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Confusing Signals from the Burger Court: Judicial Refinement of Private Causes of Action

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CONFUSING SIGNALS FROM THE BURGER COURT: JUDICIAL REFINEMENT OF PRIVATE CAUSES OF ACTION

I. INTRODUCTION

In recent years, Americans have witnessed a proliferation of state and federal legislation, unprecedented in both scope and volume. The result of such legislative activity has been to greatly increase the number of private individuals who, injured by a violation of a particular statute, have sought judicial determination of their legal rights and liabilities. In many instances citizens have requested that courts imply a cause of action for the violation. Many statutes are enacted to protect essentially private rights without any provision for recovery for those members of the public most affected by the violations. This has produced a continuing problem for the courts and resolution of the problem has produced unclear judicial guidelines. For example, Justice Rehnquist, writing for the majority in *Touche Ross & Co. v. Redington*,[1] sounded like a tired parent whose child kept getting him out of bed for another drink of water when he wrote: "Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this term alone, we have been asked to undertake this task no less than five times in cases in which we have granted certiorari."[2] This comment explores the propriety of inferring private causes of action in tort from statutes not specifically authorizing such actions. An examination of the evolving law in this area with major focus on developments in the last several years will be made.

II. LEGAL BACKGROUND

A. *Standards for Implication*

In the process of creating judicial remedies for violations of statutes, the Supreme Court has announced certain requirements for the

1. 442 U.S. 560 (1979).

2. *Id.* at 562. The five cases referred to by Justice Rehnquist are: Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Southeastern Community College v. Davis, 442 U.S. 397 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Transamerica Mortgage Advisors v. Lewis, 439 U.S. 959 (1979).

implication of a private cause of action. First, the plaintiff must be a member of the class for whose benefit the statute was enacted.[3] Second, implication of a cause of action must further the legislature's purpose in enacting the statute so that courts should consider whether legislative history supports such an implication.[4] Third, the penalties or remedies expressly provided under the statute must be inadequate to assure its complete effectiveness.[5]

The current standards for implication are a product of past judicial development of implied private causes of action. To understand the law in this area, a brief review of the historical development of the standards is essential.

B. *Member of the Class for Whose Benefit the Statute was Enacted*

The doctrine of implied private rights of action was established in *Texas & Pacific Railway v. Rigsby*,[6] where the United States Supreme Court found that the existence of dangerous conditions causing injury to a railroad employee were a direct violation of the Federal Safety Appliance Act.[7] The Court stated that when disregard of a statutory command results in damage to a party "for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ."[8]

This principle suggested that a federal private right of action might be implied for anyone injured as a result of a statutory violation.[9] The only apparent qualification "upon the implication process at this time was the requirement that the right claimed be derived from a statute enacted for the especial benefit of the plaintiff."[10]

With the expansion of federal legislation and the resultant increase in the federal case load, it became clear that the *Rigsby* standard was

3. Wyandotte Transp. Co. v. United States, 398 U.S. 191 (1967); Texas & Pac. Ry. v. Rigsbey, 241 U.S. 33 (1916).

4. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Machinists v. Central Airlines, 372 U.S. 682 (1963); Hewitt-Robbins, Inc. v. Eastern Freightways, Inc., 371 U.S. 84 (1962).

5. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

6. 241 U.S. 33 (1916).

7. 45 U.S.C. §§ 1-16 (1970).

8. 241 U.S. at 39 (cited in Note, *Implied Private Rights of Action—The Cort v. Ash Test—Interaction of "Especial Beneficiary" and Legislative Intent*, 24 WAYNE L. REV. 1173, 1174 (1978) [hereinafter cited as *Private Rights of Action*]).

9. This principle has been adopted by the RESTATEMENT (SECOND) OF TORTS § 286 (1965).

10. *Private Rights of Action*, *supra* note 8, at 1174.

not sufficiently stringent to effectively limit access to the federal courts. A complex, rigorous analysis of the statutes underlying the claims of implied private rights of action was needed.[11]

For a time, the Court indicated that implied remedies might be restricted to statutes manifesting congressional intent to provide a private right of action,[12] but it reversed this trend in the landmark decision of *J. I. Case Co. v. Borak*.[13] The Court granted a private cause of action to a stockholder alleging a deprivation of pre-emptive rights by corporate use of a false and misleading proxy statement.[14]

Upon finding the intended investors "especial beneficiaries" of the Act, the Court stated that this alone was insufficient to trigger a private right of action under the Act. Nevertheless, it was also found that the purpose of the Act could not be achieved without implying a private right of action because time and resources did not permit the Securities and Exchange Commission to adequately examine the accuracy of the overwhelming number of proxy statements that the Commission received annually.[15] Therefore, the Court determined that "private enforcement of the proxy rules provides a necessary supplement to the Commission action."[16] The congressional purpose of protecting investors from false and misleading proxy statements would be jointly achieved by Commission action and private suits.[17] Courts have a

11. *Id.* at 1174-75.

12. *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963); T.I.M.E., Inc. v. United States, 359 U.S. 464, 471 (1959); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

13. 377 U.S. 426 (1964) (cited in 31 VAND. L. REV. 1513, 1515 (1978)).

14. Borak based his suit primarily upon § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970), which had as its chief purpose the protection of investors from deceptive pratices.

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe *as necessary or appropriate in the public interest or for the protection of investors*, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

Id. (emphasis added). *See* 377 U.S. at 432.

15. 377 U.S. at 432.

> The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it . . . . We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.

Id.

16. *Id.*

17. The Court, in support of its decision to permit private actions, discussed the "potential

duty, therefore, to make such remedies available as are necessary to implement congressional purposes.[18] Whether or not a statute creates a cause of action will depend on whether the plaintiff is a member of the class of individuals which the statute was designed to protect.

C. *Furthering the Purposes of the Statute*

The primary inquiry under the "purpose" test is whether the implication of a private cause of action would promote any of the principal objectives for which Congress enacted the statute.[19] Congressional purpose was emphasized in *Allen v. State Board of Elections*,[20] where the Court determined that the purpose of the Voting Rights Act of 1965[21] might be frustrated "if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General,"[22] an office with limited staff and time. Therefore, permitting a private right of action would be consistent with the broad purpose of the Act—ending racial discrimination in the voting process.

The effect of *Allen's* broad holding produced a flood of litigants seeking relief and the Court retreated from that decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*.[23] In *Amtrak*, the National Association of Railroad Passengers brought suit to enjoin the discontinuance of certain passenger trains, alleging that the discontinuance would violate the Railway Passenger Act[24] in which the plaintiff claimed an implied private power of enforcement.[25] The Court viewed Section 307(a) as creating a public cause of action maintainable by the Attorney General. The only pri-

unfairness of relegating plaintiffs to the state courts." *Private Rights of Action*, *supra* note 8, at 1175. "If the law of the state happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated." 377 U.S. at 434-35. The Court observed that it has the duty to be alert in order to provide the necessary remedies to render effective the congressional purpose and thereby, in this instance, supplement commission action.

18. 377 U.S. at 433; Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

19. Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441, 445 (1974) [hereinafter cited as *Phenomenon of Private Actions*]. *See* National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 461-66 (1974); Remar v. Clayton Security Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949).

20. 393 U.S. 544 (1969). *See also* Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1034 (9th Cir. 1970); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

21. 42 U.S.C. § 1973(c) (1970).

22. 393 U.S. at 556.

23. 414 U.S. 453 (1974).

24. 45 U.S.C. § 307(a) (1970).

25. 414 U.S. at 458-65.

vate cause of action was explicitly limited to labor agreements.[26] *Amtrak* .thus established a "presumption against implication when a remedial scheme is expressly provided by Congress, rebuttable only by a showing of affirmative congressional intent to provide a private remedy."[27] Although *Amtrak* failed to develop a rigid test for implication of a private cause of action, it focused the inquiry upon three principal factors: congressional purpose, legislative history, and statutory construction.[28]

The congressional purpose outlined in a statute may not always be achieved by the exercise of the statutory remedies provided. In such situations, courts have assumed the duty to provide such remedies as are necessary to make the congressional purpose effective—even to the extent of implying private rights of action.

D. *Legislative Intent*

In applying the legislative intent test, a "court seeks to uncover any expressions of congressional attitude favoring or disfavoring private causes of action."[29] One writer has argued that the approach employed by a court with respect to the significance of an absence of legislative expression of intent regarding private actions is a function of the court's predisposition on whether to permit a private cause of action.[30]

There has been little unanimity among courts in the approach taken to discover legislative intent. The Ninth Circuit, in *Burke v. Compania Mexicana de Aviacion*,[31] presumed a power to grant private remedies absent other congressional intent.[32] The Tenth Circuit took a

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26. *Id.* at 457.

> In light of the language and legislative history of § 307(a), we read it as creating a probable cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement."

Id.

27. *See* 31 VAND L. REV. 1513, 1516 (1978).

28. *Id.*

29. *Phenomenon of Private Actions*, *supra* note 19, at 441. *See* Calhoon v. Harvey, 379 U.S. 134, 140-41 (1964) (the remedy provided by the statute is intended as the exclusive means of enforcing labor elections law); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 380-82 (1958) (same for antitrust statute); Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 306 (1943) (same for Railway Labor Act); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999-1000 (D.C. Cir. 1973) (private causes of action not intended by Congress under the Federal Trade Commission Act).

30. *Phenomenon of Private Actions*, *supra* note 19, at 443.

31. 433 F.2d 1031 (9th Cir. 1970).

32. "In the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of penal statutes where necessary to

different approach in *Chavez v. Freshpict Foods, Inc.*,[33] where it presumed that no such power exists without congressional authority.[34] The *Chavez* approach requires an affirmative expression of congressional intent before courts may grant remedies unexpressed in the statute, while the *Burke* view assumes the existence of judicial power to create remedies unless restricted by an affirmative act of Congress.[35]

In several cases, the Supreme Court has refused to imply remedies by narrowly construing the language of the statutes and the intent of the drafters. In *T.I.M.E., Inc. v. United States*,[36] the Court declined to imply a private cause of action in favor of a shipper seeking to recover unreasonable charges made on past shipments from a motor carrier. It did so on the ground that the provisions of the Interstate Commerce Act relating respectively to rail and water carriers[37] allowed an injured shipper the right to sue while the structure and history of the Act regulating motor carriers[38] contained no comparable provision. The Court held that, given this omission in the statutory language, it could not find congressional intent to grant the requested remedy.[39]

In discussing legislative intent, the Court has looked to the legislative history of a statute to find compatibility or preclusion of an implied right of action. This judicial search has produced two methods for measuring intent. First, courts have held that the discovery of express remedies infers the intentional exclusion of others. Absent a negative intention, the second method allows a court to fashion a remedy consistent with and in furtherance of the purpose of the statute.

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ensure the full effectiveness of the congressional purpose." *Id.* at 1033; *see* Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

33. 456 F.2d 890 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

34. This court will not fashion civil remedies from federal regulatory statutes except where . . . the intent of Congress to create private rights can be found in the statute or in its legislative history. Had the Congress intended to create private causes of action and private remedies, it was fully capable of directly and clearly so providing.

Id. at 894-95.

35. *Phenomenon of Private Actions*, *supra* note 19, at 442. Kardon v. National Gypsum Co., 69 F. Supp. 512, 512-14 (E.D. Pa. 1946), holds that in the absence of a contrary expression of intent, Congress intended to allow private civil causes of action by individuals injured by violation of a criminal or regulatory statute.

36. 359 U.S. 464 (1959) (cited in Comment, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 J.L. REF. 294, 301 (1978) [hereinafter cited as *Emerging Standards for Implied Actions*].

37. 49 U.S.C. §§ 8, 908(c) (1970).

38. *Id.* § 316(b), 316(d).

39. 414 U.S. at 456-61.

E. *Existing State Remedies*

In cases concerning private causes of action for damages, courts have considered a fourth test: the effectiveness of existing state remedies as an alternative to finding an implied federal remedy.[40] When no compelling federal interest is involved, courts have treated the availability of a private state remedy as a factor militating against implication of federal causes of action.[41] One court[42] has warned against the implication of federal remedies when satisfactory state remedies exist, thereby concluding that Congress impliedly considered the state remedy to be insufficient.[43]

The Supreme Court in *Borak*[44] found an implied private action under the federal securities laws, despite the existence of state remedies.[45] The Court's decision in *Borak* has been called a "supplantation of state law without a clear legislative expression of intent to achieve that end."[46] One critic has commented: "In view of the absence of congressional purpose to displace established corporation law, it is important that the broadly worded decision of the Court be restricted to its proper sphere—the effective enforcement of [the proxy section]."[47] This rationale is appropriate "whenever courts ignore alternative recourses available to a plaintiff—whether to state judicial or federal administrative remedies—in implying a federal private cause of action."[48]

The four tests discussed above overlap to some extent in definition and application. It is difficult to distinguish the "legislative intent" test from the "purpose of the act" test. The latter is also somewhat indistinguishable from the "class of plaintiff" criteria. Nevertheless, the focus

40. *Phenomenon of Private Actions*, *supra* note 19, at 449. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 (1971); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

41. *Phenomenon of Private Actions*, *supra* note 19, at 449. *See* Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543, 544, 546 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).

42. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

43. "[J]udicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently." *Id.* at 989.

44. 377 U.S. 426 (1964).

45. *Id.* at 434-35.

46. J. I. Case Co. v. Borak, 377 U.S. 426, 434-35 (1964); Comment, *SEC Proxy Regulations: Private Enforcement and Federal Remedies*, 64 COLUM. L. REV. 1336, 1338 (1964) [hereinafter cited as *SEC Proxy Regulations*].

47. *Phenomenon of Private Actions*, *supra* note 19, at 449.

48. *See SEC Proxy Regulations*, *supra* note 46, at 1338.

of judicial concern in recent cases involving the issue of implied private rights centers upon these four criteria.

In considering whether an implied private right is appropriate, courts recognize the existence of available state remedies. Where federal implication of private rights would be incompatible with state remedies, deference should be given to the state remedy absent an overriding federal interest. The inquiry concerns the propriety of inferring a cause of action based solely on federal law if the action is one traditionally relegated to state law.

III. RECENT DEVELOPMENTS

Cort v. Ash[49] is the first decision of the Supreme Court to establish comprehensive standards to be used in determining the propriety of inferring a civil cause of action from a criminal or regulatory statute. The guidelines announced in *Cort* represent an effort to unify the tests employed in past decisions.[50] *Cort* involved a stockholder derivative suit against the directors of the Bethlehem Steel Corporation.[51]

The Court outlined the relevant factors in determining if implication of a private cause of action was consistent with a particular federal statute:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based

49. 422 U.S. 66 (1975).

50. *Emerging Standards for Implied Actions*, *supra* note 36, at 302.

51. The stockholder complained that Bethlehem had expended corporate funds for partisan political advertisements in violation of the Federal Election Campaign Act of 1971, 18 U.S.C. § 610 (Supp. II 1972) (repealed 1976). The statute prohibits certain corporate expenditures for federal political campaigns and provides criminal sanctions for violations. The following penalties are prescribed: (1) a $5,000 maximum fine against any corporation or labor union violating the Act; (2) a $1,000 maximum fine and/or one year imprisonment for every officer or director of any corporation and every officer of any labor organization who consents to any contribution or expenditure by the corporation or labor organization and any person who accepts or receives any contribution; and (3) a $10,000 maximum fine and/or two years maximum imprisonment if the violation was willful. *Id.*

Ash sought immediate and prospective relief against further corporate expenditures in political campaigns and compensatory and punitive damages in favor of the corporation.

solely on federal law?[52]

Ash based his suit upon the belief that it is inappropriate for corporations to use corporate funds for political contributions without stockholder approval.[53] He argued that the protective attitude shown toward stockholders "proves that the statute provides stockholders with a federal right not to have corporation funds contributed for political campaign purposes."[54] The Court countered this basis for action with a discussion of the legislative history of the Campaign Act, concluding that the protection of stockholders is merely a secondary purpose of the statute.[55] The primary purpose of the statute is the elimination of the influence of corporate contributions upon federal elections. Because the legislation was not primarily concerned with the relations between the shareholders and the corporation, Ash did not belong to a class for whose special benefit the statute was enacted.[56] Alternatively, the Court found it appropriate for state law to govern Ash's claims.[57]

Cort combined the various factors at which the Supreme Court had looked in previous decisions, emphasizing the importance of all four tests. Although the Court based its decision on the plaintiff's failure to qualify for a private cause of action under the four criteria, the *Cort* decision modified the standards in several ways.

With respect to the "especial benefit" test, *Cort* imposed more stringent standards upon those seeking an implied civil action. The four criteria address the concern that implied remedies had become too accessible to plaintiffs with trifling claims under the intended beneficiary approach. By denying implied causes of action to incidental statutory beneficiaries, the especial benefit standard curtails the criticism that the implication of private remedies constitutes judicial encroachment on legislative power.[58]

In addressing the role of legislative intent as an indicator of the

52. 422 U.S. at 79.

53. *Id.* at 80.

54. *Id.* at 81; *Emerging Standards for Implied Actions*, *supra* note 36, at 306.

55. 422 U.S. at 81.

56. *Id.* at 82; *Emerging Standards for Implied Actions*, *supra* note 36, at 307. The Court added that in those situations in which we have inferred a federal private cause of action not expressly provided for, there has generally been a clearly articulated federal right in the plaintiff, *e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), or a persuasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, *e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

57. The stockholder/corporation relationship is traditionally relegated to state law except "where federal law expressly requires certain responsibilities of the directors with respect to stockholders. . . ." 422 U.S. at 84.

58. *Emerging Standards for Implied Actions*, *supra* note 36, at 309. "[I]mplied remedies will

legislature's denial or allowance of a private action, the Court indicated that an intention to permit or create a private remedy need not be shown in an area where it is evident that a class has been endowed with such a remedy by federal law.[59] By limiting the scope of the search for an indication of legislative intent, the Court accepted, at least in part, the view that implication is permissible in the absence of a positive indication of legislative intent.[60]

An implied civil remedy must be "consistent with the underlying purposes of the legislative scheme."[61] One commentator has viewed the *Cort* decision as requiring courts to assess "the legislative purposes, the need for protecting the discretionary powers of agencies vested with enforcement capabilities, and the potential impact of private civil actions on the overall scheme."[62]

State concern is noted in *Cort* by the recognition of instances in which federal interest overrides state law concerns. In *Borak*, the Court approved the inference of a civil cause of action because Congress clearly intended the statute to be "an intrusion of federal law" into a state law area.[63] The interest in a federal remedy predominates where the federal statute creates a new liability for which there exists no analagous state cause of action.[64]

The *Cort* tests determined whether the plaintiff may be granted an implied cause of action.[65] The decision, however, did not finally resolve the question of whether a private remedy is implicit in a statute not expressly providing one. The Court has since reviewed the question no less than five times.[66]

In *Cannon v. University of Chicago*,[67] an applicant for admission brought suit against the university's medical school, claiming that she was denied admission because of the university's sexual bias. Cannon, although invoking other statutory grounds,[68] based her cause of action

only be found in favor of plaintiffs whose interests are shown to be the primary concern of Congress in enacting the legislation." *Id.*

59. 422 U.S. at 81 (cited in *Emerging Standards for Implied Actions*, *supra* note 36, at 310-11).

60. *Emerging Standards for Implied Actions*, *supra* note 36, at 310-11.

61. 422 U.S. at 78.

62. *See Emerging Standards for Implied Actions*, *supra* note 36, at 313.

63. 422 U.S. at 66, 85.

64. *See Emerging Standards for Implied Actions*, *supra* note 36, at 316.

65. *Id.*

66. Note 2 *supra*.

67. 441 U.S. 677 (1979).

68. Cannon brought separate actions against both schools alleging violations of 42 U.S.C. § 1983 (1970); Title IX, 20 U.S.C. § 1681-1683 (1976); and the Age Discrimination in Employment Act of 1975, 29 U.S.C. § 621 (1976).

primarily on Title IX of the Education Amendments of 1972.[69] Each agency empowered to dispense funds for educational purposes was authorized by Title IX to promulgate appropriate enforcing regulations.[70] The Department of Health, Education and Welfare [HEW] did so, establishing enforcement provisions through its Office of Civil Rights.[71] Nowhere in the statute or in the regulations did HEW or Congress explicitly provide for a private right of action against a violator of Title IX.[72] The Court of Appeals affirmed the District Court's finding that section 901 of the statute did not provide an implied private remedy.[73] The Court of Appeals concluded that the Act established a procedure for termination of federal financial support for institutions violating sections 901 and 902 and that Congress intended that remedy to be the exclusive means of enforcement.[74]

The Supreme Court reversed, holding that Cannon could maintain her lawsuit despite the absence of any express authorization in the language of Title IX.[75] Before deciding that Congress intended to make a remedy available to a special class, the Court reasoned that congressional intent must be examined using the four criteria announced in *Cort*.[76]

Utilizing the four tests, the Court first found that the class membership test was satisfied.[77] In applying the second test, consideration of legislative history, the Court found that Title IX was patterned after Title VI of the Civil Rights Act of 1964.[78] Neither statute expressly

69. 20 U.S.C. § 1681 (1970). "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

70. *Id.* § 1682 (cited in 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 Under Title IX*]).

71. 45 C.F.R. § 86 (1977). The system of complaint adopts three methods of enforcement: (1) remedial action by the Director necessary to overcome the effects of such discrimination; (2) affirmative action by the educational institution to correct the effects of conditions which produced limited participation; and (3) self-evaluation conducted by the institution evaluating current policies and practices and their possible discriminatory effects. *Id.*

72. *Implication Under Title IX*, *supra* note 70, at 772.

73. Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977).

74. *Id.* at 1081.

75. 441 U.S. at 717.

76. *Id.* at 688. The Court noted that violation of a federal statute resulting in harm to some person does not automatically give rise to a private cause of action in favor of that person. *Id.*

77. *Id.* at 694. "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted." *Id.*

78. 42 U.S.C. §§ 2000d to -6 (1976). The enforcement procedures of Title VI are incorporated into the regulations for Title IX.

mentions a private remedy, but the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the previous eight years.[79] The Court also noted that Congress, in passing section 718 of the Education Amendments,[80] authorized federal courts to award fees to the prevailing party in private actions brought against local educational agencies. The Court reasoned that the provision allowing the United States to enforce Title VI in the context of elementary and secondary education presumes the availability of private suits to enforce Title VI.[81]

The third factor was satisfied because implication of a private remedy would not frustrate the legislative purposes of avoiding federal use of resources to support discrimination and effectively protecting citizens against such practices. Furthermore, an implication of a private right would enhance HEW's efforts in achieving the statutory purposes.[82]

In discussing the fourth criterion, the availability of state remedies, the Court stated that the federal courts and Federal Government had been the "primary and powerful reliances in protecting citizens against such [invidious] discrimination. . . . Moreover, it is the expenditure of federal funds that provides the justification for this statutory prohibition."[83]

The *Cort* criteria were alive and well until the Supreme Court's decision in *Touche Ross & Co. v. Redington*.[84] The issue before the Court was whether the customers of security brokerage firms, which are required to file certain financial reports with regulatory authorities,[85]

79. 441 U.S. at 696.

80. 20 U.S.C. § 1617 (Supp. IV 1974).

81. *Id. See* 441 U.S. at 699.

82. 441 U.S. at 703.

83. *Id.* at 708-09. *See* Steffel v. Thompson, 415 U.S. 452, 464 (1928).

In dissent, Justice Powell expressed his fear that the Court's application of the *Cort* analysis was a threat to the concept of separation of powers in that *Cort* "too readily permits courts to override the decision of Congress not to create a private action." 441 U.S. at 740-41 (Powell, J., dissenting). Powell noted that before *Cort*, the Court upheld the implication of private causes of action derived from federal statutes in only three limited sets of circumstances. These include racial discrimination in the selling of property, Jones v. Mayer Co., 392 U.S. 409 (1968); the leasing of property, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); and employment, Johnson v. Railway Express Agency, 421 U.S. 454 (1975). *See* 422 U.S. at 736. Powell expressed alarm at the increase in the lower courts' recognition of implied private causes of action on the basis of a consideration of the *Cort* factors. 441 U.S. at 740-41 (Powell, J., dissenting).

84. 442 U.S. 560 (1979).

85. 15 U.S.C. § 78q(a) (1940).

> Every national securities exchange, every member thereof . . . and every broker or dealer registered pursuant to . . . this title, shall make, keep and preserve for such periods, such accounts, correspondence . . . and other records, and make such reports, as the

have an implied cause of action for damages against accountants who audit such reports based on misstatements contained therein.

The Court limited its inquiry to whether Congress intended to create, either expressly or by implication, a private cause of action.[86] In view of the fact that the legislative history of the 1934 Act was silent on the issue of whether a private right of action for damages should be available under section 17(a), the Court looked to the plain language of the provision. Section 17(a) requires broker-dealers and others to keep such records and file such reports as the Commission may prescribe.[87]

In the Court's analysis, several factors played an important role in the decision against implying a private action. The Court noted that in past judicial discoveries of private rights, "the statute in question at least prohibited certain conduct or created federal rights in favor of private parties."[88] However, section 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful. Also, the fact that section 17(a) is surrounded by provisions of the 1934 Act that explicitly grant private causes of action[89] prompted the Court to note that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."[90]

The Court felt no compulsion to subject section 17(a) to the other *Cort* criteria based upon a failure to find that the plaintiff was a member of the class for whose benefit the statute was enacted and a legislative intent to create such a remedy in the legislative history.[91] Justice Rehnquist qualifed the applicability of the *Cort* test by holding that the four factors were not entitled to equal weight.[92] In this way the Court appeared to be modifying the *Cort* approach.

If *Touche Ross* represents the first step away from *Cort*, an even

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Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

86. 442 U.S. at 568.
87. 15 U.S.C. § 78q(a) (1970).
88. 442 U.S. at 569.
89. *Id.* at 571.
90. *Id.* at 579.
91. *Id.* at 579-80.
92. *Id.* at 575-76.

It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. . . . Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, are ones traditionally relied upon in determining legislative intent.

Id. (citation omitted).

greater departure was made in *Transamerica Mortgage Advisors, Inc. v. Lewis*.[93] That case involved the creation of a private cause of action for the victims of violations of the Investment Advisors Act of 1940.[94]

With respect to section 215 of the Act, the Court found that the statutory language itself "fairly implies a right to specific and limited relief in a federal court."[95] The Court rejected the argument that section 206 of the Act created a private cause of action. That section made it unlawful for an investment advisor "to employ any device . . . or to engage in any transaction . . . which operates as a fraud or deceit upon any client or prospective client. . . ."[96] The Court viewed the statutory language as proscribing certain conduct but not as creating or altering any civil liabilities. The Court noted that other provisions of the statute impose criminal penalties for wilfull violations, authorize the Securities and Exchange Commission to bring actions to compel compliance, and impose administrative sanctions. "In view of these express provisions for enforcing the duties imposed by section 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' "[97]

Although the respondent urged the Court to include an analysis of the fourth *Cort* criterion (alternative state remedy) and not to end upon a sole analysis of congressional intent, the Court followed its previous decision in *Touche Ross*.[98] Employing the criterion of congressional intent as an indicator of the creation of private rights, the Court found that the "mere fact that a statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf."[99]

The result of the most recent decisions by the Court in the area of implied private rights does not indicate that *Cort* has been discarded. Rather, a judicial refinement of those factors has taken place. The four factors are not equal in weight, nor does the presence of one or two of the factors result in a favorable finding for the plaintiff. This refinement has resulted in a greater emphasis being placed on the factors determinative of legislative intent such as language, the statutory pur-

93. 444 U.S. 11 (1979).
94. 15 U.S.C. § 80b-6 to -15 (1940). *See* 444 U.S. at 12, 13.
95. 444 U.S. at 18.
96. 15 U.S.C. § 80b-6 (1940).
97. 444 U.S. at 20 (citing Cannon v. University of Chicago, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).
98. 444 U.S. at 24.
99. *Id.*

pose and legislative history. The post-*Cort* decisions indicate that legislative intent expressed in the statute's language carries the most weight in the determination of implied rights.

An explanation for the shift in emphasis by the Court is its concern for the "unbalancing" of the balance of powers, as expressed by Justice Powell in his dissent in *Cannon*, which became the foundation of the majority opinion in *Touche Ross*.[100] This shift in focus has not gone unnoticed, as indicated by the recent ruling of one circuit court upon the implied private right of action of a discharged employee in retaliation for reporting safety violations to OSHA.[101]

IV. CONCLUSION

The Supreme Court since *Cort* has clearly taken a new direction in implying private causes of action. The Court has adopted a judicially conservative philosophy, deferring to congressional intent as expressed in legislative history. The implication of this new direction enables the Court to rule that expressly provided remedies are the exclusive remedies available to injured persons. The direction in which the Court is headed was announced by Chief Justice Burger's dissent in *Bivens v. Six Unknown Federal Narcotics Agents*.[102]

> I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.[103]

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100. 442 U.S. at 579.

> [W]e are not at liberty to legislate. If there is to be a federal damage remedy under these circumstances, Congress must provide it. "[I]t is not for us to fill any *hiatus* Congress has left in this area. . . ." [I]f Congress intends such a federal right of action, it is well aware of how it may effectuate that intent.

Id. (citations omitted).

101. "The dispositive question" is not whether a private right of action under section 11(c) is desirable, but "whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end. Accordingly, we hold that there is no private right of action under OSHA . . . ." Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (citations omitted).

102. 403 U.S. 388 (1971).

103. *Id.* at 411-12 (Burger, C.J., dissenting) (cited in McMahon & Rodos, *Judicial Implications of Private Causes of Action: Reappraisal & Retrenchment*, 80 DICK. L. REV. 167, 191 (1975)).

The past five years of judicial refinement of the standards for implication of implied private rights of action provides the injured plaintiff with less of an opportunity for success than he previously enjoyed. If the statute under which he seeks relief is accompanied by an expression of legislative intent which justifies an implication of a private cause of action, his success is still assured.

Douglas K. Pehrson