *Id.* at 703.

52. It is unclear why the *Cannon* Court did not approach the legislative intent from the standpoint of determining whether Congress intended to deny a private remedy under Title VI, since *Cort v. Ash* established that finding an intent to *deny* a remedy would be controlling. 422 U.S. at 82. Moreover, approaching the legislative history from that angle would alleviate the burden of proof in favor of implication. Instead, in attempting to prove that Congress intended to create an implied remedy under Title VI, the *Cannon* Court glossed over or misinterpreted several remarks that evidence a contrary intention.

Although the purpose behind Title VI is to end discrimination, it is not clear whether Congress intended to create a private cause of action. During a debate between Senator Case and Senator Humphrey over the broad powers § 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976) confers to HEW, the following discussion ensued:

> Mr. Humphrey: 602 and 603 do not in any way limit the substantive law of section 601 but set forth a procedure for the enforcement of the law for these activities included in Title VI; and I think the purpose is to see to it that there is not what I term "capricious action" and also that there shall be judicial review, and that any order to be promulgated "shall"—not "may"—have the approval of the President. This limitation is on the enforcement of the policy of section 601, not in the substantive law enunciated in section 601.
>
> Mr. Case: Yes; but we do not permit existing—
>
> Mr. Humphrey: No new rights are granted here nor any taken away; but here we have prescribed means of enforcing these rights.
>
> Mr. Case: I appreciate the Senator's statement.

110 CONG. REC. 5254-55 (1964) (Remarks of Senators Case and Humphrey). The majority in *Cannon* felt that Senator Humphrey's comments indicated that § 602 did not limit a private right of action under § 601. 441 U.S. at 712.

Another area of confusion lies in the Court's treatment of the Keating proposal. In 1963, Sen. Keating, along with Sen. Ribicoff, introduced an amendment to Title VI. The proposal would have allowed the Attorney General, and anyone aggrieved by acts depriving or potentially depriving him or her of Title VI rights, to bring a private action. District courts would have had jurisdiction of actions under the section "without regard to whether the party aggrieved shall have exhausted an administrative or other remedy." *See* 109 CONG. REC. 15375 (1963).

The Court explained the rejection of this proposal and the resulting compromise (Title VI basically as it was enacted) in the following manner: The final bill was directed against discriminatory practices rather than cutting off funds. The emphasis on preventing discrimination insulated the government from litigation. 441 U.S. at 715.

53. 441 U.S. at 699. The *Cannon* Court held with reference to the attorney's fee provision in the Education Amendments of 1972 that the language presumes the availability of private actions to enforce Title VI in the context of education. *Id.*

Title VI with Title IX.[54] The Court then reasoned that recognizing a private remedy under Title IX was consistent with the underlying purpose of ending sex discrimination.[55] Finally, the Court briefly mentioned that discrimination was a matter of federal concern not traditionally relegated to the states.[56] Thus, the facts satisfied all four factors of the *Cort* analysis.

The Supreme Court's reasoning in *Cannon* is not wholly convincing. It assumes that prior cases created individual private causes of action under Title VI.[57] With the exception of *Bossier*,[58] however, there is no clear justification for that assumption.[59] Moreover, in holding that a private cause of action already exists under Title VI,[60] the Court ignored its former inclination against ruling on that issue.[61]

In addition, although the legislative history indicates that Congress did not resolve whether Title VI contains a private remedy,[62] the Court found that Congress clearly intended an individual cause of action under that statute.[63] The analysis in *Cannon* is difficult to reconcile with the Burger Court's previous reluctance to infer congressional intent to create private remedies under federal statutes.[64]

Subsequent Supreme Court rulings on private causes of action affirm that *Cannon* may be an anomalous decision.[65] In *Touche Ross v.*

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54. *Id.* at 703. There is strong evidence supporting this contention. During the congressional debate over Title IX, various Senators introduced statements equating the two provisions. *See* 118 CONG. REC. 5807 (1972).

55. 441 U.S. at 704. The Court identified the salient legislative objectives as (1) avoiding the use of federal resources to support discriminatory practices and (2) providing individual citizens with effective protection against those practices. *Id.*

56. *Id.* at 708. The Court noted that citizens have relied on the federal government and the federal courts for decades to protect them against such discrimination. *Id.*

57. The Court's reliance on *Bossier* and the cases accompanying it suggests a less than searching analysis of what those cases say. The *Cannon* Court gave little weight to the facts that these cases were often decided on alternative grounds, and that they dealt with a large group of plaintiffs as opposed to a single individual. Other courts have given more weight to these distinctions. *See* note 46 *supra*.

58. 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

59. *See* notes 41 & 43 *supra*.

60. 441 U.S. at 696-703.

61. *See* note 46 *supra*.

62. *See* note 52 *supra*.

63. 441 U.S. at 703.

64. *See* note 24 *supra*.

65. *See* note 70 and accompanying text *infra*.

Reddington,[66] the Supreme Court ruled against a private cause of action which plaintiff brought under the Securities Exchange Act.[67] It pointedly cautioned against finding congressional intent to provide an individual cause of action where the legislative history is silent or ambiguous.[68] The *Touche* Court further opined that private causes of action are within the province of the legislature, not the courts.[69] Thus, in *Touche*, the Supreme Court reestablished its restrictive approach to implication.[70]

The *Cannon* holding is nevertheless understandable, considering the nature of the statute involved. There are strong policy considerations favoring a private remedy under Titles VI and IX.[71] Both Congress and the courts have recognized that ending discrimination is a desirable objective.[72] Individual causes of action are necessary to ef-

66. 442 U.S. 560 (1979).

67. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979).

68. 442 U.S. at 571. The *Touche* Court stated that implying a private right of action where the legislative history is silent was out of the question. *Id.*

69. *Id.* at 578. The Court observed that the ultimate question is one of congressional intent, not one of whether the Court thinks it can improve upon the statutory scheme that Congress enacted into law. *Id.*

70. The Court referred to J.I. Case Co. v. Borak, 377 U.S. 426 (1963), which also involved a private right of action under the Securities Exchange Act during a more liberal period of implication, *see* notes 24-25 *supra*, and made the following observation: "It suffices to say that in a series of cases since *Borak*, we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today." 442 U.S. at 433.

Since *Touche*, the Supreme Court has ruled on several cases concerning private rights of action. *See, e.g.*, Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979). In this case, the Court asserted that there was but a *limited* private remedy to void an investment advisers contract. It once more eschewed its emphasis on providing remedies to effectuate congressional purposes, contending the sole inquiry is whether Congress *intended to create* a private cause of action. *Id.* at 245 (Emphasis added.)

71. Congress designed Title VI to end racial discrimination and to insure that federal expenditures are in accord with the Constitution. 110 CONG. REC. 6544 (1964) (Remarks of Sen. Humphrey).

72. In addition to the Title VI history already cited, Congress has consistently evidenced its desire to end discriminatory practices. In the Voting Rights Act of 1965, Congress forbade all state voting regulations which have the effect of denying citizens their right to vote because of race. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976 & Supp. III 1979). In Allen v. State Bd. of Elections, 393 U.S. 544 (1968), the Supreme Court upheld a private right of action as a necessary adjunct to the enforcement procedure already in the Act. *Id.* at 557.

Under the Rehabilitation Act of 1973, Congress prohibited discrimination against

fectuate this goal[73] as they act as a deterrent.[74] Potential violators will not discriminate as readily if private individuals can threaten them with litigation.[75] In addition, federal agencies have been particularly ineffective in their enforcement of Title IX.[76] A private cause of action is therefore essential to achieve the statute's objective of preventing discrimination in education programs.

The *Cannon* decision has already had a pronounced effect on lower court decisions concerning Titles VI and IX.[77] In *NAACP v. Medical Center, Inc.*,[78] the Third Circuit found that a private cause of action exists under Title VI,[79] citing *Cannon* as a major factor in its decision.[80] Other courts have utilized *Cannon* in a similar manner.[81]

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otherwise qualified handicapped individuals in programs requiring federal financial assistance. 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979). In Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), the court held that the Act allowed a private cause of action in furtherance of the private rights underlying the Act. *Id.* at 1285. The *Lloyd* case represents one of the few post-*Cort* decisions finding an implied right of action. *See* note 37 *supra*.

73. *See* Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 215 (1977); Note, *Awarding Attorneys' Fees to the "Private Attorney General:" Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733 (1973).

74. A district court recognized deterrence of wrongdoers as a valid ground for implication in Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 360 (S.D. Cal. 1961).

75. The threat of private lawsuits against noncomplying school districts or states would be an added incentive to compliance with Title IX. Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121, 1158 n.220 (1974).

Granting private rights of action under Title IX may also have negative ramifications. Although the existence of private action will deter potential violators, it will also subject professional schools to litigation by disappointed applicants who see a new avenue of opportunity for admission, thus interfering in many cases with a well thought out admissions policy. UNITED STATES COMM. ON CIV. RIGHTS, AGE DISCRIMINATION STUDY 107 (1977).

76. HEW required 20,318 school districts and colleges to file acceptance compliance statements by September 30, 1976. School Law News at 3 (March 18, 1977). By March 15, 1977, only 6,742 had done so. *Id. See also* Shelton & Berndt, *supra* note 75, at 1138-49, 1158 (extensive interviews and correspondence with HEW indicate difficulties of enforcement); Comment, *Sex Discrimination in Athletics: Conflicting Legislative and Judicial Approaches*, 29 ALA. L. REV. 390, 418 (1978) (due to large number of complaints, enforcement may be impossible without private remedy).

77. *See* notes 78-81 *infra*.

78. 599 F.2d 1247 (3d Cir. 1979).

79. *Id.* at 1258, finding the cause also under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979). *See* note 72 *supra*.

80. 599 F.2d at 1256-57.

81. In Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn.

Thus, in ruling in favor of a private cause of action, the *Cannon* court has set a precedent that will insure greater protection against continued discrimination.

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1979), the court ruled in favor of a private cause of action under Title VI, noting the Supreme Court's ruling in *Cannon*. *See also* Clark v. Louisa County School Bd., 472 F. Supp. 321 (E.D. Va. 1979). Although the court ruled there was no private cause of action under Title VI, it acknowledged that the *Cannon* decision would have made a difference if the court had been able to peruse it prior to the trial, and if the plaintiff's pleadings had not been defective. *Id.* at 323, 324 n.1.