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Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978-1979 Supreme Court Term

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NOTE

BROADENING ACCESS TO THE COURTS AND CLARIFYING JUDICIAL STANDARDS: SEX DISCRIMINATION CASES IN THE 1978-1979 SUPREME COURT TERM

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I. INTRODUCTION*

During the 1978-79 Term of the Supreme Court, sex discrimination continued to be an area of active judicial concern, with the Court deciding eight cases alleging unlawful sex discrimination. The purpose of this note is to present the Court's holdings and its rationale in these decisions, to analyze the significance of the decisions in view of the Court's past rulings, and to suggest possible implications for future sex discrimination cases.

The first section of the note presents cases confronting the issue of access to the federal courts. In order to gain access to the courts, it must be shown that the alleged victim of sex discrimination is the proper plaintiff to invoke the court's jurisdiction. In addition, the court's power must include the authority to grant the relief sought. The designation of the proper plaintiff and the availability of the remedy vary according to whether the plaintiff's right is derived from the Constitution or from a federal statute. Following a background of prior rulings on these questions, the three decisions of the 1978-79 Term on these threshold issues are analyzed: *Cannon v. University of Chicago,*[1] *Great American Federal Savings & Loan Association v. Novotny,*[2] and *Davis v. Passman.*[3] Like the decisions on the merits, these cases provide insight into the Court's present attitude toward sex discrimination.

The second section of the note traces the development of the Court's approach to gender classification. Emphasis is placed on what factors must be shown to establish sex discrimination, what level of judicial scrutiny will be applied, what level of scrutiny will be applied in benign sex discrimination actions, and how the Court has applied its level of scrutiny

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* The student contributors are Janice M. Hamilton, Janine S. Hiller, Joyce Ann Naumann and Barbara H. Vann.

1. 441 U.S. 677 (1979).
2. 442 U.S. 366 (1979).
3. 442 U.S. 228 (1979).

to prior sex discrimination cases.

After this history and related background, the note presents and analyzes the five cases decided on their merits during the 1978-79 Term: *Orr v. Orr*,[4] *Parham v. Hughes*,[5] *Caban v. Mohamed*,[6] *Personnel Administration of Massachusetts v. Feeney*,[7] and *Califano v. Westcott*.[8] In these cases, the Court has in some instances relied on the tests applied in past rulings; however, in other instances the Court has based its decisions on an apparently new approach to alleged violations of the Constitutional prohibition against sex discrimination.

II. Sex Discrimination Claims Under Federal Statutes and the Constitution: Access to the Federal Courts

A. *Introduction*

An individual seeking redress in the federal courts for an alleged act of discrimination may be able to rely upon a federal civil rights statute not only to establish jurisdiction but also to obtain equitable relief or money damages. Various sections of the Civil Rights Acts of 1871[9] and 1964,[10] as well as Title IX of the Education Amendments of 1972,[11] were designed to afford protection from discrimination, but they offer viable theories for relief and recovery only if both the plaintiff and the allegedly discriminatory conduct fall within the scope of the particular statute relied upon as the basis for the suit. Thus the plaintiff must show that under the applicable statute, he is the proper plaintiff to invoke the jurisdiction of the court and that the particular relief sought is available to him, either through the express grant of the relief in the statute or through judicial interpretation of the intent and purpose of the statute.

The only remaining vestiges of the Civil Rights Act of 1871 that may afford remedies to a plaintiff alleging wrongful sex discrimination are sections 1983[12] and 1985(c).[13] The particular requirements of each of these

4. 440 U.S. 268 (1979).
5. 441 U.S. 347 (1979).
6. 441 U.S. 380 (1979).
7. 442 U.S. 256 (1979).
8. 99 S. Ct. 2655 (1979).
9. Act of April 20, 1871, 17 Stat. 13.
10. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).
11. 20 U.S.C. §§ 1681-1686 (1976).
12. 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of

statutes and the interpretive problems that have been encountered in their application to sex discrimination cases will be discussed throughout this note where relevant to the analysis of the case law surrounding other statutory provisions.

The Civil Rights Act of 1964 is the most comprehensive legislation enforcing the constitutional guarantee of personal freedom from discrimination on the basis of race, color, religion, sex, or national origin.[14] Its most pervasive parts are Title VI and Title VII. Title VI prohibits racial discrimination under any program or activity receiving federal financial as-

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> any rights, privileges, or immunities cured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the so-called Ku Klux Klan Act, to grant federal courts jurisdiction over constitutional claims against state officials, since there was no general federal question jurisdiction statute at the time. *See* Butz v. Economou, 438 U.S. 478, 502 n.30 (1977).

13. 42 U.S.C. § 1985(c) (1976) provides, in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the . . . authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1985 was originally enacted as part of § 2 of the Civil Rights Act of 1871, 17 Stat. 13.

14. *See* note 10 *supra*. This act contains seven titles, as follows:

§ 1971 (1976)—Title I (voting rights and literacy tests);

§ 2000a (1976)—Title II (prohibits racial discrimination in public accomodations);

§ 2000b (1976)—Title III (authorizes civil actions by the U.S. Attorney General against racial discrimination in public accomodations);

§ 2000c (1976)—Title IV (authorizes similar action against continued racial discrimination in public education; amended by Act of June 23, 1972, Pub. L. No. 92-318, 86 Stat. 375, to include sex discrimination in public education);

§ 1975a (1976)—Title V (adds to the provisions governing the Civil Rights Commission (created by the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634));

§ 2000d (1976)—Title VI (prohibits racial discrimination in programs receiving federal financial assistance);

§ 2000e (1976)—Title VII (prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin).

See generally 2 Emerson, Haber, & Dorsen, Political and Civil Rights in the United States (1967); Bickel, *The Civil Rights Act of 1964*, 32 Commentary 33 (1964).

For a personal view of the events surrounding the drafting and proposal of this act to Congress, *see* N. Schlei, *Foreword to* B. Scheli & P. Grossman, Employment Discrimination Law (1976) [hereinafter cited as N. Schlei].

sistance.[15] Title VII, as amended, prohibits discrimination by employers subject to its provisions on the basis of race, color, religion, sex, or national origin in virtually all phases of employment practices.[16] In 1972 Congress enacted Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in certain educational institutions receiving federal financial assistance,[17] patterned in major part upon the non-discrimination commands of Title VII with respect to race.[18]

If the victim of sex discrimination is not afforded the protection of a federal statutory scheme, such an individual may still have access to the federal courts for redress. Such a claim may come within the fifth amendment prohibition against the denial of equal protection of the laws if the discrimination involves action by the federal government or a federal official.[19] The plaintiff who wishes to assert such a claim must first establish that federal jurisdiction is proper.[20] If money damages are sought as compensation for the allegedly unconstitutional conduct, the plaintiff's action

15. 42 U.S.C. § 2000d (1976). Although the thrust of Title VI is clearly aimed at racial discrimination, its provisions, as interpreted by the courts, assume special significance here inasmuch as Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976), was modeled after Title VI. *See* notes 31 and 32 *infra.*

16. 42 U.S.C. § 2000e (1976), amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. For an excellent discussion of the legislative history of Title VII, *see* Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). It is of some interest that Title VII, as originally proposed, did not include sex as a prohibited basis of discrimination. The word "sex" was added to the bill by an amendment only one day before it was approved in the House of Representatives, purportedly by a representative whose purpose was to sabotage its passage. *See* General Electric v. Gilbert, 429 U.S. 125 (1976). *See generally* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

17. 20 U.S.C. §§ 1681-1686 (1976).

18. *See* 117 Cong. Rec. 30, 403-404, 30, 407-408 (1971) ("We are only adding the 3-letter word 'sex' to existing law." (remarks of Sen. Bayh)); *id.* at 39, 251-252 (remarks of Rep. Mink). *See also* McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978).

19. U.S. CONST. amend. V provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . . "

The due process clause has been interpreted by the Supreme Court to forbid the federal government from denying equal protection of the laws, as the fourteenth amendment so restricts the states. U.S. CONST. amend. XIV, § 1. *See, e.g.,* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Bolling v. Sharpe, 347 U.S. 497 (1954). Furthermore, the significance of the equal protection component of the due process clause has been held by the court to be the same as that of the fourteenth amendment with respect to gender based classifications. Frontiero v. Richardson, 411 U.S. 677 (1973). *Accord,* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

20. This is a problem because the federal courts have limited jurisdiction with regard to subject matter. U.S. CONST. art. III, § 1. *See generally,* Flast v. Cohen, 392 U.S. 83, 94-97 (1968).

will survive a motion to dismiss[21] only if the court determines that such a remedy can be implied under the fifth amendment, inasmuch as no remedy for money damages is expressly created within its language.

In the cases of the 1978-79 Term, the federal statutes were the basis of the claims in *Cannon v. University of Chicago*[22] and in *Great American Federal Savings & Loan Association v. Novotny*.[23] In *Cannon*, the plaintiff asserted a right to a private cause of action under Title IX of the Education Amendments of 1972.[24] The plaintiff in *Novotny* alleged a right to money damages under 42 U.S.C. section 1985(c) in conjunction with Title VII of the Civil Rights Act of 1964.[25] In *Davis v. Passman*,[26] the plaintiff claimed a cause of action for money damages under the fifth amendment. In order to understand these decisions fully and to assess their impact on future litigation, the interpretive case law development before the cases of the 1978-79 Term will also be examined in this section of the note.

B. *A Private Cause of Action Under Title IX: Cannon v. University of Chicago*

1. Introduction

The question in *Cannon v. University of Chicago*[27] was whether an injured party had the right to a private cause of action under Title IX.[28] The district court in *Cannon*, holding that Title IX did not provide for a private cause of action and that no private remedy could be inferred, had

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21. FED. R. CIV. P. 12(b)(6).

22. 441 U.S. 677 (1979).

23. 442 U.S. 366 (1979).

24. 20 U.S.C. §§ 1681-1686 (1976). *See* Comment, *Implication of a Private Right of Action Under Title IX of the Education Amendments of 1972*, 73 NW. U. L. REV. 772 (1978) [hereinafter cited as *Implication of a Private Right*] for a thorough discussion of how the courts reach a decision on an implied right of action.

25. 42 U.S.C. § 1985(c)(1976); 42 U.S.C. § 2000e (1976).

26. 442 U.S. 228 (1979).

27. 441 U.S. 677 (1979). Cannon alleged sex discrimination through age discrimination. The university will not accept to its medical program any applicants over 35 years old unless they have advanced degrees. Because more women than men interrupt their educations, the age and advanced degree requirements operate to exclude women. *Id.* at 680-81 n.2. *See* Vance v. Bradley, 440 U.S. 93 (1979), which held that age discrimination triggers the rational basis test.

28. The text of 20 U.S.C. § 1681(a) (1976) accompanies note 55, *infra*. *See generally* Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URB. L. ANN. 107 (1977); *Implication of a Private Right*, *supra* note 24; Note, *Title IX of the Education Amendments of 1972: Issues Reach the Courts*, 18 WASHBURN L.J. 310 (1979) [hereinafter cited as Note, *Title IX*.].

granted the respondent's motion to dismiss.[29] The court of appeals affirmed, stating that Congress intended section 902 as the sole means of enforcing Title IX.[30] Section 902 established the procedure for the termination of federal funds to institutions that violate the act. The Supreme Court reversed, finding that Cannon did have a private cause of action under Title IX.[31]

Title IX parallels Title VI in both languages and purpose. In order to appreciate the Court's approach in interpreting Title IX, it is first necessary to examine Title VI and those cases in which the plaintiff based his cause of action on Title VI. Title IX, and its interpretive case law before *Cannon,* is then presented.

2. Title VI

Title VI, as amended, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[32] Congress's constitutional authority to enact Title VI is found in both the thirteenth and fourteenth amendments.[33] The emphasis on race and the ability to reach private acts of discrimination under Title VI, then, stem from the interpretation of the thirteenth amendment as enabling Congress to "determine what are the badges and incidents of slavery, and . . . [to prohibit such discrimination by] effective legislation."[34]

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29. 406 F. Supp. 1257, 1259 (N.D. Ill. 1976).

30. 559 F.2d 1063 (7th Cir. 1977), *cert. granted,* 438 U.S. 914 (1978).

31. 441 U.S. at 689.

32. 42 U.S.C. § 2000d (1976). Both by its language and judicial interpretation, Title VI affords no protection against discrimination based on sex or religion. New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481 (S.D.N.Y. 1974), *rev'd on other grounds,* 512 F.2d 856 (2d Cir. 1975) (sex discrimination not actionable under Title VI); Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973), *aff'd,* 520 F.2d 894 (9th Cir. 1975) (same as to religious discrimination).

Its provisions are nonetheless important since subsequent legislation, namely Title IX, 20 U.S.C. §§ 1681-1686, which covers *only* sex discrimination and *only* in the educational context, has been interpreted by drawing parallels to the provisions of Title VI. This is in part due to the legislative history of Title IX and, even more significantly, because the greatest potential impact of Title VI was in the area of educational programs, heavily financed by federal funds, but Title VI excluded sex-based discrimination from its prohibitions. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.), *op. corrected,* 380 F.2d 385 (5th Cir. 1966), *cert. denied,* 389 U.S. 840 (1967). *See also* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 408 (1978) (Stevens, J., concurring).

33. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *op. corrected,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

34. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

The purpose of Title VI was to implement the fundamental prohibitions of the fifth and fourteenth amendments against government support of agencies, institutions, or programs which practice racial or ethnic discrimination.[35]

The primary authority to enforce Title VI was vested in the various federal departments and agencies which were empowered to promulgate rules, regulations and orders.[36] Actions to rectify violations of Title VI must originate in and proceed through the administrative process outlined in the appropriate regulations, with an emphasis on conciliation and voluntary compliance.[37] Lacking compliance, termination of funds is authorized, but only after more time-consuming procedures.[38] Judicial review is authorized for those whose funds have been terminated, but only after exhaustion of the administrative procedure.[39]

An individual adversely affected by discriminatory conduct was not expressly granted a private right of action anywhere within Title VI or any regulations, and it was universally held that only the United States Attorney General could initiate proceedings to terminate federal funds of an offender.[40] Notwithstanding the language of the statute, the Fifth Circuit held in *Bossier Parish School Board v. Lemon*[41] that the provisions of section 2000d were declarative not only of federal policy but also of case law which existed independent of the statute. The court recognized that a cause of action can be brought by an individual to seek equitable relief for violations of the act, even "[i]n the absence of a procedure through which the individuals protected by section 601's [section 2000d] prohibi-

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35. Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), *cert. denied,* 389 U.S. 1046 (1968).

36. 42 U.S.C. § 2000d-1 (1976). The regulations which have received the most attention are contained in Nondiscrimination Under Programs Receiving Federal Assistance through the Department of Health, Education and Welfare Effectuation of Title VI of the Civil Rights Act of 1964, 45 C.F.R. §§ 80.1-.13 (1977). A list of other regulations so promulgated follows 42 U.S.C.S. § 2000d-1 (1978 & Supp. 1979).

37. 42 U.S.C. § 2000d-1 (1976). *See, e.g.,* 45 C.F.R. §§ 80.8-.10 and 81.1-.107 (1979).

38. 42 U.S.C. § 2000d-1 (1976). *See, e.g.,* 45 C.F.R. §§ 80.8(c), 81.121 (1979).

39. 42 U.S.C. § 2000d-3 (1976). *See, e.g.,* Feliciano v. Romney, 363 F. Supp. 656 (S.D.N.Y. 1973); NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (D.D.C. 1972). *Contra,* NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 919 (D. Del. 1977); Dermott Special School Dist. v. Gardner, 278 F. Supp. 687 (E.D. Ark. 1968).

For a criticism of this lengthy process and its consequent ineffectiveness, *see* Note, *Sex Discrimination—The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make the Title IX Regulations More Effective,* 49 TEMP. L. Q. 207 (1975) [hereinafter cited as *Sex Discrimination—The Enforcement Provisions*].

40. *See, e.g.,* Green Street Ass'n v. Daley, 373 F.2d 1 (7th Cir.), *cert. denied,* 387 U.S. 932 (1967).

41. 370 F.2d 847 (5th Cir.), *cert. denied,* 388 U.S. 911 (1967).

tion may assert their rights under it."[42]

The theory of *Lemon*, then, is that section 2000d-1 is not an *exclusive* remedy, and that a private cause of action may be asserted by an aggrieved individual. Accordingly, black and white plaintiffs have been permitted to challenge alleged violations of Title VI in the areas of education, public housing, public transportation, municipal services, and private recreational facilities.[43] A federal district court, in *Southern Christian Leadership Conference, Inc. v. Connolly*,[44] granted the plaintiff organization a declaratory judgment in a suit involving alleged discrimination by the Small Business Administration in its approval of certain loans. The court stated that "[t]here is strong federal policy in favor of *judicial* resolution of racial discrimination claims. . . . 42 U.S.C. § 2000d-2 clearly evidences congressional intent to subject . . . [acts of possible racial discrimination by an agency] to close judicial scrutiny."[45] The emphasis by these courts makes it clear that the remedy is considered properly the subject of judicial creation rather than merely an occasion for deferral to the legislature.[46]

The Supreme Court, in *Lau v. Nichols*,[47] discussed Title VI and its reach with respect to the changes it might require in a public school's program, but did not explicitly address the legitimacy of plaintiff Lau's

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42. *Id.* at 852. The court stated that plaintiff Lemon had asserted a "national constitutional right," which deserved the protection of the federal courts. *Id.* at 851. The court then cited two cases in which remedies not expressly granted by the pertinent statutes had nonetheless been implied by the courts: Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944), where a cause of action for injunctive and monetary relief was judicially created under the Railway Labor Act of 1934, 45 U.S.C. §§ 151-188 (1976); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916), where a cause of action for a private civil remedy was implied in a federal regulatory statute.

With regard to the doctrine of implication, helpful articles are Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *Implied Private Action Under Federal Statutes—The Emergence of a Conservative Doctrine Approach*, 18 WM. & MARY L. REV. 429 (1976).

43. Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (5th Cir. 1971) (municipal services); Bossier Parrish School Board v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (education); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (public transportation); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382 (E.D. Va. 1972) (private recreation club); Thomas v. Housing Auth. of Little Rock, 282 F. Supp. 575 (E.D. Ark. 1967) (public housing). *Contra*, NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978).

44. 331 F. Supp. 940 (E.D. Mich. 1971).

45. *Id.* at 944-45 (emphasis added).

46. *See* notes 99,239 and 275, *infra*, and accompanying text.

47. 414 U.S. 563 (1974).

private right of action under Title VI.[48] Two years later, in 1976, the Court considered another Title VI case, *Hills v. Gautreaux*.[49] The only issue before the Court was the propriety of the geographical scope of the district court's remedial program,[50] but the language and terms used throughout the opinion were those of Title VI and not those of traditional equal protection cases despite the fact that plaintiffs had also asserted a violation of fifth amendment rights. Neither *Lau* nor *Hills* is conclusive as to the existence of a private Title VI action; while the Court did not preclude consideration of the merits due to its non-existence, neither did the Court explicitly approve the plaintiffs' theory of recovery. The cases provide only indirect support and indicate at best a "tacit approval" by the Court.

In 1978, *Regents of University of California v. Bakke*[51] came before the Supreme Court. Plaintiff Bakke alleged that he had been denied admission to medical school because of racial discrimination in violation of Title VI. In a plurality opinion, the Court held that Bakke was to be admitted to medical school, but only four of the Justices were willing to imply a private right of action under Title VI and then base their decision upon the school program's violation of the statute.[52] Thus, *Bakke* also was not dispositive as to the implication of a private remedy under Title VI, and the question seems to remain open, at least insofar as a majority of the Court is concerned.

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48. The interpretation of *Lau* is made difficult by the fact that the plaintiff also asserted 42 U.S.C. § 1983 as the basis of his claim. One commentator suggests that *Lau* is therefore of little or no significance to the resolution of the issue whether a private right of action exists under Title VI. *Implication of a Private Right, supra* note 24, at 779-80.

49. 425 U.S. 284 (1976). This case was the consolidation of two Seventh Circuit cases, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) and Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973) which, in turn had consolidated several district court cases.

50. 425 U.S. at 292. The inter-district remedy had been ordered in Gautreaux v. Romney, 332 F. Supp. 366 (1971).

51. 438 U.S. 265 (1978).

52. *Id.* at 408 (Stevens, J., concurring). Justice Stevens was joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justice Powell supplied the fifth vote for Bakke. He based his decision on the unconstitutionality of the medical school program, assuming "only for the purposes of this case that. . . [Bakke] has a right of action under Title VI." *Id.* at 284.

The remaining four Justices, Brennan, White, Marshall, and Blackmun, found that the program did not violate the Constitution. *Id.* at 325-26.

Justice White, in a separate opinion, adamantly opposed the implication of a private right of action under Title VI and interpreted *Lau* as a § 1983 suit, asserting that the Court had ignored the tough jurisdictional issue in that case. *Id.* at 380 n. 1.

3. Title IX

Title IX of the Education Amendments of 1972[53] was enacted in response to the problem of widespread sex discrimination by educational institutions throughout the United States, effectively denying women opportunities equal to those offered their male counterparts.[54] The command of Title IX is simply 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 educational program or activity receiving Federal financial assistance. . . ."[55] The language intentionally tracks that of the Title VI prohibition against racial discrimination in *all* federally financed programs.[56]

Congress's purpose in enacting Title IX was apparently threefold: (1) to avoid constitutional violations on the part of the federal government by financing programs administered in a discriminatory fashion; (2) to effect a measure of quality control by preventing the arbitrary exclusion of some participants who could benefit from educational programs receiving such support; and (3) to provide legal protection for women seeking such educational opportunities.[57]

The enforcement mechanism authorized by Title IX is essentially the same as that found in Title VI. The same emphasis is placed upon conciliation, voluntary compliance, and administrative procedures prior to any termination of funds.[58] Also similar to Title VI is the absence of an ex-

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53. 20 U.S.C. §§ 1681-1686 (1976).

54. *See Discrimination Against Women: Hearing on § 805 of H. R. 16098 Before a Special Subcommittee of the House Committee on Education and Labor,* 91st Cong., 2d Sess. (1970). *See also* Bueck and Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972,* 6 CONN. L. REV. 1 (1973) [hereinafter cited as Bueck & Orleans].

55. 20 U.S.C. § 1681(a) (1976). The institutions included within the scope of this prohibition are listed at 20 U.S.C. § 1681(a)(2)-(a)(9) (1976). The definition of federal financial assistance is quite broad. *See* 45 C.F.R. § 86.2(g) (1979); *see also* Note, *Title IX, supra* note 28, at 101-04.

56. The text of Title VI, 42 U.S.C. § 2000d (1976) accompanies note 32 *supra. See* notes 18 and 32 *supra,* for some of the legislative history of Title IX.

57. Bueck & Orleans, *supra* note 54, at 12-15; 118 Cong. Rec. 5806-07 (1972) (remarks of Sen. Bayh).

58. *Compare* 20 U.S.C. § 1682 (1976) (Title IX) *with* 42 U.S.C. § 2000d-1 (1976) (Title VI). The regulation promulgated by HEW appears at 45 C.F.R. § 86 (1979) and incorporates by reference the Title VI Regulations 45 C.F.R. §§ 80 and 81 (1979). *See also* the preamble to the Title IX regulation, 40 Fed. Reg. 24, 128 (1975). *See* text accompanying notes 32 through 52 *supra.*

For a review of the administrative procedures under Title VI and Title IX, *see Sex Discrimination—The Enforcement Provisions, supra* note 39.

press grant of a private right of action to individuals who have directly suffered from the prohibited discriminatory action, virtually excluding them from the enforcement mechanism.[59]

There is language in the section which grants federal agencies their enforcement powers, providing an alternative to termination of funds. The section provides that compliance may also be effected "by *any other* means *authorized by law.*"[60] Such language had been used effectively by plaintiffs to bring suit under Title VI;[61] and plaintiffs have sued under Title IX using the same theory, sometimes successfully, sometimes not.[62]

Those courts favoring implication of a private right of action under Title IX have reasoned that Congress's intent to provide a private remedy can be inferred from (1) its close tracking of Title VI language, fully aware that private suits under that act had already been judicially recognized,[63] and (2) its omission of both an express denial of a private right of action and a declaration of the administrative remedy's exclusivity.[64] One court noted that the failure to allow private suits would create a crippling handicap to the effectiveness of the statutory prohibition.[65]

Another successful argument supporting private suit is Congress's enactment of the Civil Rights Attorney's Fees Award Act of 1976.[66] The inclusion of Title IX suits with those under other civil rights statutes, the remedies of which are inherently private, gives rise to an inference that

59. Judicial review is expressly provided only for the institution or agency whose funding has been threatened, and, just as in Title VI, this process is quite lengthy. *See* 20 U.S.C. § 1683 (1976) and 45 C.F.R. §§ 80.8-.11, 81, 86 (1979), 80.8-.10, and 81.0-.110 (1977).

60. 20 U.S.C. § 1682 (1976) (emphasis added).

61. *See* notes 41 through 45 *supra,* and accompanying text.

62. For some decisions implying a private right of action under Title IX, *see* Bednar v. Nebraska School Activities Ass'n, 531 F.2d 922 (8th Cir. 1976); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Piascik v. Cleveland Museum of Art, 426 F. Supp 779 (N.D. Ohio 1976). *Contra,* Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977), *rev'd,* 441 U.S. 677 (1979); Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd on other grounds,* 563 F.2d 793 (6th Cir. 1977).

63. McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978). *See, e.g.,* notes 41 through 43 *supra* and cases cited therein.

64. Piascik v. Cleveland Museum of Art, 420 F. Supp. 779 (N.D. Ohio 1976).

65. *Id.* at 781 n.1.

66. 42 U.S.C. § 1988 (1976). The Fees Act provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX [of the Education Amendments of 1972] . . . or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of . . . title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of its costs.

Congress recognized, at the very least, a need for private suits to insure the effective enforcement of Title IX's anti-discriminatory policy.[67] One district court found this provision of the Fees Act dispositive as to the plaintiff's right to a private remedy under Title IX.[68]

A number of private suits which have been brought against private institutions under Title IX have also been based on section 1983,[69] which requires state involvement with the private institution sufficient to establish the state action requirement.[70]

Other cases in which a private plaintiff failed to survive a motion to dismiss a Title IX suit involved alleged violations of the HEW employment regulations promulgated to enforce Title IX's prohibition in the area of employment practices in covered programs.[71] Most courts have refused to honor these regulations on the ground that HEW exceeded the scope of its authority under Title IX, reasoning that Congress aimed the Title IX prohibition against sex discrimination in recruitment for and admission to educational programs and not at hiring and promotion of the faculty teaching in those programs. Furthermore, Title VII of the Civil

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67. *See, e.g.*, S. Rep. No. 94-1011, at 2 (1976) which emphasizes the practical dependence of all the statutes listed in the Fees Act upon private enforcement and the necessity of awarding attorney's fees to facilitate private suits. Thus it is quite logical to infer that Congress intended to make this award available to prevailing parties in private suits, rather than to agencies seeking judicial review when their federal funds have been threatened.

68. McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978). *Contra*, Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977), *rev'd*, 441 U.S. 677 (1979).

69. 42 U.S.C. § 1983 (1976). *See* note 12 *supra* for statutory text.

70. For an analysis of the various types of state action, *see* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974). For an application of the state action doctrine to sex discrimination cases, *see* Note, *Constitutional Law—State Action—A Lesser Standard of State Action Is to Be Employed for Claims Involving Sex Discrimination*, 21 VILL. L. REV. 973 (1976).

Some illustrative cases wherein state involvement was found sufficient: De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972).

Some cases where state involvement was found insufficient: Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977); Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1063 (7th Cir. 1977), *rev'd*, 441 U.S. 677 (1979). *See generally*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Annot., 37 A.L.R. Fed. 601 (1978).

Note that the effect of *not* implying a private remedy under Title IX is to prohibit sex discrimination in public institutions, but not private ones. *See* Note, *Title IX, supra* note 28, at 320 n.102.

71. 45 C.F.R. §§ 86.51-.61 (1979), promulgated pursuant to Title IX 20 U.S.C. § 1682 (1976).

Rights Act of 1964[72] was amended concurrently with the passage of Title IX to extend its coverage of employers to include educational institutions, public and private.[73]

4. *Cannon v. University of Chicago*

In *Cannon,* the Court applied the four factor text enunciated in *Cort v. Ash*[74] to ascertain whether the plaintiff has an implied remedy under Title IX. These four factors are:

> (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member,
> (2) whether there is any indication of legislative intent to create a private remedy,
> (3) whether implication of such a remedy is consistent with the underlying purpose of the legislative scheme,
> (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the state.[75]

To determine whether the first part of the *Cort* test is met the language of the statute is indicative of Congress's intent. Title IX "explicitly confers a benefit" on the victims of sex discrimination. Plaintiff Cannon had alleged that sex discrimination was the effective reason for denying her admission to the university's medical school. Cannon was determined to be clearly a member of the class "for whose *special* benefit the statute was enacted."[76] Also, the Court found the language of Title IX to be similar to that of other statutes in which judicial interpretation had implied a private remedy to the particular class.[77] While the Court may be reluctant to infer a private remedy under "statutes that create duties for the bene-

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72. 42 U.S.C. § 2000e (1976). *See* note 16 *supra,* and accompanying text.

73. *Id.* § 2000e-1 (1976), as amended.

See Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977). *Accord,* Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978).

74. 422 U.S. 66 (1975). *Cort v. Ash* was not a civil rights case; it concerned the rights of a private shareholder to enforce a criminal statute regulating corporate contributions. For a study on the application of the *Cort v. Ash* test to civil rights litigation, *see* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View,* 87 YALE L.J. 1378 (1978).

75. 441 U.S. at 689-709.

76. *Id.* at 694. *See* note 27, *supra.*

77. *Id.* at 690. The Court compared the language of § 901 of Title IX with the language of § 5 of the Voting Rights Act of 1965, which has been held to imply a private right of action. Section 5 states, "No person shall be denied the right to vote. . . ." Section 901 states, "no person . . . shall, on the basis of sex, be excluded. . . . " This language contrasts with that in statutes enacted to protect the general public. *Id.* at 690 nn.10-13.

fit of the public at large,"[78] it appears willing to extend the implication doctrine in the area of civil rights, including sex discrimination. As the Court stated, the right to be free of discrimination is a "personal one," supporting an inference of a personal remedy to the individual members of the designated class.[79]

The Court went behind the statutory language to the legislative history of Title IX to apply the second factor, whether Congress intended to create a private remedy. To the Court, the history of Title IX revealed such an intent.[80] However, the Court discovered this intent through an indirect route, by comparing Title IX with Title VI. Both the language and the legislative history of Title IX revealed that it was patterned on Title VI.[81] While neither Title VI nor Title IX expressly mentions a private remedy, when Title IX was enacted, a private remedy had already been implied under Title VI.[82] The Court presumed that the legislators were aware of this judicial interpretation of Title VI when they enacted Title IX.[83] Thus, if the legislature had wanted *to deny* a private remedy under Title IX, it could have expressly done so. The Court relied on the "persistence . . . of the assumption" that both Title VI and Title IX create a private right of action, an assumption in which Congress has at least acquiesced.[84] While the Court's reasoning depends largely on the implication of a private remedy under Title VI, it should again be noted that the Supreme Court has never expressly held that a plaintiff does indeed have a private remedy under Title VI. The Court also found legislative intent to create a private remedy in the inclusion of Title IX within the purview of the Civil Rights Attorneys' Fees Award Act of 1976, which provides that a court may award attorney's fees in cases under Title IX, Title VI, and several other civil rights statutes.[85]

The third test under *Court* is applied by balancing the legislative enforcement scheme and the overall purpose of the statute. The Court should not imply a private remedy if such a remedy would frustrate the enforcement scheme expressly defined in the statute. However, on balancing, this legislative scheme yields to the statutory purpose. Thus, if a private remedy, although not expressly part of the legislative scheme, will promote the statutory purpose, the Court will be more prone to imply the

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78. *Id.* at 692 n.13.
79. *Id.*
80. *Id.* at 694.
81. *Id.* at 682-85 nn.3&5; *Id.* at 694-95 nn.16-17.
82. *Id.* at 696 nn.20-21. *See* text accompanying notes 51-52 *supra.*
83. *Id.* at 696.
84. *Id.* at 703.
85. *Id.* at 699 & n.25. *See* text accompanying notes 66-68 *supra.*

private cause of action.[86]

Again comparing Title VI and Title IX, the Court found two basic purposes of the statutes in the congressional debates on the statutes: (1) to make sure that federal funds were not used to support discrimination; (2) to provide protection for the individual against discriminatory practices.[87] The first purpose obviously can be achieved through the termination of federal funds; however, this action would protect the individual victim of discrimination only indirectly. A private right of action clearly would promote the second statutory purpose. In addition, the Department of Health, Education, and Welfare, the agency that administers Title IX, supports a private remedy because it will further the purposes of the statute.[88]

The final hurdle, the fourth *Cort* factor, is whether an implication of a private remedy infringes on an area of basic concern to the states. The Court leaped this hurdle by asserting that since the Civil War, the federal government and courts have had the primary responsibility of "protecting citizens against . . . discrimination."[89]

The *Cort v. Ash* test provides four factors to balance in deciding the availability of a private remedy under a federal statute. The failure to meet one or more of the requirements would not necessarily be fatal to the implication of a private cause of action. In *Cannon,* however, no balancing was applied because all four of the factors were in the petitioner's favor.[90]

Justice White wrote a dissenting opinion in *Cannon,* in which Justice Blackmun joined.[91] Justice White found no intent to create a private

86. *Id.* at 703.
87. *Id.* at 704 n.36.
88. *Id.* at 706.
89. *Id.* at 708.
90. *Id.* at 709. The Court also considered the respondent's arguments against implying a private cause of action: (1) admission decisions of universities should not be subjected to judicial scrutiny by disappointed applicants; (2) in other titles of the Civil Rights Act of 1964, Congress expressly provided for private actions when it found them desirable; (3) the legislative history denies an implied private remedy. The Court answered these arguments in the following manner: (1) this argument is a policy issue already resolved by Congress, and a private remedy under Title VI has not created a voluminous amount of burdensome litigation for university administrators; (2) the creation of express remedies in one part of a "complex statutory scheme" is not sufficient alone to deny the implication of a private remedy in another part; an intent to exclude is needed; (3) this argument was dispensed with in the analysis of the legislative history. *Id.* at 709-16.
91. *Id.* at 718. Justice White was also opposed to the implication of a private cause of action under Title VI in *Bakke,* 438 U.S. at 379-86.

cause of action in the legislative history of Title VI or Title IX. In his opinion the purposes of the statutes are to be achieved by agency action.[92] If private suits are to be brought, they would have to be brought under section 1983, which has a color of state law requirement.[93] Without an act under color of state law, the plaintiff is not entitled to a private remedy: "Congress did not intend to create a private remedy for discrimination practiced not under color of state law but by private parties or institutions."[94] Thus Justice White appears to see only one statutory purpose to Title IX—the elimination of federal funds to institutions that practice discrimination. Individuals can obtain redress only if the recipients of these federal funds are acting under color of state law.[95]

Justice Powell also wrote a dissenting opinion, agreeing with Justice White and advocating judicial restraint in implying private causes of action.[96] Justice Powell would not imply a private remedy without "the most compelling evidence of affirmative congressional intent"[97] and unless there are no alternative remedies to enforce the statutory duty.[98] Justice Powell would put the burden back on Congress to "resolve crucial policy questions created by the legislation it enacts."[99]

5. Conclusion

Through the liberal application of the *Court v. Ash* test in *Cannon* and through the Court's dependence on Title VI to interpret Title IX, the Court seems to have afforded freedom from sex discrimination the same protection as freedom from race discrimination, if not under the Constitution,[100] at least under a federal statute. In fact, sex discrimination may have more protection than race discrimination at this point, since the Court has not yet by majority opinion implied a private cause of action under Title VI. Of course, this elevation of sex discrimination protection is limited to the area of education within the scope of Title IX.

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92. 441 U.S. at 721.

93. *See* the text of § 1983 in note 12 *supra*.

94. 441 U.S. at 724.

95. *Id.* at 725.

96. *Id.* at 73-49.

97. *Id.* at 731.

98. *Id.*

99. *Id.* at 749.

100. *See* text accompanying notes 215-19, *infra*.

C. *Damages for Title VII Violations Under Section 1985(c): Great American Federal Savings & Loan Association v. Novotny*

1. Introduction

The plaintiff in *Great American Federal Savings & Loan Association v. Novotny*[101] alleged a violation of Title VII and claimed damages under 42 U.S.C. section 1985(c). Novotny, a former officer of the defendant savings and loan association, claimed that the association had denied female employees equal employment opportunities and that when he supported their position, he was fired. Thus, the plaintiff alleged violations of Title VII. In addition, Novotny claimed damages under section 1985(c), alleging a conspiracy by the directors of the corporation to deprive him of the equal protection of, and equal privileges and immunities under, the laws.[102] The court of appeals had held that a conspiracy, "motivated by an invidious animus against women,"[103] to deny a right protected by Title VII created a cause of action for damages under section 1985(c).[104] The Supreme Court reversed this decision.

Before analyzing *Novotny,* it is necessary to consider the express scope and the remedial scheme of Title VII, as well as the judicial interpretation of section 1985(c) and other pre-existing civil rights statutes in relation to Title VII. With this background, the significance of the Court's decision in *Novotny* can be assessed.

2. Title VII

Title VII of the Civil Rights Act of 1964,[105] by way of its definitional sections, prohibits certain "unlawful employment practices" for employers, employment agencies and labor organizations.[106] Actions taken with

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101. 442 U.S. 366, 369 (1979). For the text of § 1985(c), *see* note 13 *supra*.

102. *Id.* The district court had dismissed the case because the directors of a single corporation could not, as a matter of law and fact, engage in a conspiracy. *Id.*

103. 584 F.2d 1235, 1243 (3rd Cir. 1978).

104. Novotny had alleged a violation of § 704(a) of Title VII, which states in part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (1976).

105. 42 U.S.C. § 2000e (1976). The constitutional support for Congress's authority to enact Title VII is found in the Commerce Clause (U.S. CONST. art. I, § 8(3)); hence the pervasiveness of the discriminatory acts it can reach. *See* Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974), *aff'd*, 522 F.2d 850 (6th Cir. 1975). *See also* N. Schlei, *supra* note 14.

106. 42 U.S.C. §§ 2000e, 2000e-2, 2000e-3, 2000e-16(a) (1976). The practices made unlaw-

respect to an individual's employment or employment opportunities are made unlawful if they are based on an individual's race, color, religion, sex, or national origin or because an individual has opposed any such unlawful employment practice or filed a charge or somehow participated in a proceeding pursuant to other sections of Title VII.[107] These prohibitions are obviously far-reaching, and the courts have interpreted them broadly as to what acts will amount to "unlawful discrimination."[108]

While the legislative history of the addition of the word "sex" to Title VII's list of prohibited bases of discrimination is all but non-existent,[109] courts have stated that Title VII was enacted out of growing congressional awareness and concern for sex discrimination. It has been stated that Congress's purpose was to provide a legal foundation for the principle of non-discrimination in employment based on sex as well as "suspect" classifications,[110] to provide equal access to the job market for both men and women,[111] and "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[112]

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ful include the failure to hire or the discharge or any other discrimination with respect to compensation, terms, conditions, or privileges of employment or employment opportunities of an employee, a job applicant, or an apprentice, because of the individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) to 2(d) (1976).

107. 42 U.S.C. § 2000e-3(a) (1976).

108. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). This case is well-known for its "effects" test, *i.e.*, a qualification for employment may be "fair in form, but discriminatory in operation." *Id.* at 431. The use of such a qualification is still made unlawful under Title VII, notwithstanding a lack of discriminatory intent by the employer. *Id.* at 432. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (suit filed by black policemen in 1970 before the 1972 amendments to Title VII included public employees; therefore, case decided on the basis of fifth amendment equal protection standards—different from Title VII standards developed in *Griggs* in that proof of invidious intent and not just disproportionate impact required).

See also Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975); Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974), *aff'd*, 522 F.2d 850 (6th Cir. 1975). *But see* Willingham v. Macon Tel. Publish. Co., 507 F.2d 1084 (5th Cir. 1975) (Congress did not intend its non-discriminatory command, with respect to sex, at least, to have sweeping implications).

109. For sources and comments regarding the "sex" amendment to Title VII, *see* note 16, *supra.*

110. *See* Sailer Inn, Inc. v. Kirby, 5 Cal.3d 1, 19-20, 95 Cal. Rptr. 329, 340-41 (1971). For a discussion of suspect classifications, *see* notes 217-19 *infra.*

111. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *Accord*, Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975).

112. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). *Accord*, Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971). *See also* Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1970),

The administration of Title VII's proscriptions was placed under the Equal Employment Opportunity Commission, which the act created and empowered to promulgate suitable regulations.[113] Between the statute and the EEOC regulations, an elaborate system was created for the processing of discrimination complaints and obtaining voluntary compliance through "informal methods of conference, conciliation, and persuasion."[114] Once this administrative procedure has been exhausted by the complainant and no conciliation agreement has been obtained, a right to a civil action in federal court is expressly granted.[115] The plaintiff may request and, if successful on the merits, may be granted such equitable relief as may be appropriate as well as other "affirmative action . . . which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."[116] Furthermore, reasonable attorney's fees may be awarded to the prevailing party.[117]

While the provisions of the statute and the EEOC regulations are certainly thorough, their complexity has proven to be somewhat burdensome and the proscribed administrative procedures quite lengthy,[118] causing persons aggrieved by Title VII violations to seek more expeditious routes of redress. The Supreme Court and the lower federal courts have, for the most part, been sympathetic to such efforts.

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remanded on other grounds, 477 F.2d 90 (3d Cir. 1973).

113. 42 U.S.C. §§ 2000e-4(a) and 2000e-12 (1976); 29 C.F.R. §§ 1600 to 1613 (1979). Although the regulations and the Commission's findings under its administrative proceedings do not carry the weight of law, they are "entitled to great deference" by the courts in subsequent litigation. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

114. 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1600-02 (1979). For an instructive guide to the administrative process, *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, chs. 26-29 (1976) [hereinafter cited as SCHLEI & GROSSMAN].

115. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(f)(3) (1976). For an instructive review on the procedural aspects of Title VII litigation, *see* SCHLEI & GROSSMAN, *supra* note 114, ch. 30; Casey and Slaybod, *Procedural Aspects of Title VII Litigation: Pitfalls for the Unwary Attorney*, 7 U. TOL. L. REV. 87 (1975).

116. 42 U.S.C. § 2000e-5(g). As to the equitable nature of an award of back pay and the circumstances under which such an award might be made, *see generally* Annot., 21 A.L.R. Fed. 472 (1974).

117. 42 U.S.C. § 2000e-5(k) (1976). As to when an award of attorney's fees might be appropriate, *see generally* Annot., 16 A.L.R. Fed. 643 (1973).

118. *See* Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831 (1976). *See generally* Blumrosen, *Developments in Equal Employment Opportunity Law-1976*, 36 FED. B.J. 55, 60 (1977); Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME LAW. 46 (1973).

In *Alexander v. Gardner-Denver Co.,*[119] the Supreme Court held that the civil action created by Title VII is not an exclusive remedy for the victim of racial discrimination in violation of the statute, stating that the statute's purpose was "to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[120] One year later, in *Johnson v. Railway Express Agency, Inc.,*[121] the Court held that the exhaustion of Title VII and EEOC administrative remedies is not required before filing suit under section 1981[122] for damages resulting from racial discrimination.

Some lower federal courts had already developed the rationale that the remedies contemplated by Title VII were not co-extensive with those of earlier civil rights statutes, *i.e.*, the availability of a Title VII action does not necessarily preclude recovery based on statutes already protecting against violations of the same rights. The courts have allowed actions to be maintained not only under section 1981, when racial discrimination in employment is alleged,[123] but also under section 1983, when employment discrimination involves state action.[124] In both such situations, Title VII's

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119. 415 U.S. 35 (1974).

120. *Id.* at 48-49. *Cf.* Brown v. General Services Admin., 425 U.S. 820 (1976) (§ 717 of Title VII [42 U.S.C. § 2000e-16 (1976)] is the exclusive judicial remedy for federal employees). *See also* 110 Cong. Rec. 7207 (1964) (remarks of Sen. Bayh: "Of course, Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes").

121. 421 U.S. 454 (1975).

122. 42 U.S.C. § 1981 (1976) was originally enacted as part of § 1 of the Civil Rights Act of 1866 (Act of April 9, 1866, 14 Stat. 27) and provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

123. Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971) (§ 1981). *Accord,* Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 405 U.S. 916 (1972). *See generally* SCHLEI & GROSSMAN, *supra* note 114, ch. 21; Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 HARV. C.R.-C.L.L. REV. 56 (1972).

124. 42 U.S.C. § 1983 (1976). Of course, the state action requirement of § 1983 may be a substantial barrier. *Compare* Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (sex discrimination case; allegations sufficient to establish state action under § 1983) *with* Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1979) (sex discrimination case; allegations insufficient under § 1983). *See also* Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116 (9th Cir. 1971) (religious discrimination); Puntolillo v. New Hampshire Racing Comm., 390 F. Supp. 231 (D.N.H. 1975) (national origin discrimination); Scott v. University of Del., 385 F. Supp. 937 (D. Del. 1974) (racial discrimination).

prescribed administrative procedures can be circumvented.[125]

Since the Supreme Court's holding in *McDonald v. Santa Fe Trail Transportation Co.*,[126] that "[section] 1981 is applicable to racial discrimination in private employment against white persons,"[127] it is well settled that, at least in the racial context or where state action is involved, Title VII is not the exclusive source of an individual's right of action against an allegedly discriminatory employer. The victim of sex discrimination who cannot come within the ambit of either section 1981[128] or section 1983, has only section 1985(c)[129] as an alternative to a cause of action under Title VII.

3. Section 1985(c)

The early interpretation of section 1985(c) by the Supreme Court imparted to this section the state action requirement of section 1983,[130] since the congressional authority for its enactment was found to be in the fourteenth amendment.[131] In *United States v. Price*,[132] the statute was

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125. Where it is possible to choose among § 1981, § 1983, and Title VII as the basis for plaintiff's suit, it should be noted that under some circumstances relief, whether equitable or monetary damages, may be available *only* under § 1981 and Title VII. *Compare* Monroe v. Pape, 365 U.S. 167 (1961) (money damages cannot be awarded in § 1983 suit against municipality) *and* City of Kenosha v. Bruno, 412 U.S. 507 (1973) (equitable relief is not available in § 1983 suit against municipality) *with* Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978) (monetary damages *can* be awarded in § 1981 suit against municipality) *and* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (monetary damages *can* be awarded in Title VII suits against states or municipalities) *and* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (equitable relief can be obtained under § 1981 suit against state officials). *See generally* SCHLEI & GROSSMAN, *supra* note 114, ch. 21.

126. 427 U.S. 273 (1976).

127. *Id.* at 287. The lower federal courts have also permitted a member of an ethnic group to maintain a suit under § 1981. Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978) (Spanish-surnamed plaintiff within ambit of § 1981 if racial animus can be demonstrated). *Accord,* Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976). *But see* Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977) (discrimination on basis of national origin not actionable under § 1981).

128. The courts have consistently refused to extend § 1981 to encompass sex discrimination. *See* O'Connell v. Teachers College, 63 F.R.D. 638 (S.D.N.Y. 1974); League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636 (N.D. Cal. 1972); NOW v. Bank of Cal., 6 F.E.P. 26 (N.D. Cal. 1972). *See also* SCHLEI & GROSSMAN, *supra* note 114, 610 n.23 and cases cited therein.

129. 42 U.S.C. § 1985(c) (1976).

130. 42 U.S.C. § 1983 (1976).

131. U.S. Const. amend. XIV, § 5. The state action requirement of § 1985(c) originated in United States v. Cruikshank, 92 U.S. 542 (1975) and was reiterated in Collins v. Hardyman, 341 U.S. 651 (1951).

132. 383 U.S. 787 (1966).

held by the Court to be applicable to a conspiracy where private citizens acted in concert with public officials.

Under *United States v. Guest*,[133] however, a private conspiracy was held to be covered by section 1985(c) if its predominant purpose is interference with or deprivation of constitutionally protected rights. In 1971 the Court held, in *Griffin v. Breckenridge*,[134] that section 1985(c) is also applicable to private conspiracies if the object of such a conspiracy is the deprivation of equal rights, motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."[135]

These decisions do not make clear what "otherwise class-based" discrimination must occur to bring a private conspiracy within the ambit of section 1985(c). It is not surprising that the lower federal courts are in disagreement as to the proper interpretation and application of *Price*, *Guest*, and *Griffin*.[136]

The possible remedies available under section 1985(c) have also not been clarified. In *Johnson v. Railway Express Agency, Inc.*,[137] the Supreme Court compared the remedies available under Title VII with those under section 1981, stating:

> [B]oth equitable and legal relief, including compensatory and, under certain circumstances, punitive damages [and a back pay award not subject to the restriction of Title VII, might be possible under section 1981].
>
> [On the other hand] Title VII offers assistance in investigation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable under [section] 1981.[138]

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133. 383 U.S. 745 (1966).

134. 402 U.S. 88 (1971).

135. 403 U.S. at 101-102.

136. *Compare* Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 507 (4th Cir. 1974) (state involvement required in § 1985(c) claim where plaintiff alleged he was fired by private employer because "there are no Equal Protection Clause rights against wholly private action") *and* Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (narrow reading of *Griffin v. Breckenridge;* absent racial context or interstate travel, *only* fourteenth amendment rights are protected by § 1985(c) and state action is required) *with* Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (no state action requirement for § 1985(c) but on remand, trial court would need to determine whether alleged sex discrimination was "class-based, invidiously discriminatory animus" required under *Griffin* and if not, whether violation of Title VII would suffice) *and* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (broad reading of *Guest* and *Griffin;* since deprivation of plaintiff's first amendment rights was protected under the fourteenth amendment, no state action required).

137. 421 U.S. 454 (1975).

138. *Id.* at 460. *See also* Sabol v. Snyder, 524 F.2d 1009 (10th Cir. 1975) (punitive damages possible in a suit brought under §§ 1981 and 1983); Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) (attorney's fees award possible, upon showing bad faith or unrea-

The same reasoning would logically apply to section 1985(c) so that the available remedies, in major part, should be quite similar and would include, among other things, back pay, as well as compensatory damages, injunctive relief, and reinstatement.[139]

Section 1985(c), then, may provide a beneficial remedial alternative to the victim of sex discrimination who wishes to bypass the cumbersome administrative procedure of Title VII or to seek relief beyond its restrictions, but who is precluded from bringing suit under sections 1981 and 1983. Not only might compensatory or punitive damages be available, but a jury trial might also be available.[140]

Since section 1985(c) creates no substantive rights,[141] the question is whether such a plaintiff may assert rights created under a federal statute, such as Title VII, through the remedial provisions of section 1985(c). Some lower federal courts have permitted a plaintiff in a sex discrimination employment context to maintain a cause of action under section 1985(c), stating that the private conspiracy alleged was within the reach of the statute because the object of the conspiracy was the deprivation of plaintiff's federally created Title VII right to be free from sex-based employment discrimination.[142] One commentator has drawn a parallel between section 1985(c) and section 241 of the Civil Rights Act of 1870,[143]

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sonableness of defendant, in suit brought under Title VII and § 1981); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (whatever injunctive relief is appropriate under the circumstances in § 1981 suit). *But see* Claiborne v. Illinois Cent. R.R., 401 F. Supp. 1022 (E.D. La. 1975) (punitive damages available under Title VII if circumstances warrant).

See generally SCHLEI & GROSSMAN, *supra* note 114, pp. 638-39, 1258-59.

139. *See, e.g.,* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).

140. A jury trial is not constitutionally mandated under a Title VII civil action since it is exclusively equitable in nature. Albemarle Paper Co. v. Moody, 422 U.S. 405, 443-44 (1975) (Rehnquist, J., concurring). *Accord,* Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) and cases cited therein. *See generally,* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824 (1972).

141. Howard v. State Dept. of Highways, 478 F.2d 581 (10th Cir. 1973). *Contra,* Poirier v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978). Of course § 1985(c) is not without problems. *See* notes 130-38 *supra* and accompanying text. *See generally* SCHLEI & GROSSMAN, *supra* note 114, pp. 629-635.

142. Milner v. National Inst. of Health Technology, 409 F. Supp. 1389 (E.D. Pa. 1976). *Accord,* Fannie v. Chamberlain Mfg. Corp., 445 F. Supp. 65 (W.D. Pa. 1977). *Contra,* Doski v. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Abbott v. Moore Bus. Forms, 439 F. Supp. 643 (D.N.H. 1977); Parish v. Maryland & Va. Milk Producers Ass'n, 437 F. Supp. 623 (D. Md. 1977). *See also* Poirier v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978); Local 1, Teamsters Union v. International Bhd. of Teamsters, 419 F. Supp. 263 (E.D. Pa. 1976) (§ 1985(c) held applicable to right created under Labor-Management Reporting and Disclosure Act).

143. 18 U.S.C. § 241 (1976).

providing criminal penalties for similar conspiracies. Since section 241 has been construed by the Supreme Court to cover conspiracies to deprive a plaintiff of a right created by a federal statute,[144] a similar construction of section 1985(c) may be appropriate.[145]

The Supreme Court's holding in *Brown v. General Services Administration*[146] would seem to create some difficulty in extending this theory to Title VII rights, however. In *Brown,* the Court dismissed a section 1981 suit brought by a black federal employee alleging that racial discrimination had caused denial of his promotions. The Court held that section 717[147] of Title VII is the exclusive remedy for federal employees. Examining the legislative history of the amendment which added this section, the Court reasoned that Congress intended to provide federal employees the same access to the federal courts which private employees enjoyed under the existing provisions of Title VII as originally enacted. Since Congress obviously was convinced that federal employees were without any remedy before the amendment, the section fashioned an elaborate and complete mechanism which could not have been designed to supplement anything; rather, Congress intended its remedy to be "an *exclusive, pre-emptive* administrative and judicial scheme for the redress of federal employment discrimination."[148]

Since the victims of sex discrimination by private employers were also without a remedy in the federal courts prior to the passage of Title VII,[149] the effect of the *Brown* holding could be to preclude any alternatives to Title VII as to such persons. This issue remained unresolved when

144. *See* United States v. Waddell, 112 U.S. 76 (1884).

145. Note, *Section 1985(c): A Viable Alternative to Title VII for Sex-Based Employment Discrimination,* [1978] WASH. U.L.Q. 367, 380-86 [hereinafter cited as *Section 1985(c): A Viable Alternative*]. This analytical approach is supported by the fact that the Supreme Court in Griffin v. Breckenridge, 403 U.S. at 98, drew a similar parallel between § 1985(c) and its "closest remaining criminal analogue . . . 18 U.S.C. § 241," in considering whether state action should be required in the civil liability context. The Court's conclusion was that § 1985(c) would not always require state action since that was not essential to a § 241 criminal action.

146. 425 U.S. 820 (1976).

147. 42 U.S.C. § 2000e-16 (1976). This section was added to Title VII in 1972 to include federal employees within the scope of its protection. The Civil Service Commission was granted powers similar to those of the EEOC. *See* note 106 *supra.*

148. 425 U.S. at 829 (emphasis added). Justice Stevens (joined by Justice Brennan) examined the same legislative history and found support for an opposite conclusion, placing heavy reliance on the rejection of an amendment which would have expressly established § 717 as an exclusive remedy. *Id.* at 838 (Stevens, J., dissenting).

149. Note that all the cases cited in note 142 *supra,* supporting the use of § 1985(c) to reach the private employer were decided *after* Title VII was enacted.

Novotny came before the Supreme Court.

4. *Great American Federal Savings & Loan Association v. Novotny*

The first step in the Court's decision in *Novotny* concerned the function of section 1985(c). Simply stated, section 1985(c) creates no substantive rights for the victim of a conspiracy. Rather, if a right designated by section 1985(c)—"equal protection of the laws, or . . . equal privileges and immunities under the laws"—is violated by a conspiracy, the victim is entitled to damages. Thus the question becomes, what are these rights designated by section 1985(c)? More specifically, the question here is whether a violation of section 704(a) of Title VII—discrimination by an employer because an employee has opposed a practice unlawful under the statute—amounts to a deprivation of the rights covered by section 1985(c).[150]

In reaching its decision that section 1985(c) cannot be used to seek damages under a violation of Title VII, the Court explained the purpose of Title VII and the preferred means of achieving that purpose. The purpose of the Act is "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[151] The preferred means of achieving this goal, however, is not through the legal remedy of damages, especially if the damages could be punitive. Rather, when Title VII was enacted, Congress provided a comprehensive procedure for accomplishing the purpose of the Act through "[c]ooperation and voluntary compliance."[152] This procedure would be completely bypassed if Novotny were allowed to bring his suit under section 1985(c).

Novotny is not denied eventual access to the courts for damages under Title VII. However, Title VII provides for only an action in equity, with a possible award of back pay, and does not allow general or punitive damages. Under section 1985(c), Novotny would be entitled to these general and punitive damages.[153] The Court did not allow Novotny to circumvent the Title VII requirements and stated: "Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under [section] 1985[(c)]."[154]

150. 442 U.S. at 369-70.
151. *Id.* at 370, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1973).
152. 442 U.S. at 370.
153. *Id.*
154. *Id.* at 378.

In a footnote, the Court noted the "relative narrowness of the specific issue before the Court."[155] The Court did not consider what would be the result if the defendant were not subject to a suit under Title VII or a similar statute and a plaintiff brought an action under section 1985(c). Neither did the Court consider whether the wording of section 1985(c) implies a remedy for a statutory right other than "those fundamental rights derived from the Constitution."[156]

Justice Powell, in his concurrence, dealt with this latter issue. He would go further than the majority decision and indeed hold that section 1985(c) is confined to conspiracies to deny a "fundamental right derived from the Constitution."[157] These fundamental rights would not include a right to any specific private employment.

Justice Stevens, in his concurrence with the majority opinion and with Justice Powell, explained that the legislative history of the 1871 act reveals that Congress was concerned only with rights protected by the Constitution, especially the fourteenth amendment.[158] Thus private conspiracies to deprive a person of these rights are actionable under section 1985(c). Outside of this area, private acts of discrimination are not unconstitutional, and "[p]rivate discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after 1985[(c)] was enacted."[159]

Justice White wrote a dissenting opinion, in which Justices Brennan and Marshall joined. The dissenting justices viewed section 1985(c) as a supplement to other federal rights, giving the plaintiff additional redress when one of his federal rights is violated by an "invidious" conspiracy. Thus, according to the dissent, two remedies are available to Novotny: first, he has a remedy under Title VII for the violation of a federal right; second, he has a remedy under section 1985(c) because the right was violated by an "invidious and threatening" conspiracy.[160]

5. Conclusion

From the majority holding in *Novotny*, it appears that this case re-

155. *Id.* at 370 n.6.
156. *Id.*
157. *Id.* at 379. For a discussion on fundamental rights, see J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, at 410-19 (1978).
158. 442 U.S. at 382-83.
159. *Id.* at 385.
160. *Id.* at 385-96.

solves the issue left open in *Brown.*[161] If Title VII provides a remedy not previously available under a federal statute or under the Constitution, Title VII is the exclusive remedy available. On the other hand, Title VII does not eradicate pre-existing statutory rights. Thus, because a victim of race discrimination in private employment was covered under section 1981 before Title VII was enacted, the right remains, giving the victim of race discrimination in private employment dual avenues of recovery. No such statute was available to the victim of sex discrimination in private employment before the passage of Title VII, and, therefore, he has only a single statutory remedy.

The holding by the Court in *Novotny* that section 1985(c) creates no substantive rights limits the relief available to the victim of either race or sex discrimination and does not appear to draw intentionally a distinction between the two forms of discrimination. Yet the holding is more restrictive to the victim of sex discrimination since he is also precluded from section 1981, one of the civil rights statutes created when the legislature and the courts were more concerned with race discrimination than with sex discrimination.

However, if the victim of sex discrimination is, for some reason, not protected under Title VII, the possibility exists that the Court might "fashion" a remedy out of section 1985(c). As the Court itself noted, the question is still unresolved as to whether the plaintiff would be allowed to use section 1985(c) if the discriminatory act were not covered by a federal statute.[162] Also unanswered is whether section 1985(c) will in the future be held to apply only to fundamental rights.

D. *Damages Under the Fifth Amendment: Davis v. Passman*

1. Introduction

The plaintiff in *Davis v. Passman*[163] based her sex discrimination charge on the fifth amendment and sought money damages. Davis had been dismissed from her position as deputy administrative assistant to Representative Otto Passman, a United States Congressman from Louisiana. Davis alleged that she was dismissed solely on the basis of her sex.[164]

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161. Brown v. General Services Administration, 425 U.S. 820 (1976). *See* text accompanying notes 147-49 *supra.*

162. 442 U.S. at 370 n.6.

163. 442 U.S. 228 (1979).

164. *Id.* at 231. Representative Passman wrote Davis a letter in which he stated that although she was "able, energetic and a very hard worker," "I concluded that it was essential that the understudy to my administrative assistant be a man." *Id.* at 230-31 n.3.

Since Passman was no longer in office when Davis' suit reached the courts, her only available remedy was damages in the form of backpay.[165] This remedy of money damages is not expressly created in the language of the fifth amendment. The district court, and ultimately the court of appeals, had denied jurisdiction, holding that no cause of action for money damages may be implied from the due process clause of the fifth amendment.[166] The Supreme Court reversed this holding. Before analyzing *Davis v. Passman,* this section of the note will provide a survey of the cases wherein the Supreme Court had previously confronted the issue of the availability of money damages under the Constitution.

2. Jurisdiction

The lower courts in *Davis* had held, in effect, that if the relief requested could not be granted, the court would deny jurisdiction. However, the issue of jurisdiction and the issue of the availability of the requested relief are two separate questions. Because the lower courts appeared to have confused these issues, the Supreme Court discussed the technical distinctions between the lack of subject matter jurisdiction and the failure of the plaintiff to state a claim upon which relief can be granted.

The jurisdictional barrier facing a plaintiff is a formidable obstacle, given the overriding principles of federalism and the consequent limitations on the matters which the federal courts have power to decide.[167] A plaintiff bringing suit against the federal government or a federal official must rely on 28 U.S.C. section 1331(a),[168] which grants federal courts the

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165. *Id.* at 231 n.4.

166. 571 F.2d 793, 801 (5th Cir. 1978). After the District Court for the Western District of Louisiana had dismissed Davis's claim, the Court of Appeals for the Fifth Circuit reversed and remanded. 544 F.2d 865 (5th Cir. 1977). The Court of Appeals granted a rehearing en banc and affirmed the District Court's decision that the plaintiff did not have an implied cause of action. 571 F.2d at 801. Davis could not use Title VII because congressional employees are not within the protection of the Act. Davis v. Passman, 442 U.S. at 247. The Supreme Court stated that the exclusion of federal congressional employees from the coverage of Title VII was not intended "to foreclose alternative remedies available to those not covered by the statute." *Id.*

167. *See generally,* WRIGHT, LAW OF FEDERAL COURTS §§ 1, 7-8 (3d ed. 1976) [hereinafter cited as WRIGHT]. Unless a plaintiff's jurisdictional statement properly supports the court's power to hear the subject matter of the suit, all is for naught. Dismissal can be obtained by the defendant or effected by the court on its own motion at *any* stage of the litigation if a deficiency is found in subject matter jurisdiction. FED. R. CIV. P. 12(h)(3).

168. 28 U.S.C. § 1331(a) (1976). It is a much simpler matter where state action is involved, since a plaintiff under § 1983 has ready access to the federal court's jurisdiciton under 28 U.S.C. § 1343(3) (1976) which grants the federal courts jurisdiction over civil ac-

power to decide questions "arising under the Constitution, laws, or treaties of the United States."

Such general federal question jurisdiction was upheld by the Supreme Court in *Bell v. Hood*,[169] involving a money damages claim for injuries suffered as a result of alleged infringement of fourth amendment rights.[170] The district court had dismissed the suit for lack of subject matter jurisdiction and the court of appeals affirmed.[171] In reversing the dismissal, the Supreme Court found that the complaint clearly was based solely on the violation of rights protected by the Constitution, and since the claim was neither immaterial nor frivolous,[172] jurisdiction was proper under section 1331(a).[173] Whether the complaint stated a valid cause of action and whether the plaintiff was entitled to prevail on the merits were decisions to be made after jurisdiction was taken, and not before.[174]

The lower federal courts have used reasoning similar to that of *Bell* to rule on the appropriateness of subject matter jurisdiction where the controversy was based solely and directly on a claim of deprivation of rights protected under the Constitution.[175] It is now well settled that section

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tions such as § 1983 claims.

169. 327 U.S. 678 (1946).

170. U.S. CONST. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

171. Bell v. Hood, 150 F.2d 96 (9th Cir. 1945).

172. Indeed, the Court stated that plaintiff's claim raised "serious questions, both of law and fact." 327 U.S. at 683.

This concern with materiality and frivolousness emanates from the requirement of § 1331(a) that the federal question so raised must be substantial. A plaintiff cannot invoke the jurisdiction of federal courts by attaching to what is essentially a non-federal claim an immaterial or frivolous federal question that is otherwise proper. *See generally* WRIGHT, *supra* note 167, §§ 17-19.

173. 327 U.S. at 682. The Court cited several earlier cases where federal jurisdiction had been sustained for claims of money damages sought by persons alleging deprivation of the constitutional right to vote. *See*, Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); Brickhouse v. Brooks, 165 F. 534 (1908).

174. 327 U.S. at 682.

175. The lower courts have held that the fourteenth amendment supports jurisdiction in the following cases where the defendant, either a school board or municipality, could not be reached under § 1983: Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977); Lewis v. District of Columbia Dept. of Corrections, 533 F.2d 710 (D.C. Cir. 1976) (District of Columbia held not subject to § 1983 suit in District of Columbia v. Carter, 409 U.S. 418 (1973)); Brault v. Town of Milton, 527 F.2d 730, *rev'd en banc on other grounds*, 527 F.2d 736 (2d Cir. 1975); Panzarella v. Boyle, 406 F. Supp. 787 (D.R.I. 1975).

1331(a) supports such jurisdiction inasmuch as the Supreme Court has reaffirmed *Bell* in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[176] and *Butz v. Economou.*[177]

3. Money Damages Under the Constitution

A question left open in *Bell v. Hood*[178] was whether the allegedly unconstitutional conduct of a federal official gives rise to a cause of action for money damages when such an action is based solely on the Constitution. This issue came before the Supreme Court again in *Bivens*,[179] a case quite similar to *Bell* on its facts. In *Bivens*, the Court held that violations of fourth amendment rights by federal agents acting under color of their authority could be redressed by a monetary award for damages suffered as a result of such conduct. The Court stated that the fourth amendment serves as an "independent limitation upon the exercise of federal power"[180] and reaches beyond tortious conduct as defined by local state law. As such, conduct in violation of the amendment's restrictions is both "necessary and sufficient to make out the plaintiff's cause of action."[181] Despite the fact that the fourth amendment does not expressly provide for its enforcement through a damages award, such a remedy is generally available in the federal courts and "[h]istorically, [money] damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[182] The Court also cited its reference in *Bell* to the well settled proposition that "where federally protected rights have been in-

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Other constitutional amendments were held to support jurisdiction in the following cases: Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (first amendment); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments); Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716 (7th Cir. 1975) (fourteenth amendment); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975) (fifth amendment); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (fourth and fifth amendments); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) (same); Berthea v. Reid, 445 F.2d 1163 (3d Cir. 1971) (same); Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975) (fifth and eighth amendments).

176. 403 U.S. 388 (1971).

177. 438 U.S. 478 (1978). The major thrust of the Court's opinion in *Butz* concerned the scope of the defendant federal official's absolute immunity defense to allege violations of plaintiff's first and fifth amendment rights. The Court ruled that certain federal officials, though acting in an administrative setting, were performing essentially judicial functions and would therefore enjoy absolute immunity. Others, whose duties were essentially administrative would only be granted qualified immunity, under the circumstances outlined in Scheuen v. Rhodes, 416 U.S. 232 (1974).

178. 327 U.S. 678 (1946).

179. 403 U.S. 388 (1971).

180. *Id.* at 394.

181. *Id.* at 395.

182. *Id.*

vaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[183]

The *necessity* for such a remedy to enforce the safeguards guaranteed by the fourth amendment was not of major concern to the Court, since Congress had not expressly excluded this particular remedy from the reach of injured plaintiffs, thereby relegating such claims to some other remedial scheme equally effective in their legislative judgment. Furthermore, the Court noted that there were no "special factors counselling hesitation [to create such a remedy judicially] in the absence of affirmative action by Congress."[184]

Justice Harlan's oft-cited concurring opinion in *Bivens* offered further support for the majority's decision. He reasoned that if the Court were to adopt the notion asserted by respondents, such a holding would produce an anomalous result. If the Constitution were interpreted so that the power to authorize damages as a remedy for the vindication of a federal constitutional right rests exclusively with Congress, then the federal courts would be powerless to protect the very rights which they were specifically created to safeguard.[185] Justice Harlan drew a parallel to the broad discretionary powers of the federal courts to grant any form of equitable relief, provided that subject matter jurisdiction is proper, and stated that the ability to grant traditional remedies at law, namely, damages, should be equally unfettered. This reasoning was particularly appropriate with regard to Webster Bivens, since it was too late for equitable relief to benefit him, and *a fortiori,* to redress the wrong he had suffered, "it [was either] damages or *nothing.*"[186] This is the anomalous result which the majority clearly intended to avoid, since "[t]he very essence of civil liberty certainly consists in the right of every individual claim the protection of the laws whenever he receives an injury."[187]

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183. *Id.* at 392, *quoting* Bell v. Hood, 327 U.S. 678, 684 (1946).

184. 403 U.S. at 396. To illustrate what those "special factors" might be, the Court explained some of its earlier decisions, contrasting those in which judicial creation of a damages remedy was granted with those in which such a remedy was denied, even though the federal statute under which the action was brought created substantive rights. *Compare* J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (remedy granted to effectuate the underlying policy of the federal securities laws) *and* Jacobs v. United States, 290 U.S. 13 (1933) (remedy granted because duty to pay was imposed by the fifth amendment just compensation clause) *with* Wheeldin v. Wheeler, 373 U.S. 647 (1963) (remedy denied because no constitutional prohibition transgressed) *and* United States v. Standard Oil Co., 332 U.S. 301 (1947) (remedy denied as a matter of federal fiscal policy).

185. 403 U.S. at 401-02 (Harlan, J., concurring). Harlan's discussion of the legislative history of the Bill of Rights is also quite enlightening. *Id.* at 400-01 n.3.

186. *Id.* at 410 (Harlan, J., concurring) (emphasis added).

187. Marbury v. Madison, 1 U.S. (1 Cranch) 368, 378 (1803).

While *Bivens* created a new remedy with respect to the fourth amendment, it was unclear whether violations of other constitutional rights could be similarly redressed, lacking affirmative congressional action.[188] Both the majority opinion and Justice Harlan's concurrence focused on the nature of the personal interest that had been violated;[189] and Justice Harlan specifically reserved the question whether money damages would be appropriate with respect to other types of constitutionally protected interests.[190] It is noteworthy that this reservation was made in a discussion of the ability to award damages in such cases so as to effect meaningful compensation. Arguably then, a *Bivens*-type remedy might be justifiable in any case of a constitutional violation, regardless of the nature of the right, *per se,* so long as a damage award would be ascertainable under ordinary common law doctrinal standards.

In fact, lower federal courts have extended the *Bivens* holding to encompass a broad range of constitutionally protected rights even though none of the constitutional provisions relied upon by the plaintiffs expressly provides for such a remedy. A money damages remedy has been judicially created in numerous cases where jurisdiction was based solely and directly on the Constitution and the various plaintiffs asserted violations of rights under the first, fifth, sixth, eighth, and fourteenth amendments.[191]

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188. *See, e.g.,* 42 U.S.C. § 1981 (1976), the text of which is given in note 122 *supra;* 42 U.S.C. § 1983 (1976), the text of which is given in note 12 *supra;* 42 U.S.C. § 1985(c) (1976), the text of which is given in note 13 *supra.*

189. 403 U.S. at 395-96, 402-03 (Harlan, J., concurring).

190. *Id.* at 409 n.9 (Harlan, J., concurring), citing his concurring opinion in Monroe v. Pape. 365 U.S. 167 (1961).

191. *Bivens* was extended to protect first amendment rights. *See, e.g.,* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 161 (D.D.C. 1976) (interests to be protected held to be "equally if not more fundamental" than forth amendment rights). *Accord,* Jihaad v. Carlson, 410 F. Supp. 1132 (E.D. Mich. 1976).

A *Bivens* type remedy was upheld where fifth amendment rights were allegedly violated. *See, e.g.,* Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), *cert. pending sub nom.* Moffit v. Loe (No. 78-1260); Green v. Carlson, 581 F.2d 669 (7th Cir. 1978), *cert. granted,* 442 U.S. 940 (1979); Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971), "nature of the violation determines the scope of the remedy"); United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975).

Bivens was also held applicable to sixth amendment rights in Bennett v. Campbell, 564 F.2d 329 (9th Cir. 1977). *Accord,* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

Bivens was held appropriate where eighth amendment rights were asserted in Green v. Carlson, 581 F.2d 669 (7th Cir. 1978), *cert. granted* 442 U.S. 940 (1979). *Accord,* Patmore v.

The Supreme Court had an opportunity to extend *Bivens* in *District of Columbia v. Carter*[192] and *Butz v. Economou*,[193] but in each case ruled on another issue, leaving open the question whether a violation of fifth amendment rights could be redressed by a money damages award.

4. *Davis v. Passman*

The Supreme Court considered three issues in *Davis:* (1) the equal protection component of the fifth amendment; (2) the plaintiff's right to a private cause of action under the fifth amendment; (3) the plaintiff's right to damages under the fifth amendment. The first issue was not seriously in dispute. The Court noted that the incorporation of the equal protection of the laws into the fifth amendment has been expressed in numerous decisions.[194] The test for sex discrimination under the fifth amendment is the same as under the fourteenth: "classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."[195] Thus, through the equal protection component of the due process clause, Davis had a "federal constitutional right to be free from gender discrimination which cannot meet these requirements."[196]

The Court proceeded to the remaining questions: Does the plaintiff have a private right of action? Does the plaintiff have an action for damages? The court of appeals in *Davis* had applied the *Cort v. Ash* test to determine if a private cause of action could be implied when not expressly provided for.[197] The Supreme Court stated that "[t]his was error, for the question of who may enforce a *statutory* right is fundamentally different than the question of who may enforce a right that is protected

Carlson, 392 F. Supp. 737 (E.D. Ill. 1975).

Violations of fourteenth amendment rights have been redressed on a *Bivens* theory in Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977). *Accord,* Panzarella v. Boyle, 406 F. Supp. 787 (D.R.I. 1975). *But see* Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977) (claim for damages against town not subject to suit under § 1983 disallowed where plaintiff had valid cause of action against other named defendants).

See generally Lehmann, *Bivens and its Progeny,* 4 HASTINGS CONST. L.Q. 534 (1977).

192. 409 U.S. 418 (1973). The Court ruled that a § 1983 action would not lie against the District of Columbia, since it was not a "state or territory" within the meaning of that statute.

193. 438 U.S. 478 (1978). The Court's holding in *Economou* is discussed at note 177 *supra.*

194. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

195. Craig v. Boren, 429 U.S. 190, 197 (1976).

196. 442 U.S. 228 (1979).

197. 571 F.2d at 797-800.

by the Constitution."[198] If Congress creates a statutory right, it is appropriate for Congress to decide who has what type of remedy under the statute. On the other hand, a constitutional right triggers the protection of the judicial branch of the government to enforce this right. Thus, unless the Constitution expressly delegates an issue to another branch of government, a litigant in a justiciable controversy whose constitutional rights have been violated and who has no other effective means to enforce these rights has access to the federal courts.[199] Davis was, therefore, "an appropriate party to invoke the general federal question jurisdiction of the District Court to seek relief."[200] This explanation by the Supreme Court in *Davis* makes it clear that Congress's intentional exclusion of a certain area of discriminatory employment practices under a civil rights statute does not affect the existing protection that a plaintiff has under the Constitution.

While Davis had a cause of action under the Constitution, if the relief she sought was not available, her complaint would not have survived a Rule 12(b)(6) motion to dismiss. To avoid this contingency, the Supreme Court in *Davis* extended the *Bivens* holding that damages may be awarded for the violation of a constitutional right, stating that "[f]or Davis, as for Bivens, 'it is damages or nothing.' "[201]

Even in this situation, however, damages may still be denied if there are "special factors" adverse to the award.[202] The "special factor" in *Davis*—the governmental position of the defendant—was not powerful enough to bar the award of damages. While the Court might hesitate in allowing an action for damages against a congressman "in the course of his official conduct," this concern is not sufficient to place a congressman's actions above the law.[203] The Court thus concluded that Davis had a cause of action under the fifth amendment, and if she should prevail on the merits, she "should be able to redress her injury in damages."[204]

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198. 442 U.S. at 241.

199. *Id.* at 248.

200. *Id.* at 244. The district court had jurisdiction under 28 U.S.C. § 1331(a) (1976). *See* text accompanying notes 20-21 *supra*. *See also* the explanation of federal court jurisdiction, 442 U.S. at 239-40 n.18.

201. *Id.* at 245, *quoting Bivens*, 403 U.S. at 410.

202. 442 U.S. at 245, *quoting Bivens*, 403 U.S. at 396.

203. 442 U.S. at 246. The Court noted that Passman could have some protection under the Speech and Debate Clause. *Id.*

204. *Id.* at 248. The Court of Appeals had expressed concern with "deluging the federal court with claims" should Davis be allowed her action for damages. 571 F.2d at 800. In response, the Supreme Court stated, "[a] plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official will be redressed in damages . . . . And, of

5. Conclusion

Davis v. Passman indicates the willingness of the majority of the Court to provide some type of remedy for sex discrimination, at least in the area of employment. Although excluded under Title VII, Davis is entitled to the same award of backpay that would be available to her under Title VII, if she prevails on the merits. Whether employment discrimination by a governmental official who comes within the coverage of Title VII would still entitle the victim to a remedy of damages under the Constitution is unresolved. While an exclusion under Title VII does not eliminate any remedies available to those not covered by the statute,[205] an inclusion and creation by Congress of "equally effective alternative remedies" might eliminate this need for money damages under the Constitution.[206]

E. *Conclusion*

Before the decision in *Cannon*, a complainant alleging sex discrimination in violation of Title IX had to proceed through the administrative scheme expressly provided in the act. In effect, the alleged victim turned her complaint over to HEW. HEW could decide not to investigate at all, perhaps due to lack of resources. If HEW did investigate and find violations, the institution could choose not to comply with Title IX and instead accept the elimination of federal funds. Even if the institution did agree to comply voluntarily, the agreement need not require that specific relief be granted the complainant who was the victim of the unlawful discrimination. Therefore, it is clear that the decision in *Cannon* providing the plaintiff with a private right of action grants the individual victim who suffered the harm an essential means of vindicating her rights. Without this private right of action, the elimination of sex discrimination in education that comes within the scope of Title IX would be severely restricted.

Both *Novotny* and *Davis* are concerned with sex discrimination in employment. Section 704(a) of Title VII provides that a person cannot be discriminated against in employment in retaliation for opposing a practice made unlawful by Title VII. As a practical matter, the victim of a

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course, were Congress to create equally effective alternative remedies, the need for damages relief *might be* obviated." 442 U.S. at 248. The Court also noted that through 42 U.S.C. § 1983, the damages remedy is already available in an action such as Davis' if the injuries occur under color of state law. *Id.*

Chief Justice Burger, joined by Justices Powell and Rehnquist, dissented on the basis of Representative Passman's immunity under the Speech and Debate Clause. *Id.* at 249-51.

205. *Id.* at 246.

206. *Id.* at 248.

violation of section 704(a) would often be able to allege a conspiracy, thus providing the plaintiff with the alternative or additional route to relief through section 1985(c). The decision in *Novotny* closed this alternative route. The plaintiff is restricted to the remedies provided in Title VII, including, *inter alia,* injunctive relief and limited backpay, and excluding the general or punitive damages that could be available under section 1985(c). Although Novotny is without a remedy for the alleged conspiracy, he is of course not without a remedy for the alleged sex discrimination, provided he conforms to the procedural requirements delineated in Title VII, including the timely filing of his complaint. Under Title VII, Novotny also has an express private cause of action.

Novotny, included under Title VII, was restricted to the remedies provided in Title VII. Davis, excluded under Title VII, was provided the same remedy that she would have been entitled to had she been included under Title VII. Unlike Novotny, had Davis been denied the remedy she sought, she would have had a constitutional right to be free of sex discrimination but no remedy for the violation of this right. The Court was unwilling to remove the right by denying the remedy. *Davis* thus stands for the proposition that a victim of sex discrimination in violation of the Constitution *and* outside the coverage of a federal statute is entitled to money damages under the Constitution *if* no other remedy is available. The holding is a narrow one.

Both *Novotny* and *Davis* viewed in light of *Brown*[207] reveal the Court's clear support of Title VII and its remedial scheme. Novotny was not allowed to circumvent the administrative procedures provided in Title VII. Davis was allowed money damages in backpay that she would have been entitled to under Title VII, with the Court also noting that if Congress were "to create equally effective alternative remedies, the need for damages relief might be obviated."[208]

The decision in *Cannon,* while allowing the plaintiff to go beyond the remedial scheme provided in the statute, does not contradict the rationale and policy enunciated in the other cases. The Court in all three of these decisions of the 1978-79 Term has protected the plaintiff's opportunity for individual redress and has denied a specific remedy for sex discrimination only where the victim has an alternative remedy.

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207. Brown v. General Services Administration, 425 U.S. 820 (1976). *See* text accompanying notes 147-49 *supra.*

208. 442 U.S. at 248.

III. Sex Discrimination Claims Under the Constitution: Substantive Considerations

After all the procedural requirements are met, the plaintiff must pass the substantive analysis applied by the courts to gender classifications. The development of the court's treatment of these equal protection claims is important in understanding the significance of the Supreme Court's decisions in the 1978-79 Term. The earlier cases provide the background in which the Court searched for a definite standard to apply to sex classifications. These will be briefly surveyed. With this foundation, the five cases which the Supreme Court ruled upon substantively in the past term will be analyzed to determine what the plaintiff's, and the state's, burden will be if a gender classification is challenged.

A. *Background*

Classifications based on gender have received two very distinct types of treatment in judicial review. The first was based on traditional notions of men's and women's roles in society. Its standard was very clear and easy to apply. The second, more recent, treatment is based less on traditional roles of the sexes and more on the principles evolving from judicial interpretation of the fourteenth amendment's equal protection clause. The newer standard is uncertain and difficult to apply. This becomes more apparent from a brief survey of the Supreme Court's opinions in the area of gender classifications.

The Supreme Court's original view on gender classifications was that there really was not much wrong with such classifications. Statutes that prevented women from holding public office, serving on juries, owning or conveying property, bringing suits in their own name, or acting as legal custodians of their own children encountered no equal protection difficulties.[209] This view was perhaps most clearly established in Justice Bradley's concurring opinion in *Bradwell v. Illinois*,[210] in which he stated

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the devine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say

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209. Frontiero v. Richardson, 411 U.S. 677, 685 (1973). *See generally* L. Kantowitz, Women and the Law: The Unfinished Revolution, 5-6 (1969); G. Mydral, An American Dilemma 1073 (20th Anniversary Ed. 1962).

210. 83 U.S. (16 Wall.) 130 (1872).

> identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[211]

This view remained essentially the same through the 1960's. In 1961, the Court stated in *Hoyt v. Florida* that, "[the] constitutional proposition [that a State may constitutionally 'confine' jury duty 'to males'] has gone unquestioned for more than eighty years in the decisions of the Court . . . . Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues."[212] Thus, the Court found no equal protection difficulties with laws prohibiting women from jury duty, not to mention laws, such as Florida's, which merely automatically exempted women from jury duty unless they filed a letter with the clerk of court to the effect that they wished to be considered for jury duty.[213]At the time of this decision, three states still prohibited women from jury duty.[214]

Then in the 1970's a new type of judicial review of classifications based on gender emerged. The Supreme Court, in 1971, decided the case of *Reed v. Reed*,[215] apparently established a new standard of review for gender classifications, one that did not fit very well into either of the well established levels of review in equal protection cases—rational basis or strict scrutiny.

The rational basis test is perhaps best expressed in the Court's decision of *Williams v. Lee Optical Co.*, in which the Court, through Justice Douglas, stated, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for

211. *Id.* at 141 (Bradley, J., concurring).

212. 368 U.S. 57, 60 (1961).

213. FLA. STAT. § 40.01(1) (1959), provided in part that "the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Hoyt was re-examined and not followed by the Court in Taylor v. Louisiana, 419 U.S. 522 (1975). LA. CONST., art. VII, § 41, provided that women could not serve on juries unless they filed a letter with the clerk of court indicating their desire to serve. Taylor's conviction of a crime by a jury constituted under this provision was overturned as a violation of the sixth amendment right to a trial by a jury composed of a fair cross section of the population. The Court said "[i]f it was ever the case that women are unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." The Court then overruled contrary implications of *Hoyt v. Florida.*

214. ALA. CODE, tit. 30, § 21 (Recompiled vol. 1958); MISS. CODE ANN., § 1762 (Recompiled vol. 1956); S.C. CODE, § 38-52 (1952).

215. 404 U.S. 71 (1971).

correction, and that the particular legislative measure was a rational way to correct it."[216] Thus the rational basis test is very deferential to the legislatures. All that the state need show to pass this test is (1) that the purpose of the statute is a legitimate one and (2) that the classification created by the statute is rationally related to achieving the legitimate purpose.

On the opposite end of the spectrum, strict scrutiny of suspect classifications, which include race,[217] alienage,[218] and ancestery,[219] requires that a compelling state interest has necessitated the creation and use of the suspect classification and that the interest cannot be served by less severe alternatives. Thus when a classification is found to trigger strict scrutiny (because it classifies on the basis of race, alienage, or national origin), the state must demonstrate that the classification (1) serves a compelling state interest and (2) was the least drastic alternative available to the state. If the state fails to meet either of the two parts of the test, the statute is found unconstitutional. In practice, statutes do not survive strict scrutiny analysis. Thus, if a plaintiff can trigger strict scrutiny, his success is virtually assured.

The classification which brought *Reed* to the attention of the Court was Idaho's automatic and compulsory preference for males as the administrators of a deceased person's estate over females even if both were equally qualified.[220] The Court adopted the language of *Royster Guano Co. v. Virginia*[221] and stated, "[a] classification 'must be *reasonable*, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[222] The Court framed the issue as "whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective that is sought to be advanced . . . . "[223]

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216. 348 U.S. 483, 487 (1955). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-2 (1979) [hereinafter cited as TRIBE].

217. Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

218. Surgarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). But the Court may be retreating from this position. *See* Foley v. Connelie, 435 U.S. 291 (1978).

219. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

220. IDAHO CODE § 15-314 provided that "Of several persons claiming and equally entitled [under § 15-312] to administer, males *must* be preferred to females. . . . " (emphasis added).

221. 253 U.S. 412, 415 (1920).

222. 404 U.S. at 76.

223. *Id.* (emphasis added).

Although the language of the Court seemed to adopt the rational basis test for the case, the way it applied the test to the facts of the case was somewhat unusual. The Supreme Court did not hypothesize a legitimate state purpose to justify the state's classifications, as it regularly does in rational basis analysis.[224] Instead, the Court considered only the purpose advanced by the state itself, that of administrative convenience. The Court then found the classification to be arbitrary and the advanced state purpose to be insufficient to justify the classification.[225] Thus, the automatic preference for males as administrators of estates was found unconstitutional.

The standard that the Court had adopted in *Reed* was not strict scrutiny and nothing in the language of the Court would suggest that it was. Yet the application of the test to the facts of the case was much stronger than the usually deferential rational basis test. The test for gender classifications was somewhere between the two established levels of review for equal protection cases, but where or what it was remained unclear.

The next major case that the Court dealt with in relation to gender classifications did nothing to clarify the state of the law. In *Frontiero v. Richardson*,[226] servicewoman Frontiero claimed that the government's requirement that she must demonstrate that her spouse was dependent on her for at least fifty percent of his maintainance before they qualified for dependents' benefits[227] when male personnel need not make such showing,[228] was a violation of the fifth amendment's due process clause. The Court split on the issue and there was no majority opinion in the case.

Frontiero represented the closest that gender classifications have come to being a suspect category, as four of the Justices, Douglas, White, Marshall, and Brennan, found gender to be a suspect category and applied

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224. The Court usually tries to find some set of facts that will justify a classification as rational and then assume that this was the purpose that the legislature had in mind when it passed the statute. Allied Stores v. Bowers, 358 U.S. 522, 530 (1959); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955); TRIBE, *supra* note 216 at § 16-3.

225. 404 U.S. at 76.

226. 411 U.S. 677 (1973).

227. 37 U.S.C. § 401 (1966) provided in part that: "In this chapter, 'dependent,' with respect to a member of uniformed service means—(1) his spouse . . . . However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . . " 10 U.S.C. § 1072(2) provided in part that: " 'Dependent' with respect to a member . . . of a uniformed service means—(a) the wife . . . . (c) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . . "

228. *See* note 227 *supra*.

strict scrutiny to the federal statute.[229] These Justices asserted that the situation of women was "comparable to that of blacks" in that women had been historically discriminated against by law and by practice,[230] that gender classifications violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility,"[231] that sex is a distinct characteristic determined by the accident of birth,[232] and the characteristic usually has no relationship to capacity or ability,[233] and that Congress also was becoming more sensitive to classifications based on gender.[234] The Justices found the asserted purpose of administrative convenience less than compelling and thus found that the classification was unconstitutional.[235]

Justice Stewart's concurring opinion resulted in the particular classification being stricken, but he very carefully did not adopt gender as a suspect category.[236] Instead he found it an invidious discrimination and thus void on the basis of *Reed*.[237]

The concurrence of Justice Powell, joined by Justice Blackmun and Chief Justice Burger, is particularly noteworthy. They concurred in the result on the basis of *Reed*, but would not add gender to the list of suspect categories.[238] Justice Powell stated:

> I find compelling reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification

229. 411 U.S. at 682.
230. *Id.* at 685.
231. *Id.* at 686, (*quoting with approval* Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972)).
232. *Id.* at 686.
233. *Id.*
234. *Id.* at 687.
235. *Id.* at 690.
236. *Id.* at 691 (Stewart, J., concurring).
237. The term "invidious discrimination" has no exact definition in constitutional interpretation. However, it is usually used to describe a classification which the Court, after applying the appropriate test (strict scrutiny, intermediate scrutiny, or rational basis), has concluded violates the equal protection clause. *See* Morton v. Mancari, 417 U.S. 535 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Reed v. Reed, 404 U.S. 71 (1971); Graham v. Richardson, 403 U.S. 365 (1971); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Thus the term is used to indicate a conclusion of, not a test of unconstitutionality. Justice Stewart, however, seems to be applying the term in a new and unclear way. *See* text accompanying notes 318-21 *infra*. Perhaps Justice Stewart's concurrance in *Frontiero* was the beginning of this new approach to invidiousness.
238. 411 U.S. at 691 (Powell, J., concurring).

> to the States. . . . By acting prematurely and unnecessarily, as [I] view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in the process of resolution does not reflect appropriate respect for duly prescribed legislative processes.[239]

This strong, straightforward reason may be the simplest explanation of why the Court did not and has not adopted gender as a suspect category. It nonetheless left unanswered what type of classification gender represents, and what level of scrutiny it must withstand.

The next major decision of the Court in this area was of a different nature. In *Kahn v. Shevin*,[240] the first sex discrimination case brought by a male, a Florida widower challenged Florida's $500 property tax exemption for widows only, as an unconstitutional gender classification.[241] The decision of the Court shrouded gender classifications in yet another layer of confusion. Writing for the majority, Justice Douglas, who has argued in *Frontiero* that gender should be a suspect category,[242] adopted the *Reed* test and stated "[t]here can be no doubt therefore that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relationship to the object of the legislation.' "[243] *Frontiero* was distinguished since in that case the only stated objective of the state was administrative convenience, while in *Shevin* Florida asserted that the purpose was to remedy past employment discrimination against women which had made it more difficult for women to support themselves.[244]

Shevin raises the possibility then that gender classifications which are benign or remedial in purpose will receive a lesser level of scrutiny. Although it may be the intention of the Court to subject benign classifications only to rational basis review, the Court's opinion does not clearly establish the intention due to another complicating factor—a state tax

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239. *Id.* at 692.

240. 416 U.S. 351 (1974).

241. FLA. STAT. § 196.191(7) (1971) was the statute under which appellant was denied exemption. The statutes have been renumbered and slightly changed, but the basic substance of this provision was unchanged. Now FLA. STAT. § 196.202 (Cum. Supp. 1979) provides that, "[p]roperty to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation."

242. 411 U.S. at 682.

243. 416 U.S. at 355 (quoting with approval from Reed v. Reed, 404 U.S. at 76).

244. *Id.*

regulation was in issue in *Shevin*, and such regulations have traditionally received the rational basis level of scrutiny.[245]

Thus, although the majority were content to apply only a rational basis test in *Shevin*, whether it was because of the remedial purpose of the legislation, or the fact that it was a state regulation, or a combination of both, remained unclear.

Dissenting, Justice Brennan, joined by Justice Marshall, made it clear that part of the Court was willing to apply strict scrutiny to gender classifications regardless of the purpose or nature of the classification. In applying the strict scrutiny standard, Justice Brennan found the state's asserted remedial purpose to be compelling, but found that the means of accomplishing the goal were not sufficiently narrowly tailored.[246] The statute was "plainly overinclusive, for the $500 property tax exemption may be obtained by a financially independent hieress as well as by an unemployed widow with dependent children."[247]

The Court dealt with its second sex discrimination case brought by a male in *Schlesinger v. Ballard*.[248] Ballard had been discharged from the armed services pursuant to federal statute because he had not been promoted within nine years.[249] He challenged the constitutionality of the statute because women were given thirteen years in which to be promoted

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245. *See* note 241 *supra*. Traditionally, state tax regulations have received the minimum rational basis level of scrutiny from the Supreme Court and the Court's opinion made specific reference to this. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973); Allied Stores v. Bowers, 358 U.S. at 528: "We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation' . . . . The statute before us is well within those limits."

246. 416 U.S. at 357 (Brennan, J., dissenting).

247. 416 U.S. at 360. For an excellent explanation of the concepts of over- and underinclusiveness, and their application to equal protection analysis, see Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). *See also* note 303 *infra*, and accompanying text.

248. 419 U.S. 498 (1975).

249. 10 U.S.C. § 6382 (1976) provides in part that:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time . . . .
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> . . . .
>
> (d) This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty.

before being discharged.[250] Five of the Justices found that Congress's intent in allowing this difference was to compensate female personnel for fewer opportunities to receive promotions, especially their lack of opportunity for combat duty.[251] The classification was deemed reasonable to achieve this benign purpose.

Again the dissenters, Justices Brennan, Douglas, Marshall, and "mostly"[252] White, argued that gender classifications required a stricter level of scrutiny than the majority was applying.[253] They further pointed out that there was no evidence that Congress's purpose in passing the statute had been to compensate women for fewer promotional opportunities,[254] and that no other compelling interest of the state was served by the classification.[255] Therefore the classification was unconstitutional sex discrimination.

Schlesinger and *Shevin* together established the trend of the Court to uphold classifications it found to be benign in purpose and not to allow men to sue successfully on a discriminatory gender classification theory. But this comparatively clear trend became clouded in *Weinberger v. Wiesenfield*.[256]

In *Weinberger*, a widower challenged the Social Security Act's mandatory requirement that the wife and children of a deceased husband be made the beneficiaries of the husband's benefits under the Act, but that a deceased wife's beneficiaries be only the children of the marriage.[257] The husbands were automatically excluded. The majority of the Court found the provision unconstitutional. The Court found that the

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250. 10 U.S.C. § 6401(a) (1976) provides in part that:

> Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant and each woman officer on the active list of the Marine Corps who holds a permanent appointment in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which—
> (1) she is not on a promotion list; and
> (2) she has completed 13 years of active commissioned service in the Navy or the Marine Corps.

251. 419 U.S. at 508.

252. *Id.* at 521 (White, J., dissenting).

253. *Id.* at 511 (Brennan, J., dissenting).

254. *Id.* at 512-19.

255. *Id.* at 519-21.

256. 420 U.S. 636 (1975).

257. 42 U.S.C. § 402(g) (1976) provides in part that: "(1) The widow . . . of an individual who dies a fully or currently insured individual . . . shall . . . be entitled to a mother's insurance benefit . . . . " There is no corresponding section or benefit for a widower or surving divorced father in the act.

classification was discriminatory as to *women* stating, "the Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men."[258] Hence, the decision of the case was based on a theory of sex discrimination against women, even though the plaintiff was a male alleging discrimination against men by the classification.

The next major point of the opinion was that the purpose alleged by the government for the classification was rejected by the Court. The government had argued that the provision was to compensate women for the difficulties they face in supporting themselves and their families.[259] This remedial purpose, which had been found sufficient in *Shevin* and *Schlesinger*, was rejected in *Weinberger*. The Court found the true purpose of the provision was to allow children deprived of one parent the attention of the other parent.[260] In relation to this purpose then the classification was "entirely irrational."[261] A father no less than a mother should have the opportunity for the companionship, care and custody of his children.[262] The widower won his case, but the precedential value for the next male bringing a sex discrimination suit was severely limited since the Court had based its opinion on the statute's discriminatory effect on women as well as men. Furthermore, the Court had rejected the purpose of the classification asserted by the government, had substituted what it found to be the true purpose of the classification, and then found this purpose to be insufficient to withstand the scrutiny of the equal protection clause.

This same type of analysis was present in *Califano v. Goldfarb*,[263] where the Court had before it another provision of the Social Security Act. The provision in question provided benefits automatically to a widow, but a widower had to establish a minimum of fifty percent dependence on his deceased wife in order to receive benefits.[264] The provision

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258. 420 U.S. at 645.
259. *Id.* at 648.
260. *Id.* at 649.
261. *Id.* at 651.
262. *Id.* at 652.
263. 430 U.S. 199 (1977).
264. 42 U.S.C. § 402(f)(1) (1976) provides in part that: "The widower . . . of an individual who dies a fully insured individual, if such widower—(D)(1) was receiving at least one-half of his support . . . from such individual at the time of her death . . . shall be entitled to a widower's insurance benefit. . . . "

Section 402(e)(1) (1976) provides in part that:

> The widow of an individual who dies a fully insured individual, if such widow . . . (A)

was held invalid, but the Court could not reach a majority position.

Joined by Justices White, Marshall, and Powell, Justice Brennan found that the provision discriminated against women, just as in *Weinberger,* and rejected the asserted remedial purpose of the classification.[265] He found that the classification came instead from an intention to aid dependent wives of deceased wage-earning husbands and that this intention was based on the assumption that most wives are dependent. This Justice Brennan argued was the same situation presented in *Frontiero* and *Weinberger.*[266] "The only conceivable justification for writing the presumption of wives' dependency into the statute is the assumption . . . based simply on 'archaic and overbroad' generalizations that it would save the Government time, money, and effort simply to pay benefits . . . rather than require proof of dependency of both sexes."[267] Thus, as in *Frontiero* and *Weinberger,* they found the classification invalid. It is worth noting that again the decision was based on discrimination against a female, not a male, and that the Court rejected the government's asserted purpose, substituted its own, and found it to be insufficient.

Justice Stevens rejected the view that the classification discriminated against women and wrote that under the test of equal protection, the provision was an invalid discrimination against men.[268] "I am thereby persuaded that this discrimination against a group of males is merely the accidental by-product of a traditional way of thinking about females."[269]

Justice Rehnquist's dissent, joined by Justices Stewart and Blackmun, and Chief Justice Burger, argued that social insurance legislation such as this should be subjected to a lower level of scrutiny than the other Justices had applied[270] and that on the basis of *Shevin,* the Court should have found that this provision "rest[ed] upon some ground of difference having a fair and substantial relation to the object of the legislation."[271]

> is not married, (B)(i) has attained age 60 or (ii) has attained age 50 . . . and is under a disability . . . (C)(i) has filed application for widow's insurance benefits . . . and (D) is not entitled to old-age insurance benefits or is entitled to old-age benefits each of which is less than the primary insurance amount of such deceased individual, shall be entitled to a widow's insurance benefit.

The two provisions are identical except for the fact that § 402(f)(1)(D)(1), the showing of dependence requirement, has no counterpart in § 402(e)(1).

265. 430 U.S. at 206, 216.

266. *Id.* at 217.

267. *Id.*

268. *Id.* at 217 (Stevens, J., concurring).

269. *Id.* at 223.

270. *Id.* at 225 (Rehnquist, J., dissenting).

271. *Id.* at 226.

He accepted the Government's asserted purpose of the classification and thus believed the provision should have been upheld.[272]

The Court seemed to be retreating from any kind of elevated standards for gender classifications in *Geduldig v. Aiello*.[273] At issue was California's disability insurance plan which excluded from coverage for benefits any disabilities resulting from a normal pregnancy.[274] The majority of the Court found that this was not a gender classification at all.

> The program divides potential recipients into two groups—pregnant women and nonpregnant persons. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[275]

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272. *Id.* at 242.

273. 417 U.S. 484 (1974).

274. CAL. UNEMP. INS. CODE § 2626 (West, 1972) provided in part that, "in no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

275. 417 U.S. at 496-97 n.20. Even though the Court's distinction between pregnant and non-pregnant persons seems to offend common sense, the decision has been followed and used as valid precedential law in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). There the Court upheld a private company's policy to exclude coverage in their disabilty plan for disabilities arising from pregnancy over the plaintiff's claim that the policy violated Title VII § 703(a)(1) of the Civil Rights Act of 1964. Reaffirming *Geduldig*, the Court found the policy valid but stated that the classification would be invalid "if it were in fact a subterfuge to accomplish a forbidden discrimination. . . . " *Id.* at 136.

The Court has found one type of pregnancy policy to be invalid, even if the classification is not of gender but of pregnant and non-pregnant persons. In Nashville Gas Co. v. Satty, 434 U.S. 136, 139-43 (1977), the Court found that the company's policy of forcing pregnant persons to take a leave of absence without pay and depriving these employees of all accumulated seniority for such leave of absence was invalid under Title VII § 703(a)(2). The Court found that although the policy was neutral on its face, its treatment of male and female employees was in fact discriminatory.

Subsequent to the Court's decisions in *Geduldig*, *Gilbert*, and *Satty*, Congress amended Title VII so that pregnancy is now a gender classification under Title VII. Section 701(k) now provides that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. 2000(e)(k) (Supp. 1974-78). The amendment became effective October 31, 1978.

It would seem that this time, at least, the Court's refusal to act when action seemed so

There was no showing by the plaintiff that the classification was a pretext for discrimination and since the program excluded benefits for all short term disabilities, the majority concluded that there was a reasonable basis for such exclusion—lowering the costs of the program.[276] As the Court stated, "[t]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[277] Thus, the majority applied a rational basis test because this was a social insurance program and because it found that the exclusion of pregnancy coverage was not a distinction based on sex but a distinction between pregnant women and nonpregnant persons.

Justice Brennan's dissent, joined by Justices Douglas and Marshall, found that an exclusion of pregnancy coverage was a classification based on gender and that the Court's previous decisions in *Reed* and *Frontiero* required a stricter standard of scrutiny than the majority applied here.[278]

Even the Justices were becoming weary of the indefiniteness of the gender classification standard by the time they decided *Stanton v. Stanton*[279] in 1975. Here a Utah court had held that a father did not have to continue child support payments for his daughter after she reached age eighteen or for his son after he reached age twenty-one.[280] The difference in the ages for the children was based upon Utah's law that women attained majority at eighteen and men at twenty-one.[281] The Utah court based its decision on what it called some "old notions"—that it is generally the man's primary responsibility to provide a home and support, that it is thus more important that he obtain an education, and that women mature faster than men.[282] The Supreme Court reversed the decision. Justice Brennan, speaking for the majority, wrote, "We therefore conclude that under any test—compelling state interest or rational basis, or something in between—[the statute] does not survive an equal protection

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clearly called for spurred Congress into action to correct the situation. The result in this series of cases seems to bear out the predilection of some of the justices for throwing back to the legislatures issues which they prefer not to handle. *See* Justice Powell's dissent in *Frontiero,* note 239 *supra; see also* notes 46 & 99 *supra* and accompanying text.

276. 417 U.S. at 495-496.

277. *Id.* at 495 (quoting with approval from Dandridge v. Williams, 397 U.S. 486, 487 (1970)).

278. *Id.* at 498 (Brennan, J., dissenting).

279. 421 U.S. 7 (1975).

280. 30 Utah 2d 315, 517 P.2d 1010 (1974).

281. UTAH CODE ANN. § 15-2-1 (1953) which provides that "[t]he period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors obtain their majority by marriage."

282. 30 Utah 2d at 319, 517 P.2d at 1012.

attack."[283]

The latest major gender classification decision of the Court before the 1978-79 Term was *Craig v. Boren.*[284] Bringing a class action for males between the ages of eighteen and twenty-one, Craig challenged Oklahoma's statute which forbade the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen.[285] The difference in the ages of males and females was alleged to be an impermissible gender classification.

Writing for the majority, Justice Brennan stated, "to withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[286] After thus stating the test, Justice Brennan found that Oklahoma had not met its burden. The Court accepted as important Oklahoma's asserted purpose of traffic safety,[287] but found that the classification was not substantially related to that purpose.[288] "The State's surveys do not adequately justify the salient features of Oklahoma's gender-based traffic safety law."[289] The classification thus invidiously discriminated against males aged eighteen to twenty-one.

Justice Powell's concurrence was particularly instructive. After stating that the Court does apply a more critical look to gender classifications than it does where no fundamental rights or suspect categories are involved,[290] he commented in a footnote that

> [a]s has been true of *Reed* and its progeny, our decision today will be

283. 421 U.S. at 17.

284. 429 U.S. 190 (1976).

285. OKL. STAT. tit. 37, §§ 241, 245 (1958 and Supp. 1976) provide that:

§ 241: It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one percent of alcohol measured by volume and not more than three and two tenths (3.2) percent of alcohol measured by weight. § 245: A "minor," for the purpose of Section . . . 241 . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

286. 429 U.S. at 197.

287. *Id.* at 199-200.

288. *Id.* at 204.

289. *Id.* at 202-03. In noting that Oklahoma's surveys were inadequate to support the classification, Justice Brennan stated, "[b]ut this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204. However, compare this statement with the Court's reliance on statistics for their opinions in Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 635 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).

290. 429 U.S. at 210 (Powell, J., concurring).

> viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdivision of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification.[291]

Justice Stevens concurred in the result but specifically rejected the idea of adding another level of scrutiny to equal protection analysis.[292] He even rejected a double standard of review stating that "there is only one Equal Protection Clause."[293] The proper question in equal protection analysis is whether or not persons similarly situated with reference to the law are similarly treated.[294] He found in this case that they were not.

In dissent, Justice Rehnquist, joined by Chief Justice Burger, wrote that there was no basis for applying an elevated standard of review to gender classifications since neither the Constitution nor previous cases compelled it.[295] The test to be applied is the minimal "rational basis" test as established in *McGowan v. Maryland.*[296] Under such analysis, Oklahoma's statute would be permissible. "The only redeeming feature of the Court's opinion . . . is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero v. Richardson,* from their view that sex is a 'suspect' classification for purposes of equal protection analysis."[297]

The Court's opinion in *Craig* was very important for clarifying the standard that at least a slim majority of the Court would apply to a gender classification. It also marked the first time that a male had successfully challenged a gender-based classification and clearly won on the discrimination issue as applied to men. There was no discussion in the majority opinion as to whether the statute discriminated against women as well as men. It was apparently this precise point that bothered the dissenters. "[B]efore today no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution."[298]

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291. *Id.* at 211 n.24.
292. *Id.* at 212 (Stevens, J., concurring).
293. *Id.* at 211-12.
294. *See* 430 U.S. at 219 (Stevens, J., concurring).
295. 429 U.S. at 217 (Rehnquist, J., dissenting).
296. *Id.* at 217-18; McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
297. 429 U.S. at 217.
298. *Id.* at 219.

Thus, before the 1978-79 Term, the standard for a slim majority of the Court in sex discrimination cases was that the classification must serve important state objectives and be substantially related to achieving those objectives. This standard is not strict scrutiny, nor is it the traditional rational basis test. It is somewhere in between.

B. *Substantive Decisions in the 1978-79 Term*

During the 1978-79 Supreme Court Term there were five cases dealing with sex discrimination which were ruled upon substantively by the Court.[299] All of these cases involved challenges under the fourteenth amendment's equal protection clause. Although in two of the cases the Court tested the statutes involved by the standard established in *Craig*, the other three decisions evidenced some novel approaches to sex discrimination cases.

1. *Orr v. Orr*

In *Orr v. Orr*[300] the Supreme Court declared an Alabama statute unconstitutional under the fourteenth amendment. Under this statute, the Alabama court could require husbands but not wives to pay alimony, thus prompting Orr, a male, to challenge the statute.

Before turning to the substantive issues, the Court first addressed the plaintiff's standing to bring the case. Since Orr did not claim that he himself, through need, was entitled to alimony, he would not benefit from state remedial action extending alimony rights to needy husbands. Therefore Orr would lack standing to challenge the statute because a "proper plaintiff" would need to request alimony for himself.[301]

On the other hand, if the state should remedy the statute by denying benefits to either party, Orr would clearly benefit because he would not be required to pay alimony. Thus the state could redefine the classification so as to exclude Orr's wife from, or to include Orr in, alimony payments, so long as the classification is gender-neutral.[302]

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299. An additional case ruled upon by the Court was Duren v. Missouri, 439 U.S. 357 (1979). The dissent, written by Justice Rehnquist, insisted that "the majority is in truth concerned with the equal protection rights of women to participate in the judicial process rather than with the Sixth Amendment right" to a jury trial, even though the majority opinion was based solely upon sixth amendment rationale. *Id.* at 371.

300. 440 U.S. 268 (1979).

301. *Id.* at 271-72.

302. *See* Craig v. Born, 429 U.S. 190, 210 n.24 (1976) and Stanton v. Stanton, 421 U.S. 7, 17-18 (1975), both of which assert the right of the state, rather than the Court, to redefine the discriminatory classification.

This inherent problem in underinclusive statutes will not be manipulated by the Court to deny a plaintiff standing.[303] Since Orr could possibly benefit, the standing requirement was met; Orr had "alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness."[304] The Court went on to state, "There is no question but that Mr. Orr bears a burden that he would not bear were he female . . . . The burden alone is sufficient to establish standing."[305] The majority view is clear. If a discriminatory statute can be rectified so that the plaintiff would be concretely affected, he will not be denied standing simply because an alternative means of rectification is available.[306]

Turning then to the substantive issues, the Court held that the statute triggered a heightened level of scrutiny because it classified on the basis of sex. The test the Court used to determine the statute's validity under the Constitution was that of intermediate scrutiny in that, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[307] Satisfied to follow in the steps of *Reed, Webster,* and *Craig* the Court continued to apply an intermediate level of scrutiny to cases dealing with sex discrimination.

The fact that the classification discriminated against men rather than women did not affect the level of scrutiny employed. This approach was consistent with *Craig* and further established the right of the male to sue under the equal protection clause.

The Court proceeded to examine the governmental objectives as expounded by counsel for the state of Alabama. The first of three stated objectives was to "effectively announc[e] . . . the State's preference for an allocation of family responsibilities under which the wife plays a de-

303. 440 U.S. at 272.

304. *Id., citing* Baker v. Carr, 369 U.S. 186, 204 (1962).

305. 440 U.S. at 273.

306. Justice Rehnquist wrote a dissenting view on the standing issue and stated, "The Court holds that Alabama's alimony statutes may be challenged in this court by a divorced male who has never sought alimony [and] who is demonstrably not entitled to alimony even if he had." *Id.* at 290. Mr. Orr's standing was based on the possibility that the state could rectify the unconstitutional statute by doing away with alimony altogether. Justice Rehnquist does not consider this alternative as likely enough even to be considered; surely Alabama will not take away alimony from the many women in the state dependent on it. If this alternative is, as a practical matter, non-existent, the only other alternative is extending alimony to husbands in need, thus rendering Orr unqualified for alimony. The issue raised by Mr. Orr is thereby rendered purely hypothetical. *Id.* at 296.

307. *Id.* at 279, (citing with approval Califano v. Webster, 430 U.S. 313, 316-17 (1977)).

pendant role."[308] Without hesitation, the Court denounced this objective as insufficient, stating that, "the 'old notion' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender."[309] This statement further entrenches the principles set forth in *Stanton* and *Goldfarb* in that the Court will not accept outmoded concepts of gender roles to validate a sex discriminatory statute.

The second objective which the Court identified was a "legislative purpose to provide help for needy spouses, using sex as a proxy for need."[310] In evaluating this objective, the Court found that providing help for needy spouses was indeed an important governmental objective. However, the Court never reached a conclusion as to whether sex was a reliable proxy for determining need. The Alabama statutory scheme already provided a hearing to determine whether the relative financial status of the parties warranted awarding alimony to the wife. Since a hearing was already held, it could be determined at that point whether either spouse, male or female, was in need of support. Thus, a sweeping generalization which automatically classified women as needy and men as not was unnecessary, and thus could not survive the Court's scrutiny.[311]

A distinction may be drawn between *Orr* and the previous cases of *Shevin, Schlesinger* and *Weinberger,* although all of these cases involved the question of whether sex was a reliable proxy for establishing need. In contrast to previous cases decided by the Court, a hearing was already held in *Orr*. Thus, the decision in *Orr* applies only to such limited situations where a hearing to determine need is already required. Statutes which do not already provide for a hearing to determine need will still be evaluated in light of *Shevin, Goldfarb,* and *Weinberger*. Under these decisions, the first test will be whether the proxy is accurate. If the classification is not a reliable proxy, then the statute will be held invalid. If the proxy is accurate, the state must further prove that the classification is substantially related to an important governmental purpose. Neither task will be easy since, as it did in *Goldfarb* and *Weinberger,* the Court may reject the asserted purpose of the state if it decides that the statute is in reality based upon a stereotypical view of a certain gender's position in society.

The third objective of the state was that of "compensating women for

308. 440 U.S. at 280.
309. *Id., citing with approval* Stanton v. Stanton, 421 U.S. 7, 10 (1975).
310. 440 U.S. at 280.
311. *Id.* at 282-83.

past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."[312] Using the same reasoning as it applied in testing the second objective, the Court found that economic compensation for past injustices was an important governmental objective. Here, too, however, the Court did not reach a conclusion as to whether women had indeed been left disadvantaged by past legislation. Instead, it was noted that the individualized hearing already provided by Alabama's statute could provide a forum where it would be determined whether each particular woman has been discriminated against in the marital relationship. Thus, the Court concluded, "[w]here, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies, and therefore [the gender-based classification] carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."[313] Thus, the Court did not rule out ameliorative sex based statutes entirely. Arguably, the Court could continue either to validate remedial statutes which classified on the basis of sex, or at least apply a lower level of scrutiny in assessing their validity. This approach would be consistent with *Shevin* and *Schlesinger.* Justice Blackmun's concurrence was based on this very assumption—that the decision would impose no limitations on *Shevin.*[314]

The Court in dicta, however, warned that such classifications on the basis of sex "carry the inherent risk of reinforcing stereotypes . . . [and thus] must be carefully tailored."[315] This indicates that the Court is following its decisions in *Weinberger* and *Goldfarb* in that it will refuse to accept a state's assertedly ameliorative purpose when it believes that the purpose is in actuality a reinforcement of a stereotypical image.

2. *Parham v. Hughes*

In *Parham v. Hughes,*[316] the Supreme Court was faced with a Georgia statute[317] which allowed the natural mother of an illegitimate child to sue for that child's wrongful death, or, if the mother was dead, allowed the father who had legitimated the child to sue. A father who had not legitimated his child, however, was precluded under the statute from bringing an action for the wrongful death of his illegitimate child. The question

312. *Id.* at 280.
313. *Id.* at 283.
314. *Id.* at 284 (Blackmun, J., concurring).
315. *Id.* at 283.
316. 441 U.S. 347 (1979).
317. GA. CODE § 105-1307 (1968) (Repealed April 4, 1979).

presented to the Court was whether this statute violated the equal protection and due process clauses of the fourteenth amendment by denying a father, and not a mother, the right to sue for the death of their illegitimate child solely on the basis of the parent's sex. In a split decision, the Court decided that the statute did not violate either clause.

The plurality opinion, written by Justice Stewart, presented a unique approach to equal protection challenges. Justice Stewart establishes a test never before used by the Court in assessing discrimination claims, and thus deserving of special consideration. He began by stating that "[s]tate laws are generally entitled to a presumption of validity."[318] He continued, however, to note that not all laws are entitled to that presumption.[319] The determining factor is whether the discrimination is "invidious." If the statute is not invidious, then it is entitled to the presumption of validity unless the Court can find "no rational relationship to a permissable state objective."[320]

Thus, Justice Stewart's new approach hinges on proof that the statute is "invidious." The word, invidious, appears to assume a novel meaning. Earlier opinions used the word in a broad sense to denote a conclusion. When the classification was found to be in violation of constitutional guarantees, then it was labeled invidious.[321] Contrary to this prior usage, Justice Stewart seemed to create a new definition which serves as a test rather than a conclusion.

The true import of the meaning of invidiousness is gleaned from Justice Stewart's entire opinion, and not from one lucid definition. In distinguishing *Reed, Stanton, Frontiero,* and *Craig,* he found that, "underlying these decisions is the principle that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."[322] Justice Stewart continued to point out differences in these prior cases in that the statutes were overbroad and treated classes differently even though they were similarly situated with respect to the law. In contrast then, he found that men and women were not similarly situated in this case. This finding stemmed from the fact that under another Georgia statute only the father could legitimate a child.

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318. 441 U.S. at 351.

319. Classifications based upon race present one such exception since they are inherently suspect. Other classifications, including illegitimacy, alienage and gender, may also rebut such a presumption of validity. *Id.*

320. *Id.*

321. *See* note 237 *supra.*

322. 441 U.S. at 351.

Thus, Justice Stewart wrote that "the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not."[323] Therefore, the statute is not overbroad because there are genuine differences between the status of men and women under the law. Thus, the key to proving invidiousness is that the statute be "premised upon overbroad generalizations and . . . [exclude] all members of one sex even though they . . . [are] similarly situated with members of the other sex."[324]

Having found that the statute was not invidiously discriminatory, the statute was presumed valid. The only qualification to this presumption now is that a statute must be rationally related to a permissible state objective—an application of the test used in the first sex discrimination cases.[325]

A variance in interpretation may arise in reading Justice Stewart's opinion. He initially stated that certain classifications, gender included, may rebut the presumption of validity given to statutes. His next paragraph however begins with the statement that "[i]n the absence of invidious discrimination . . . , a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures."[326] This may be interpreted to imply that only those enumerated classifications are invidious. Furthermore, since Justice Stewart wrote that the distinction made by the statute was between fathers who had legitimated their children and those who had not, it may be that he does not see this as a gender classification at all. Since the classification was not based on gender, then it was not invidious.[327]

The more likely interpretation is that Justice Stewart viewed this statute as gender based, but not as one which *"invidiously* discriminate[d] against the appellant *simply* because he is of the male sex."[328] The statute is gender related but not overbroad because "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated."[329]

323. *Id.* at 356.
324. *Id.* at 356-57.
325. *Id.* at 357.
326. *Id.* at 351.
327. This reasoning is similar to that used in *Geduldig* when a clasification based on pregnancy was held not to be a gender classification. Perhaps the reasoning used by Justice Stewart in establishing a test of invidiousness was intended to satisfy those who criticized his distinction in *Geduldig.*
328. 441 U.S. at 356-57 (emphasis added).
329. *Id.* at 355.

The distinction, therefore, is that this was not a classification based merely on gender, but was limited to a more narrow class of fathers who could have legitimated their children, but did not. Thus, the statute was not overbroad, and not invidious, because it qualified the gender classification and only affected a subset of fathers with a particular characteristic.

Having thus disposed of the appellant's claim under the equal protection clause, Justice Stewart quickly dismissed the claim under the due process clause of the fourteenth amendment,[330] because appellant did not sufficiently present his claim.[331]

Justice Stewart never discussed what the result would be if the statute in question was found to be invidious. It may be implied from his discussion of *Reed* and *Frontiero* that if invidiousness had been found, the statute would have automatically been deemed to be invalid. It will be seen from a subsequent case, however, that this is not entirely clear.

It is important to note that this was only a plurality opinion, joined by Chief Justice Burger and Justices Rehnquist and Stevens, but it was Justice Powell's concurrence which tipped the scales in the favor of the state.[332] Justice Powell agreed with the outcome, but disagreed with the plurality's reasoning. He used the *Craig* test to find that the statute was substantially related to the important state interest of avoiding problems of proving paternity.[333]

The dissent, written by Justice White and joined by Justices Marshall, Brennan and Blackmun, also used the *Craig* test to determine whether the statute violated the fourteenth amendment. Justice White reached a contrary conclusion, however, and would have held that the statute violated the constitutional guarantee of equal protection.[334] Thus, it is important to note that the majority of the Court continued to use the *Craig* test to assess equal protection claims.

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330. *Id.* at 358-59. The Court also distinguished Stanley v. Illinois, 405 U.S. 645 (1971), by noting that the present case involved merely an action for money damages, whereas *Stanley* involved child custody.

331. 441 U.S. at 358-59.

332. *Id.*

333. *Id.*

334. In balancing the interests of the state against those of the father, the dissent could not conceive of any interest which would justify the sex discriminatory statute. *Id.* at 368.

3. *Caban v. Mohammed*

Caban v. Mohammed,[335] was decided the same day as *Parham* and once again involved the father of an illegitimate child. A New York statute[336] permitted an unwed mother, but not an unwed father to prevent the adoption of her child by refusing to give her consent to such adoption. The appellant, an unwed father who wished to block his illegitimate child's adoption, attacked this statute on equal protection and due process grounds and alleged that the statute discriminated against him because of his sex.[337]

The Court, in a majority opinion by Justice Powell, tested the statute's validity by the test expressed in *Craig,* that "[g]ender based distinctions 'must serve governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause."[338] Accordingly, Justice Powell stated simply that there was no broad distinction between the mother and father of a child at every stage of development which would warrant such a difference in treatment. Thus, the Court rejected the state's presumption that the sexes were not similarly situated, and that this difference would provide a basis for the dissimilar treatment by the statute. This careful assessment of a state's objectives and the subsequent rejection of those stated objectives is the same reasoning used by the Court in *Orr, Goldberg* and *Weinberger.*

Next, the state argued that this gender-based distinction was substantially related to the best interests of the illegitimate child in furthering his adoption. The Court recognized that providing for the child's best interests was an important government objective. Nevertheless, the distinction between sexes, as provided for in the statute, was not substantially related to this goal because it could not be shown that unwed fathers were more likely to block adoption proceedings than were unwed mothers. In conclusion, the Court stated that this statute was overbroad in assuming that all unwed fathers were "invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."[339] Thus the statute could not pass muster and was invalidated by the Court.

Four Justices dissented. Justice Stewart, writing only for himself, be-

335. 441 U.S. 380 (1979).
336. N.Y. Dom. Rel. Law (McKinney) § 111 (1977).
337. 441 U.S. at 381-82.
338. 429 U.S. 190 (1977) *cited with approval in* 441 U.S. at 388.
339. 441 U.S. at 394.

lieved the majority had given too little credence to the importance of the child's future, as aided by adoption. He used the same test of invidiousness as applied in *Parham* and argued that, "[w]hen men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated," and, in his opinion, mothers and fathers were not similarly situated. Fathers were often "unknown, unavailable or simply uninterested."[340] An unwed mother, however, had legal custody of the child and it was she who decided whether or not to give birth to that child. Justice Stewart recognized, however, that in this particular case, the father was a known and caring parent, and thus the statute worked an invidious discrimination against him. Instead of continuing in his explanation as to what the next step would be once a statute is determined to be invidious, and thus clarifying his decision in *Parham,* Justice Stewart simply wrote that he would agree with the reasoning used by Justice Stevens in his dissent.[341]

Justice Stevens' dissent was joined by Chief Justice Burger and Justice Rehnquist. They also recognized the compelling[342] interest of the state in facilitating adoption, and viewed the gender-based distinctions as justified because the parties were not similarly situated. Justice Stevens went a step further, however, by stating that if the statute was justified in its most frequent application, then a presumption of validity should arise. To invalidate the statute, then, the challenger should be required to show that it was unjust in a sufficient number of cases to mandate a finding of invalidity.[343]

If read in light of Justice Stevens' opinion then, the test of invidiousness as established in *Parham* and advanced in *Caban* would present an awesome barrier to a challenge under the equal protection clause. Its reasoning would be somewhat circular and would read as follows: if the statute were overbroad and treated members of a class differently even though they were similarly situated, then it would be invidious discrimination. This would not automatically invalidate a statute though, and the challenger would have to show that its application was invidious in a sufficient number of cases so as to require its invalidation. Conversely, if the statute was not overbroad, then it would only be necessary to show that it was rationally related to a permissible state objective.

340. *Id.* at 398.

341. *Id.* at 401.

342. Justice Stevens distinguished his use of the word "compelling" from those cases where strict scrutiny required that an interest be compelling. *Id.* at 402-03 n.3.

343. *Id.* at 410-12. Furthermore, both the majority and dissenting Justices would not extend this holding to cases where the child was a newborn infant. *Id.* at 392 n.11, 407.

Thus *Caban* and *Parham,* decisions handed down on the same day, reached conflicting conclusions in cases which were very similar. Justice Stewart attempted to draw a distinction between the cases by explaining that in *Parham* the father could remove himself from the classification, whereas in *Caban* he could not.[344] The real reason for the varying conclusions, however, stemmed from the split in the Court. Four Justices, led by Justice Stewart, follow the newly defined invidousness test. Five other Justices apply the *Craig* test. The difference in outcomes was caused by Justice Powell's voting switch. While using the *Craig* test in both instances, he arrived at opposite conclusions as to the tailoring of the statute to meet governmental goals. Thus, at this point, it seemed that equal protection cases were subject to a split approach by the Court, with Justice Powell's assessment of the state's goal being the deciding factor.

4. *Personnel Administration of Massachusetts v. Feeney*

The challenge in *Personnel Administration of Massachusetts v. Feeney*[345] was to an absolute veterans preference mandated by Massachusetts law.[346] The appellee, a woman, had attempted to advance through the civil service system of Massachusetts. She took several qualifying tests, and although always scoring near the top, was never certified for the advanced positions, since Massachusetts law gave an absolute lifetime preference to veterans. Feeney brought an action challenging the constitutionality of the statute under the equal protection clause of the fourteenth amendment. She alleged that the disproportionate impact of the statute worked a discrimination against women. The state appealed the district court's judgment which had declared the statute unconstitutional, and the Supreme Court reversed the district court's decision.[347]

In establishing a background for its decision, the Court first examined the evolution of the veteran's preference in Massachusetts law. The justification for such a preference was found to be "to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."[348] Since the initial passage of such a statute in 1896, the language employed was technically, although perhaps not realistically, gender-neutral. The Court also noted the severe disproportionate impact which the statute had upon women's employ-

344. *Id.* at 390 n.9.
345. 442 U.S. 256 (1979).
346. MASS. GEN. LAWS ANN. ch. 31 § 23 (1977).
347. 442 U.S. at 259.
348. *Id.* at 265.

ment opportunities in the public sector.[349]

Keeping this background in mind, Justice Stewart, in writing the majority opinion, recognized that, "[a]lthough public employment is not a constitutional right . . . any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment."[350] Noting that the statute was not discriminatory on its face, but was challenged because of its discriminatory effects, the Court established a two-step test of validity for such a situation. First, it had to be determined whether the statute was indeed neutral. Secondly, the Court would look to see if "the adverse effect reflects invidious gender-based discrimination."[351] They key to this test, according to Justice Stewart, was not merely that the impact should be severe, but that the purposeful discriminatory intent must have been present.[352]

This approach to a statute, challenged because of its disproportionate impact upon a certain group, is consistent with the Court's decision in *Washington v. Davis*.[353] Faced with a regulation which disproportionately affected employment opportunities for blacks, the Court in *Washington* held that the impact must be accompanied by a discriminatory purpose in order to violate the fourteenth amendment.

The Court found no problem in deciding that the first step was satisfied in that, "the legitimate noninvidious purposes . . . [of the statute] cannot be missed."[354] Supporting this proposition was the fact that a substantial number of males were also adversely affected by a veteran's preference. Thus, the statute was not merely a pretext for preferring men over women.[355]

The Court then proceeded to determine whether the statute was invidious on a disproportionate impact theory. The test for invidiousness varied from that used by Justice Stewart in *Parham* because, unlike *Parham*,

349. *Id.* at 270-71.

350. *Id.* at 273.

351. *Id.* at 274. Justice Stevens probably made a valid point in his concurring opinion when he stated, "I am inclined to believe the question whether [the classification] is covertly gender-based is the same as the question whether its adverse effects reflect invidious gender-based discrimination." *Id.* at 281.

352. *Id.* at 274.

353. 426 U.S. 229 (1976). *See, e.g.*, Village of Arlington Heights v. Metropolitan House. Dev. Corp. 429 U.S. 252 (1977); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

354. 442 U.S. at 278-80.

355. *Id.*

the statute was facially neutral. Justice Stewart, however, continued to couch the test for disproportionate impact as invidiousness. He attempted to expand the use of his test to an area historically given unique treatment.

Justice Stewart established two requirements for a statute to be invidious. First, the effect on one group needed to be disproportionate. Second, the disproportionate impact had to be caused by a discriminatory intent. So, although he used the terminology of invidiousness, Justice Stewart nonetheless applied the same test established in *Washington.*

The real question, then, focused on the intent of the legislature in enacting the statute. The plaintiff argued that several factors contributed to a finding that the discrimination was purposeful. First, the statute was based upon a qualification, veteran status, historically reserved to men under gender-biased policies of the military. Secondly, the disproportionate impact upon women was too obviously inevitable to be unintended. Lastly, it was argued that the preference has very little to do with employment capabilities.[356]

The Court rejected these arguments although recognizing that "[t]o the extent that the status of veteran is one that few women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased."[357] Nevertheless, these gender-biased policies of the military did not convince the Court that the required discriminatory intent was present. The Court noted that "the history of discrimination against women in the military is not on trial in this case."[358] And, the Court stated, if there was such a discriminatory purpose, the plaintiff should not have argued that a less stringent preference would be legitimate, since any discriminatory purpose would invalidate such a preference in its entirety.[359]

The Court also recognized that "it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable," however "purpose implies more than intent as volition or intent as awareness of consequences."[360] Instead, the legislature must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'inspite of,' its adverse effects upon an identifi-

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356. *Id.*
357. *Id.* at 276-77.
358. *Id.* at 278.
359. *Id.* at 276.
360. *Id.* at 278-79.

able group,"[361] and the history of this statute discredited any claim of such a purpose. This definition of discriminatory purpose is important because it clears up areas left cloudy after *Washington*. No longer could discriminatory purpose be established by showing foreseeable impact. The test would now be whether the action was taken partially "because of" its disproportionate impact. This test, as the dissent noted,[362] will be difficult to meet.

A vigorous dissent was written by Justice Marshall, joined by Justice Brennan. They rejected the majority's conclusion that because the veteran's preference was based on *one* valid purpose, it could not have a *discriminatory* purpose as well. Instead, Justice Marshall contended that "[w]here the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."[363] The opinion recognized that "[a]bsent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute."[364] In light of this reality, Justice Marshall argued that "since reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable."[365] The dissent found that the legislative history indicated an awareness of the impact the statute would have on women, and that the legislature chose to mitigate those effects only with respect to traditionally female jobs. Thus, Justice Marshall concluded: "Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid."[366]

Since a discriminatory purpose was found, Justice Marshall examined whether the statute was substantially related to an important state inter-

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361. *Id.* at 279.

362. *Id.* Justice Stewart came short of declaring foreseeable impact completely irrelevant in establishing discriminatory purpose. The inevitability that a certain action will have a discriminatory effect may create an *inference* that there was a discriminatory purpose motivationg that action. According to Justice Stewart, in this case, "the inference simply fails to ripen into proof." *Id.* at 279 n.25.

363. *Id.* at 284. Note however, that in Arlington Heights, 429 U.S. 252, 270-71 n.21 (1977), *dicta* indicated that when it was proven that discriminatory purpose was at least *part* of the motivation for an action, the burden shifted to the state to show that, "the same decision would have resulted even had the impermissable purpose not been considered." In a separate opinion, Justice Marshall, *id.* at 271, would require the state to shoulder a higher burden of proof and show that *no* impermissable purpose was a factor in the decision.

364. 442 U.S. at 282.

365. *Id.* at 283.

366. *Id.* at 285.

est. He found that the statute was not substantially related to the stated objectives, and thus, believed the preference to be unconstitutional.[367]

5. *Califano v. Westcott*

The last sex discrimination case heard by the Supreme Court in the 1978-79 term, *Califano v. Westcott,*[368] closely followed *Orr* in using the *Craig* standard to test the validity of a statute challenged under the equal protection clause.[369] Although previously split between the *Craig* test and Justice Stewart's new test for sex discrimination cases, the Court united and applied the *Craig* test unanimously.

The suit was brought by a woman who asserted that section 407 of the Social Security Act violated the fourteenth amendment by denying her benefits solely because of her sex. The statute allowed children with unemployed fathers to receive benefits which would ensure the children the basic necessities. If the mother was unemployed however, the children did not qualify for those benefits. The district court declared this statute unconstitutional, and an appeal was taken to the Supreme Court.[370]

The government first argued that the statute did not, in fact, classify by gender. Instead, the classification was that of whole families, and its effect was felt not only by the mother, but also by the father and children. The Court rejected this argument based upon precedent[371] which struck down "gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent."[372]

The government attempted to distinguish the precedent of *Frontiero, Goldfarb* and *Weinberger* by asserting that the accomplishments of women were not denigrated here, as they were in the previous cases. Instead, the source of the benefits was a welfare program supported by the revenues of the state. The Court recognized that "[t]he distinction between employment-related benefits and other forms of government largesse may be relevant to equal protection analysis," but that it was nevertheless a "discredited view that welfare benefits are a 'privilege' not subject to the

367. *Id.* at 288.

368. 99 S. Ct. 2655 (1979).

369. The challenge was based on a violation of the fifth amendment, since a federal statute was involved. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

370. 99 S. Ct. at 2657.

371. *See, e.g.,* Califano v. Goldbarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

372. 99 S. Ct. at 2660.

guarantee of equal protection."[373] Furthermore, the presumption which the statute was based upon posed an absolute barrier to the plaintiff's qualification, and was not merely procedural in nature. Thus, the deprivation of subsistance benefits was also absolute and so all the more onerous.[374]

Next, the government argued that the statute was substantially related to important state objectives, and offered two objectives to support this theory. First, that the statute was designed to aid children who were in need because of a parent's unemployment. The Court quickly rejected this argument. Although it thought the state objective was important, it found no evidence that the gender distinctions in this statute were substantially related to the achievement of that particular end. The Court looked to legislative history in attempting to find some purpose which the distinction could serve. What they found however, was merely an intent to aid needy children. The Court could find no evidence, nor was any asserted, that showed gender distinctions served this goal.[375]

Secondly, the government argued that the goal of the statute was to remedy a flaw in the original provision which had provided assistance for dependent children only when a parent was absent. This caused the father to leave the home in order to receive assistance, thereby breaking up the family unit. To remedy this effect, the statute was amended to apply to those families where the father was unemployed, instead of absent.

The Court found two problems with this reasoning. First, the original statutes were gender-neutral. Again, the Court inspected the history of the amendment. It looked to determine whether the change to a gender-based statute was intended to remedy the original provision's flaw in inducing desertion. To the contrary, the Court found that the gender limitation was instead tied to a reduction in program costs.[376] Secondly, there was no evidence to support the proposition that the father was more likely to desert than the mother in cases where the mother was the principal wage-earner. Instead, the Court found that the statute was based upon old notions that the father was the bread winner, and thus this onerous stereotype could not be tolerated. The Court concluded then, that "[l]egislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment."[377]

373. *Id.* at 2661. *Contra,* Maher v. Roe, 432 U.S. 464 (1977).

374. 99 S. Ct. at 2661.

375. The Court rejected the "one step at a time" approach taken in *Geduldig. See* notes 273-83 *supra* and accompanying text.

376. 99 S. Ct. at 2662.

377. *Id.* at 2663.

Thus, *Westcott* continued to use the intermediate level of scrutiny established in *Craig* and reaffirmed in *Orr*. Why the four Justices who had used the test of invidiousness did not continue to use that test is left to speculation since no concurring opinion addressed this issue.

C. *Conclusion*

The 1978-79 Supreme Court Term raised major new questions about sex discrimination analysis as well as settling some old questions from previous terms. Perhaps the most definite statement that can be made about judicial treatment of gender classifications is that it will not receive strict scrutiny, even from the four Justices who originally found gender to be a suspect classification in *Frontiero*.

The clear test for at least five of the Justices (Powell, Brennan, Marshall, Blackmun and White) is now the test announced by the Court in *Craig*. To survive equal protection analysis, a gender classification must serve an important state interest and be tailored to relate substantially to that interest. Failure to meet either of these two requirements results in a finding of unconstitutionality.

The position of the remaining four Justices (Stevens, Stewart, Rehnquist and Burger) on gender clasifications is less certain. At times they join with the majority of the Court and apply the *Craig* test, as in *Orr* and *Westcott*. At other times, they retreat from this intermediate scrutiny to a more deferential though very uncertain standard—that verbalized by Justice Stewart as "invidious discrimination." Although these words have traditionally been used to indicate a conclusion of unconstitutionality, Justice Stewart's opinions this term may indicate that invidious dicrimination is a test to be applied to find unconstitutional gender classifications. This is perhaps his test for all classifications challenged as constitutionally invalid under the equal protection clause. Even if this is the beginning of a new type of analysis, its paremeters are, at best, uncertain and its acceptance by the Court over the *Craig* test in the near future is doubtful, particularly in light of *Westcott*.

Under either type of analysis, however, it is clear that the Court has followed its earlier trend and now requires the government, in defending its gender classification, to articulate the purpose of the classification and convince the Court that this is the true purpose. The Court will not, as it will in rational basis analysis, hypothesize a state of facts that will justify the classification. Furthermore, the Court will reject the purpose set out by the government if it finds another to be the actual purpose and will proceed to test this substituted purpose under the *Craig* test for its constitutionality. Once the plaintiff has established that there is in fact a

gender classification that triggers intermediate scrutiny, the burden is clearly on the government to convince the Court that the articulated purpose is an important interest and that the classification is, in fact, a substantially related way of dealing with the interest.

As to what will be a sufficiently important interest, the only definite position of the Court is that old and traditional notions of the societal roles of the respective sexes are insufficient and that administrative convenience alone is insufficient. The assessment of the actual purpose and its importance may be a point of conflict between the justices, as in *Caban.*

The treatment of benign or remedial purposes of gender classifications is still unclear. It appears that the Court will not give such classifications a lower level of scrutiny as they did in *Shevin* and *Schlesinger.* Instead, it appears that in *Orr* the Court applied the *Craig* test's intermediate level of scrutiny to a remedial classification and its benign purpose was only a factor in deciding if an important state interest was being served. Thus, benign classifications are subject to the same level of scrutiny, but have an easier time of meeting the first prong of the *Craig* test. This approach is uncertain, however, since Justice Blackmun's concurrence in *Orr* specifically stated that the Court's opinion in no way retreated from the holding in *Shevin.*

Another clear result of the 1978-79 Term is that men can successfully challenge gender classifications as a violation of the equal protection clause. The Court discontinued its practice of invalidating statutes challenged by men on the basis that it was discriminatory as to women, as in *Weinberger* and *Goldfarb.* Instead, the Court looked to the discriminatory effect on men themselves, as in *Westcott, Orr, Caban* and *Parham.*

All of the above presupposes that the Court has found the statute to contain a gender classification. The Court, or at least four of the Justices led by Justice Stewart, is very demanding as to what types of classifications it will find to be gender classifications. The most obvious example of this is the refusal in *Geduldig* and subsequent cases to find pregnancy classifications to be gender classifications. Although no opinion this term clearly continued this trend, none clearly eliminated the practice. The confusing opinion in *Parham* may indeed point to the Court's continuing narrow definition of a sex classification. Perhaps continuing this tough stance will spur Congress into action to provide corrective legislation for these complex areas.

The Court will also be very demanding in finding a gender classification from a disproportionate gender impact resulting from a facially neutral

statute or practice. In its decision in *Feeny* this term, the Court expanded the *Washington* intent requirement from race classifications to include gender classifications. From now on, any successful constitutional challenge based on disproportionate gender impact will have to include a showing of intent on the part of the government. The Court found the necessary intent to exist where the government pursued a gender discriminatory course of action at least in part "because of" not "in spite of" its adverse effect on either of the sexes. This basically subjective intent requirement will be difficult to fulfill and will undoubtedly limit the number of successful gender discrimination challenges based on a disproportionate gender impact theory.

Despite the active role of the Court in the sex discrimination area this Term, uncertainty remains as to when a gender classification exists and by what standard its constitutionality will be tested. But when a gender classification is found, the clear position of at least a slim majority of the Court is that such a classification cannot stand in the face of the equal protection clause unless it is substantially related to achievement of an important state interest. Although the rubber-stamp approval is inevitable from the application of the rational basis test, and strict scrutiny almost always determines that the statute will be invalidated, the *Craig* test is unique in equal protection challenges in that the result is not predetermined by the application of that particular level of scrutiny. The *Craig* test is a true balance of the interests of the government on one hand and the right of the individual to equal protection of the laws on the other. The success or failure of either party to the controversy is more dependent on the merits of the case and less determined by the test applied to it.

IV. Conclusion

In light of the Supreme Court decisions in sex discrimination cases during the 1978-79 Term, it seems fairly certain that a victim of alleged sex discrimination will be able to gain access to a federal court. In the area of admission and recruitment to educational programs, provided that the definition of federal financial assistance in Title IX is met, a private cause of action for equitable relief is now assured. As for sex discrimination in employment, plaintiffs whose employers are covered by Title VII are confined to its remedial provisions — including the lengthy conciliation process and limited "damages" awards. On the other hand, those whose employers are not within Title VII may be able to assert a claim based directly on the Constitution. It must be noted, however, that such a remedy is of limited scope, since the employer must be the federal government and the plaintiff must be other than a civil service employee. The

Court's support of the spirit of federal legislation aimed at enforcing the constitutional guarantee of personal freedom from discrimination on the basis of sex is very clear. Although a "day in court" is a certainty, the likely outcome of a trial on the merits is another matter, as no guidelines can be gleaned from the Court's opinions this Term, making lower court opinions on the relevant issues the only sources of direction.

Approaching the area of sex discrimination from a different perspective were the Court's decisions on the merits of equal protection challenges to alleged gender classifications in state and federal statutes. It is clear from these cases that strict scrutiny will *not* be the test applied, even if a classification is found to be based upon gender in the first place. In facially neutral statutes, the burden upon the plaintiff to show discriminatory intent is not only demanding, but also problematic. Once that burden is met, the burden will then shift to the government to meet the *Craig v. Boren* test of constitutionality. A statute will only be upheld when the government articulates the purpose of the classification, and proves that it is the true purpose, that it is an important purpose, and that the classification is narrowly tailored and substantially related to the achievement of that purpose. The *Craig* test, unlike the other tests used by the Court in equal protection challenges, does not predict the ultimate result. The advantage to plaintiffs lies in the fact that while success is not assured, neither is failure.