Title VII & Title IX =?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector

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INTRODUCTION

In 1964, President Johnson signed the Civil Rights Act of into law, which contained a title providing for "EQUAL EMPLOYMENT OPPORTUNITY." The Act represented a comprehensive government reaction to employment discrimination. On April 19, 1972, Congress passed extensive amendments to the Act, broadening the reach to include state and local government employers, establishments with eight or more employees, and educational institutions. Barely two months later, Congress passed the Higher Education Amendments of 1972. Title IX, which prohibited sexual discrimination in any federally funded educational program, was included in this extensive legislation. Although Title IX was not originally viewed as applying to employment, Supreme Court decisions expanded Title IX to encompass private rights of action to remedy employment discrimination. As a result, Title IX soon became the source of employment discrimination litigation, and Title IX and Title VII claims were consolidated in complaints against education employers. Since the legal requirements and remedies of Title IX and Title VII are remarkably similar, this association, appearing relatively inconsequential under normal circumstances, may have significant implications in situations where plaintiffs raise both claims concurrently.

These situations arise when a claimant fails to fulfill the more extensive administrative procedures of Title VII. When this happens, Title IX benefits the plaintiff. Even though their Title VII action is precluded, judicial interpretations of Title IX allow plaintiffs access to the courthouse, resulting in pleas for the same damages available under Title VII. Although these plaintiffs may no longer assert Title VII claims, they still have identical opportunities for relief.

Whether plaintiffs in this situation have a right to circumvent Title VII is increasingly the subject of litigation. As the overlap between Title VII and Title IX comes under greater scrutiny, courts must define the parameters of the overlap and decide whether or not to allow this type of circumvention.

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Defendants arguing that Title VII preempts its educational companion face a difficult battle, because they are arguing for a proposition the Supreme Court appears to have rejected in its cases interpreting Title IX. However, a more thorough analysis of Title IX, Title VII and these Supreme Court cases indicates that Title VII does indeed preempt Title IX.

This Note will examine the issues involved in the question of whether Title VII preempts Title IX in employment discrimination claims. The purpose of this note is to look past the facade created by a literal reading of these Supreme Court cases to form a more accurate picture of the scope of Title IX. Section One will provide a statutory description of Title VII and Title IX. Section Two will examine the holdings of the Supreme Court cases that have shaped Title IX into its modern form. Section Three will examine the reasoning of two district court opinions which have interpreted these Supreme Court cases but have arrived at contrary conclusions regarding the preemption issue. This Section will conclude that the Supreme Court holdings do not support a Title IX private right of action for employment discrimination.

Defendants arguing for preemption must present persuasive reasons why Title VII should be the exclusive remedy for educational employees. Accordingly, Section Four will examine the statutory construction and legislative history of Title IX and will look at the arguments proponents of preemption must present. This analysis will demonstrate that Congress intended employment discrimination plaintiffs to plead for relief under Title VII not through an invocation of the implied right of action under Title IX.
I. STATUTORY BACKGROUND OF TITLE VII AND TITLE IX

A. TITLE VII

Title VII of the Civil Rights Act of 1964 represents Congress' most comprehensive attempt at battling employment discrimination. Today, after two major amendments, Title VII is still the most potent legal weapon against discrimination. It is the "weapon of choice" for plaintiffs. In three federal districts, the number of Title VII cases filed in 1980-81 outnumbered actions filed under sections 1981, 1982, 1985, 1986 of Title 28, the Equal Pay Act, the Rehabilitation Act, and the ADEA. In fact, among all civil rights statutes, the only statute generating more claims than Title VII was 42 U.S.C. § 1983.

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex or


(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


8 The districts studied were the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia. "Together, these three districts accounted for 7.9% of all nonprisoner civil rights claims filed in fiscal 1980-81, and they include the major cities of Los Angeles, Philadelphia, and Atlanta." Id. at 598.
The purpose of Title VII is equally concise to: "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."\(^9\)

To achieve these goals, Congress created the Equal Employment Opportunity Commission (EEOC) to enforce Title VII.\(^11\) As a result of legislative compromise, an effort to respect state sovereignty, and to encourage conciliatory outcomes, Congress created very specific administrative requirements and time limitations concerning claims under the Act.\(^12\) Exhaustion of these requirements is a prerequisite for any suit under Title VII.\(^13\) These administrative requirements complicate the operation and interpretation of Title VII. The requirements differ depending on whether a claim is being asserted in a state which has its own agency which enforces fair employment laws or in a state which that lacks such an agency.

In a state without a state enforcement agency, plaintiffs must first file a charge with the EEOC within 180 days of the discriminatory act.\(^14\) The EEOC then conducts an investigation to determine whether there is probable cause that a violation has occurred.\(^15\) If probable cause exists, the EEOC attempts to eliminate the violation through negotiation or mediation.\(^16\) The EEOC has 180 days to attempt this informal resolution of the conflict.\(^17\) If, after thirty days, the EEOC’s methods do not produce satisfactory results, the commission may file a complaint in federal court.\(^18\) This precludes private actions against the employer.\(^19\) If, after 180 days, informal methods still have not resolved the conflict, the charging party may request a "right to sue" letter from the EEOC allowing the party to initiate a private suit.\(^20\) Since the letter is a prerequisite to filing a complaint, private action is barred until the EEOC

\(^19\) Id.
has had an opportunity to attempt to resolve the conflict.\textsuperscript{21} However, at any time the EEOC may complete its investigation and issue a right to sue letter. After receipt of the letter, a party has ninety days to file suit.\textsuperscript{22}

The procedure for filing a Title VII claim is slightly different in states that have agencies to enforce fair employment laws. In these states, a party must file a charge with a local agency. The charge must be filed during the time limits set by local law. These limits are not less than 180 days.\textsuperscript{23} If timely, the claim is handled exclusively by the local agency for sixty days.\textsuperscript{24} If after sixty days there is no resolution, the party may file an action with the EEOC.\textsuperscript{25} To preserve a claim, the party must file thirty days after termination of the state proceedings, or within 300 days of the occurrence of the discriminatory act, whichever is earlier.\textsuperscript{26} Once before the EEOC, the complaint is subject to the same requirements as those applicable in a state that does not have a local fair employment agency.

In 1991, Congress passed several amendments to the Civil Rights Act.\textsuperscript{27} These amendments provided for compensatory and punitive damages for victims of intentional employment discrimination.\textsuperscript{28} The amendments also provided plaintiffs the option of a jury trial, and prohibited "mixed-motive" discrimination.\textsuperscript{29}

\textsuperscript{21} Stebbins v. Continental Ins. Companies, 442 F.2d 843 (D.C. Cir. 1971); Vinieratos v. United States, 939 F.2d 762 (9th Cir. 1991).
\textsuperscript{23} 42 U.S.C. § 2000e-5 (1981). If the party files first with the EEOC within the 180 day deadline, the commission will refer the charge to the state agency. \textit{Id}. This provision insures that a claimant is not restricted to a shorter time limit than those filing directly with the EEOC. Davis v. Valley Distributing Co., 522 F.2d 827, 832 (9th Cir. 1975), \textit{cert. denied}, 429 U.S. 1090 (1977).
\textsuperscript{25} \textit{Id}.
\textsuperscript{26} \textit{Id}. If the charge was originally filed with the EEOC, the commission will reactivate it upon termination of the local proceedings and filing by the claimant.
B. TITLE IX

Enacted as part of the Education Act Amendments of 1972, Title IX was a response to Congress' growing concern about the problem of sex discrimination in educational programs. Title IX was initially adopted as a floor amendment and, as a result, is less complex and structured than Title VII. Title IX requires that "[n]o 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."

The purposes of Title IX are twofold: Congress wanted both to "avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." To achieve these purposes, Congress required all departments and agencies extending financial assistance to educational programs to create procedures for terminating financial assistance to institutions violating Title IX. The administrative portion of Title IX prohibits a financial termination action until the relevant agency or department has determined that compliance cannot "be secured by voluntary means." The statute also requires that termination emanate only from an "express finding on the record, after opportunity for hearing, or a failure to comply." As a result, Title IX contains none of the characteristics most commonly associated with Title VII such as references to "conciliation," timetables, or requirements of deference to state agencies.

In the last 15 years, Title IX has changed considerably, predominantly as a result of three Supreme Court decisions interpreting the statutory language. These decisions recast Title IX in the images of Titles VI and VII. Understanding these three cases is fundamental to understanding Title IX and the issue of its preemption by Title VII. Therefore, the analysis must begin by examining these cases.

35 20 U.S.C. § 1682 (1994) (this is the only express remedy provided for in Title IX).
36 Id.
37 Id.
II. INTERPRETATION OF TITLE IX BY THE SUPREME COURT

Litigation surrounding Title IX is more complex than the statutory language might indicate. This is because the Supreme Court's interpretation of Title IX in Cannon v. University of Chicago, North Haven Bd. of Educ. v. Bell, and Franklin v. Gwinnett Co. Pub. Sch. In the thirteen year span of these cases, the Court transformed Title IX into an effective weapon against employment discrimination, even though Title IX contains neither references to employment, nor remedies beyond termination of federal funding. The Court accomplished this feat by constructing a private right of action from the terms of Title IX with recoverable monetary damages. The Court then applied those terms to the employment context. The case that began this statutory reconstruction was Cannon v. University of Chicago.

A. CANNON V. UNIVERSITY OF CHICAGO

The plaintiff in Cannon was denied admission to both the University of Chicago Medical School and Northwestern University Medical School. She brought a civil rights suit under Section 901(a) of Title IX alleging sex discrimination. Her complaint claimed a private right of action for damages for sex discrimination that occurred during the admission selection process. The district and circuit courts rejected this claim, but the Supreme Court reversed the lower courts concluding that Title IX did contain a private right of action.

The Court based its analysis on the four factors for establishing an implied right of action identified in Cort v. Ash. Cort involved a claim arising under 18 U.S.C. § 610, which prohibits corporate contributions in connection with federal elections. The plaintiff asserted an implied cause of

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41 441 U.S. 677 (1979).
42 Id. at 681 n.2.
43 Id.
44 Id.
action from the statute. However, the Supreme Court held no such cause of action existed. In its opinion, the Court identified four factors used to determine whether an implied cause of action existed. First, courts must ask whether the plaintiff is "one of the class for whose especial benefit the statute was enacted." Second, the Court must inquire whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" Third, the Court must ask whether the implied remedy is "consistent with the underlying purposes of the legislative scheme . . ." Finally, the Court must inquire whether the remedy was better left to state law.

In Cannon, the Court affirmatively answered the first factor. Drawing an analogy to § 5 of the Voting Rights Act of 1965, the court noted that the language differs from language which protects the general public. The Court then examined the legislative history of Title IX to determine whether Congress had intended to create a private remedy, as required by the second prong of the Court analysis. The Court focused on several references made to Title VI of the 1964 Civil Rights Act by Senator Bayh, the sponsoring Senator of the Title IX amendment. Based on these comments, the Court concluded that Congress had fashioned Title IX after Title VI. The Court assumed that Congress knew that the judiciary had found an implied right of action under Title VI. As a result, the Court reasoned that Congress intended the courts to recognize a similar right of action under Title IX.

49 Id. at 85.
50 Id. at 78 (citation omitted).
51 Id.
52 Id.
53 Id.
55 Cannon, 441 U.S. at 690.
56 Id. at 694.
57 Id. at 694 n.16. The Court cited two additional statements by Senator Bayh: "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX];" and "[E]nforcement of [Title IX] will draw heavily on these precedents." Id. at 696 n.19 (alterations in original).
58 The Court noted that "[e]xcept for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the statutes use identical language to describe the benefited class." Id. at 694-95. One congresswoman contended that Title IX was merely a "cut and paste job" using Title VI as a model. See North Haven Board of Education v. Bell, 456 U.S. 512, 528 (1981) (citing Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 409 (1975) (remarks of Rep. O'Hara).
59 Cannon, 441 U.S. at 703.
The Court also found that a private right of action would serve the purposes of Title IX, as required under the third prong of the *Cort* analysis. Although finding that federal funding termination might further the Act's first purpose—eliminating federal support for discriminatory practices—the Court concluded that the Act's second purpose—providing individuals with protection against those practices—could not be served by restricting relief to federal funding termination. Positing that the government would rarely use such a severe remedy, the majority noted that the statute provided only marginal protection to individuals threatened by discrimination. It concluded that an alternative remedy of individual relief was necessary for "orderly enforcement of the statute." Finally, the Court answered the fourth prong of the *Cort* inquiry, whether the cause of action is one traditionally relegated to the states, in favor of federal law since, according to the Court, the federal sector has been the primary protector of civil rights since the Civil War.

B. NORTH HAVEN BOARD OF EDUCATION V. BELL

Until 1981, it was unclear whether Title IX applied to employment practices. Not only were the Circuit courts split on the question, but federal agencies were also in conflict.

The petitioners in *North Haven* were atypical for Title IX cases—both petitioners were public school boards. Public school boards are more frequently involved in employment discrimination claims as defendants, rather than as plaintiffs. The petitioners challenged the Department of Health, Education, and Welfare’s authority (hereinafter HEW) to issue regulations

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60 Id. at 705.
61 Id. at 704-06.
62 Id. at 708-09.
63 Id. at 708.
64 456 U.S. 512 (1982).

For examples of federal agency conflict, see *North Haven*, 456 U.S. at 516, 517 n.6, 520 n.9. See also 34 C.F.R. §§ 106.51-106.61 (1980); 7 C.F.R. §§ 15a.51-15a.61 (1980); 13 C.F.R. §113.3 (1981).
regarding employment discrimination. HEW had investigated both petitioners for violation of Title IX regulations stemming from employees' complaints about gender discrimination. Both school districts filed suit in federal district court when HEW threatened them with corrective action.

On appeal, the Second Circuit consolidated the cases and concluded, based on Title IX's legislative history, that the statute applied to employment discrimination as well as to the more common circumstances of student admissions and faculty advancement. The Supreme Court affirmed.

The majority opinion began by examining the language of Title IX. Concluding that the language of the statute "neither expressly nor impliedly excludes employees from its reach," the Court held (consistent with the construction of other civil rights acts), Title IX should be interpreted broadly. However, because the statutory language was not determinative, the Court searched the legislative history of Title IX for evidence of Congressional intent.

The Court based its reading of Title IX on two aspects of the provision's legislative history: statements made at the time of Title IX's enactment, and the post-enactment history of enforcement. In reviewing the history of the Senate bill, the Court relied exclusively on floor comments made by Senator Birch Bayh. Although recognizing that floor amendments are a weak foundation for judicial interpretation, the Court noted that since the Senator's statements were "the only authoritative indications of congressional intent regarding the scope of [Title IX]," they should guide the statute's interpretation. The Court reasoned that the Senator's comments indicated his intent that Congress should include employment practices in Title IX.

In reviewing the Act's legislative history in the House, the Court's analysis concentrated on a provision in the House bill which expressly excluded employment practices from protection. The Senate bill contained no corresponding provision and, as the Court noted, the section was later eliminated during reconciliation of the House and Senate versions. This

66 North Haven, 456 U.S. at 517.
68 North Haven, 456 U.S. at 540.
69 Id. at 521.
70 Id. at 522.
71 Id. at 523-30.
72 Id. at 530-35.
73 Id. at 524-26.
74 Id. at 527.
75 Id.
elimination, coupled with Senator Bayh's statements, convinced the Court that when Congress promulgated Title IX, it intended to prohibit employment related discrimination as well as discrimination related to admissions, seniority, and scholarships.76

The Court noted that the "postenactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Congress' desire to ban employment discrimination in federally financed education programs."77 For example, the Court noted that Congress, in reviewing HEW's regulations four years after the enactment of Title IX, rejected a resolution objecting to HEW's application of Title IX to the employment arena.78 The Court concluded that the legislative history "indicate[d] that Congress was made aware of the Department's interpretation of the Act and ... lends weight to the argument that coverage of employment discrimination was intended."79

C. FRANKLIN V. GWINNETT COUNTY PUBLIC SCHOOLS80

In deciding Cannon, the Supreme Court did not specify the remedies available for plaintiffs who successfully asserted the newly recognized cause of action. Instead, the Court left a void for the lower courts to fill. While one circuit did suggest the school district should consider the possibility of compensatory damages to private litigants,81 others refused to do so,82 limiting damages to only declaratory and injunctive relief.83 The Supreme Court resolved these conflicting remedies in Franklin v. Gwinnett County Public Schools.84

76 Id. at 528.
77 Id. at 530-31.
78 Id. at 534-35.
79 Id. at 534.
81 See Pfeiffer v. Marion Center Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990).
83 The reasoning of the four circuits, supra note 82, comes from Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1980). In Pennhurst, the Supreme Court decided that where Congress enacts or has enacted spending clause legislation, the proper remedy is to stop payment of federal funds to the offending entity. Id. at 28.
The petitioner in *Franklin* was a former student at North Gwinnett High School.\(^8\) She alleged that a teacher had made sexual advances towards her and forced her to engage in sexual intercourse.\(^6\) Although school administrators were allegedly aware of the teacher's actions, the petitioner claimed they made no attempt to discourage the teacher's advances.\(^7\) The school initiated an investigation, but closed its inquiry when the teacher resigned after the petitioner filed her complaint.\(^8\) The petitioner sought damages under Title IX for intentional gender-based discrimination.\(^9\)

To determine whether damages are available under Title IX, the Court reexamined the state of the law at the time the legislature passed Title IX.\(^9\) As in *Cannon*, the Court assumed that Congress knew of the Court's treatment of similar laws at the time of the enactment, and assumed Congress enacted Title IX with these treatments in mind. In ruling, the Court presumed Congress' familiarity with the Judicial Branch's broad power to provide any and all necessary remedial relief for violations of statutorily created rights.\(^9\) The Court concluded that unless the legislature indicated an intention to abandon this premise, then "Congress enacted this statute with the prevailing traditional rule in mind."\(^9\)

As in *North Haven*, the Court also considered the post-enactment history of the statute. The Court focused on two amendments to Title IX, the Civil Rights Remedies Equalization Amendment of 1986\(^9\) and the Civil Rights Restoration Act of 1987.\(^9\) Both amendments afforded Congress the opportunity to restrict the right of action recognized in *Cannon*. Instead of placing explicit restrictions on the damages available under Title IX, however,

\(^8\) *Id.* at 63.
\(^6\) *Id.* at 63-64.
\(^7\) *Id.* at 64.
\(^8\) *Id.*
\(^9\) *Id.* at 60.
\(^9\) *Id.* at 71-73.
\(^9\) *Id.* at 72-73.
\(^9\) *Id.* The Court arrived at this conclusion although the legislature had remained completely silent on the issue of remedies. *Id.* at 71. The Court sidestepped the issue of Congressional silence by arguing that Congress could not be expected to mention applicable remedies for an action implied by the Court five years after enactment. The majority reasoned that if Congress legislated under the awareness of the traditional presumption, its silence only demonstrated that it assumed the courts would provide any appropriate remedies that were later found necessary. *Id.* at 71-72.

Congress remained silent. The Court viewed this silence as an indication that Congress accepted the courts’ power to provide appropriate remedies. 95

Based on this history, the Court unanimously concluded that damages are available for an action brought under Title IX. 96 Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, concurred in the opinion. Scalia, however, characterized the holding as standing for the paradoxical proposition that “[u]nless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied.” 97 Justice Scalia suggested that courts should have the power to limit the remedies available for an action constructed by the judiciary rather than expressly created by Congress. 98 Nevertheless, he stated that in light of subsequent legislation, “it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.” 99

III. APPLICATION OF THE SUPREME COURT CASES AND IMPLICATIONS FOR LITIGANTS

Franklin completed the thirteen year evolution of Title IX. By 1992, Title IX was transformed from a generally worded prohibition against sex discrimination in education—with questionable practical effectiveness—into a forceful tool for attacking sexual discrimination in educational institutions, including sex discrimination in employment. The Supreme Court had gradually reformed Title IX in the image of Title VII. After Franklin, the two had become, in terms of legal requirements and remedies, virtually the same. In fact, several courts subsequently found that the substantive standards of both acts were so similar that issue preclusion prevented assertion of a Title VII claim when a plaintiff had previously lost on the substantive issues of a Title IX claim. 100

The similarities, however, did not stretch to Title VII’s administrative procedures. Unlike Title VII plaintiffs, plaintiffs who file a Title IX claim are not required to attempt to resolve their grievances through conciliation or negotiation. Likewise, Title IX plaintiffs are not subject to any filing dead-

96 Id. at 76, 78.
97 Id. at 77.
98 Id.
99 Id. at 78.
lines, nor are they subject to mandatory deferment to state agencies. These administrative differences give Title IX plaintiffs an obvious advantage. Title IX essentially creates a quicker and easier route to the courthouse for claimants suing an educational institution for employment discrimination. A plaintiff filing both a Title IX and a Title VII action has the opportunity to recover even though she failed to meet EEOC deadlines, refused to allow conciliation procedures to run their course, or did not receive a right to sue letter from the EEOC. By filing only a Title IX suit, a plaintiff employed by an institution covered by Title IX could avoid the carefully constructed Title VII framework in its entirety. Thus, Title IX allows the plaintiff to wholly circumvent Title VII.

Few courts have confronted this problem. These courts disagree about its resolution. This discrepancy results from differing interpretations of the trio of Supreme Court holdings that expanded Title IX. Because the Supreme Court has not directly confronted the issue of whether Title IX supports an implied cause of action for employment discrimination, the outcome of Title VII and Title IX cases depend largely on the conclusions lower courts derive from the three Supreme Court decisions.

The two district court cases discussed in the following sections illustrate the differing degree of significance courts place on Cannon, North Haven, and Franklin. The first opinion concludes that the three decisions leave open the question of preemption of Title IX by Title VII, while the second holds that these decisions foreclose the preemption question.

A. STOREY v. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN

In Storey I and Storey II, the federal district court for the Western District of Wisconsin considered whether Congress intended Title VII to preempt remedies other than those existing prior to Title VII's enactment. The plaintiff, an assistant professor at the University of Wisconsin, brought suit under Title VII, 42 U.S.C. § 1983, and Title IX, alleging that the University's denial of her appointment to full professor constituted discrimination.

1 Storey v. Board of Regents of the Univ. Of Wisconsin, 600 F. Supp. 838 (W.D. Wis. 1985) (hereinafter Storey I). The district court reserved judgement on defendants' motion to dismiss under Title IX. Id. at 842. The viability of plaintiff's Title IX claim was adjudicated in Storey v. Board of Regents of the Univ. of Wisconsin, 604 F. Supp. 1200 (W.D. Wis. 1985) (hereinafter Storey II).


3 See Storey I, 600 F. Supp. 838, 842 (W.D. Wis. 1985). This opinion discussed but did not decide the defendant's motion to dismiss the Title IX cause of action. The court reached that issue in Storey II. See also Wedding v. Univ. of Toledo, 862 F. Supp. 201 (N.D. Ohio 1994) (holding that Title VII preempts Title IX).
due to her gender. The University’s Board of Regents moved to dismiss the § 1983 and Title IX claims.

With respect to plaintiff’s § 1983 claim, the court attempted to ascertain from the legislative history of Title VII whether Congress intended to preempt other conflicting legislation. The court divined an intent to “leave untouched pre-existing avenues of relief.” The Storey court concluded that this intention allowed the plaintiff to assert a claim under § 1983, because the statute was enacted before Title VII. However, the opinion noted that the plaintiff’s Title IX claim presented an entirely different issue.

Unlike Title VII’s legislative history, the court found nothing in the legislative history of Title IX indicating that Congress designed it to provide remedies “in addition” to pre-existing avenues of relief. The opinion noted that there was no indication that Congress intended to have Title IX depart from Congress’ earlier instructions that in enacting Title VII it desired “to leave intact only preexisting alternative remedies, not to permit future overlapping avenues of relief.” The court reasoned that Congress’ specific preservation of pre-existing remedies indicated a conscious decision to allow Title VII to act as the exclusive remedy for violations of overlapping post-Title VII statutes.

The Storey analysis also focused on the similarities between the remedies available under Title VII and Title IX. The court observed that in cases which had accorded a private right of action under Title IX, the plaintiff “typically had not had recourse to a remedial statutory scheme like Title VII.” The court argued that where a plaintiff asserts both a Title IX and a Title VII claim:

Plaintiff is not remediless. She is fully capable of pursuing her claim under Title VII, not to mention § 1983 . . . . Of course, following enactment of Title VII, Congress has been free to provide victims of employment-related discrimination

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104 Storey I, 600 F. Supp. at 839.
105 Id. See supra note 103.
106 Id. at 840.
107 Id. at 840-41 (“[T]t appears Congress intended to retain only those statutory remedies already in existence when Title VII was enacted.” (emphasis added)).
108 Id. at 841.
109 Id. at 842.
110 Id.
111 Id. (emphasis added).
with additional remedies. It has been free to do so expressly. It has been free to do so by implication, but against the background of Title VII, its intention to do so requires a powerful implication on its part.\textsuperscript{113}

The court concluded that, unlike in \textit{Cannon}, there was insufficient evidence of Congressional intent to imply a remedy for employment-related discrimination.\textsuperscript{114}

The \textit{Storey} opinion distinguished \textit{Cannon}, noting that the \textit{Cannon} majority had relied upon the absence of a private remedy for individual victims of discrimination. The \textit{Storey} plaintiff, however, was capable of pursuing her claim under Title VII.\textsuperscript{115} As a result, the plaintiff was not left remediless and was protected from discrimination—which satisfied the primary purpose of the Act.\textsuperscript{116} The court then dismissed the plaintiff's Title IX claim.

\textbf{B. HENSCHKE V. NEW YORK HOSPITAL-CORNELL MEDICAL CENTER}\textsuperscript{117}

In a recent decision, the Southern District of New York has explicitly rejected the \textit{Storey} analysis, concluding that Title VII does \textit{not} preempt Title IX.\textsuperscript{118} The plaintiff, a professor of radiology, alleged that she was passed over for appointment to Acting Chief of her department because of gender-based discrimination. She filed actions under Title IX and VII.\textsuperscript{119} Defendants moved to dismiss the Title VII cause of action because the plaintiff had not fulfilled the statute's procedural requirements. They also moved to dismiss the Title IX cause of action asserting that Title VII preempted Title IX.\textsuperscript{120} The court granted the first motion\textsuperscript{121} and denied the second, relying in large part on its readings of \textit{Cannon}, \textit{North Haven} and \textit{Franklin}.\textsuperscript{122} In a brief discussion, the court held that when the opinions were read together they stood for the proposition that Title IX was intended to

\textsuperscript{113} \textit{Storey II}, 604 F. Supp. at 1205.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} 821 F. Supp. 166 (S.D.N.Y. 1993).
\textsuperscript{118} \textit{Id.} at 172. \textit{See also} Bowers v. Baylor Univ., 862 F. Supp. 142 (W.D. Tex. 1994) (cause of action under Title IX).
\textsuperscript{119} \textit{Id.} at 168.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 170-71.
\textsuperscript{122} \textit{Id.} at 171-73.
“serve as an additional protection against gender-based discrimination in educational programs receiving federal funding regardless of the availability of a remedy under Title VII . . . .”

The *Henschke* court’s interpretation of Title IX is flawed by its incorrect extrapolation from the Supreme Court opinions. Fundamentally, neither *Cannon*, *North Haven* nor *Franklin* held that a private cause of action arises in an employment related claim where Title VII is also asserted. In fact, none of the claims considered in the three Supreme Court cases were brought by employees. The *Cannon* and *Franklin* plaintiffs were students seeking admission to educational institutions, while the *North Haven* suit was brought by two federally funded public school boards contesting the validity of Title IX’s express remedy. The *Henschke* court ignored these distinctions when evaluating the three cases. It is thus unsurprising that the court quotes neither word nor rationale of these decisions in support of its holding. Instead, *Henschke* relies only on *North Haven’s* “extensive analysis of the legislative history of Title IX” and lack of:

suggestion in either the Supreme Court opinion or the Second Circuit opinion in *North Haven* that the scope of Title IX’s protection against employment discrimination would not extend to an action by an individual who is also seeking relief under Title VII.

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123 *Id.* at 172.
124 See, *e.g.*, *id.*:

There is no suggestion in either the Supreme Court opinion or the Second Circuit opinion in *North Haven* that the scope of Title IX’s protection against employment discrimination would not extend to an action by an individual who is seeking relief under Title VII . . . . Reading all of the above together [*Cannon, North Haven and Franklin*], it is the opinion of this court that the legislative history of Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection.

The District Court in *Bowers v. Baylor Univ.* used similar reasoning. Although agreeing with the defendant’s analysis, the court stated that the Supreme Court’s decisions “lead this Court to the conclusion that the Supreme Court would take the next logical step of recognizing Bowers’ cause of action under Title IX.” *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145 (W.D. Tex. 1994).

125 *Henschke*, 821 F. Supp at 172.
However, because the North Haven Court was concerned only with the express portions of the act, the Court had no reason to consider whether Cannon’s implied right of action covered employment. As a result, the lack of suggestion in the Cannon opinion that Title IX did not apply to employment discrimination was neither surprising or dispositive. In his dissent, Justice Powell referred to the tension between Title IX and Title VII, but only as one indication that Congress did not intend Title IX to cover employment practices.\(^{26}\) So although the Court rejected Justice Powell’s view of Congress’ intent; there is no indication that it specifically rejected his more specific remedy for employment discrimination.\(^ {27} \)

Moreover, the district court in Henschke focused on the wrong case. Cannon best answers the question of whether Title IX supports an action for employment discrimination, not North Haven.\(^ {28} \) The Cannon majority’s silence on whether the issue of an implied action for employment discrimination exists is even less surprising than the absence of such a discussion in North Haven. When the Cannon court considered the question of whether an implied private cause of action existed under Title IX, the Court had yet to hold that Title IX covered employment practices. Thus, the majority had no more reason to consider the issue than did the North Haven majority.

Even when read together, as the Henschke opinion encourages, the three cases do not provide an answer to the Title IX/Title VII question. The Supreme Court cases on which Henschke relies are not as conclusive on the issue as that opinion intimates. The North Haven and Cannon decisions were predominately based on findings of legislative intent. To the extent that legislative history is the primary source for determining whether an implied


\(^{27}\) Id. at 535 n.26.

\(^{28}\) The challenge is not to determine if the North Haven holding applies to the implied right of action found in Cannon, but to decide if an implied right of action for employment discrimination existed at all. As Justice Scalia pointed out, the search for Congress’ remedial intent for a private cause of action is unlikely to succeed, since Congress never created it—the Court merely implied it. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (Scalia, J. concurring). The search for the scope of that right would encounter similar difficulties. Congress is unlikely to discuss the scope of a cause of action it did not realize it was creating. In contrast, it is more likely that where Congress indicated an intent to create a cause of action, it would have indicated whether this new cause of action should apply to employment discrimination. Consistent with this analysis, the North Haven Court did not restrict its reasoning to the specific circumstances of the case before it, but spoke in broad, general terms about the scope of the Title as a whole. Cannon left room to identify specific areas that are not necessarily subject to that holding. This is because, unlike the North Haven analysis (which was simple legislative interpretation), the Cannon opinion drew on inferences from “contextual” evidence of legislative intent. If the contextual evidence is different for different subject areas of the Title, it would also indicate whether an implied action exists might also be different. In this respect, Justice Powell’s dissent is misplaced; he should have made the dissent thirteen years earlier in Cannon, rather than in North Haven.
action exists, the Supreme Court, even while reading the cases together, has yet to make the requisite analysis of Title IX legislative history regarding employment history. The *Henschke* court did not recognize this failure. Instead, it was content to piece together dicta from various opinions to draw its final conclusion. However, the issue of whether an implied right of action for employment discrimination exists cannot be dealt with through inferences from dicta. Since both *Cannon* and *North Haven* were based on inferences of legislative intent, adding their holdings together to infer a separate proposition compounds inference upon inference. There is no assurance that this level of abstraction accurately reflects congressional intent.

The substantive right found in *Cannon* is “one that Congress did not expressly create, but that [the] Court found to be implied.” Since Congress did not create it, there is no way to determine what Congress would have intended the courts do. Hence, the search for Congressional intent as to scope of the remedial right is “unlikely to succeed.” Courts should base future holdings in this arena on an analysis that does not rely on Congressional intent. Otherwise, employment discrimination may not be covered by the language of *Cannon* and *North Haven*, leaving victims of employment discrimination without a private right of action.

At first glance, this proposition—that employment discrimination presents an exception to *Cannon*’s holding—may seem curious. The implication is that an implied right of action exists for some plaintiffs, but not others, even though both groups are within the title’s scope. This implication may not be as anomalous as it seems. In prior cases, the Supreme Court has found an implied cause of action under one provision of a statute while finding no implied cause of action under a separate provision of the same statute. For instance, in *Transamerica Mortgage Advisors v. Lewis,* the Court concluded that in enacting the Investment Advisor’s Act of 1940, Congress intended to create a cause of action in one section but not in another section of the Act. Similarly, with respect to Title IX, Congress may have intended non-employees to possess a right of action against federally funded

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129 See *Wedding v. University of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994) (“This Court does not, however, find these cases [Cannon and North Haven] dispositive of the matter…. [E]ven when read in conjunction with Cannon, it does not necessarily follow… that a private cause of action must also exist for employees.” Id. at 202-03.).

130 *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (Scalia, J., concurring).

131 *Id.*


educational institutions, while intending that employees be restricted to relief through Title VII. Alternatively, Congress may not have considered the issue at all, placing relief with the courts' discretion.

In either case, the challenge for courts confronting simultaneous Title IX and Title VII actions is to determine whether Title IX supports an implied cause of action specifically for employment discrimination. Ten years ago, the law required courts to simply apply the test of *Cort v. Ash* to Title IX, as the Supreme Court did in *Cannon.* Today, however, the Supreme Court applies *Cort v. Ash* in name only, if at all. In its place, courts engage in a much less formulaic inquiry that is more consistent with a modest view of the judiciary's purpose. This more restrained approach is premised on the belief that the Court's tasks are the same whether deciding the existence of an implied cause of action or an express cause of action. In both instances, the Court defers to the authority of Congress to enact laws and focuses on divining the Congressional intent.

IV. CONGRESSIONAL INTENT ANALYSIS AND THE INTERACTIONS OF TITLE VII AND TITLE IX.

A. THE DEVELOPMENT OF THE INTENT ANALYSIS

The Court's treatment of implied causes of action has gone through several doctrinal periods. *Cort v. Ash* represents a transition between the two most recent periods. The *Cort* decision shifted away from using legislative purpose as the determining factor for establishing implied actions, in favor of using Congressional intent.

Although *Cort's* clear and comprehensive format was generally accepted for four years, dissatisfaction grew over its split in emphasis between legislative purpose and intent and it was gradually redefined out of


137 See generally H. Miles Foy III, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 Cornell L. Rev. 501, 565-84 (1986) (hereinafter FOY). The history of implied actions is long and stretches through several different doctrinal periods. The first implied action case was Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Before Justice Marshall struck down the Judiciary Act as contrary to the Constitution, the Court held that Marbury was entitled to relief by implication of law, although no remedy had been expressly provided for by Congress in the 1801 Act. *Id.* at 166.

138 Transamerica, 444 U.S. at 15.


existence. The Cannon v. University of Chicago marked the outermost expansion of the Cort period. Prior to Cannon, the Court reaffirmed the Cort analysis in several decisions. However, by 1979, there were signs that members of the Court were dissatisfied with the Cort scheme. The Cannon Court rigidly applied the Cort analysis to the facts in Cannon. This rigid application may have been the immediate reason for the test's demise. The advantage of the Cort calculus was that it was straightforward and mechanical. Lower courts found it easy to follow the Supreme Court's lead, and liberally recognized new implied actions. Between 1975 and 1979, lower courts found implied causes of action in twenty cases. The Court over-turned seven of these cases, retreating from the more expansive approach.

The Supreme Court's treatment of implied causes of action reflects its evolution to a more restrictive view of its role in relation to the legislature. The Court's use of congressional intent was part of the evolution. However, at the time the Supreme Court decided Cort v. Ash, its analysis of implied action questions still reflected its earlier, more expansive purpose approach to recognizing implied actions. Though the four part Cort test contained a congressional intent requirement, the other three prongs related to statutory purpose and the general desirability of implying a private right of action. These criteria were inconsistent with the policy of Congressional intent, which
is premised on the belief that providing a private cause of action is a legislative, not a judicial responsibility. The mixture of varying doctrinal foundations for the Cort factors ultimately doomed the approach.

The harbinger of Cort's death came in the 1978 case, Davis v. Passman. In Davis, the Supreme Court found that a cause of action existed for redressing violations of a claimant's Fifth Amendment rights. In dictum, the Court described the requisite inquiry for finding causes of action within statutes: "[S]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them in what manner . . . . In each case, however, the question is the nature of the legislative intent informing a specific statute . . . ."

Three justices expressed similar views in Cannon (Justice Powell in dissent and Chief Justice Rehnquist and Justice White in concurrences). They argued that without proof of contrary intent, to imply a cause of action was inappropriate regardless of the purpose of the statute in question. In their view, federal courts' actions were limited by their statutory function of divining and effectuating the intent of Congress.

The seed planted by Powell's dissent grew in the Court's opinions in Touche Ross & Co. v. Redington and Transamerica Mortgage Advisors Inc. v. Lewis. Both opinions stated that the sole test for determining implied causes of action was whether Congressional intent existed for such actions. The practical effect of this was to circumscribe the Cort analysis and to dispose of inquiry into purpose as an analytical tool.

In Touche Ross, the Court rejected a plaintiff's claim under § 17a of the Securities Act of 1934. The plaintiff, a trustee of an insolvent securities firm, claimed that because the defendant had erred in auditing and certifying the firm's reports, the firm's customers had suffered additional losses. He sought an action for damages and rescission of the investment contract.

In an opinion by Justice Rehnquist, the Court denied the plaintiff relief under § 17a. When the Court questioned the validity of implied causes of actions, it used a different tone than in prior decisions. For instance, Justice Rehnquist made only a single reference to the four Cort factors,

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146 Id. at 739-40 (Powell, J., dissenting).
147 442 U.S. 228 (1978).
148 Id. at 241.
149 See Cannon, 441 U.S. at 710 (Rehnquist, J., concurring); id. at 728 (White, J., concurring); id. at 731 (Powell, J., dissenting).
152 See Touche Ross, 442 U.S. at 575; Transamerica, 444 U.S. at 17.
despite the district court’s reliance on these factors to decide the case.\textsuperscript{154} Instead, the opinion flatly asserted that the Court’s task was simply to determine “whether Congress intended to create, either expressly or by implication, a private cause of action.”\textsuperscript{155} Consistent with this emphasis on congressional intent, Justice Rehnquist construed the \textit{Cort} test as merely a guide for divining congressional intent.\textsuperscript{156} Likewise, he applied the holdings of \textit{Cannon} and \textit{J.L. Case Co. v. Borak},\textsuperscript{157} a case decided largely on the basis of statutory purpose, using reasoning similar to \textit{Cort}.\textsuperscript{158}

In these respects, \textit{Touche} indicated a change in direction for the Court; the Court announced a much stricter interpretation of the \textit{Cort} approach. Congressional “purpose” was no longer a consideration in determining the definitive issue—whether the requisite degree of Congressional will existed so as to assume an implied cause of action. As Justice Rehnquist stated: “[t]he ultimate question is one of Congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.”\textsuperscript{159} The Court was no longer searching for implied actions in law, but instead searched for unexpressed causes of action implied by legislative facts.\textsuperscript{160}

The \textit{Transamerica} opinion supported the Court’s evolution to a strict intent-based rule.\textsuperscript{161} The plaintiff in \textit{Transamerica} sought to pursue an action under the Investment Adviser’s Act of 1940. The Supreme Court refused to imply such an action, concluding that the Act’s provisions indicated a lack of congressional intent for the judiciary to create any additional remedies beyond those expressly provided. The Court observed, however that the lack of an express private right was not determinative, and that it would look to “the language or structure of the statute, or in the circumstances of its enact-

\textsuperscript{154} \textit{Touche Ross}, 442 U.S. at 575.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 575-76 (The four \textit{Cort} factors are not “entitled to equal weight,” and the language and focus of the statute, its legislative history, and its purpose are all used to determine legislative intent.).
\textsuperscript{157} 377 U.S. 426 (1964) (finding a private right of action in § 14(a) of the Securities Exchange Act of 1934, because “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.” \textit{Id.} at 433.).
\textsuperscript{158} \textit{See} \textit{Cannon}, 441 U.S. at 703 (reaching different conclusion as to Congressional intent, though using same method). The Cannon court cited \textit{Borak} five times. \textit{See id.} at 689 n.9, 690-92 n.13, 703-04 n.35, 706-07 n.41, 711. The latter reference was used in the text of the opinion to refute the respondent’s argument that the express enforcement mechanisms of Title IX indicated a lack of congressional intent to create a private right of action. \textit{See infra} note 185.
\textsuperscript{160} \textit{See} \textit{Foy}, \textit{supra} note 137, at 565.
ment." Nonetheless, the Court argued that Congress knew how to provide private remedies, and refused to imply a cause of action based on the comprehensive statutory remedies. In general, the "presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." A plaintiff needed to demonstrate "persuasive evidence of a contrary legislative intent" to rebut this presumption. In addition, although the Court recognized that the Act had a purpose of protecting "clients of investment advisers," it deemed the issue of a private cause of action to be "a different question." Even in the face of a legislative history "entirely silent" on the matter of private litigation under the act, the Court was unwilling to overcome the presumption against implication by analyzing the purpose of the statute. The Court was reluctant to exert judicial power to compensate for Congress' neglect in specifying the limits of its statutory power. This created a difficult burden for future claimants wishing to introduce implied causes of action.

Powell's concurrence culminated the evolution of the implied cause of action analysis. He simply stated that he viewed the majority's opinion as "compatible with [his] dissent in Cannon v. University of Chicago . . ." This opinion clearly marks the Court's shift away from the multi factored Cort test used in Cannon (using purpose analysis and implied private rights of action) and towards a test based purely on Congressional intent. As Justice Scalia later observed:

It could not be plainer that we effectively overruled the Cort v. Ash analysis in Touche, Ross & Co. v. Reddington, and Transamerica Mortgage Advisors, Inc. v. Lewis, converting one of its four factors (congressional intent) into the deter-

162 Id. at 18.
163 Id. at 19-20.
165 Transamerica, 444 U.S. at 21 (1979); see also Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 532-33, 536 (1989) ("The ultimate issue is whether Congress intended to create a private cause of action. Unless such congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." (citations omitted) (internal quotations omitted)) But see Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (legislation silent on the question of private remedies evinces an intent to preserve private actions, where such actions had already been recognized by the courts at the time of enactment.)
166 Transamerica, 444 U.S. at 17-18.
167 Id. at 18.
168 Id. at 25.
minative factor, with the other three merely indicative of its presence or absence. . . . [T]his Court has long since abandoned its hospitable attitude towards implied rights of action. . . . The recent history of our holdings is one of repeated rejection of claims of an implied right.\textsuperscript{169}

B. CONGRESSIONAL INTENT ANALYSIS AS APPLIED TO TITLE IX

Though the Supreme Court's modern implied action analysis indicates the \textit{Cannon} reasoning is now out of fashion, the Court's change in approach since \textit{Cannon} does not suggest that the opinion is defunct, or even that the Court would overturn its decision given the opportunity. Rather, the significance of the Court's change in philosophy is an indication of the methods the lower courts should use to determine whether Title VII preempts Title IX. As noted above, the existence of an implied private action for employment discrimination is still an open question. At most, the \textit{Cannon} Court concluded only that there existed a \textit{general} private cause of action under Title IX. It did not consider the specific issue of a cause of action regarding employment practices.

The clear indication of \textit{Touche} and \textit{Transamerica} is that a court must identify evidence of congressional intent in order to recognize an implied cause of action for employment discrimination under Title IX. If evidence of congressional intent cannot be found in either the statutory construction of Title IX or its legislative history, the presumption against recognizing an implied cause of action controls. Under this "intent based" approach, it is plausible for a court to recognize a general cause of action in a statute, while failing to find a specific cause of action for individual provisions of the act.\textsuperscript{170} Congressional intent is rarely uniform regarding a statute. The evidence adequate to support a general private right of action may not be sufficient to establish a private right of action for a specific provision or area, as in Title IX.

Deciphering the legislative intent for any part of Title IX is not easy. As the Court recognized in \textit{North Haven}, there is a dearth of legislative history.\textsuperscript{171} Of course courts have frequently faced this problem when dispos


\textsuperscript{170} The \textit{Borak}, \textit{Touche}, and \textit{Piper} line of cases support this point. Though all involved issues of implied actions under the Securities Act of 1934, 15 U.S.C. § 78, the Court found implied actions in some provisions of the Act, but not in others. Similarly, the \textit{Transamerica} decision recognized a cause of action under § 215 of the Investment Advisors Act of 1940, but not under § 206. \textit{Transamerica}, 444 U.S. at 18-24.

\textsuperscript{171} North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982). Commentators have also criticized the lack of legislative history. \textit{See, e.g.}, Nancy Peterson, Note, \textit{Lieberman v.}
ing of implied action claims. Inherently, implied action cases are not conducive to a congressional intent analysis. By the very nature of implied cause of action cases, there normally is no clear evidence of intent to identify. Paradoxically, the right of action the court must find is one whose very existence Congress did not expressly acknowledge. Thus, though facially straightforward, the "intent based" standard forces the court to predict what Congress would have done if confronted by the specific issue, rather than merely identifying Congress' general intent. In order to accomplish this feat, the Court uses doctrines of statutory construction and interpretation of legislative history to infer congressional intent from the legislative record. The use of this deductive method permits the Court to stray from a strict statutory approach. This leads some observers to conclude that the test is inadequate as a model for the Court's holdings and that, in practice, is often nothing more than purpose-based analysis disguised in the language of congressional intent.

Although Title IX's design is simple and its legislative history sparse, it is possible to gain some insight from an examination of its statutory construction and history. The following sections will attempt to illuminate these insights through a detailed examination of Congress' treatment of Title IX, Title VII, and the relationship between the two. This analysis starts with an examination of the language of Title IX. If congressional intent can be found unambiguously in the words of a statute there is no need to make investigations beyond that point.

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173 See HARIED, supra note 139, at 370-72, 381 (the Supreme Court should return to a common law theory for defining implied rights of action and discard the statutory construction examination).

174 See, e.g., Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 13 (1980) ("The key to the inquiry [whether a private right of action exists] is the intent of the Legislature. We look first, of course, to the statutory language, particularly the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation . . . .") (citations omitted); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) ("What must ultimately be determined is whether Congress intended to create the private remedy asserted . . . Accordingly, we begin with the language of the statute itself.")
1. **Statutory Language of Title IX**

The wording of Title IX provides little insight into whether an action for employment discrimination exists. Title IX provides for neither private enforcement, nor does it imply Congressional contemplation of relief through customary suits.\(^\text{175}\) Rather, its provisions simply proscribe certain conduct and authorize federal fund termination for those institutions which ignore that proscription.\(^\text{176}\) The only solid indication of Congressional intent is Congress’ desire to rid public education of sex based discrimination.\(^\text{177}\) The statute gives no indication of the degree of the courts authority to enforce the act, the precise scope of the title’s reach, or whether the title’s focus is purely remedial or also compensatory. As a result, courts must look beyond the express language of the title, examining the statute for implicit evidence of intent. The *Cannon* decision provides instruction for examining the statute for intent.

Although the *Cannon* Court did not specifically examine the language of Title IX, it referred to Title IX’s language in applying the *Cort* test. In the first instance, the Court noted that the Title IX language was similar to the language in Title VI, and concluded that Title VI was the model for Title IX.\(^\text{178}\) From this use of similar language, and from other evidence, the Court concluded that Congress intended Title IX to be construed similarly to Title VI. Title VI had been read as providing a private cause of action.\(^\text{179}\) Based on this deductive reasoning, the Court found congressional intent for a Title IX cause of action. Though perhaps correct as to Title IX generally, this reading of Title IX does not support the existence of a specific private right of action for employment discrimination. Title VI, by its language, does not pertain to employment practices, except where the primary purpose of the federal assistance is to provide employment.\(^\text{180}\) Thus, even if Congress was aware of the Supreme Court’s holdings regarding Title VI, and even if Congress desired that the Court interpret Title IX similarly, it does not follow that Congress also expected or intended the Court to find a private right of action for employment discrimination. As Justice Blackmun noted in *North Haven*,

\(^{175}\) See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (By drafting § 215 of the Investment Advisers Act of 1940 so that any contract in violation of the section was rendered “void,” Congress altered defendant’s civil liabilities and thus implied an intent to allow legal actions to avoid a contract under the statute. In contrast, the language of § 206 of the Act simply makes certain practices by investment advisors “unlawful” and thus does not indicate congressional intent to create a cause of action).


\(^{179}\) *Id.* at 698-99.

although the statutes are similar, the Court must take notice of slight differences between the two. In the event there are discernible differences between the language and legislative history of each, he maintained, courts should not hold Title VI precedent as persuasive. He argues that Congress could not have anticipated that courts would find a private right of action for employment discrimination when Title VI's scope is expressly limited to non-employment relationships. The parallels between Title IX and Title VI that existed in Cannon simply do not exist in the specific area of employment discrimination.

The Cannon Court next looked to the wording of Title IX during its examination of Cort's third factor: statutory purpose. The Court noted that Title IX expressly provided an enforcement mechanism to deter institutions from employing discriminatory practices. However, the Court discounted this mechanism as inadequate to fulfill one of the Act's purposes: the protection of citizens from discriminatory conduct by educational institutions. It considered fund termination inappropriate and too severe a remedy for isolated discriminatory acts against single individuals. Without an opportunity for individual relief, the court explained that the Title's beneficiaries would confront the formidable burden of showing that the discriminatory practices were pervasive before they might gain protection.

Again, the Court's argument is unavailable in the situation of an employment discrimination claim. Victims of employment discrimination are not without recourse. Title VII provides plaintiffs with effective remedies for any injury that they may have suffered. After the Civil Rights Act of 1991, Title VII plaintiffs may receive punitive damages, and in some instances, attorneys' fees.

Thus, both the language of Title IX and the inferences from it are largely ambiguous and provide little aid for the detailed inquiry of whether Title IX supports an implied right of action for employment discrimination.

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2 Cannon, 441 U.S. at 704.
3 Id. at 704-05.
4 Id. at 705.
6 The existence of the express enforcement provision of fund termination should make a court "chary of reading others into it." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979). This analysis suggests that Congress did not intend any implied causes of action under Title IX. The Cannon Court rejected this reasoning. The Cannon majority stated that the Court normally avoids "excursion[s] into extrapolation of legislative intent." Cannon, 444 U.S. at 711. Yet, it appears that in the following term, however, the Court did extrapolate legislative intent. In Touche Ross & Co. v. Reddington, 442 U.S. 560, 571-72 (1979), the Court held that a private right of action did not exist under § 17(a) of the Securities Act of 1934,
Therefore, other indications of congressional intent—such as legislative history and statutory construction—must be examined.

2. Preclusion Exception as a Test for Congressional Intent

When the statutory language is silent, one frequently employed doctrine of statutory interpretation is to evaluate the existing remedial and enforcement schemes. When these provisions are "comprehensive," they may "suffice to demonstrate congressional intent" to preclude a private cause of action.\(^{187}\) Although the Court has largely restricted application of this so-called "preclusion exception" to Section 1983 actions,\(^{188}\) it has also used this reasoning in implied action cases.\(^{189}\) This doctrine's logic provides significant doubts that Congress sought a Title IX cause of action for employment discrimination.

The Supreme Court described the basic preclusion exception, *expressio unius est exclusio alterius*\(^ {190}\) in National Railroad Passenger Corp. (Amtrack) v. National Association of Railroad Passengers:\(^ {191}\) "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'\(^ {192}\)" The Court applied this rule to the Amtrack Act, because the Act explicitly provided express remedies in other sections. In subsequent cases, the Court has accepted this extrapolation as a canon of statutory construction. See, e.g., Middlesex Co. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981) ("In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens 

\(^{187}\) Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1, 20 (1981). For a case defining the level of comprehensiveness required, see Wright v. City of Roanoke, 479 U.S. 418, 425 (1987) ("remedial mechanisms provided [by the Housing Act, 42 U.S.C. § 1401 are not] sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights.").


\(^{192}\) Id. at 458 (quoting Botany Mills v. United States, 278 U.S. 282, 289 (1929)).
finding that since it "create[d] a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances" the plaintiff could not assert a cause of action outside of the enforcement provisions provided. The presence of comprehensive enforcement measures in the statute indicated that Congress intended those measures be the only means for enforcing the Act.

Though the Amtrack holding concerned provisions within the same statute, its reasoning is applicable to the interaction between Title VII and Title IX. When Title VII was promulgated in 1964, it contained an exception for educational institutions. This limitation was one of the few to Title VII's otherwise broad reach, and it was largely inconsistent with both the policies and goals of the Civil Rights Act. As a consequence, the drafters of Title IX planned to eliminate this exception with enactment of Title IX. Initial drafts of the bill that eventually became Title IX included a provision repealing the Title VII exception, however, this provision was later removed in conference committee.

An identical repeal passed as part of the Equal Employment Opportunity Act of 1972, two months before the act containing Title IX went to conference committee. Thus, Title VII protections were once tentatively included in Title IX. Although the version enacted did not contain the repeal, it is reasonable to assume that Congress was conscious of the relationship between the two measures when passing Title IX. As further support for this proposition, the measures were approved only months apart from one another. In this context, it is easy to conclude that the two titles are analytically similar to provisions within the same statute. It is unlikely Congress would have placed educational institutions under the scope of Title VII, only to allow Title IX to provide redundant relief. Thus, applying Amtrack's logic, courts should not expand the coverage of Title IX to subsume Title VII remedies.

The Supreme Court has also applied the expressio unius doctrine to the relation between the enforcement schemes of two separate statutes. For instance, in Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n, the Court considered which statutory rights the plaintiff could assert.

193 Id.
194 Id. The Cannon Court rejected this type of analysis as inappropriate for determining whether Congress intended an implied right of action. Subsequent Supreme Court cases did not follow this view. See infra note 263-266 and accompanying text.
against a state official in an action pursuant to 42 U.S.C. § 1983. The court explained:

When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. As Justice Stewart... stated in Chapman v. Houston Welfare Rights Organization, when “a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.”

In a similar action, the Supreme Court denied a claimant’s assertion of a Section 1983 action in tandem with a claim under the Education of the Handicapped Act. Because the latter contained a comprehensive set of enforcement procedures, the Court determined that Congress intended it to exclude the former. Similarly, when the Court confronted the issue of whether the Civil Services Reform Act (CSRA) conferred a private right of action on federal employees against a breaching union, it relied upon the “elemental canon” of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. It concluded that:

Just as in United States v. Fausto, we held that the CSRA’s “integrated scheme of administrative and judicial review” foreclosed an implied right to Court of Claims review, we follow a similar course here. To be sure, courts play a role in CSRA... fair representation cases, but only sitting in review of the FLRA. To hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme...

199 Id. at 20 (citation omitted).
200 Id. at 1013.
203 Id. at 536 (citations omitted).
These holdings suggest that the comprehensive regulatory and enforcement scheme of Title VII—and Congress’ decision to subject educational employers to that scheme—did not intend to disturb the Title VII system by allowing complainants to make competing claims under Title IX.

The language and structure of Title IX indicate that Congress did not contemplate claimants would invoke Title IX to redress incidents of employment discrimination. However, the search for congressional intent is a multi-dimensional inquiry. Where the statutory construction is vague, the Court often looks to other indicia of congressional intent such as the legislative history of the statute and the circumstances of its enactment. Ultimately, indeterminate statutory language must yield to any clear evidence of congressional intent found through other means. Using this rationale, the legislative history of Title IX, although sparse, supports the interpretation that is suggested by the Title’s language and statutory construction.

3. Legislative History of Title IX

Title IX originated from several proposals in the House of Representatives suggesting that Congress address the issue of gender discrimination. The House then held hearings on the issue in 1970. A bill extending Title VI prohibitions to gender discrimination, amending the Equal Pay Act to include executive, administrative and professional employees, and expanding Title VII to public school employees was introduced that year. It was not until the following year, however, that a proposal actually reached the House floor for a vote. That proposal, sponsored by Representative Green, ultimately became Title IX.

The Senate’s counterpart to Representative Green’s measure was introduced on the Senate floor by Senator Birch Bayh in late 1971. He bypassed the committee process by presenting the measure as an amendment

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206 Though the Supreme Court in Cannon and North Haven used legislative history to decide the cases, the history presented in both those opinions is of little help in deciding the present issue. The legislative record provides no direct indication of Congress’ intentions as to a Title IX private right of action for employment discrimination. The “circumstantial evidence” used by the Cannon court mainly consisted of recent Supreme Court cases finding an implied action under Title VI. Cannon, 441 U.S. at 694-99. This indication of legislative intent is inapplicable to the present inquiry. See supra note 171.


to the Aid to Higher Education bill, which Congress was then considering.\textsuperscript{209} The amendment was ruled non-germane, but was passed when reintroduced in 1972 as part of the 1972 Education Amendments Act.\textsuperscript{210}

The primary difference between Senate and House provisions of Title IX was the House's requirement that nothing in the title authorize: "action by any department or agency with respect to employment practices . . . except where a primary objective of the Federal financial assistance is to provide employment."\textsuperscript{211} When the two bills went to the conference committee this condition was eliminated without explanation.\textsuperscript{212} In late May 1972, the conference committee provided the reconciled bills to each house. Title IX passed as part of the Education Amendments Act of 1972.

Aspects of this modest legislative history indicate a lack of congressional intent to create, or to permit the courts to create, a Title IX cause of action for employment discrimination. There is persuasive evidence that Congress intended employment discrimination claims to be exclusively redressed by Title VII from the language of Title IX to the statements made by its legislative sponsors.

A central provision of both bills was the repeal of Title VII's exemption of educational institutions from compliance with requirements of that title. The House Report described this repeal by saying Title IX: "would remove that exemption (for educational employees) and bring those in education under the equal employment provision (of Title VII)."\textsuperscript{213} Senator Bayh expressed a similar opinion. One of these passages, quoted by the North Haven opinion, describes the centrality of the repeal of the Title VII education exemption to Senator Bayh's bill: "basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs . . . Other important provisions in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions . . . ."\textsuperscript{214}

The House Report and Senator Bayh's statements make it appear that Congress intended to have employment discrimination claims redressed under Title VII, not Title IX. While a private cause of action under Title IX would

\textsuperscript{209} 117 CONG. REC. 30155-58 (1971).
\textsuperscript{210} 118 CONG. REC. 5802-5815 (1972). Unfortunately, the measure's introduction as an amendment makes a court's interpretation task that much more difficult since no committee reports discussing the measure exist to elucidate the intent of the Senate. Floor debate and the conference committee's brief report are all the Court had to rely on when trying to determine Congress' goals.
\textsuperscript{211} S. CONF. REP. NO. 92-798, 92d Cong., 2d Sess., 221 (1972).
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} H.R. REP. NO. 92-554, 92d Cong., 1st Sess. 51 (1971).
\textsuperscript{214} \textit{North Haven}, 456 U.S. at 524 (citing 118 CONG. REC. 5803 (1972) (remarks of Sen. Bayh)).
also serve to close "loopholes," nothing in the legislative history implied that
Title IX would provide that service. Nor did the legislative history indicate
that an implied cause of action would be available to provide a second level of
protection for educational employees, despite the comprehensive summary of
Title IX's benefits. The inference is that Congress legislated with the intent
of solving the issue of sex discrimination in the employment of educational
personnel by repairing Title VII, not by creating a new remedy in Title IX.

Ironically, though Title IX was intended to "repair" Title VII, repeal
of the educational exemption was implemented through the Equal Employ-
ment Opportunity Act of 1972. The Act was considered by the Senate
Committee on Labor and Public Welfare in October of 1971. The Committee
indicated that repeal of the exemption for employees of educational institu-
tions would provide a remedy for employment discrimination that was
unaddressed by any other statutory provision:

The practices complained of parallel the same kinds of
illegal actions which are encountered in other sectors of
business . . . The Committee believes that it is essential that
these employees [of educational institutions] be given the
same opportunity to redress their grievances as are available
to other employees in the other sectors of business.

It would not be "essential" to bring education employees within the
umbrella of Title VII if they were able to redress their grievances independ-
ently and more easily through Title IX. Indeed, if Congress had intended that
the courts' implied cause of action apply to educational employment relation-
ships, there would have been no need to eliminate the Title VII exception for
educational employees. The scant legislative history of both acts implies that
Congress intended educational employees to have access to the same cause of
action available to employees in other sectors of business.

Moreover, if Congress intended to create a separate scheme for
educational employees, it should have provided administrative procedures
similar to those found in Title VII. There is no clear reason for Congress to

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that in the legislative history of the Equal Employment Opportunity Act of 1972 in both the House and the Senate, there is no comment on the concurrent protection that a private action
under Title IX would provide.

217 Though it is possible that Congress saw educational employees as special, Title VII's statutory scheme of attempted settlement of grievances is more conducive to academic freedom
than a purely litigation-based regime.
subject educational employees to the conciliation and deadline requirements of Title VII, while creating a cause of action that allows claimants to circumvent these requirements. Title VII is Congress' most comprehensive and specific employment discrimination statute. This makes Congress' silence regarding Title IX's private right of action all the more suspicious. The clear circumvention of Title VII procedures, combined with an absence of discussion about Title IX's potential preemption of the entire Title VII scheme suggests that Congress did not envision plaintiffs asserting employment discrimination actions under Title IX. The simplicity and explicitness with which Congress repealed the Title VII exemption, without referring to any possible ramifications for Title IX, supports this interpretation, as does Congress' failure to create a remedial structure for private causes of action under Title IX. There does not seem to be any explanation for these inconsistencies other than Congress' intention that Title VII be the exclusive avenue for remedying employment discrimination in the educational sector.\(^{218}\)

5. Title IX Circumvention of Title VII

As described earlier, Title VII is a technically worded statute filled with several layers of administrative requirements and deadlines. Congress established the detailed scheme of Title VII in part to ensure that the EEOC "is given an opportunity to persuade before an aggrieved person may resort to court action."\(^{219}\) The final bill was the result of careful drafting and consideration and spanned over five months of floor debate.\(^{220}\)

Although much of the Act was the product of careful drafting by the congressional architects, several aspects of the Act result from one of the most important political compromises in civil rights history. In fact, the legislative

\(^{218}\) Justice Powell made a similar argument in dissent in North Haven. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 540, 552-53 (1982). His argument is misplaced, however. The comparison of the provisions and legislative history of Title VII and Title IX provide a weak indication that Title IX does not reach employment. However, the comparison of the provisions provide a much stronger indication that Title IX was not meant to create a competing private right of action with that created by Title VII. Justice Powell's arguments would have been more appropriately raised in response to the questions raised in Cannon than those raised in North Haven.

\(^{219}\) Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 649 (4th Cir. 1968). Accord, 110 Cong. Rec. 14,191 (1964) (remarks of Sen. Javits) ("The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation.").

\(^{220}\) The bill voted on by the Senate was 74 pages long. 110 Cong. Rec. 12,725 (1964). The House debated the bill from January 31, 1964 to February 10, 1964. 110 Cong. Rec. 1511, 2805 (1964). The Senate, before taking up the bill, engaged in debate from March 9, 1964 until March 26, 1964 over a motion to bypass consideration of the bill by the Judiciary Committee. 110 Cong. Rec. 4743, 6455 (1964). Continuous debate then proceeded on the bill itself until June 10, 1964 when cloture was imposed. 110 Cong. Rec. 13,327 (1964).
result of the 1964 debates on the Civil Rights Act is a “classic example of Congressional compromise.” Because of the ability of Southern Senators to sustain one of the longest filibusters in Senate history, portions of the original act were amended as part of a compromise to secure cloture. As a result, the administrative scheme of the Act may seem haphazard and irrational. Nevertheless, on several occasions, the Supreme Court has acknowledged the importance of the Congressional compromise for the Act’s passage, and has subsequently interpreted the language of Title VII in accordance with the terms of that compromise.

The detailed enforcement scheme resulting from the compromise and Congress’ careful drafting makes it difficult to accept the existence of an implied private right of action for employment discrimination under Title IX. In many instances, a Title IX cause of action for employment discrimination would not supplement Title VII, but would supplant it. Where a claimant asserts both Title VII and Title IX actions and the EEOC has the power to grant relief under Title VII, an additional court created remedy is superfluous. However, where the EEOC has such power, but is unable to utilize its available remedies because the plaintiff has not met Title VII’s procedural requirements, a court-created cause of action under Title IX would amount to circumvention of the regular procedures that other employment discrimination cases are subject to. It is difficult to imagine that Congress intended this result.

The significance which Congress placed on advancing certain objectives in drafting and amending Title VII indicate that Congress likely would have considered the impact of allowing plaintiffs to assert a Title IX action for employment discrimination if it had truly intended to create one. These objectives can be broken down into four categories according to their statutory expression: enforcement through EEOC litigation; conciliatory resolution of claims; time limitation of Title VII; and a deferral of claims to state agencies.

In order to preserve the autonomy of potential defendants and strengthen state sovereignty, the Senate amended the enforcement provisions of H.R. 7152 by eliminating the right of the EEOC to issue cease and desist orders. This shift in power to pursue a complaint from the EEOC to the


222 See generally id. See also R. Wayne Walker, Title VII: Complaint and Enforcement and Relief and Remedies, 7 B.C. INDUS. & COM. L. REV. 495, 523-24 (1966) (hereinafter WALKER).


224 See 110 CONG. REC. 14,331 (1964). Unanswered questions are “especially abundant in the procedural area because of the last minute creation of a new enforcement system for Title
victim, and from an administrative agency to the courts, signals a general distrust of agency politics during the period. As part of the "leadership compromise," this change was instrumental in getting the act passed. However, after several years of less than encouraging results from conciliation attempts by the EEOC, and with the EEOC facing a growing backlog of claims, Congress concluded that employment discrimination was so insidious that the EEOC needed stronger enforcement procedures. Although it was important to handle the problem of employment discrimination in the least confrontational means possible, no actual improvement in employment equality could be achieved without the availability of some type of stronger response to recalcitrant employers. Therefore, prior to the passage of Title IX, Congress strengthened the conciliatory measures of the Act.

The Equal Employment Opportunity Act of 1972 added a second level of enforcement for combating employment discrimination. In addition to the EEOC's use of conciliatory procedures to remedy individual claims, Congress amended Title VII in 1972 to authorize the institution of suits by the EEOC in federal district court. Congress felt that enabling the EEOC to directly sue employers would both provide enforcement where voluntary agreements were unreachable, and induce stubborn employers to consider noncompulsory measures more seriously. In addition, Congress preserved the independent right of claimants to sue. Where the EEOC decides not to sue or is unable to process the charge within 180 days, or where the claimant is unsatisfied with the outcome, the claimant may file a suit within 90 days after receiving a right-to-sue letter from the EEOC.

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225 Id. at 522.


231 See 42 U.S.C. § 2000e-5(f)(1) and 29 C.F.R. § 1601.28 (1979). These improvements in the enforcement scheme of Title VII did not come easily. The Congressional debate on the 1972 Amendments spanned almost three months and filled nearly 500 pages of the Congressional Record.
Congress was explicit about its preference for providing the Commission with enforcement authority of its own. Congress made it clear that private actions alone provided inadequate enforcement of the Act and were not the preferred means of relief.\textsuperscript{232} Accordingly, the major issue of disagreement was not whether to create administrative enforcement procedures, but rather what type of administrative procedure should be created.\textsuperscript{233} Congress ultimately chose EEOC suits in federal court, rather than administrative "cease and desist" orders, as the principal enforcement mechanism of the Act.\textsuperscript{234} "Under either scheme, however,... Congress fully expected that the enforcement activities of the Commission, and not private lawsuits, would carry the major burden of realizing the goals of Title VII."\textsuperscript{235} Congress did not seriously consider using private suits as the primary enforcement mechanism.\textsuperscript{236} The Joint Conference Committee report summarized the enforcement provisions of the bill: "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the office of the EEOC or the Attorney General, as appropriate."\textsuperscript{237} The timetable for private actions also reflects this preference, by circumscribing the time within which a cause of action may be brought.\textsuperscript{238} Similarly, Congress gave the Commission both exclusive jurisdiction once it filed suit, and authority to intervene in suits filed by individuals.\textsuperscript{239}

\textsuperscript{232} 118 CONG. REC. 7168 (1972).


\textsuperscript{234} Though there was clear support in Congress for additional enforcement powers for the EEOC, members were split on what type of powers should be added. One contingent urged use of administrative cease and desist orders to enforce the Act, while another group, led by Senator Dominick and supported by the Nixon Administration, advocated the eventual scheme of direct authority for the EEOC to sue in district court. The Dominick alliance was able to force adoption of the latter scheme through a month-long filibuster. See generally Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 358-64 (1976).


\textsuperscript{236} See Occidental Life, 432 U.S. at 364 (1977) ("During the course of [the Senate] debate there were only a few isolated and ambiguous references to the provision in the substitute bill authorizing federal suits by complainants dissatisfied with EEOC delay.") (citations omitted).

\textsuperscript{237} 118 CONG. REC. 7565 (1972). By establishing the authority for the EEOC to initiate litigation, Congress did not reject the role of private suits. Congress retained these suits as a means for claimants "to avoid any prejudice to their rights as a result of government inadvertence, delay and error." Id. See also E.I. DuPont, 373 F. Supp. at 1329.

\textsuperscript{238} Section 706(f)(1) of the 1972 Amendments expressly provided for termination of the individual's right to sue 90 days after vesting, but there is no comparable limitation for suits brought by the EEOC. See E.I. DuPont, 373 F. Supp. at 1329.

It is clear from the original committee reports that one advantage of an EEOC enforcement scheme was the expertise that the EEOC would bring to resolution of employment discrimination claims.\textsuperscript{240} Introducing the bill to the House, the spokesman for the bill observed:

The same consideration which led to the adoption of administrative enforcement in other areas are equally applicable here. Perhaps the most important of these is the need for the development and application of expertise in the recognition and solution of employment discrimination problems—particularly as these problems are presented in their more complex, institutional forms.\textsuperscript{241}

In reference to an amendment substituting EEOC suits in district court for EEOC “cease & desist” orders (the original scheme contained in the Senate bill), Senator Dominick noted the amendment “would bring together and preserve both the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases [with] the expertise and freedom . . . of the federal courts.”\textsuperscript{242} It is clear that whichever enforcement scheme Congress was to adopt, there was almost uniform agreement that it should somehow entail a type of EEOC-initiated action.

A Title IX “private suit” would undermine Title VII’s policy of conciliatory resolution of discrimination claims. From the beginning, emphasis has been placed on conciliation. When the Civil Rights Act was originally enacted in 1964, conciliation measures were the only real remedial method provided by statute. Congress considered other enforcement schemes but chose to implement only noncompulsory remedies. The legislative history of the Act:

establishes conclusively and beyond doubt that Congress intended that conciliation be preferred to coercion and that the conciliation step would be a prerequisite to the institution of a civil action under this title. [T]he Report of the House Education and Labor Committee on the bill providing for adjudication by the Commission stated that: “It is the intent of the Committee that maximum efforts be concentrated on informal and voluntary methods of eliminating unlawful employment practices before commencing formal

\textsuperscript{242} 117 CONG. REC. 40290 (1971).
procedures” . . . [which] “should be pursued only when informal methods fail or appear futile.”

Because the 1972 Amendments to Title VII provided additional enforcement to the persuasion and conciliatory scheme, it is mistaken to presume this type of relief fell into disfavor with Congress after 1972. Although Congress in 1972 recognized that voluntary measures were insufficient by themselves to remedy the problem, provisions mandating conciliatory attempts to resolve claims were retained in the bill as the initial response to discriminatory practices. As Congressman Perkins, the House sponsor of the bill, stated: “The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement.”

When Senator Javits, who sponsored the committee’s cease and desist bill, sought to amend the opposition’s bill (by requiring that the EEOC bring a civil action if conciliation attempts failed after 30 days), Senator Dominick objected to mandatory filing of a suit and proposed that the EEOC merely be given permission to file suit. Senator Dominick justified this substitute:

[W]hat we are trying to do whenever we can is to have the unlawful employment practice charge solved by voluntary compliance. I think that all of us would prefer to see this rather than a commission filing a cease-and-desist order, or as in my amendment, having to go to court.

It would seem to me that in the interest of flexibility . . . in working something out through voluntary

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243 Dent v. St. Louis-San Francisco Ry. Co., 265 F. Supp. 56, 58 (N.D. Ala. 1967) (Congressional intent that conciliation efforts would be a prerequisite to instituting a civil action):

[W]hile the bill originally contained a clause which would have permitted the institution of a civil action “in advance” of conciliation, this clause was eliminated from the bill through amendment in the House for the express purpose of insuring that civil actions would not be brought until there had been conciliation.

Id. at 59. See also Mickel v. S.C. State Employment Serv., 377 F.2d 239, 242 (4th Cir. 1967) (citing Dent with approval).

244 118 CONG. REC. 7563 (1972).

245 118 CONG. REC. 1068-69 (1972).
compliance, it would be far better to put in the word "may."\textsuperscript{246}

In response, Senator Javits agreed to delete the mandatory language.\textsuperscript{247}

Courts also have recognized the importance of conciliation in the statutory scheme of Title VII. The Supreme Court observed that the "complex administrative and judicial process" of Title VII was specifically designed to provide "an opportunity for nonjudicial and non-adversary resolution of claims."\textsuperscript{248} As the Court explained in \textit{Alexander v. Gardner-Denver Co.}:\textsuperscript{249} "Congress enacted Title VII of the Civil Rights Act of 1964 ... to assure equality of employment opportunities. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."\textsuperscript{250} Affirming this view five years later, the \textit{Novotny} Court characterized the administrative process of Title VII as "crucial" in the Title VII scheme.\textsuperscript{251}

The courts, moreover, deem conciliation attempts as conditions precedent to EEOC suits,\textsuperscript{252} and will dismiss any action brought by the Commission when an attempt to conciliate has not been made.\textsuperscript{253} This legislative preference is further reflected in the unlimited time the EEOC has for conciliation efforts.

This Congressional philosophy, that the competing needs of employees and employers are best accommodated by conciliation, is inconsistent with Title IX's implied right of action for employment discrimination. Such an implied right of action nullifies the Title VII conciliatory procedures. Both in 1964 and in 1972, Congress had the opportunity to design such a system for Title VII, but chose not to design it.

Third, a private cause of action under Title IX would circumvent the specific time lines established for each step of the Title VII procedural scheme. Though these timetables may seem arbitrary, they reflect policy choices made by Congress when drafting the Title.\textsuperscript{254} In reference to one of

\begin{footnotesize}
\begin{enumerate}
\item[246] 118 \textsc{Cong. Rec.} 1069 (1972).
\item[247] \textit{Id}.
\item[249] 415 \textsc{U.S.} 36 (1974).
\item[250] \textit{Id.} at 44.
\item[252] EEOC \textit{v. Continental Oil Co.}, 548 \textsc{F.2d} 884, 889 (10th Cir. 1977).
\item[253] \textit{Id.} at 890.
\item[254] Policies include federalism concerns, see \textit{Mohasco Corp. v. Silver}, 447 \textsc{U.S.} 807, 820-21 (1980) (citing 110 \textsc{Cong. Rec.} 11937 (1964) (remarks of Sen. Humphrey)); insuring due process, see 117 \textsc{Cong. Rec.} 31,972; insuring fairness to both parties, see \textit{Electrical Workers v. Robbins & Myers, Inc.}, 429 \textsc{U.S.} 229, 240 n.14 (1976); avoiding state claims, see 110 \textsc{Cong. Rec.} 7214 (1964); and promoting the conciliatory resolution of claims, see 118 \textsc{Cong. Rec.}.
\end{enumerate}
\end{footnotesize}
these timetables, the Supreme Court stated: "It should not be forgotten that time-limitations provisions themselves promote important interests; the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interest in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." Recognizing on several occasions that these procedural provisions are not inconsequential and were "defined with precision," the Supreme Court has applied them strictly, even in the face of harsh results. Correspondingly, a court would be remiss to recognize a cause of action in Title IX that completely avoids these requirements. To recognize a cause of action would produce the anomalous result of enabling a discrimination claim filed by an employee of an educational institution to survive summary judgment though the claim was untimely. At the same time, a claim filed by an employee outside of the educational field would fail under the same circumstances. It is unlikely that Congress intended such a result.

It is even less likely that Congress intended Title IX to circumvent the federalism interests that influenced the structure of Title VII. Congress fashioned Title VII’s procedures so that “State anti-discrimination laws . . . play an integral role in the congressional scheme.” In states having an equal employment program, plaintiffs must first exhaust—and the EEOC must defer to—remedies provided by that state’s employment agency. This deference was intended to preserve the traditional state authority over employment relationships, while insuring the efficient handling of claims.

The 1964 Act’s concern for state involvement in the Title VII procedures—and the inclusion of the mandatory deferral to state agencies—was largely the result of congressional compromise. In order to break the Senate filibuster, the proponents of the Civil Rights bill were forced to agree to a compromise proposal forged by the Senate leadership, particularly

1069 (1972).


257 See generally id. at 260-61.


261 Id. See also 118 CONG. REC. 1812-13 (1972) (remarks of Sen. Allen).
Senator Dirksen. One of the main tenants of the "Dirksen Compromise" was that state regulatory schemes would be preserved, while federal authority to intercede and protect civil rights also be maintained. Senators opposing the Civil Rights Act had long argued that the bill would destroy state control of a traditionally local interest. The procedures which mandated deferment to state agencies were intended to address this concern. Thus, deference to state authority was a major political component of the final act.

An implicit cause of action for employment discrimination bypasses the provisions added by the Dirksen compromise, and in effect undoes the agreements and decisions of Congress. By allowing a claimant access to federal court while bypassing the state agency, an implied action for employment discrimination under Title IX completely abrogates the comity considerations built into Title VII’s machinery.

Various Supreme Court opinions indicate that the Court appreciates the separation of powers concern. As the Court stated in Mohasco Corp. v. Silver: "We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." Courts should exhibit similar restraint in construing Title IX.

An implicit cause of action under Title IX circumvents these four features of Title VII. This provides clear, if circumstantial, indications that Congress did not intend Title IX’s implied cause of action to reach employment practices. Congress would have provided some acknowledgment if it wanted to bypass these basic considerations. In the absence of such express intent, or a credible reason why Congress might detach educational employment discrimination from the scope of Title VII, a court should not reflexively stretch Title IX’s implied cause of action into Title VII’s domain. By stretching Title IX’s implied causes of actions, the court is acting as lawmaker in the most pernicious sense. Courts lack debates, hearings and a public mandate for actions of these sorts. They are inappropriate bodies to circumvent statutory schemes through inferences of legislative intent. The selection of a

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263 110 Cong. Rec. 12,721-25 (1964). See also Richard Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brook. L. Rev. 62 (1965) ("With respect to Title VII there were three principal areas of difference between the House-passed bill and the so-called ‘leadership compromise’: ... (2) the relationship of the title to state fair employment laws and procedures ..." Id. at 66).


policy "which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them."266

In similar contexts, courts have shown self-restraint. Inferring Congress' intent from the incongruity that results from allowing one act to frustrate the carefully tailored scheme of another, courts have restricted the scope to areas of non-overlapping concerns. Two of these opinions are especially revealing.

In Smith v. Robinson,267 the plaintiffs were parents of a handicapped boy who was denied funding for a special educational program. They asserted claims under 42 U.S.C. §§ 1988,268 the Education of the Handicapped Act,269 and under § 504 of the Rehabilitation Act of 1973270 for deprivation of a state sponsored education. The Court had "little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."271 The Court recognized that Congress created specific procedures in the EHA to allow as much local resolution of claims as possible, and concluded that to allow plaintiffs to maintain their § 1983 action would circumvent this approach.272 The Court stated:

In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accom-

272 Id.
modated by having the parents and the local education agency work together to formulate an individualized plan.\textsuperscript{273}

Turning to the plaintiffs claim under § 504 of the Rehabilitation Act, the Court observed that since § 504 and the EHA were "different substantive statutes," the comparative analysis of the EHA and § 504 required a different approach than was used with plaintiff's equal protection claim.\textsuperscript{274} The difference between the two acts is comparable to the difference between the substantive content of Titles IX and VII. Therefore, the Court's analysis provides a good model for addressing the present inquiry.

The Court explained that both measures cover largely the same conduct: equal access to state programs and facilities.\textsuperscript{275} The EHA, however, requires specific substantive and procedural rights in order to provide free and adequate public education\textsuperscript{276} The Court concluded that the requirements imposed by the two statutes are different, and that "the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA."\textsuperscript{277} This uncertainty about the scope and extent of any obligation created by § 504 made the majority reluctant to allow the plaintiffs to bypass the remedies and procedures of the EHA by asserting a § 504 claim.\textsuperscript{278}

\textsuperscript{273} *Id.* at 1011-12.
\textsuperscript{274} *Id.* at 1016.
\textsuperscript{275} *Id.* at 1017.
\textsuperscript{276} *Id.* at 1018-19. Because both statutes are grounded on similar interests, the Court observed, the two measures' "substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar." *Id.* at 1017.
\textsuperscript{277} *Id.* at 1018. The Court explained why it felt § 504 did not require the same substantive and procedural rights as the EHA: "In *Southeastern Community College v. Davis*, the Court emphasized that § 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination. . . In the EHA, on the other hand, Congress specified the affirmative obligations imposed on States to ensure that equal access to a public education is not an empty guarantee." *Id.* at 1018-19 (citations omitted).
\textsuperscript{278} The Court explained:

Even assuming that the reach of § 504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procurers Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general anti-discrimination provision of § 504. The only elements added by § 504 are the possibility of circumventing EHA administrative procedures and going straight to court with a § 504 claim.

*Id.* at 1019.
Although Title IX and Title VII do not differ in the affirmative obligations they mandate, they differ in the procedural requirements and in the precision with which Congress specified the scope and remedies of each Act. Title VII sets up very explicit procedures for an employment discrimination claim, while Title IX does not. Similarly, Title IX is unclear as to its scope and remedies for employment discrimination, but Title VII was expressly drafted to remedy these types of practices. At the same time, Title IX adds nothing to plaintiff's substantive rights. Therefore, the Court's conclusion in Smith also applies to Titles IX and VII: the only element added by Title IX is the possibility of circumventing Title VII's administrative procedures and going straight to court with a Title IX claim.

The second comparison case, Ernst & Ernst v. Hochfelder, involves the Supreme Court's interpretation of the Securities Act of 1933 and the Securities Exchange Act of 1934. Starting with J.I. Case Co. V. Borak various sections of the 1933 and 1934 Acts have been the subject of Supreme Court cases charting the boundaries for the implied rights of action doctrines. One of the early decisions in this chain of implied right of action cases was Superintendent of Insurance v. Bankers Life & Cas. Co., in which the Court recognized an implied right of action in Section 10(b)-5 of the 1934 Act for the use of any deceptive or manipulative device in connection with the purchase or sale of securities. The opinion did not indicate, however, whether scienter was a necessary element of the cause of action, or

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279 Although the Supreme Court has found that Title IX contains a private right of action and applies to employment practices, these were not at all self-evident decisions. In neither case did Congress explicitly indicate that Title IX had these features. In fact, before the Supreme Court made each ruling, circuit courts were split on their interpretation of the relevant legislative history. The Court made a decisive holding in each case, but it must be noted that the statutes involved did not afford the contrast of Title IX with the overlapping and more explicit statute of Title VII.

280 Smith v. Robinson, 468 U.S. 992, 1019 (1984). Smith, however, provides an alternate conclusion. In footnote 22, the majority suggests that "[i]n view of the substantial overlap between the two statutes," cases arguably within the EHA carry the presumption that plaintiff must exhaust the EHA remedies and procedures. Id. at 1019 n.22. The same presumption could be applied to Title IX claims within the scope of Title VII.

287 Id. at 9-13.
whether negligence sufficed. Predictably, this issue eventually found its way before the Court, and was resolved in *Ernst & Ernst v. Hochfelder.*

The importance of the *Ernst & Ernst* decision is the manner in which the Court came to its resolution. The reasoning of the Court, if applied to the conflict between Title IX and Title VII, supports the conclusion that Title IX preempts Title VII in the area of employment discrimination.

In arriving at his decision that scienter was necessary for an action under Section 10(b)-5, Justice Powell compared the express civil remedies in the 1933 Act, which permitted recovery for negligent conduct, with those of Section 10(b)-5. Observing that the express remedies placed several procedural restrictions on plaintiffs, Justice Powell concluded:

> We think these procedural limitations indicate that the judicially created private damages remedy under §10(b)-5—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§ 11, 12(2), and 15 to be brought instead under § 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions.

Although the *Ernst & Ernst* decision involves the interpretation of security exchange legislation rather than employment discrimination legislation, the reasoning of the opinion is still germane. The case stands for the general proposition that in the face of provisions within a companion act which provide the same relief, but which require a plaintiff to fulfill specific, procedural conditions before bringing suit, the presumption must be that Congress did not intend the judiciary to allow plaintiffs to use the companion provision to circumvent the other, more restrictive provision.

This reasoning applies to Title IX and Title VII. Although it is conceivable that Congress intended Title IX to be a modification of Title VII, with the addition of a new remedy (federal fund termination) and with more relaxed procedural restrictions, this is highly unlikely. There is simply no apparent reason for Congress to create such an exception for educational employees alone. Further, modification in the form of an almost completely redundant private right of action is even harder to accept. As Justice Powell indicated in *Ernst & Ernst,* the judiciary should only expand a judicially created cause of action to replace an express cause of action if there exists

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289 *Id.* at 206-11.
290 *Id.* at 210 (citations and footnote omitted).
substantial support in the legislative history to make such a change.\textsuperscript{291} As there is no such legislative history to support supplanting Title VII with Title IX, a court would be acting irresponsibly if it expanded Title IX into the area of employment discrimination.

Justice Powell made a comparable argument in his \textit{North Haven} dissent, contending that "no competent legislative draftsman would have written" Title IX intending it to have the meaning the majority assigned it.\textsuperscript{292} In support of this argument, he contrasted the ambiguity of Title IX to the detailed provisions of Title VII and concluded that Congress would not have enacted the inconsistent provisions of the latter if it had meant it to overlap with the former.\textsuperscript{293}

Justice Blackmun responded to these contentions in footnote 26 of the majority opinion.\textsuperscript{294} His response is instructive in its misinterpretation of the conflict between Title VII and Title IX. Initially, he argued that Justice Powell's reasoning was unsubstantiated since the Court "repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination."\textsuperscript{295} He cited three cases, \textit{Electrical Workers v. Robbins & Myers, Inc.},\textsuperscript{296} \textit{Johnson v. Railway Express Agency, Inc.},\textsuperscript{297} and \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{298} as examples of such holdings. However, Justice Blackmun failed to recognize that overlapping remedies did not concern Justice Powell. Rather, Justice Powell was concerned about the inconsistency between the comprehensive and detailed scheme of Title VII and the lack of administrative requirements in Title IX. In fact, one of the bases for Justice Powell's conclusions was the contrast between the lack of remedies uniquely suited for employment discrimination violations in Title IX and the conspicuous presence of such remedies in Title VII. In this respect, it was actually the \textit{lack} of remedial redundancy that concerned Justice Powell, not its overabundance.

Moreover, based on the cases cited by Justice Blackmun, it is questionable whether his position is firmly grounded in law. Although the holdings in the three cases sustained actions asserting remedies that overlapped with Title VII, the Court in these decisions ruled based on legislative

\textsuperscript{291} Id. at 211.
\textsuperscript{293} Id. at 552.
\textsuperscript{294} Id. at 535 n.26.
\textsuperscript{296} 429 U.S. 229 (1976).
\textsuperscript{297} 421 U.S. 454 (1975).
\textsuperscript{298} 415 U.S. 36 (1974).
history indicating that Congress intended to leave intact *preexisting* alternative remedies to Title VII. This suggested that Congress meant individuals to have the opportunity to pursue rights under both Title VII and other applicable state and federal statutes. However, since Title IX was enacted after Title VII it’s remedies are not a “preexisting remedies” and are not subject to Congress’ command. Thus, the reasoning of *Alexander, Electrical Workers*, and *Johnson* is largely inapplicable to the question of whether Title IX supplants, or is preempted by, Title VII.

The second reason these cases are inapposite is that they involved claims based on independent rights. In all three cases, the plaintiffs were seeking relief for violations of separate substantive rights. In *Alexander*, the plaintiff alleged he had been discharged from employment because of his race. He presented his claim to an arbitration panel and then instituted a Title VII action in federal court. The district court ruled that the plaintiff had waived his right to bring a Title VII suit by submitting his grievance to the arbitration process. The Supreme Court reversed, observing that Title VII’s rights were separate and distinct from those guaranteed to the plaintiff under the collective bargaining agreement. The *Robbins* and *Johnson* opinions also rested on distinctions between different rights created by the statutes at issue. Since the employees in these cases were basing their claims on rights of independent origin, “no inconsistency result[ed] from permitting both rights to be enforced in their respectively appropriate forums.”

In contrast, the Court in *Great American Federal Savings & Loan v. Novotny* held that a claimant may not invoke § 1985 as a remedy when Title VII provides the basis for the claim. The Court invalidated plaintiff’s § 1985 claim because it rested on the same right as asserted in plaintiff’s Title VII claim. Instead of asserting a single right with “two basic rights” as was asserted in *Alexander, Robbins and Johnson*, the plaintiff in Novotny merely asserted two different remedies for the same right. Since this right origi-

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299 Id. at 39-43.

300 *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 1014 (Co. 1971). *But see Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1992) (plaintiff may be bound by agreement to arbitrate Title VII claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (plaintiff bound by is agreement to arbitrate age discrimination claim.).

301 *Alexander*, 415 U.S. at 48-49. (The Court also based its opinion on the inappropriateness of arbitration as a forum for the resolution of Title VII issues.).

302 *Robbins & Meyers*, 429 U.S. at 238 (claimant brought claims under grievance procedures pursuant to a collective bargaining agreement and under Title VII). *See also Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975).

303 *Alexander*, 415 U.S. at 50.


305 *Novotny*, 442 U.S. at 377-78.
nated in Title VII, and since a claim under § 1985 would allow the plaintiff to circumvent the Title VII procedures, the Court ruled that Title VII was the plaintiff's exclusive avenue of relief.\(^{306}\)

Returning to the conflict between Title VII and Title IX, it is now clear that Justice Blackmun overstated the amount of support Alexander, Electrical Workers and Johnson provide for his argument. The issue of whether Title VII preempts Title IX is more akin to the issue litigated in Novotny than the one at the center of the Alexander, Electrical Workers and Johnson disputes. A plaintiff asserting a claim under Title VII and Title IX is claiming protection under the same right, not independent rights. No additional interests are protected by a Title IX claim; under both statutes, employers are simply prohibited from making employment decisions on the basis of sex. Thus, extending the right of action under Title IX to employment discrimination would not simply involve recognizing overlapping remedies, as was done in Alexander, Electrical Workers and Johnson, but would involve recognizing completely redundant remedies the effect of which would be to "bypass the administrative process, which plays such a crucial role in the scheme established by Congress."\(^{307}\)

Justice Blackmun's second criticism of Justice Powell's reasoning regarded Powell's use of comparisons between Title IX and Title VII to ascertain legislative intent. Blackmun argued that second-guessing Congress is inappropriate in determining legislative intent, and maintained that reliance on legislative history, "however truncated," is the only correct method for determining Congressional intent.\(^{308}\) This is an extremely myopic view of statutory interpretation and is unsupported by traditional Supreme Court statutory review doctrines.\(^{309}\) When the legislative history does not present a clear picture of Congress' intent, a court may need to use common sense to deduce Congressional intent, using comparisons of statutory design and the

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\(^{306}\) Id. at 378. Subsequent Supreme Court cases have articulated the same preemption theme in addressing overlapping statutory claims. See Smith v. Robinson, 468 U.S. 104 (1984) (Education of the Handicapped Act was exclusive remedy for a plaintiff asserting an equal protection claim to a publicly financed education); Middlesex County Sewerage Auth. v. Nat'l Sea Clammer Ass'n, 435 U.S. 1, 14 (1981) (Congressional intent to preclude suits under § 1983 demonstrated by comprehensiveness of remedial devices in Federal Water Pollution Control Act); Maine v. Thiboutot, 448 U.S. 1, 22 n.11 (1980) (Powell, J. dissenting) (§ 1983 would be unavailable where "the governing statute provides an exclusive remedy for violations of its terms.").

\(^{307}\) Great Am. Fed. Savs. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1978). See also Torres v. Wisconsin Dept. of Health and Social Servs., 592 F. Supp. 922 (E.D.Wis. 1984) (Plaintiffs could not sue under § 1983 because remedy was available under Title VII. The court reasoned that the plaintiff's § 1983 "allegations are so tied up with their cause of action under Title VII that they are... nearly unidentifiable as discreet claims." Id. at 930.).


purposes of prior statutes. Justice Frankfurter understood the importance of
this type of investigation to accurate statutory interpretation: "Often the
purpose or policy that controls is not directly displayed in the particular
enactment. Statutes cannot be read intelligently if the eye is closed to consid-
erations evidenced in affiliated statutes, or in the known temper of legislative
opinion." A more restricted view risks producing forced interpretations
that, although sounding consistent with the slim legislative history available,
are counterproductive in their results.

To require that legislative intent be established any other way would
create an unreasonable standard for courts in implied action cases. In the
absence of explicit preambles attached to statutes, the task of deciphering
legislative intent is almost always a practice of "second-guessing" Congress.
Only the exceptional cases contain passages from the Congressional Record
and conference committee reports that clearly reveal Congress' intent on an
issue; and do not require additional inferences from historical information and
statutory structure. This is especially true of implied action cases, since they
normally require interpretation of legislative history on an issue Congress did
not address. In fact, the Cannon Court's reasoning that Congress must have
intended a private cause of action under Title IX because funding termination
is "such a drastic remedy," is merely interpretation through inference.
Justice Blackmun also joined in this type of "second-guessing" analysis in his
North Haven opinion. He argued that Congress' failure both to disapprove
HEW regulations regarding Title IX's applicability to employment claims,
and to pass an amendment to Title IX limiting its coverage to certain employ-
ment practices were indications of legislative intent to have Title IX apply to
employment. Similarly, in Smith v. Robinson, Justice Blackmun con-
cluded: "to the extent § 504 otherwise would allow a plaintiff to circumvent
the state procedures of the EHA], we are satisfied that the remedy conflicts

312 North Haven, 456 U.S. at 532-35. Justice Blackmun qualifies this use of the post-enactment history of Title IX by noting that this type of evidence "cannot be accorded the weight of contemporary legislative history" and only lends credence to the Court of Appeals' interpretation. Id. at 535 (internal quotations omitted). Of course, in the face of little or no
direct legislative history, a court would be remiss not to consider this type of evidence.
with Congress' intent in the EHA. These inferences are no different in form than Justice Powell's comparison of Titles IX and VII.

The factors outlined above indicate that the legislators did not intend Title IX to supplant Title VII as the appropriate statute for educational employees to gain redress for employment discrimination. Considering both the different procedural requirements, combined with the short timespan in which they were both enacted, only a rather stark view of Congressional inconsistency can support concurrent, yet separate, causes of actions. Thus, the legislative history of Title IX serves to support the same interpretation of its language accorded by rules of statutory construction. This interpretation is also consistent with Title IX's relationship with Title VII and the importance Congress and the courts placed upon Title VII's administrative procedures. Whether this is enough evidence for the Court to infer that Congress would have meant to exclude a Title IX remedy if they had confronted the issue is difficult to determine. Certainly, a court must question the lack of positive indicia that the legislature intended Title IX to act as an additional protection to Title VII, especially after Congress had applied Title VII to educational employers only two months earlier. It must have been clear to Congress that the reach of Title VII clearly overlapped with Title IX. If the legislature intended to change existing law, it would be expected to say so explicitly within the legislative record. This at least suggests that courts should not summarily reject the Title IX-Title VII issue as the Henschke Court did.

In contrast to the Cannon decision, there is no like concern as to the need for an implied action for employment discrimination under Title IX to effectuate the purpose of that title. As defined by the majority opinion of Cannon, the two purposes of Title IX were to stop federal funds from supporting discriminatory practices, and to protect victims of discrimination. The Court identified the latter purpose as the one requiring a private right of action since the express remedy in that statute (federal funding termination) is severe, and is unlikely to aid an individual victim. The Court believed that without an opportunity for individual relief, the beneficiaries of the title would confront the formidable burden of showing that the discriminatory practices were pervasive before they could gain protection. This extra burden functionally left them remediless.

Alternatively, victims of employment discrimination under Title IX are not without recourse. Title VII already provides plaintiffs with effective protection against employment discrimination that they may have suffered. After the Franklin opinion and the Civil Rights Act of 1991, the same relief

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314 Id. at 1020.
315 Id. at 704.
316 Id. at 705.
is available to a plaintiff under Title VII as under Title IX. Neither title deters proscribed conduct more than the other title; under either measure, discriminatory employers will be forced to pay damages for their actions. Thus, recognizing a private cause of action for employment discrimination under Title IX does not effectuate Congress' goals. It also frustrates Congress' purpose in repealing the Title VII exemption for educational employees. Under these circumstances it is neither "necessary" or "sensible" to have an implied action for employment discrimination under Title IX.

CONCLUSION

Increasingly, federal courts are faced with the conflict between Title VII and Title IX in education employment situations. The trio of Supreme Court cases interpreting Title IX seem to provide a straightforward answer. However, there is no easy solution and these cases are misleading. As the discussion of legislative intent and congressional purpose demonstrated, the question of whether Title IX specifically implies a private right of action for employment discrimination is different that the questions confronted in those cases.

Because of the procedural distinctions between the two statutes, the issue of Title VII's exclusivity is crucial. Plaintiffs using Title IX are allowed to bypass the complete administrative configuration of Title VII and avoid the objectives that configuration is meant to achieve. In Storey, the Wisconsin District Court appreciated these difficulties and correctly held that a private action for employment discrimination under Title IX cannot be available to plaintiffs asserting a Title VII action. The Storey court reasoned that the congressional intent which supported an implied cause of action under Title IX generally did not exclude the possibility that Congress did not intend to support an action for employment discrimination specifically. After examining the legislative record of Title IX, its relationship to Title VII, and the purpose behind the private action recognized in Cannon, it is clear that courts in the future should follow the Storey lead.

Douglas P. Ruth