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An Overview of Implied Rights of Action: Cannon v. University of Chicago

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strict scrutiny were used.[71] The constitutionality of excluding aliens from land ownership is just one of the many questions that the Court must answer in trying to escape from the analytical morass created by the *Graham* opinion. Hopefully, any new analytical structure adopted by the Court will rest on firmer ground.

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AN OVERVIEW OF IMPLIED RIGHTS OF ACTION: *Cannon v. University of Chicago*

Plaintiff, a female denied admission to two private medical schools, filed a complaint with the local office of the United States Department of Health, Education and Welfare (HEW) alleging that both schools violated Title IX of the federal Education Amendments of 1972[1] which prohibits sex discrimination in most educational institutions. When the department delayed taking any action on the complaint, plaintiff filed a private suit in federal district court. The district court held that plaintiff had no private cause of action under Title IX because Congress, in providing for an administrative scheme of enforcement within the provisions of the Act, intended that to be the only available remedy for violation of the Act. The United States Court of Appeals for the Seventh Circuit affirmed the district court decision. Reversing the lower court decision, the United States Supreme Court *held* that a private litigant may pursue a private cause of action under Title IX. *Cannon v. University of Chicago*, 99 S. Ct. 1946 (1979).

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71. See note 4, *supra*. The state's interest might be weighty enough if non-resident aliens were purchasing real property to such an extent that the health of the economy might be affected.

One author has implied that the real thrust of the *DeCanas* holding, that a state may, without preemption, forbid employers from hiring illegal aliens, see note 69, *supra*, is indicated by the use of equal protection language in a preemption case. That author suggests that the Court is indicating a lesser standard than strict scrutiny. Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1081 (1979). There may be a further question as to whether a non-resident alien who is precluded from purchasing land in this country is even entitled to the benefit of the equal protection clause. *Id.* at 1080-81. In *Yick Wo* the Court had said only that equal protection was a pledge to "all persons within the jurisdiction of the United States." 118 U.S. at 369.

1. 20 U.S.C. §§ 1681-86 (1976).

An implied right of action is the "extension of a civil remedy to one injured by another's breach of a statute or regulation not providing for such relief."[2] The doctrine of implied private rights of action originated in English law, providing the first detailed analysis of the doctrine in 1854,[3] and was first applied by the United States Supreme Court in the 1916 case of *Texas & Pacific Railway Co. v. Rigsby*.[4] While performing his normal duties, a railroad employee was injured due to a defective handhold on a railroad car. The existence of the defect resulted in a violation of a federal safety statute, but the statute's enforcement mechanism only provided for the imposition of criminal penalties. The employee sued the railroad, which defended that the statute did not expressly confer a private right to recover for injuries caused by a condition which violated the regulatory provisions of the statute. Finding the principal object of the statute to be the safety of employees and travelers,[5] the Court held that the implication of a private right of action was not so precluded. In fact, the Court found the implication of a private right of action "irresistible,"[6] stating that "[a] disregard of the com-

2. Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 285 (1963). Implied rights of action must be distinguished from the concepts of jurisdiction and standing. Jurisdiction is the judicial power to hear a case and must be determined before addressing the question of standing or implied private rights of action; standing is the determination whether a particular plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." Baker v. Carr, 369 U.S. 186, 204 (1962). *See* Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L. L. REV. 425, 429-30 (1978); Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1408-11 (1975) [hereinafter cited as *Some Implications*].

As implied rights of action supplement existing statutes and regulations, they may be distinguished from the development of federal common law and implications of rights of action based upon jurisdictional grants. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Mowe, *Federal Statutes and Implied Private Actions*, 55 OR. L. REV. 3 (1976). This note treats only the implication of private rights of action from federal statutes.

3. Couch v. Steel, 118 Eng. Rep. 1193 (Q.B. 1854). For the development in English law, *see* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167, 168-69 (1975).

4. 241 U.S. 33 (1916). The recognition of such a right can be traced to Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which he asked: "If [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?", *id.* at 162, and he answered: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163. The implication doctrine was recognized in 1914 by Thayer in his article *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 328 (1914).

5. 241 U.S. at 39.

6. *Id.* at 40.

mand of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[7] The Court characterized its decision as an application of the maxim *ubi jus, ibi remedium*[8] and reasoned that liability to private suit is as potent a deterrent to violation of the statute as criminal prosecution.[9]

Three theories have been developed as to when courts should find implied rights of action: the statutory tort approach, the statutory interpretation approach, and the statutory policy approach. The statutory tort approach allows such a finding upon a showing that the plaintiff is within the class for whose benefit and protection the statute was enacted.[10] Since federal regulatory statutes are normally enacted to protect certain classes of persons, a strict application of this approach would result in findings of implied rights of action in all instances in which the plaintiff falls within the protected class.[11] Under the statutory interpretation approach, the court may find an implied right of action when it determines that Congress specifically intended to create a private right of action. In order to make this determination, the court must examine the language and legislative history of the statute. Finally, the statutory policy approach requires that the court examine the purpose for which the statute was enacted. It may find an implied private right of action upon a determination that such an action could further the act's policy.[12]

In the aftermath of the *Rigsby* decision, which had applied the statutory tort approach without establishing any limitations upon

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7. *Id.* at 39.

8. "Where there is a right there is a remedy." BLACK'S LAW DICTIONARY 1363 (5th ed. 1979).

9. 241 U.S. at 42. In this early case the Court relied in part upon the tort doctrine that violation of a criminal statute is negligence per se in that a reasonable man obeys the law and therefore one who violates the law must be negligent. *See* Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815 (1920) ("By the very terms of the hypothesis, to omit, willfully or needlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life and limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform.").

Negligence per se cases must be distinguished from private actions based on criminal violations in which the court creates a cause of action rather than adopting a conclusive standard for an already existing common law cause of action. *See* Mowe, *supra* note 2, at 4. The Court in *Rigsby* failed to make the distinction between the remedies but was creating a private right of action from a federal statute that did not provide such a remedy.

10. Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 376 (1976).

11. *Some Implications*, *supra* note 2, at 1394.

12. Note, *supra* note 10, at 378.

the use of this approach, the Supreme Court has followed an unsettled path in attempting to prevent findings of implied rights of action in all cases in which the plaintiff is a member of the protected class. Using very broad language, the Court stated in dictum in *Bell v. Hood*:[13] "[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."[14] The Court has also sought to limit the doctrine of implied private rights of action as in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*[15] After refusing to examine the reasonableness of rate charges determined by the Federal Power Commission under the Federal Power Act,[16] the Court declared that the petitioner "cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment."[17]

Many of the difficulties encountered by the Court in its attempt to place limitations on the doctrine of implied private rights of action stemmed from its inability to establish once and for all any one of the alternatives to the statutory tort approach as the standard to be used in determining the existence of an implied right of action. In *T.I.M.E. Inc. v. United States*[18] the Court denied an implied private right of action; three years later, in *Hewitt-Robins Inc. v. Eastern Freight-Ways Inc.*,[19] it allowed an implied private right of action under the same Motor Carrier Act of 1935.[20] The two cases present a marked contrast. In *T.I.M.E.* the Court found that the Act provided administrative remedies which precluded judicial implication,[21] while

13. 327 U.S. 678 (1946) (involving a suit brought against agents of the Federal Bureau of Investigation for damages for violations of the fourth amendment).

14. *Id.* at 684. There were two civil rights cases implying a private cause of action in 1944. In *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), and in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944), the Court held that black employees possessed an implied right of action under the Railway Labor Act to remedy harm caused by discriminatory agreements between management and a union.

15. 341 U.S. 246 (1951) (involving two power companies which earlier had been under the same management but were now separate; one company sued, challenging the reasonableness of rates charged to it by the other).

16. 16 U.S.C. §§ 791a-825r (1948) (current version at 16 U.S.C. §§ 791a-828c (1976)).

17. 341 U.S. at 251.

18. 359 U.S. 464 (1959) (a suit by a shipper of goods challenging the reasonableness of the carriers' charges).

19. 371 U.S. 84 (1962) (a suit over the routing practices of a common carrier).

20. Interstate Commerce Act, pt. II, 49 Stat. 543 (as amended) (codified at 49 U.S.C. §§ 301-27 (1976)).

21. 359 U.S. at 469-72 (1959). The Court also found evidence from Senate hearings that Congress considered and rejected a private cause of action. *Id.* at 477, *citing Hearings on S. 1194 Before the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 1, 5, 11-12 (1949).

finding in *Hewitt-Robins* that such an action would supply necessary aid in the administration of the Act.[22] Additionally, the *T.I.M.E.* decision evidenced doubt as to whether legislative history would support the implication of a private right of action, while the *Hewitt-Robins* decision expressed concern with the fulfillment of the purpose behind the Act regardless of whether a private cause of action was contemplated.

A breakthrough in favor of implied private rights of action came in the 1964 decision of *J.I. Case Co. v. Borak*.[23] Borak, a stockholder in the Case Company, sought to enjoin a merger between Case and another company on the ground that Case had issued a false and misleading proxy statement. Case argued that Congress did not specifically provide a private right of action in enacting section 14(a) of the Securities Exchange Act of 1934,[24] the statute alleged to have been violated, and that it intended that statute to be enforced only by the Securities and Exchange Commission. The Court disagreed, finding that the Act places a great burden of enforcement on the Commission and an implied right of action would ease that burden, allowing for efficient operation of the Commission and the Act.[25] Although the Act does not specifically include a private right of action, the purpose of the Act is to protect investors which "certainly implies the availability of judicial relief where necessary to achieve that result."[26] Therefore, courts must effectuate this congressional purpose by providing the necessary remedies.[27] Essentially in *Borak*, the Court abandoned the legislative intent approach in favor of a functional test which, due to the difficulty in determining specific legislative intent, lessened the burden on those asserting private rights of action.

The trend away from the restrictive legislative intent approach continued in *Wyandotte Transportation Co. v. United States*,[28] in

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22. 371 U.S. at 88 (1962). The Court also stated:

> Those who contended that no judicial remedy is available place much weight on the fact . . . the Interstate Commerce Commission has primary jurisdiction in routing practices . . . . To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows.

Id. See text at notes 15-17, *supra*, to note the change in the Court's handling of these types of situations.

23. 377 U.S. 426 (1964).

24. 15 U.S.C. § 78n(a) (1976).

25. 377 U.S. at 432-33.

26. *Id.* at 432.

27. *Id.* at 433.

28. 389 U.S. 191 (1967) (a suit by the United States to recover the expenses incurred in removal of Wyandotte's sunken barge).

which the Court looked to legislative history to determine if Congress intended to *preclude* implication of a private remedy,[29] rather than to find positive indication of intent to *create* a private remedy. By placing the legislative intent question in the negative, the Court greatly eased the plaintiff's burden in attempting to establish an implied right of action. Two years later, the Court employed a similar negative formulation in its application of the functional approach. As it had in *Wyandotte*, the Court in *Allen v. State Board of Elections*[30] found that a governmental enforcement provision in the act under consideration[31] did not preclude a private remedy. However, in analyzing the need for a private right of action, the Court expanded upon *Borak*. Whereas the plaintiff in *Borak* was required to show that a private right of action was "necessary" for proper enforcement of the act in question,[32] the plaintiff in *Allen* had only to show that the effectiveness of the act in question would be "severely hampered" without an implied right of action.[33]

Although these cases went far toward removing earlier, established limitations on the finding of implied rights of action, a key dissent in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[34] signalled the beginning of a more conservative approach. In that case, a suit by a citizen for damages against federal officers for violation of fourth amendment rights, the Court made it clear that individuals have a private cause of action to protect rights secured for them by the Constitution. However, Chief Justice Burger dissented, condemning such implication of private rights of action as judicial legislation and as a breach of the separation of powers doctrine.[35] This was to be the rallying cry of subsequent courts.

Three years later, in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*,[36] Chief Justice Burger was in the majority when the Court seemingly retreated from *Borak* and *Allen* in concluding that, since the act sued upon ex-

29. *Id.* at 200. The suit involved section 15 of the Rivers and Harbors Act, 33 U.S.C. § 409 (1976).

30. 393 U.S. 544 (1969) (a suit by individual voters challenging local voting enactments under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976)).

31. 42 U.S.C. § 1973c (1976).

32. 377 U.S. at 433. See notes 23-27, *supra*, and accompanying text.

33. 393 U.S. at 556.

34. 403 U.S. 388 (1971).

35. 403 U.S. at 411-12 (Burger, C.J., dissenting). *See also* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (judicial responsibility in development of remedies implementing the Bill of Rights in *Bivens*).

36. 414 U.S. 453 (1974) (a suit by a group of passengers to enjoin Amtrak from cancelling certain train routes).

pressly conferred on the Attorney General a right to bring suit, presumably Congress did not intend a private right of action.[37] An examination of the legislative history reinforced the conclusion that Congress intended to preclude civil remedies.[38] The trend toward limiting the finding of implied private rights of action continued in *Securities Investor Protection Corp. v. Barbour*[39] in which the Court held that the recognition of a judicial remedy would be inconsistent with the Securities Investor Protection Act of 1970.[40] Furthermore, the Court noted that the similarities between *Barbour* and *Amtrak* were undeniable and therefore insurmountable.[41] Because the act in *Barbour* did not contain standards of conduct which a private action could aid in enforcing, the Court distinguished it from *Borak*; the latter case involved section 14(a) of the Securities Exchange Act of 1934[42] which specified standards of private conduct.[43] Distinguishing *Allen* on the basis that the large number of local governments required assistance of affected persons in order to effectuate congressional goals, the *Barbour* Court emphasized that Congress had established an effective regulatory mechanism in the Securities Investor Protection Act which did not require the assistance of private persons to accomplish its goal.[44]

In 1975, the Supreme Court in the unanimous decision of *Cort v. Ash*[45] established four criteria with which to determine the existence of an implied private right of action:

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37. *Id.* at 458, *citing* Rail Passenger Service (Amtrak) Act of 1970, 45 U.S.C. §§ 501-645 (1976). The Court also noted that a proposal to permit unlimited private suits was made to the House Committee during hearings and rejected. 414 U.S. at 458-61. The Court considered whether implication of a private cause of action would be consistent with the Act's purpose of achieving economic viability for basic rail passenger systems, *id.* at 461, and concluded that it would not, *id.* at 463.

38. *Id.* at 464-65. It is interesting to note that twelve days after its *Amtrak* decision the Court in *Lau v. Nichols*, 414 U.S. 563 (1974), allowed a private suit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976), despite the express provision in the Act for an administrative enforcement mechanism, 42 U.S.C. § 2000d-1 (1976).

39. 421 U.S. 412 (1975) (a suit by a brokerage customer to compel action under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa to 78*111* (1976)). The Securities Investor Protection Corporation (SIPC) was established by Congress as a non-profit membership corporation for the purpose of providing financial relief to the customers of failing broker dealers with whom they had left cash or securities on deposit. The question was whether there was an implied right of action under the Act to compel the SIPC to exercise its statutory authority.

40. 15 U.S.C. §§ 78aaa to 78*111* (1976).

41. 421 U.S. at 420.

42. 15 U.S.C. § 78n(a) (1976).

43. 421 U.S. at 423-24.

44. *Id.* at 425.

45. 422 U.S. 66 (1975).

(1) Is the plaintiff one of the class for whose especial benefit the statute was enacted?

(2) Is there any indication of legislative intent, explicit or implicit, to create such a remedy or deny one?

(3) Is it consistent with the underlying purposes of the legislative scheme to imply a remedy for the plaintiff?

(4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?[46]

The stockholder in *Cort* sued the corporation's chairman for breach of a fiduciary duty in allowing the corporation to contribute to a presidential campaign in violation of a criminal statute. Since Cort could not have prevailed even under the loose test of *Rigsby*, the Court could have easily disposed of the case. Instead, the Court chose to establish certain criteria to be used in determining if a private cause of action exists.

The *Cort* decision, in its attempt to embrace the middle ground of the various philosophies by including a consideration of all of them, succeeded only in establishing a malleable approach that can be shaped to approximate any of the philosophies. The ambiguity engendered by the decision is indicated by the liberal fear that it is too conservative and the conservative fear that it is too liberal. Also, the decision is unclear as to whether all four of the criteria must be answered affirmatively to allow an implied right of action or whether a balancing approach is appropriate. Commentators have criticized the *Cort* decision as being overly restrictive[47] in that the Court adopted an approach to statutory interpretation necessitating that the judiciary take affirmative action only when the legislature explicitly directs. Thus, absent express legislative intent to create an implied private right of action, the *Cort* decision may require rejection of such an implied right of action.[48]

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46. *Id.* at 78.

47. McMahon & Rodos, *supra* note 3, at 167-68, 177 & 184; Note, *supra* note 10, at 371-72 & 380-89; Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429, 446 (1976) (undeniably more restrictive).

48. McMahon & Rodos, *supra* note 3, at 187. The commentators' alarms were groundless, however, as evidenced by the large number of subsequent appellate court decisions that have implied a private cause of action. Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1379 n.7 & 1380 (1978).

In the instant case, plaintiff filed a complaint with a local HEW office in April 1975, alleging violations of Title IX of the Education Amendments of 1972,[49] which bans discrimination on the basis of sex in all federally aided programs and institutions. She received an acknowledgment, but was told that an investigation of her complaint would not begin until early 1976. In June 1976 she was informed that the local investigation had been completed but that the national HEW office wished to conduct further studies.[50] Cannon then filed her present suit against the University of Chicago and Northwestern University in federal district court. The district court dismissed the action on grounds that Title IX sets forth a scheme of administrative enforcement only and that although the Act provides for judicial review of such administrative action, it does not authorize a right of action against alleged violators.[51] The court of appeals affirmed, determining that the existence of administrative enforcement procedures precludes the existence of an implied private right

49. Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-86 (1976)). The Act's central provision, section 1681, provides in part: "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 applies only to institutions of vocational education, professional education, graduate education and public institutions of undergraduate education. 20 U.S.C § 1681(a)(1) (1976). Religious schools, military schools and single-sex institutions are also exempted. 20 U.S.C. §§ 1681(a)(3), (4) & (5) (1976). Congress enacted Title IX in response to evidence demonstrating sex discrimination in public and private education, H.R. REP. No. 554, 92d Cong., 1st Sess. 51-52 (1971), modeling it after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976). 117 CONG. REC. 30,403-04, 30,407-08 (1971) (remarks of Sen. Bayh); *id.* at 39,251-52 (remarks of Rep. Mink). Title IX authorizes and directs each federal entity extending educational assistance to issue regulations consistent with the Act's central provision and provides for termination of assistance or any other means authorized by law in case of non-compliance. 20 U.S.C. § 1682 (1976). Only the Department of Health, Education and Welfare (HEW) has published regulations concerning Title IX enforcement. *See* Nondiscrimination on the Basis of Sex, in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86 (1977). HEW gave affected educational institutions one year to comply. For a full discussion of HEW regulations to Title IX, *see* Kadzielski, *Title IX of the Education Amendments of 1972: Change or Continuity?*, 6 J.L. & EDUC. 183, 188-96 (1977).

50. Cannon v. University of Chicago, 99 S. Ct. 1946, 1949 n.2 (1979). *See generally* Note, *Sex Discrimination—The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make Title IX Regulations More Effective*, 49 TEMP. L.Q. 207 (1975).

51. Cannon v. University of Chicago, 406 F. Supp. 1257, 1260 (N.D. Ill. 1976). There were other charges brought by Cannon, *id.* at 1258, but they are beyond the scope of this note. These other charges included violations of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6 to -8 (1976), the Public Health Service Act, 42 U.S.C. §§ 292c & 292d (1976), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c) (1976).

of action.[52] The court briefly examined the legislative history and determined that Congress did not intend to allow the "drastic remedy of" individual lawsuits to be included within the Act's enforcement clause.[53] Although HEW action might be slow and ineffective, the court found that individual suits cannot be a solution because private actions may not effectively combat sex discrimination on a larger scale.[54]

The court of appeals reheard the case after Title IX was included within the provision of the Civil Rights Attorney's Fees Awards Act of 1976[55] which, at the court's discretion, allows the prevailing party a reasonable attorney's fees award as part of the costs in cases brought under the included acts. Cannon argued that this inclusion indicated congressional intent that there be an implied private right of action as there would be no reason to allow a private litigant attorney's fees if the litigant had no cause of action. However, the court reaffirmed its earlier decision holding that the inclusion of Title IX in the Act does not support an implied private right of action but merely provides for the possibility that future court decisions would allow such an action for Title IX violations.[56] Significantly, HEW changed its position on rehearing and argued that *Cort* required a finding of an implied right of action, perhaps recognizing the ineffectiveness of the agency's enforcement mechanism. Moreover, another district court, in examining the same legislative history, determined that an implied private right of action was consistent with the congressional intent in enacting Title IX.[57]

The Supreme Court reversed the lower courts in a decision written by Justice Stevens, in which three members of the Court joined. Following the four-part *Cort* analysis, the Court first found the plaintiff to be in the "especial" class recognized as protected by the statute.[58] Secondly, the Court disagreed with the appellate court's finding that Congress did not intend an implied private right of ac-

52. Cannon v. University of Chicago, 559 F.2d 1063, 1073 (7th Cir. 1976).

53. *Id.* at 1074. The court, however, stated that "a suit brought by a large group to enforce the national interest against sexual discrimination may be possible under Title IX." *Id.* at 1074 n.16.

54. *Id.* at 1075.

55. 42 U.S.C. § 1988 (1976).

56. 559 F.2d at 1079. The court also cited legislative history showing that the court of appeals decision was mentioned and that Representative Railsback stated that the attorney's fees bill "does not authorize or statutorily grant any private right of action which does not now exist." *Id.* at 1079-80, *citing* 122 CONG. REC. H35124 (1976) (remarks of Rep. Railsback).

57. Piascik v. Cleveland Museum of Art, 426 F. Supp. 779, 781 n.1 (N.D. Ohio 1976) (dictum).

58. Cannon v. University of Chicago, 99 S. Ct. 1946, 1953-56 (1979).

tion; legislative language indicated that Congress knew of an earlier case implying a private right of action under Title VI and intended for Title IX to be similarly treated,[59] since it had made no attempt legislatively to overrule that earlier case. Thirdly, the Court found the private remedy "is necessary or at least helpful to the accomplishment of the statutory purpose"; the Court was "decidedly receptive to its implication under the statute."[60] Finally, the Court summarily found that an implied right of action would not encroach upon subject matter of exclusive concern to the states because Title IX involves expenditure of federal funds.[61] Although the Court would have preferred an express grant of a right of action, it permitted the implied private right of action since all four criteria were met.[62]

Justice Rehnquist, joined by Justice Stewart, concurred in the judgment but with certain qualifications which may affect future decisions. While recognizing that Congress left to the courts the decision concerning the implication of a private right of action in this case, he warned that in the future the courts should be "extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch."[63] In his dissent, Justice White, joined by Justice Blackmun, examined the legislative history of Title IX and concluded that Congress intended the administrative mechanism to be the only means of enforcement.[64] Disputing the majority's reading of the legislative history, he argued that Congress assumed courts would allow a private right of action only when the recipients of federal funds were acting under color of state law;[65] thus, the courts should not create a new right of action against totally private discrimination. Justice Powell, in a separate dissent, charged that the *Cort* analysis provides a means of violating the separation of powers doctrine by permitting a court to determine the desirability of private enforcement using its own views rather than those of Congress.[66]

Cannon does not settle conclusively the controversy regarding the doctrine of implied private rights of action. In spite of the fact

59. *Id.* at 1956-61, *citing* 118 CONG. REC. 5807 (1972); 117 CONG. REC. 30,408 (1971) (remarks of Sen. Bayh). The case referred to by the Court was *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

60. 99 S. Ct. at 1961.

61. *Id.* at 1963.

62. *Id.* at 1967-68.

63. 99 S. Ct. at 1968 (Rehnquist & Stewart, JJ., concurring).

64. 99 S. Ct. at 1968-74 (White & Blackmun, JJ., dissenting).

65. *Id.* at 1972.

66. 99 S. Ct. at 1981 (Powell, J., dissenting).

that the Court used the four *Cort* factors in arriving at its decision, it did not determine whether all four are necessary to imply a private cause of action. It is significant that the Court considered Title IX an atypical case in which all four factors are present[67] and suggested that it would have weighed the factors against each other if they had not all supported implication of a private right of action,[68] possibly indicating that all four factors need not be satisfied to allow a private right of action. *Cannon* also demonstrates the futility encountered in attempting to discover the intent of Congress in passing certain legislation. The nature of the political process dictates that Congress cannot legislate in anticipation of all possible situations and must leave the difficult applications of the law to the courts. An examination of the legislative history by both the majority and the dissent, with each side citing supportive history, demonstrates the complexity of the problem of determining legislative intent. A statement by Chief Justice Marshall almost 175 years ago still rings true today: "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . . ."[69]

Cannon can be viewed, however, as signalling a movement toward a loosening of the standards necessary to imply a private right of action. In discussing the third *Cort* factor, that no private remedy should be implied if it would frustrate the legislative scheme, the Court indicated that the remedy need not be necessary but need only be "at least helpful" to the accomplishment of the statutory purpose.[70] This perhaps marks a return to the *Allen* rationale, which would allow courts to effectuate congressional goals in the most beneficial manner regardless of an explicit enforcement mechanism.

In *Cannon*, the Court noted congressional acquiescence to an implied right of action under Title VI.[71] This statement should settle any debate concerning the validity of the court of appeals decision which found that Title VI allows a private remedy.[72] As a result of

67. 99 S. Ct. at 1968.

68. *Id.* at 1964.

69. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

70. 99 S. Ct. at 1961.

71. *Id.* at 1956-61. The Court also stated that the relevant inquiry is not what Congress correctly perceived as the state of the law but what its actual perception of the law was. *Id.* at 1964, *quoting* Brown v. General Servs. Adm'n, 425 U.S. 820, 828 (1976).

72. The Court in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), left the question unanswered, since four Justices assumed for the purposes of the case that Bakke had a right of action under Title VI. *Id.* at 2745. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court permitted a private suit under Title VI to force a school district

the Court's determination, the most far reaching effect of the *Cannon* decision may be upon the Rehabilitation Act of 1973[73] which prohibits discrimination against otherwise qualified handicapped individuals in federally funded programs.[74] Since the Rehabilitation Act was patterned after Titles VI and IX[75] and similarly places great emphasis on the protection of individuals,[76] *Cannon* should require the finding of an implied private right of action under this Act as well. In the latest decision involving the Rehabilitation Act, *Southeastern Community College v. Davis*,[77] the Court disposed of the case on its facts, finding that the refusal to admit a deaf student into nursing school did not violate the Act, and declared it unnecessary to decide if Davis had a private right of action.[78]

Essentially, the decision in *Cannon* is the product of a broad philosophical battle between judicial activism and judicial restraint. Political realities force Congress to bypass controversial issues; time pressures and limits of human foresight result in ineffective congressional remedies in some instances. These factors render unworkable the characterization of statutory enactment as a totally self-sufficient and exclusive legislative process.[79] It would appear that the effectiveness of the legislative branch depends upon a recognition of the power of the federal courts to evaluate the enforcement scheme enacted by Congress in order to determine if it effectuates congressional goals, and the duty of the federal courts to take appropriate action when those goals cannot otherwise be achieved.[80]

The arguments of Justice Powell and others against the implied private right of action are based upon the constitutional doctrine of separation of powers. However, the implication of a private right of action encroaches only slightly upon the legislative sphere. Congress retains the sole prerogative to make laws; yet when an enforcement scheme fails to adequately protect the intended beneficiaries, it should be the duty of the courts to imply a cause of action to fulfill

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receiving federal funds to comply with regulations prohibiting recipients from discriminating on the basis of race, but the Court did not discuss the question of a private right of action. See note 38, *supra*.

73. 29 U.S.C. §§ 701-96 (1976).

74. 29 U.S.C. § 794 (1976).

75. *See* 120 CONG. REC. 30,532-34 (1974) (discussing patterning of Rehabilitation Act to Titles VI and IX and the permitting of a judicial remedy through private action).

76. Titles VI and IX protect every person from discrimination while the Rehabilitation Act protects every otherwise qualified handicapped individual.

77. 99 S. Ct. 2361 (1979).

78. *Id.* at 2366 n.5.

79. Michkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

80. *Id.* at 799-800. *See also* Note, *supra* note 10, at 374.

those congressional goals.[81] As advocated in *Allen*[82] the Court should emphasize goals rather than means, since "implying a cause of action may increase the likelihood of compliance with the statute by giving victims incentive to assist in its enforcement and potential violators, faced with an additional penalty, added reason to conform their conduct to it."[83]

Walter Joseph Hryszko

LOUISIANA'S PRESUMPTION OF PATERNITY: THE BASTARDIZED ISSUE

A concursus proceeding was brought by Tenneco Oil Company to determine the ownership of oil and gas royalties owed under certain mineral leases. The trial court ruled that the Houstons, possessors of the property, were entitled to payment of the royalties in dispute. The Second Circuit Court of Appeal affirmed,[1] interpreting article 3654(1) of the Louisiana Code of Civil Procedure[2]

81. *See* Allen v. State Board of Elections, 393 U.S. at 556-57; J. I. Case Co. v. Borak, 377 U.S. at 432-33. If Congress had explicitly indicated in the legislation that the courts were to determine the means of effectuating the goals established by the legislative branch, then the Court's implication of a private cause of action would not violate the doctrine of separation of powers. In fact, if Congress did leave this duty to the courts, the separation of powers doctrine would be violated if the courts were to shirk this responsibility. If the courts do err and imply a private cause of action when none was intended by the enactment, Congress may overrule the courts by denying the existence of such an implied action. Congress may also prevent judicial interference of an enforcement scheme by expressly denying private actions in the statute. 49 U.S.C. § 5(11) (1976) (remedies conferred by statute are exclusive, Interstate Commerce Act, part I).

82. 393 U.S. at 556-57. See notes 30-31, *supra* and accompanying text.

83. Note, *supra* note 2, at 291.

1. Tenneco Oil Co. v. Houston, 364 So. 2d 1056 (La. App. 2d Cir. 1978).

2. LA. CODE CIV. P. art. 3654 provides:

When the issue of ownership of immovable property or of a real right is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right is so presented, the court shall render judgment in favor of the party:

(1) Who would be entitled to the possession of the immovable property or real right in a possessory action, unless the adverse party makes out his title thereto; or

(2) Who proves better title to the immovable property or real right, when neither party would be entitled to the possession of the immovable property or real right in a possessory action.