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Musick, Peeler & Garrett v. Employers Insurance: Will the Judicial Oak Seed a Judicial Forest?

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NOTES

MUSICK, PEELER & GARRETT v. EMPLOYERS INSURANCE: WILL THE JUDICIAL OAK SEED A JUDICIAL FOREST?

The United States Constitution vests the power to make laws in the legislative branch[1] and the power to interpret laws in the judicial branch.[2] The judiciary nevertheless undertakes law-making functions when it creates federal common law.[3] This sparks concerns that the judiciary is as-

1. Article I of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1.

2. Article III of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

3. Federal common law may be defined as "*any* federal rule of decision that is not mandated on the face of some authoritative federal text." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890 (1986) (defining federal common law as "any rule of federal law created by a court . . . *when the substance of the rule is not clearly suggested by federal enactments—constitutional or congressional*" (footnote omitted)). In essence, federal common law is a "label pinned on a rule of law created by a federal court when it finds that an issue cannot be resolved directly by reference to the Constitution, a treaty, a federal statute or state law." Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167, 189 (1985).

The scope of federal common law is, however, an issue of debate among commentators. For a narrower definition of federal common law, see Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989). For a liberal definition of federal common law, see Field, *supra*, at 883; Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Jeanne Proko-Elkins, Comment, *The Propriety of the Federal Common Law*, 32 VILL. L. REV. 1127 (1987).

Federal common law is different from state common law and the "general" common law developed by the federal courts under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts were empowered to create uniformity in the law through the development of a federal general common law), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The federal general common law of *Swift* was the creation of state law by the federal courts. In *Erie Railroad*, the Supreme Court, in overruling *Swift*, announced that "Congress has no power to declare substantive rules of common law applicable to the states." *Erie Railraod*, 304 U.S. at 78. This holding confirmed the federal courts' ability to determine federal common law for federal matters. CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 60, at 387-88 (4th ed. 1983).

suming the law-making authority of the legislative branch,[4] since the judiciary's power to create federal common law is not expressly granted by the Constitution[5] or any federal statute.[6] Despite the lack of express authority, the Supreme Court recognizes the need for, and authority of, the judiciary to formulate federal common law in limited circumstances.[7]

Judicial creation of implied private rights of action[8] is a significant aspect of this federal common law jurisprudence.[9] Prior to 1975,[10] federal

4. The framers of the Constitution provided for the separation of powers within the federal government to guard against judicial usurpation of the lawmaking function. Merrill, *supra* note 3, at 19. Nevertheless, the creation of federal common law is recognized as a legitimate function of the judiciary so long as this authority is exercised within certain boundaries. *See generally* Proko-Elkins, *supra* note 3, at 1130-36 (discussing sources recognized as legitimate authority for the creation of federal common law).

5. *See* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025-26 (1967) (explaining that the "place of such judge-made law in our federal system is not immediately indicated by the Constitution").

6. *Id.*; Field, *supra* note 3, at 928.

7. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (indicating that federal courts have limited powers to create federal common law where the sovereignty of the United States, interstate controversies, or international controversies are at issue). Federal courts are authorized to create federal common law in two instances: (1) when a federal rule of decision is necessary to protect a uniquely federal interest; and (2) when congressional legislation gives the judiciary the power to develop substantive law. Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90 (1981). Federal courts have created federal common law for purposes of rounding out incomplete legislation, establishing uniform national application of a federal action, resolving conflicts between state and federal laws where application of state law would frustrate federal policies, and where federal interests are of the utmost importance. *See* Proko-Elkins, *supra* note 3, at 1136-51; *see also* Merrill, *supra* note 3, at 35 (explaining that the Supreme Court recognizes its authority to create federal common law when it fills gaps in, or supplements, a federal statute).

8. An implied cause of action exists not by the express direction of Congress, but rather by judicial recognition of its authority to enforce legal rights and duties. John Haried, Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355, 356 (1980); *see also infra* note 52 (discussing causes of action and remedies).

9. *See generally* Haried, *supra* note 8 (analyzing the Supreme Court's federal common law jurisprudence as applied to implied causes of action). *See* Hill, *supra* note 5, at 1026-28 (explaining that federal common law arises when the judiciary creates substantive duties through statutory or constitutional construction of the language, fashions remedies, and preempts state laws).

One commentator notes that it appears the Supreme Court attempted to draw a clear distinction between creating an implied right of action and interpreting federal common law. *See* Merrill, *supra* note 3, at 4. This commentator suggests that the distinction rests upon the analysis adopted by the Court; namely, that an implied right of action must be found by interpreting the text to discern congressional intent, whereas the creation of federal common law need not be found in such a manner. *Id.*

10. In 1975, the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975), set forth a rigid four-part analysis to determine whether an implied right of action exists in a particular statute. *Id.* at 78; *see infra* notes 59-61 and accompanying text.

courts freely created implied rights of action, while professing to do so only when Congress—either expressly or by implication—intended their creation.[11] In the last decade and a half, however, the Supreme Court has retreated from its willingness to establish implied private rights of action.[12] During this period, some members of the Court questioned whether the judiciary should create such substantive rights.[13] This trend spawned predictions that the implied rights doctrine would wither and die.[14]

Despite this restrictive trend, implied rights of action continue to play an important role in the reliance on and use of federal securities laws.[15] The most prominent influence is the judiciary's creation of a federal common law implied right of action to redress violations of section 10(b) of the Securities Exchange Act of 1934,[16] which prohibits "deceptive and

11. Commentators note that the eleven-year period prior to *Cort* was the "expansion era," 1 ALAN R. BROMBERG & LEWIS B. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 2.2, at 462 (1992), and the "ebullient stage," LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1058 (1983), of the implied rights doctrine. *See also* William F. Schneider, *Implying Private Rights and Remedies Under the Federal Securities Acts*, 62 N.C. L. REV. 853, 902 (1984); *infra* notes 55-60 and accompanying text (discussing the development and limitation of the *Borak* implied rights theory).

12. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (finding that the appropriate standard for implying causes of action is to determine congressional intent); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (holding that the Court will only find implied causes of action based on congressional intent); *infra* notes 59-71 and accompanying text (discussing the Court's restrictive approach to its implied rights jurisprudence).

13. *See* Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing that the judiciary "should get out of the business of implied private rights of action altogether"); Cannon v. University of Chicago, 441 U.S. 677, 732 (1979) (Powell, J., dissenting) (asserting that the judiciary assumes the law-making authority of the legislative branch when it implies private rights of action).

14. This suggestion frequently arises in securities litigation. *See* 3B HAROLD S. BLOOMENTHAL, SECURITIES & FEDERAL CORPORATE LAW § 9:03, at 9-30 (Supp. 1992) (discussing the Court's dislike for the implied rights doctrine); MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 5:03, at 21 (1992 Cumulative Supp.) (suggesting that if Chief Justice Rehnquist, along with Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, have an opportunity to address the private right of action under section 10(b), they would most likely decide against its existence).

15. *See generally* Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 89-94 (1981) (discussing the application of the implied rights doctrine to aiding and abetting under section 10(b) of the 1934 Act); John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1031-33 (1991) (discussing the application of the implied rights doctrine to section 12 of the 1933 Act); Schneider, *supra* note 11, at 855 (discussing the powers of the judiciary to create remedies and rights of actions).

16. Securities and Exchange Act of 1934, ch. 404, title I, § 1, 48 Stat. 881 (current version at 15 U.S.C. § 78a-zzz (1988)) [hereinafter 1934 Act]. The Securities Act of 1933

manipulative"[17] securities practices.[18] In *Superintendent of Insurance v. Bankers Life & Casualty Co.*,[19] the Supreme Court recognized an implied right of action against those who commit securities fraud prohibited by section 10(b)[20] and by rule 10b-5[21] thereunder. Following the recognition of this federal common law implied right of action, federal courts developed the contours of section 10(b) actions in a series of decisions.[22] The implied right of action under section 10(b) quickly grew from a "legislative acorn" into a "mighty oak."[23]

One branch of this oak, the right under section 10(b) to obtain contribution from a joint tortfeasor, was consistently recognized by federal district courts and federal courts of appeals for nearly twenty-five years.[24] This principle received scant analysis for a number of years and was assumed to be embedded in the jurisprudence of section 10(b).[25] In 1981, however, the Supreme Court, in *Northwest Airlines, Inc. v. Transport Workers Union*[26] and *Texas Industries v. Radcliff Materials, Inc.*,[27] narrowly construed the power of federal courts to create a cause of action for contribution.[28] In these decisions, which did not involve interpretation of

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regulates the initial offer and sale of securities. Securities Act of 1933, ch. 38, title I, § 1, 48 Stat. 74 (current version at 15 U.S.C. § 77a-lll (1988)) [hereinafter 1933 Act].

17. *See infra* note 75 (providing the text of section 10(b)).

18. *See* Hill, *supra* note 5, at 1026; Merrill, *supra* note 3, at 45 n.198.

19. 404 U.S. 6, 13 n.9 (1971).

20. 15 U.S.C. § 78j(b) (1988); *see infra* note 75 (providing the text of section 10(b)).

21. 17 C.F.R. § 240.10b-5 (1993). Rule 10b-5 was promulgated by the Securities and Exchange Commission (SEC). *See infra* note 77 (providing the text of rule 10b-5). For purposes of this Note, section 10(b) and rule 10b-5 are collectively referred to as section 10(b).

22. *See infra* notes 82-91 and accompanying text.

23. Justice Rehnquist stated: "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

24. *See infra* notes 106, 132-33 and accompanying text. The Second Circuit has recognized the existence of the right of contribution from a joint tortfeasor under section 10(b) at least since 1982. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 578 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982); *see also* Huddleston v. Herman & MacLean, 640 F.2d 534, 559 (5th Cir. 1981) (recognizing an implied right of contribution under section 10(b)), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983).

25. *See, e.g.*, Smith v. Mulvaney, 827 F.2d 558, 560 (9th Cir. 1987) (holding that the right to contribution under section 10(b) exists and finding apportionment of contribution the more difficult issue); *Sirota*, 673 F.2d at 578 (concluding summarily that the right to contribution exists under section 10(b)).

26. 451 U.S. 77 (1981).

27. 451 U.S. 630 (1981).

28. In *Northwest Airlines* and *Texas Industries*, the Court stated that in order to find a right of action, it must engage in the task of statutory construction. *Northwest Airlines*, 451 U.S. at 91; *Texas Industries*, 451 U.S. at 639. These decisions refused to imply a right to contribution under Title VII of the Civil Rights Act, the Equal Pay Act, and section 1 of the Sherman Act. *Northwest Airlines*, 451 U.S. at 94 (finding that Congress did not ex-

the securities laws, the Supreme Court held that neither public policy nor equity justified creating a federal common law right of contribution under a federal statute where Congress did not clearly intend to create one.[29]

After *Northwest Airlines* and *Texas Industries*, several lower federal courts split with the weight of lower court authority and refused to find an implied right of contribution under section 10(b).[30] In *Chutich v. Touche Ross & Co.*,[31] the United States Court of Appeals for the Eighth Circuit relied upon the *Northwest Airlines* and *Texas Industries* analytical framework in declining to recognize a federal common law implied right of contribution under section 10(b).[32] The Supreme Court granted certiorari in *Musick, Peeler & Garrett v. Employers Insurance*[33] to resolve the conflict between *Chutich* and the contrary conclusion reached by the other circuits.[34]

In *Musick, Peeler*, the shareholders of Cousins Home Furnishings, Inc. filed a class action against the parties involved in a public offering issued in 1983; however, the plaintiffs did not sue the attorneys and accountants who assisted in the offering.[35] Rather, upon settling the case, the defendants' insurers, Employers Insurance of Wausau and Federal Insurance Co., sued the attorneys and accountants alleging violations of section 10(b) and requesting contribution for a portion of the amount settled.[36]

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pressly or by implication intend to create a right of contribution for wage differentials that violated the Equal Pay Act and Title VII of the Civil Rights Act); *Texas Industries*, 451 U.S. at 640 (finding that Congress did not expressly or by implication intend to create a right to contribution among antitrust wrongdoers under section 1 of the Sherman Act). *See infra* part II.A (discussing the Court's implied right of contribution jurisprudence).

29. *Texas Industries*, 451 U.S. at 638; *Northwest Airlines*, 451 U.S. at 89-90, 98 n.41.

30. *See, e.g.*, Chutich v. Touche Ross & Co., 960 F.2d 721, 724 (8th Cir. 1992) (holding that *Northwest Airlines* and *Texas Industries* prevented the finding of an implied right to contribution under section 10(b)); King v. Gibbs, 876 F.2d 1275, 1280 n.8 (7th Cir. 1989) (questioning whether *Northwest Airlines* and *Texas Industries* would preclude a finding of contribution generally); *In re* Professional Fin. Management, Ltd., 683 F. Supp. 1283, 1286-87 (D. Minn. 1988) (declining to find an implied right to contribution under section 10(b) based upon *Northwest Airlines* and *Texas Industries*).

31. 960 F.2d 721 (8th Cir. 1992).

32. *Id.* at 722-24.

33. 113 S. Ct. 2085 (1993).

34. *Id.* at 2087. *Compare* Employers Ins. v. Musick, Peeler & Garrett, 954 F.2d 575, 577 (9th Cir. 1992) (finding an implied right of contribution under section 10(b)), *aff'd*, 113 S. Ct. 2085 (1993) *and In re* Jiffy Lube Sec. Litig., 927 F.2d 155, 160 (4th Cir. 1991) (same) *and* Sirota v. Solitron Devices, Inc., 673 F.2d 566, 578 (2d Cir.) (same), *cert. denied*, 459 U.S. 838 (1982) *and* Huddleston v. Herman & MacLean, 640 F.2d 534, 557-59 (5th Cir. 1981) (same), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983) *and* Heizer Corp. v. Ross, 601 F.2d 330, 331-32 (7th Cir. 1979) (same) *with Chutich*, 960 F.2d at 724 (finding no implied right of contribution under section 10(b)).

35. *Musick, Peeler*, 954 F.2d at 576.

36. *Id.* at 577.

The United States District Court for the Southern District of California dismissed the action.[37] The district court held that the settling defendant insurance companies were not entitled to contribution because they paid no more than their fair share of the total liability.[38] The United States Court of Appeals for the Ninth Circuit reversed,[39] finding that federal courts have long recognized an implied right of contribution under section 10(b).[40] The Ninth Circuit further found that, under federal law, a party may seek contribution from a party not named in the original action through a separate third-party action.[41]

The Supreme Court held in *Musick, Peeler* that an implied right of contribution among joint tortfeasors exists under section 10(b).[42] The Supreme Court's analysis first focused on the threshold question of whether the judiciary has the authority to find an implied contribution right under section 10(b).[43] The Court concluded that the parameters of private actions under section 10(b) have become a matter of federal common law—an area which Congress left to the judiciary to fashion appropriate relief.[44] Although the majority was careful not to find that the judiciary had the authority to recognize an independent cause of action not expressly created by statute, the Court skirted this issue by concluding that contribution was merely a remedy for an existing cause of action.[45] The Court stated that the proper test for determining whether to create such a right turns on how the Congress that adopted section 10(b) in 1934 (the 1934 Congress) would have addressed the right of contribution issue had the underlying section 10(b) private right of action been an express provision of the 1934 Act.[46] Using this standard, the Court found an implied right of contribution under section 10(b) based on sections 9 and 18 of the 1934 Act, which expressly provide for contribution in simi-

37. Employers Ins. v. Musick, Peeler & Garrett, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,208 (S.D. Cal. 1990), *rev'd*, 954 F.2d 575 (9th Cir. 1992), *aff'd*, 113 S. Ct. 2085 (1993).

38. *Id.* at 95,855.

39. *Musick, Peeler*, 954 F.2d at 577.

40. *Id.*

41. *Id.*

42. Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2092 (1993). The Supreme Court failed to provide guidance as to which method of apportioning liability among joint tortfeasors is appropriate. For a complete discussion of this unresolved issue, see Barbara Moses & Ronit Setton, *Contribution Under Rule 10b-5*, 26 Sec. & Comm. Reg. (McGraw-Hill) 159 (Sept. 29, 1993).

43. *Musick, Peeler*, 113 S. Ct. at 2086.

44. *Id.* at 2087-88.

45. *Id.* at 2088.

46. *Id.* at 2089-90.

lar circumstances.[47]

The dissent agreed with the majority that discerning the 1934 congressional intent was key to determining whether to imply a right of contribution under section 10(b).[48] The dissent based its analysis, however, upon the premise that the right of contribution is a separate cause of action, not merely a remedy.[49] Thus, the dissent framed the issue as whether the Court should imply a cause of action for contribution.[50] The dissent examined the language of section 10(b) and concluded that section 10(b) does not recognize a private cause of action for contribution.[51]

This Note explores the role of the judiciary in the formulation of federal common law private rights of action and remedies. This Note first examines the Supreme Court's development of its implied rights jurisprudence, including the section 10(b) implied right of action, and explores whether contribution is a remedy or a separate cause of action under the Court's implied rights jurisprudence. Next, this Note analyzes the majority and dissenting opinions in *Musick, Peeler* and the potential impact of the case on other areas of federal common law and implied rights jurisprudence. It argues that the analysis set forth by the majority of the Court sets a dangerous precedent. This Note concludes that the section 10(b) judicial oak, if left unchecked, could seed a judicial forest by converting other causes of action into remedies not subject to the Court's recent implied rights jurisprudence.

I. Federal Common Law of the Implied Rights Doctrine and Its Application to Section 10(b) of the Federal Securities Laws

A. Evolution of the Implied Rights Doctrine

The existence of an implied private right of action originally was predicated on the tort law maxim *ubi jus, ibi remedium*—where there is a right there is a remedy.[52] The seminal United States Supreme Court case concerning implied rights of action is the 1916 *Texas & Pacific Railway v.*

47. *Id.* at 2090-91.

48. *Id.* at 2092 (Thomas, J., dissenting).

49. *Id.* at 2093.

50. *Id.* at 2094.

51. *Id.* at 2094-95.

52. *See infra* note 80 and accompanying text. Remedies center on corresponding rights and duties. A cause of action exists when a plaintiff has the right to sue for a remedy resulting from another party's violation of a duty. Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1037 (1992); Davis v. Passman, 442 U.S. 228, 238 (1979). A remedy may be available only after a duty has been created and a cause of action exists. *Franklin*, 112 S. Ct. at 1033. Rights and duties are generally created by the Constitution or by Congress through a statutory scheme. *Id.* "[I]f a right of action exists to enforce a federal right and

Rigsby[53] decision. *Rigsby* gave subsequent federal courts the latitude to infer private statutory causes of action on behalf of special classes of plaintiffs when faced with congressional silence.[54] The Court reaffirmed and expanded this power in its 1964 *J.I. Case Co. v. Borak* decision.[55] In *Borak*, the Court supplied a cause of action it believed Congress would have enacted if Congress had considered the issue.[56] The Court held that where a statute does not explicitly grant a cause of action, federal courts have a duty to imply one whenever necessary to effectuate that statute's congressional purpose.[57] The decade following *Borak* is termed the "'hey-day of the implied rights doctrine,'" due to the establishment of an unprecedented number of implied rights of action.[58]

A little more than a decade later, the Supreme Court once again addressed the jurisprudence of the implied rights doctrine in *Cort v. Ash*.[59] This decision rejected the *Borak* standard and severely limited federal court authority to create implied causes of action.[60] In *Cort*, the Court developed a restrictive four-part analysis to determine whether Congress impliedly created a cause of action in a particular statute.[61] Supreme

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Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Id.* at 1034.

53. 241 U.S. 33 (1916). In *Rigsby*, a railroad employee sought damages from his employer for injuries received on the job. *Id.* at 36-37. The employee argued that he should be compensated because his employer was not in compliance with section 2 of the Federal Safety Appliance Act. *Id.* at 37.

54. *Id.* at 39. The *Rigsby* Court held that where the "disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.*; *see also* Steven L. Nelson, Note, *Implication of Private Actions From Federal Statutes: From* Borak *to* Ash, 1 J. CORP. L. 371, 376 (1976) (discussing the development of the tort-based approach to the implied rights doctrine).

55. 377 U.S. 426 (1964).

56. *Id.* at 433-34. The Court held that the remedial purposes of the 1934 Act and the exclusive grant of federal jurisdiction under section 27 of the 1934 Act, enabled it to imply a cause of action for private parties who were injured by a violation of section 14(a) of the 1934 Act. *Id.* at 433.

57. *Id.*

58. Langmore & Prentice, *supra* note 15, at 1035 (quoting Robert A. Prentice, *Implied Rights of Action: Of Commodities and the Future*, 17 WAKE FOREST L. REV. 911, 913 (1981)); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 554-55 (1969) (finding an implied right of action under section 5 of the Voting Rights Act of 1965); Gomez v. Florida State Employment Serv., 417 F.2d 569, 575-76 (5th Cir. 1969) (finding an implied right of action under the Wagner-Peyser National Employment System Act); Goodman v. H. Hentz & Co., 265 F. Supp. 440, 445 (N.D. Ill. 1967) (finding an implied right of action under section 15(b)(5)(E) of the 1934 Act).

59. 422 U.S. 66 (1975).

60. *Id.* at 85; *see also* Nelson, *supra* note 54, at 371-73 (examining the shift in the Supreme Court's implied rights jurisprudence).

61. *Cort*, 422 U.S. at 78. The four *Cort* factors to be analyzed are: (1) the language of the statute itself; (2) its legislative history; (3) the underlying purpose and structure of the

Court decisions following *Cort* strictly applied the four-part analysis.[62] This inquiry soon merged into the single question of whether Congress intended such a right be created.[63] The first factor, looking at the language of the statute itself, necessarily provided little guidance, since the statute always lacked an express cause of action. Thus, courts were left to apply factors two through four, each of which seeks to discern congressional intent.[64] Congressional intent thus became the focal point for determining whether a federal statute that did not expressly provide for a cause of action should nevertheless be interpreted as inferring one.[65]

In 1979, the Supreme Court further abandoned the permissive *Rigsby* doctrine in *Touche Ross & Co. v. Redington*[66] and *Transamerica Mortgage Advisors, Inc. v. Lewis*.[67] These decisions emphasized that the judiciary may establish an implied right of action only when principles of statutory construction evidence Congress' clear intent to create a private right of action.[68] The Court restricted the search for congressional intent to a showing that Congress neglected to include statutory language pro-

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statutory scheme; and (4) the likelihood that Congress intended to supersede or to supplement existing state remedies. *Id.*

62. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) (holding that the ultimate determination must be whether Congress intended to create a cause of action); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (finding that the Court's task is solely to determine what Congress intended); Cannon v. University of Chicago, 441 U.S. 677, 688 (1979) (focusing the *Cort* analysis on congressional intent).

In all, the Supreme Court reversed seven federal courts of appeals' decisions that found implied rights of action during the period between *Cort* and *Transamerica Mortgage*. *Transamerica Mortgage*, 444 U.S. at 11; *Touche Ross & Co.*, 442 U.S. at 560; Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977); *Cort*, 422 U.S. at 66.

63. *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 91 (1981) (finding the central inquiry to be what Congress intended); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) (same); *Transamerica Mortgage*, 444 U.S. at 15-16 (finding that the proper approach in discerning whether to imply private rights of action is to determine congressional intent); *Touche Ross & Co.*, 442 U.S. at 568, 575-76 (collapsing the *Cort* factors into a single inquiry of congressional intent).

64. *See infra* notes 91-98 and accompanying text (discussing the effectiveness of methods used by the Supreme Court to determine the elements of the section 10(b) cause of action by examining congressional intent).

65. *See Touche Ross & Co.*, 442 U.S. at 575; *see also supra* note 63.

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

67. 444 U.S. 11 (1979).

68. *Transamerica Mortgage*, 444 U.S. at 24 (finding that the "dispositive question" is congressional intent); *Touche Ross & Co.*, 442 U.S. at 577 (stating that reliance on tort-based principles to imply private rights of action is "misplaced").

The Court apparently adopted the position set forth in Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting), criticizing the *Cort* four-part analysis. Justice Powell asserted that the *Cort* analysis allowed the judiciary to assume policy-making authority of the legislative branch. *Id.* at 743. Justice Pow-

viding for a cause of action through inadvertence.[69] At the same time, some members of the Court began to question whether it is ever proper for the judiciary to create substantive rights.[70]

These shifts in judicial philosophy produced a significant change in the Court's rulings in implied rights cases. In at least eleven of the last fifteen Supreme Court decisions addressing a request to recognize an implied right of action decided before 1993, the Court found no such right.[71] Still,

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ell illustrated his argument by listing twenty courts of appeals' decisions between *Cort* and *Cannon* that found implied private rights of action in federal statutes. *Id.* at 741-42.

69. *See, e.g.*, *Transamerica Mortgage*, 444 U.S. at 20 (finding it unlikely that Congress "'absentmindedly forgot'" to provide a private right within the provision in question if the private right was expressly written in other provisions of a statutory scheme (quoting *Cannon*, 441 U.S. at 742 (Powell, J., dissenting))).

70. Justice Scalia, in Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991), stated that "the federal cause of action at issue here was never enacted by Congress and hence the more narrow we make it (within the bounds of rationality) the more faithful we are to our task." *Id.* at 2767 (Scalia, J., concurring) (citations omitted). In *Cannon*, Justice Powell stated that "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting).

71. Since *Transamerica Mortgage* the Supreme Court has refused to recognize an implied private right of action in the following cases: *Virginia Bankshares*, 111 S. Ct. at 2749 (refusing to find an implied right of action for damages under section 14(a) of the 1933 Act); Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989) (refusing to find an implied right of action under Title VII of the Civil Service Reform Act of 1978); Thompson v. Thompson, 484 U.S. 174 (1988) (refusing to find an implied right of action under the Parental Kidnapping Prevention Act); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (refusing to find an implied right of action under ERISA); Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984) (refusing to find an implied right of action for investment companies under section 36(b) of the Investment Company Act of 1940); Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) (refusing to find an implied right of action under the Urban Mass Transportation Act); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (refusing to find an implied right of action for damages under the federal Water Pollution Control Act or the Marine Protection, Research, and Sanctuaries Act of 1972); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (refusing to find an implied right of action for contribution under the Sherman Act); California v. Sierra Club, 451 U.S. 287 (1981) (refusing to find an implied right of action under section 10 of the Rivers and Harbors Appropriation Act of 1899); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) (refusing to find an implied right of action for contribution under Title VII); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (refusing to find an implied right of action under the Davis-Bacon Act).

However, the Supreme Court did recognize an implied right of action in the following cases: Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989) (recognizing an implied right of action under the Civil Rights Act, 42 U.S.C. § 1983); Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) (recognizing an implied right of action under the Brooke Amendment to the Housing Act of 1937); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (plurality opinion) (recognizing an implied right of action under Title VI of the Civil Rights Act of 1964); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (recognizing an implied right of action for damages under the Commodities Exchange Act).

the Court has been unwilling to overrule its prior decisions creating implied rights of action.[72] Instead, in *Virginia Bankshares, Inc. v. Sandberg*,[73] the Court recognized its obligation to maintain and develop the contours of such actions.[74]

B. Judicial Creation and Development of an Implied Right of Action Under Section 10(b) and Rule 10b-5

Section 10(b) of the 1934 Act prohibits "deceptive" and "manipulative" practices in the purchase and sale of securities.[75] It does not contain an express private right of action for violations;[76] alternatively, Congress provided for the promulgation of rules by the SEC under this statute.[77]

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72. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1032 (1992) (accepting the establishment of the implied right of action created in *Cannon* and considering what remedies are available pursuant to this implied right); *Virginia Bankshares*, 111 S. Ct. at 2763-64 (accepting the establishment of the implied right of action created in *Borak* and considering the legitimacy of rounding out the contours of such an implied action).

73. 111 S. Ct. 2749 (1991).

74. *Id.* at 2764. The Court stated that "where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." *Id.*

75. Section 10 of the 1934 Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance 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.

15 U.S.C. § 78j (1988).

76. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975) (recognizing that Congress did not consider private actions under section 10(b)).

There are two substantive references to section 10(b) in the legislative history of the 1934 Act. First, the Senate Report states that section 10(b) is "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. REP. NO. 792, 73d Cong., 2d Sess. 6 (1934), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, item 17, at 6 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) [hereinafter LEGISLATIVE HISTORY]. Second, the House Hearings contained a statement by Thomas Corcoran, Counsel to the Reconstruction Finance Corporation, testifying on behalf of the drafters of section 10(b). He noted that section 10(b) "is a catch-all clause to prevent manipulative devices . . . . The Commission should have the authority to deal with new manipulative devices." *Stock Exchange Regulation: Hearings on H.R. 7852 & H.R. 8720 Before the House Comm. on Interstate & Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934), *reprinted in* 8 LEGISLATIVE HISTORY, *supra*, item 23, at 115.

77. *See supra* note 75 for the text of section 10(b). The SEC enforces and administers this provision. The SEC promulgated rule 10b-5 in 1942. The rule currently provides:

When the SEC finally promulgated rule 10b-5 in 1942, however, it provided for no rights beyond those set forth in section 10(b).[78]

The first case to recognize an implied private right of action under section 10(b) was *Kardon v. National Gypsum Co.*, decided in 1946.[79] In *Kardon*, a federal district court found an implied action based upon the common law principle that an injury requires a remedy.[80] Numerous federal district court and court of appeals decisions following *Kardon* allowed private parties to bring implied rights of action for section 10(b) violations.[81] Twenty-five years after *Kardon*, the Supreme Court upheld the existence of an implied private cause of action for violation of section 10(b) in *Superintendent of Insurance v. Bankers Life & Casualty Co.*[82] The Court decided this case at a time when the liberal *Borak* theory of federal court authority prevailed, thereby allowing implied causes of action without serious inquiry into congressional intent.[83]

The Court issued a number of decisions after *Bankers Life & Casualty*

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1993).

78. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 462-63 (1990).

79. 69 F. Supp. 512 (E.D. Pa. 1946).

80. *Id.* at 513. The court quoted Texas & Pacific Railway Co. v. Rigsby, 241 U.S. 33 (1916), for the proposition that "'[t]his is but an application of the maxim, *Ubi jus ibi remedium*.'" *Kardon*, 69 F. Supp. at 513 (quoting *Rigsby*, 241 U.S. at 39). Translated, this phrase means, "Where there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1520 (6th ed. 1990); *see supra* note 52 and accompanying text.

81. *See, e.g.*, List v. Fashion Park Inc., 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965); Kohler v. Kohler Co., 319 F.2d 634 (7th Cir. 1963); Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962); Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951).

82. 404 U.S. 6, 13 n.9 (1971). The Supreme Court later stated that it "simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)," rather than examine the existence of the implied private right of action based on congressional intent. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 n.19 (1979); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (stating that the *Bankers Life & Casualty Co.* Court confirmed the existence of an implied right of action under section 10(b) "with virtually no discussion").

83. See *supra* notes 55-58 and accompanying text for a discussion of the *Borak* theory. Rather than engage in extensive analysis, the Court acknowledged in a footnote that the implied right of action under section 10(b) is now established. *Bankers Life & Casualty Co.*, 404 U.S. at 13 n.9.

Co. defining the substantive and procedural scope of the section 10(b) cause of action.[84] These decisions established: (1) the class of persons entitled to assert a claim under section 10(b);[85] (2) the standard of conduct an investor must show to establish a claim;[86] (3) the factors that constitute a wrongful act;[87] (4) the standard of proof for investors;[88] (5) the remedies available for a violation, and the appropriate measure of damages;[89] and (6) the applicable statute of limitations.[90] The Court crafted these elements of a section 10(b) action by analyzing what Congress would have done if it had expressly created the cause of action.[91]

In order to ascertain congressional intent, the Court customarily begins its analysis of section 10(b) by reviewing the statutory language of the section.[92] Because this approach provides little guidance in determining the contours of a section 10(b) cause of action,[93] the Court more often

84. *See supra* notes 72-74 and accompanying text.

85. *Blue Chip Stamps*, 421 U.S. at 736 (finding that persons entitled to bring an action under section 10(b) are limited to purchasers and sellers—the intended beneficiaries of the statute).

86. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202 (1976) (finding that liability under section 10(b) is limited to violators who have scienter).

87. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988) (finding that a violation of section 10(b) occurs only when there is a duty to disclose material nonpublic information); Santa Fe Indus. v. Green, 430 U.S. 462, 474 (1977) (finding that a failure to provide advance notice of a merger was not a violation of section 10(b) where shareholders were given all relevant information); *Bankers Life & Casualty Co.*, 404 U.S. at 10 (finding that section 10(b) governs the sale of securities to "'any person'" and that the transaction does not have to occur on the stock exchange).

88. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 (1983) (establishing the appropriate standard of proof as a preponderance of the evidence); *Ernst & Ernst*, 425 U.S. at 193 n.12 (finding that scienter is a "mental state embracing intent to deceive, manipulate, or defraud"); Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972) (finding that actual reliance on a material fact need not be shown to prove a violation of section 10(b)).

89. *Bankers Life & Casualty Co.*, 404 U.S. at 13 (finding that an implied cause of action under section 10(b) and any available state law remedies provide appropriate redress for section 10(b) violations).

90. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2781 (1991) (providing for a statute of limitations similar to the one-and-three year limitations imposed by other sections of the 1934 and 1933 Acts), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992). However, *Lamp, Pleva* has since been effectively overruled by Congress. *See infra* note 102.

91. *See, e.g.*, Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (recognizing that the intent of Congress governs the elements of an action under section 10(b)).

92. *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 226 (1980) (noting that every inquiry into section 10(b) begins with an examination of the text of section 10(b)); *Ernst & Ernst*, 425 U.S. at 197 (finding that an analysis of the section 10(b) cause of action should begin with the language of section 10(b)).

93. In a few instances, however, this review has been fruitful. It provided some assistance in developing the requirement that only purchasers and sellers have standing to bring

has had to rely upon the legislative history and the policies underlying section 10(b).[94] Furthermore, the Court consistently determines the elements of the section 10(b) cause of action by comparing the language of section 10(b) with other sections of the 1933 and 1934 Acts.[95] Thus, in *Blue Chip Stamps v. Manor Drug Stores*, the Court contrasted the language of sections 11 and 12 of the 1933 Act with that of section 10(b), concluding that an implied cause of action under section 10(b) must meet the purchaser-seller requirement.[96] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[97] the Supreme Court discerned congressional intent by comparing sections 9 and 18 of the 1934 Act to section 10(b), all of which are similar in purpose, intent, and structure, in order to establish a statute of limitations for section 10(b) actions.[98]

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suit under section 10(b). *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975) (finding that a cause of action under section 10(b) is limited to "purchasers or sellers of securities"). It also aided in creating the requirement that a defendant must have scienter to be liable under section 10(b). *See Ernst & Ernst*, 425 U.S. at 197, 201 (finding that a violation under section 10(b) requires scienter because the words "manipulative," "device," and "contrivance" in section 10(b) indicate liability only for conduct different from, and more severe, than negligence).

94. *See, e.g.*, *Chiarella*, 445 U.S. at 226 (noting that section 10(b) was designed to be a "catch-all" provision); Santa Fe Indus. v. Green, 430 U.S. 462, 473 & n.13 (1977) (relying on legislative history to find that section 10(b) governs manipulative and deceptive conduct); *Ernst & Ernst*, 425 U.S. at 201-03 (finding that scienter is required for a section 10(b) cause of action because of references in the legislative history that section 10(b) was enacted to prevent the use of "manipulative" and "cunning" devices); *Blue Chip Stamps*, 421 U.S. at 732-33 (discerning congressional intent from the defeat of proposed amendments to section 10(b) in 1957 and 1959).

95. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780 (1991) (finding no clearer indication of congressional intent can be found than that contained in the other provisions of 1933 and 1934 Acts), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992); *Santa Fe Industries*, 430 U.S. at 476 (considering section 9 of the 1934 Act in interpreting section 10(b)); *Ernst & Ernst*, 425 U.S. at 204-08 (considering section 9 of the 1934 Act in interpreting section 10(b)).

96. *Blue Chip Stamps*, 421 U.S. at 752-54. The purchaser-seller element of section 10(b) refers to the restriction that only those shareholders who actually purchase or sell securities may maintain a private cause of action against violators of section 10(b). *Id.* at 732-33. The Court noted that Congress "had little trouble" expressly providing a remedy for those other than purchasers and sellers when Congress intended such protection. *Id.* at 734.

97. 111 S. Ct. 2773 (1991), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992).

98. *Id.* at 2780-81. The Court found that a private cause of action under section 10(b) must be commenced within one year after discovery of facts constituting a violation and within three years of such a violation because sections 9 and 18 provide the same time limitations. *Id.* at 2780-81 nn.6-7. The Court adopted this rule to provide a uniform federal statute of limitations and to provide consistency with the provisions of the 1934 Act. *Id.* at 2778-79. The Court set forth what appears to be a more limited test than previously used in determining congressional intent—by considering what statute of limitations the

Even though the Court has sought to determine the scope of a section 10(b) cause of action through the confines of congressional intent, some Justices questioned the Court's broad authority to do so.[99] The Court's authority to interpret section 10(b) was expressly acknowledged by Congress in two amendments to the 1934 Act, however, thereby legislatively accepting the judicially created implied cause of action under section 10(b).[100] First, Congress enacted section 20A of the Insider Trading and Securities Fraud Enforcement Act of 1988. This amendment expressly stated that nothing in the provision shall limit a party's implied right of action under section 10(b).[101] Second, in 1992 Congress expressly acknowledged the judiciary's authority to shape the section 10(b) cause of action by enacting section 27A of the 1934 Act, which limited the retroactive effect of the statute of limitations standard adopted in *Lampf, Pleva*.[102]

1934 Congress would have applied to an express right of action under section 10(b) if it had considered the issue. *Id.* at 2780.

99. The section 10(b) implied cause of action was thought to be somewhat established after Congress adopted the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (codified as amended at 15 U.S.C. §§ 78k-80b (1988)). These amendments are considered the most comprehensive and extensive revisions to the 1934 Act since its enactment. *See* H.R. CONF. REP. No. 229, 94th Cong., 1st Sess. 91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 322. Since Congress left section 10(b) intact, it was thought that "Congress ratified the cumulative nature of the § 10(b) action." Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983).

Yet some Justices remained wary of the Court's role in fashioning implied rights of actions. *See* Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing that the Court "should get out of the business of implied private rights of action altogether"); Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (espousing that "this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch").

100. *See* 15 U.S.C. § 78aa-1 (Supp. IV 1992); 15 U.S.C. § 78t-1(d) (1988).

101. 15 U.S.C. § 78t-1(d). Section (d) of the Act states: "Nothing in this section shall be construed to limit . . . the availability of any cause of action implied from a provision of this chapter." *Id.* The Insider Trading and Securities Fraud Enforcement Act of 1988 was enacted as Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.). Section 20A of this Act provides that investors may hold insider traders and their tippers jointly and severally liable under section 10(b)'s implied right of action. 15 U.S.C. § 78t-1(c).

The House Energy and Commerce Committee also recognized federal court authority to shape implied rights of action under section 10(b) and rule 10b-5. *See* H.R. REP. No. 100-910, 100th Cong. 2d Sess., 27, 39 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6064, 6076.

102. *See* 15 U.S.C. § 78aa-1 (Supp. IV 1992). Subsection (a) of this provision, for example, states: "The limitation period for any private civil action implied under [section 10(b)] of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." *Id.* § 78aa-1(a). Congress enacted section 27A of the 1934 Act, Pub. L. No. 102-242, title IV, § 476, 105 Stat. 2387 (codified at 15 U.S.C. § 78aa-1 (Supp. IV 1992)), to reinstate certain implied private actions brought under section 10(b) that otherwise would have been barred by the section 10(b) statute of limitations estab-

II. THE IMPLIED RIGHT TO CONTRIBUTION

Though the Supreme Court developed most elements of the section 10(b) cause of action,[103] the question remained whether there was an implied right to contribution[104] under section 10(b).[105] Most federal courts recognized the right to contribution among tortfeasors under section 10(b) in the absence of Supreme Court guidance.[106] In 1981, however, two leading Supreme Court decisions set forth an analysis for determining whether an implied right to contribution may be created by federal courts.[107] In both decisions the Court analyzed an implied right to contribution as a private right of action rather than as a remedy, thus refusing

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lished by the Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992). For a discussion of the Court's decision in *Lampf, Pleva* see *supra* notes 97-98 and accompanying text.

103. *See supra* notes 84-91 and accompanying text (discussing the elements of a section 10(b) cause of action established by the Supreme Court).

104. A right to contribution is claimed by one tortfeasor against another tortfeasor where both are liable to the same plaintiff for the same injury. RESTATEMENT (SECOND) OF TORTS § 886A (1979). Such claims are brought to compel the other tortfeasor to contribute to the liability imposed on only one tortfeasor. *See* James S. O'Shaughnessy, Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is The New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, 16 SUFFOLK U. L. REV. 983, 983-85 (1982). The right to contribution is based upon the policy notion that when two or more persons share responsibility for a wrong, it is inequitable to require just one to bear the entire cost of liability. *Id.* Contribution also is premised upon the view that such a right will deter wrongdoing because contribution reduces the likelihood that any one tortfeasor will injure someone and expect another to bear the liability. *Id.*

105. The Supreme Court expressly left unresolved whether an implied right of contribution existed under section 10(b). *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 n.11 (1981) (stating that the Court would not express any "view as to the correctness" of decisions recognizing an implied right of contribution under section 10(b)); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 91-92 n.24 (1981) (acknowledging that a number of federal courts have recognized an implied right of action under section 10(b), but refusing to address the issue).

106. *See supra* note 34 (listing federal circuit courts that have recognized an implied right of contribution under section 10(b)); *see also* United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth., 772 F. Supp. 1565, 1569 (D.S.C. 1991) (recognizing an implied right of contribution under section 10(b)); MFS Mun. Income Trust v. American Medical Int'l, Inc., 751 F. Supp. 279, 281 (D. Mass. 1990) (same); Baker v. BP America, Inc., 749 F. Supp. 840, 842-44 (N.D. Ohio 1990) (same); *In re* National Student Mktg. Litig., 517 F. Supp. 1345, 1346-49 (D.D.C. 1981) (same); Marrero v. Abraham, 473 F. Supp. 1271, 1276 (E.D. La. 1979) (same); McLean v. Alexander, 449 F. Supp. 1251, 1266-67 (D. Del. 1978) (same), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 957-58 (S.D.N.Y. 1975) (same); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 569 (S.D. Iowa 1973) (same).

107. *See infra* notes 110-30 and accompanying text (discussing the Supreme Court's implied right of contribution jurisprudence).

to create such a right.[108] The Supreme Court's analytical framework subsequently led some federal courts to abandon precedent and find no right of contribution under section 10(b).[109]

A. The Supreme Court's Implied Right of Contribution Jurisprudence

In two 1981 decisions, the Supreme Court declined to imply a cause of action for contribution under three federal statutes.[110] In *Northwest Airlines, Inc. v. Transport Workers Union*,[111] the Supreme Court rejected an employer's claim that an implied right of contribution exists under Title VII of the Civil Rights Act or under the Equal Pay Act.[112] The Court held that an implied cause of action for contribution may arise in two ways.[113] First, Congress may create a cause of action, either expressly or impliedly.[114] Second, the judiciary may create a cause of action for contribution under federal common law to provide appropriate remedies for unlawful conduct.[115]

The *Northwest Airlines* Court examined whether Congress provided for such a right in the statutes at issue.[116] It found that Title VII and the Equal Pay Act do not expressly provide for a right of contribution.[117] Nor did the Court find anything in either Acts' statutory structure or legislative history to support a right of contribution.[118] Moreover, the Court

108. *See Northwest Airlines*, 451 U.S. at 94-95; *Texas Industries*, 451 U.S. at 641-42.

109. *Compare* Sirota v. Solitron Devices, Inc., 673 F.2d 566, 578 (2d Cir.) (recognizing an implied right to contribution under section 10(b)), *cert. denied*, 459 U.S. 838, *and cert. denied*, 459 U.S. 908 (1982) *and* Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979) (explaining that contribution is used to distribute losses equally and fairly) *with* Chutich v. Touche Ross & Co., 960 F.2d 721, 724 (8th Cir. 1992) (finding that federal courts cannot imply a right of contribution because this discretion is properly reserved to the executive and legislative branches). *See also infra* note 134.

110. *Northwest Airlines*, 451 U.S. at 77; *Texas Industries*, 451 U.S. at 630.

111. 451 U.S. 77 (1981).

112. *Id.* at 98.

113. *Id.* at 90.

114. *Id.* at 91. The Court explained that when a federal statute does not expressly provide for a particular right of action, that right may be created through statutory construction. *Id.*

115. *Id.* at 90 (finding that "a cause of action for contribution may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct"); *cf.* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1034 (1992) (distinguishing between whether there is a right to a cause of action and whether there is a right to relief or a remedy). *See generally supra* note 52 (explaining the analytical difference between remedies and causes of action).

116. *Northwest Airlines*, 451 U.S. at 91-94.

117. *Id.* at 91.

118. *Id.* at 91-94. The Court applied the *Cort* analysis and examined the language of the statute itself, other provisions within Title VII and the Equal Pay Act, and the legislative histories of Title VII and the Equal Pay Act. *Id.*

determined that the right of contribution was a separate cause of action and not a remedy under the statutory scheme.[119] The Court noted that the employer, the tortfeasor, was outside the intended class of statutory beneficiaries and was in fact in the class against whom the statute was directed.[120] Thus, the Court held that there could be no right of contribution without the "essential predicate" of congressional intent to protect such a person.[121]

The Court then analyzed whether federal common law could be fashioned to create an implied right of contribution.[122] The Court found that where a statutory scheme is broad, detailed, and evidences congressional consideration of appropriate causes of action, it is not necessary to create additional causes of action.[123] Because Title VII and the Equal Pay Act are broad and detailed, the Court concluded that federal common law could not be used to create a right of contribution.[124]

Similarly, in *Texas Industries v. Radcliff Materials, Inc.*,[125] the Court found that an antitrust defendant had no express or implied right to contribution from coconspirators under section 1 of the Sherman Act.[126] In reaching this conclusion, the Court applied the analytical framework set forth in *Northwest Airlines*.[127] The Court stated that federal courts have the authority to craft federal common law—(1) when a federal court's decision is "'necessary to protect uniquely federal interests,'" or (2) when Congress confers the authority upon the judiciary to develop substantive law.[128] The Court also held it improper to address policy considerations

119. *Id.* at 88-89. The Court explained that all elements of a contribution claim were established in *Northwest Airlines*. *Id.*

120. *Id.* at 92.

121. *Id.* at 94. Although the *Northwest Airlines* Court abandoned the tort-based approach to implied rights and adopted a statutory construction approach, it maintained the Court's restrictive trend, focusing its analysis on providing rights for those whom the statute was enacted to benefit. *See supra* notes 66-74 and accompanying text (discussing the shift in the Court's implied rights jurisprudence).

122. *Northwest Airlines*, 451 U.S. at 95-98.

123. *Id.* at 97.

124. *Id.* at 97-99.

125. 451 U.S. 630 (1981).

126. *Id.* at 640.

127. *Id.* at 638; *see supra* notes 113-15 and accompanying text (discussing the *Northwest Airlines* analytical framework for determining an implied right of contribution).

128. *Texas Industries*, 451 U.S. at 640 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)). The Court explained that the areas in which the judiciary has substantive law-making power are limited. *Id.* at 641. In the Court's opinion, without "congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Id.* (footnotes omitted). The Court specifically discussed its role in creating federal common law in the areas of

when deciding whether to create federal common law, because policy questions are only to be considered by Congress.[129] After examining the legislative history and discerning for whose benefit the statute was enacted, the Court found that Congress neither expressly nor impliedly intended to create an implied cause of action for contribution under section 1 of the Sherman Act.[130]

B. Contribution Under Section 10(b)

Prior to *Northwest Airlines* and *Texas Industries*, the federal courts of appeals and district courts generally agreed that principles of federal common law and policy considerations authorized the courts to create an implied right of contribution under section 10(b).[131] The first case to recognize such an implied cause of action for contribution was *deHaas v. Empire Petroleum Co.*,[132] decided in 1968. After *deHaas*, four federal courts of appeals recognized an implied cause of action for contribution under section 10(b).[133] Following the Court's refusal in *Texas Industries* and *Northwest Airlines* to find such a right in Title VII, the Equal Pay Act, and the Sherman Act, however, some federal courts of appeals and district courts began to reconsider whether an implied cause of action for contribution was available under section 10(b).[134]

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admiralty, labor-management relations, and monopolies and restraints on trade. *Id.* at 642-45; *see supra* notes 3-7 (discussing the limited law-making power of the judiciary).

129. *Texas Industries*, 451 U.S. at 646-47.

130. *Id.* at 648.

131. *See, e.g.*, Smith v. Mulvaney, 827 F.2d 558, 560 (9th Cir. 1987) (finding an implied right of contribution under section 10(b)); Huddleston v. Herman & MacLean, 640 F.2d 534, 559 (5th Cir. 1981) (finding a right of contribution under section 10(b)), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979) (finding a right of contribution under section 10(b)); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970) (finding a right of contribution under section 10(b)), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

132. 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

133. *See supra* note 131.

134. *See, e.g.*, King v. Gibbs, 876 F.2d 1275, 1280 n.8 (7th Cir. 1989) (explaining that an earlier decision finding an implied right of contribution under section 10(b) improperly analyzed the right of contribution in light of *Texas Industries* and *Northwest Airlines*); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1105-06 (4th Cir. 1989) (finding no implied right of contribution or indemnification under section 12(2) of the 1933 Act based on the *Texas Industries* and *Northwest Airlines* analytical framework and on the irrelevancy of policy considerations in the absence of congressional intent to create such a cause of action); Fogel v. Chestnutt, 668 F.2d 100, 119 n.17 (2d Cir. 1981) (questioning why defendants did not argue that the court exceeded its authority to apportion liability among defendants in a section 10(b) cause of action in light of *Texas Industries* and *Northwest Airlines*), *cert. denied*, 459 U.S. 828 (1982); Biden v. Card, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331-32 n.2 (W.D. Mo. 1991) (discussing the trend to

In response to *Northwest Airlines* and *Texas Industries*, the United States Court of Appeals for the Eighth Circuit, in *Chutich v. Touche Ross & Co.*,[135] held that federal courts have no power to create a right of action for contribution among violators of section 10(b).[136] The Eighth Circuit adopted the standard set forth in *Texas Industries* and *Northwest Airlines*, and applied it to determine whether an implied right of contribution exists under section 10(b).[137] The Eighth Circuit refused to find a right to contribution under section 10(b) because such a right does not implicate "uniquely federal interests," and because no provision in the 1934 Act gives the judiciary broad power to develop a federal common law of implied contribution.[138] While the Eighth Circuit found that the judiciary has more authority to provide a remedy than to create a cause of action, it concluded that contribution is a separate cause of action.[139] The court explained that the power to create a new cause of action for

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disallow an implied right of contribution under section 10(b) in light of *Texas Industries* and *Northwest Airlines*); Robin v. Doctors Officenters Corp., 730 F. Supp. 122, 124-25 (N.D. Ill. 1989) (finding no implied right of contribution under section 10(b) based upon application of the *Texas Industries* and *Northwest Airlines* analytical framework); Nelson v. Craig-Hallum, Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989) (finding no implied right of contribution under section 10(b) in light of *Texas Industries* and *Northwest Airlines*); *In re* Professional Fin. Management, Ltd., 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (finding no implied right of contribution under section 10(b) of the 1934 Act or section 12(2) of the 1933 Act based upon application of the analytical framework set forth in *Texas Industries* and *Northwest Airlines*).

135. 960 F.2d 721 (8th Cir. 1992).

136. *Id.* at 722. Other federal courts of appeals read *Northwest Airlines* and *Texas Industries* as limiting the authority of the judiciary to create an implied cause of action for contribution in other areas of law. *See, e.g.*, Mortgages, Inc. v. United States Dist. Ct., 934 F.2d 209, 213 (9th Cir. 1991) (refusing to create an implied right of contribution under the False Claims Act); United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 n.6 (1st Cir. 1990) (refusing to create an implied right of contribution under CERCLA); Kim v. Fujikawa, 871 F.2d 1427, 1432-33 (9th Cir. 1989) (refusing to create an implied right of contribution under ERISA); Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1191 (7th Cir. 1989) (refusing to create an implied right of contribution under I.R.C. § 6672(a)); Getty Petroleum Corp. v. Island Transp. Corp., 862 F.2d 10, 16 (2d Cir. 1988) (refusing to create an implied right of contribution under the Lanham Act), *cert. denied*, 490 U.S. 1006 (1989).

137. *Chutich*, 960 F.2d at 722; *see supra* notes 113-15 and accompanying text (discussing the *Texas Industries* and *Northwest Airlines* analytical framework for determining an implied right of contribution).

138. *Chutich*, 960 F.2d at 724; *see supra* note 7 (discussing the authority of federal courts to created federal common law).

139. *Chutich*, 960 F.2d at 724. The Eighth Circuit directly relied on the Supreme Court's decision in Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992). The Court in *Franklin* recognized that *Northwest Airlines* and *Texas Industries* "involved holdings that plaintiffs had no right of action," rather than no right to a remedy. *Franklin*, 112 S. Ct. at 1034 n.6; *see supra* note 52 (explaining that remedies analytically differ from causes of action).

contribution is beyond its jurisdiction and properly falls within the power reserved for the legislative and executive branches.[140] The court, therefore, found that federal courts do not have authority to fashion a right of action for contribution among violators of section 10(b).[141]

III. MUSICK, PEELER & GARRETT V. EMPLOYERS INSURANCE: JUDICIAL IMPLICATION OF RIGHTS AND REMEDIES

The Supreme Court granted certiorari in *Musick, Peeler & Garrett v. Employers Insurance*[142] to resolve the conflict between *Chutich* and the contrary conclusion reached by other circuits.[143] In *Musick, Peeler*, the shareholders of Cousins Home Furnishings, Inc. filed a class action against Cousins, its holding company, and certain officers and directors.[144] The shareholders alleged that the defendants violated federal securities laws and California corporation laws in connection with a 1983 public offering issued by Cousins.[145] The shareholders also sued two of the lead underwriters, but did not sue the attorneys or accountants involved in the public offering.[146] The parties eventually settled the suit for $13.5 million.[147] The defendants expressly denied liability.[148] The defendants' insurers, Employers Insurance of Wausau and Federal Insurance Co., then sued the attorneys and accountants, alleging violation of section 10(b) and requesting contribution for a portion of the settlement amount.[149]

The United States District Court for the Southern District of California dismissed the action.[150] The district court held that a settling defendant is not entitled to contribution where it has paid no more than its fair share of the total liability.[151] The United States Court of Appeals for the Ninth Circuit reversed,[152] finding that federal courts long have recognized that section 10(b) implies a right of contribution even though no explicit right

140. *Chutich*, 960 F.2d at 724.
141. *Id.*
142. 113 S. Ct. 2085 (1993).
143. *Id.* at 2087; *see supra* note 34 (setting out the conflicting circuits).
144. Employers Ins. v. Musick, Peeler & Garrett, 954 F.2d 575, 576 (9th Cir. 1992), *aff'd*, 113 S. Ct. 2085 (1993).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 577.
149. *Id.*
150. Employers Ins. v. Musick, Peeler & Garrett, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,208 (S.D. Cal. 1990), *rev'd*, 954 F.2d 575 (9th Cir. 1992), *aff'd*, 113 S. Ct. 2085 (1993).
151. *Id.* at 95,855.
152. *Musick, Peeler*, 954 F.2d at 577.

is set forth in the statute.[153] The court further found that under federal law, a party may seek contribution from an unnamed party in the original action through a third-party action.[154] After the Ninth Circuit decided *Musick, Peeler*, the Eighth Circuit handed down the *Chutich* decision, creating a conflict among the circuits.[155] The Supreme Court granted certiorari in *Musick, Peeler* to resolve the conflict.

A. The Majority: Devising Distinctions

Justice Kennedy, writing for the majority,[156] addressed the issue of whether defendants in a suit based on an implied private right of action under section 10(b) may seek contribution from joint tortfeasors.[157] The Court held that there is such a right as a matter of federal law.[158]

The Court acknowledged its earlier refusal to recognize an implied right of contribution under various federal laws in *Northwest Airlines* and in *Texas Industries*.[159] The Court concluded, however, that the *Northwest Airlines* and *Texas Industries* decisions were not relevant to its inquiry into whether an implied right of contribution exists under section 10(b).[160] The *Northwest Airlines* and *Texas Industries* decisions were distinguishable because the federal statutes being interpreted provided an express cause of action against violators of those provisions.[161] In contrast, the section 10(b) cause of action was never enacted by Congress, rather it was implied by the judiciary.[162] The Court therefore found that the analytical framework used in *Northwest Airlines* and *Texas Industries*

153. *Id.*

154. *Id.* The Ninth Circuit acknowledged that the right of contribution is a substantive right and is a separate cause of action from the underlying litigation. *Id.*

155. *See supra* notes 135-41 and accompanying text (discussing the *Chutich* decision).

156. Chief Justice Rehnquist and Justices White, Stevens, Scalia, and Souter joined with Justice Kennedy in the majority decision. Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2086 (1993).

157. *Id.*

158. *Id.*

159. *Id.* at 2087. The Supreme Court also recognized that it previously found an implied right of contribution among joint tortfeasors in federal common law admiralty decisions. *Id.* The Court declined to rely upon these admiralty decisions, however, reasoning that admiralty is an area in which the federal judiciary historically has been responsible for the elaboration of legal doctrines and the creation of just and equitable remedies. *Id.*; *see supra* part II.A (discussing the Supreme Court's *Texas Industries* and *Northwest Airlines* decisions).

160. *Musick, Peeler*, 113 S. Ct. at 2087.

161. *Id.* at 2087-88.

162. *Id.* at 2088. The Court explained that the *Northwest Airlines* and *Texas Industries* analytical framework provides no guidance in cases where the underlying right of action was originally premised on the implied rights theory that "courts should recognize private remedies to supplement federal statutory duties." *Id.* The Court appears to accept the continued existence and vitality of private rights of action created under the *Borak* stan-

was not the proper method to determine whether to create a right of contribution for a right that was itself implied.[163]

The Court rejected Musick, Peeler's argument that the creation of a new right of contribution should be left to Congress, not the judiciary.[164] The Court held that where conduct is already subject to liability through an implied right of action, the Court has the authority to treat newly created duties such as contribution as ancillary questions.[165] The Court also found that a right of contribution is merely a remedy, not a separate implied private right of action under section 10(b).[166] It reasoned that contribution, by definition, is sought against persons who have allegedly violated existing securities laws.[167] The Court believed it unfair to sustain an implied right of action under section 10(b) while declining to fashion a way for one tortfeasor to obtain just contribution from another tortfeasors.[168]

The Court justified its broad authority to shape the parameters of the section 10(b) cause of action by concluding that Congress knowingly abdicated to the judiciary the authority to shape the section 10(b) cause of action.[169] The Court identified goals to be considered in determining

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dard, under which federal courts have a duty and, in effect, the inherit authority to create a remedy where none existed. *See supra* notes 55-58 (discussing the *Borak* standard).

163. *Musick, Peeler*, 113 S. Ct. at 2088; *see infra* note 165.

164. *Musick, Peeler*, 113 S. Ct. at 2088.

165. *Id.* The Court found that the analytical framework set forth in *Northwest Airlines* and *Texas Industries* was not controlling. *Id.* The Court determined that the *Northwest Airlines* and *Texas Industries* analytical framework would apply only when federal courts seek to create a duty for: (1) conduct already subject to liability under an express cause of action, or (2) conduct not already subject to liability through a particular statute. *Id.* It is unclear from the Court's analysis if its standard for creating new duties under implied causes of action is applicable only when creating a duty for contribution, or if the standard may be applied more broadly.

166. *Id.*; *see supra* note 52 (explaining that remedies analytically differ from causes of action).

167. *Musick, Peeler*, 113 S. Ct. at 2088. The Court explained that the duty it sought to recognize by creating a right to contribution arises from a wrong that is already subject to liability through an implied right of action. *Id.*

168. *Id.* The Court stated that "[h]aving implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed." *Id.*

169. *Id.* The Court derived authority to fashion the section 10(b) cause of action from recent congressional amendments to the 1934 Act, which expressly acknowledged the Supreme Court's primary role in this area. *Id.* at 2089; *see supra* notes 99-102 and accompanying text (discussing congressional abdication of maintaining and defining the section 10(b) cause of action). The Court also emphasized that federal courts long have assumed primary responsibility for defining "the scope of the 10b-5 right and the definition of the duties it imposes." *Musick, Peeler*, 113 S. Ct. at 2089. The Court noted that the judiciary's role was necessary because of the absence of congressional guidance. *Id.* (citing Virginia

whether to create an implied right of contribution under section 10(b).[170] Establishment of such parameters was based on achieving three goals: (1) to prevent a conflict between judge-made action and Congress' express right of action; (2) to promote clarity, consistency, and coherence of section 10(b) jurisprudence; and (3) to achieve congressional objectives for securities laws.[171]

In this case, the Court found concerns with efficiency and equity to be irrelevant, noting that it declined to consider such issues in *Northwest Airlines* and *Texas Industries*.[172] Rather, Justice Kennedy declared that the Court's task is to ascertain how the 1934 Congress would have decided the right to contribution issue if section 10(b) had originally contained an express private right of action.[173] The purpose of this analysis, Justice Kennedy reasoned, is to provide symmetrical and consistent rules governing the section 10(b) action in conjunction with the overall structure of the 1934 Act and those provisions of the Act most like the section 10(b) implied right of action.[174]

The Court found useful guidance in its search for congressional intent in sections 9 and 18 of the 1934 Act.[175] The Court determined that sections 9 and 18 are the most analogous in purpose, intent, and structure to section 10(b).[176] The Court found that sections 9, 18, along with section

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Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2764 (1991)); *see supra* notes 71-74 and accompanying text (discussing the Court's burden of maintaining implied causes of action).

170. *Musick, Peeler*, 113 S. Ct. at 2090.

171. *Id.* The Court stated that its goals for establishing limits for the section 10(b) cause of action have not changed over time, even though the Court's discretion has been limited. *Id.*

172. *Id.* at 2089; *see supra* note 29 and accompanying text.

173. *Musick, Peeler*, 113 S. Ct. at 2089-90.

174. *Id.* at 2090; *see supra* notes 92-98 and accompanying text (discussing the Court's analytical approach to determining the elements of the section 10(b) cause of action).

175. *Musick, Peeler*, 113 S. Ct. at 2090-91. Section 9 of the 1934 Act prohibits the willful manipulation of security prices. 15 U.S.C. § 78i (1988). Section 18 of the 1934 Act prohibits misleading filings. 15 U.S.C. § 78r.

The Court noted that an inquiry into whether Congress might have created a right of contribution under section 10(b) is unconvincing and unpromising because Congress never considered whether to create the underlying section 10(b) cause of action when it enacted the 1934 Act. *Musick, Peeler*, 113 S. Ct. at 2090. The Court determined, therefore, that analysis of the language of section 10(b) provides little guidance for discerning Congress' intent as to the scope of section 10(b). *Id.* The Court added that since the 1934 Congress did not consider providing a private cause of action under section 10(b), it could not have considered how to limit, compute, or allocate liability arising from such an action. *Id.*

176. *Musick, Peeler*, 113 S. Ct. at 2090. The Court adopted a similar analysis in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1989), which provided a uniform statute of limitations for section 10(b) causes of action. *See supra* notes 97-98 and accompanying text (discussing the *Lampf, Pleva* decision).

10(b), to discourage fraudulent and manipulative securities practices, and ensure full disclosure of material information.[177] The Court then noted that sections 9 and 18 expressly provide for contribution.[178] The Court also examined the six other provisions of the 1934 Act and 1933 Act[179] that provide express causes of action but, unlike section 9 and 18, do not provide express rights for contribution.[180] Reasoning that section 10(b) more closely resembles sections 9 and 18,[181] the Court adopted a contribution rule under section 10(b).[182]

The Court further noted that implying a right for contribution under section 10(b) is consistent with the longstanding lower court practice of recognizing an implied right of contribution under section 10(b).[183] The Court also noted that a right to contribution does not hinder or detract from the effectiveness of the implied private right of action under section

177. *Musick, Peeler*, 113 S. Ct. at 2090. The Court stated that the purpose of each section is "'to deter fraud and manipulative practices in the securities market, and to ensure full disclosure of information material to investment decisions.'" *Id.* (quoting Randall v. Loftsgaarden, 478 U.S. 647, 664 (1968)).

178. *Id.* at 2091. Section 9(e) of the 1934 Act provides for an express right of contribution: "Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. § 78i(e) (1988).

Section 18(b) of the 1934 Act also provides for an express right of contribution: "Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. § 78r(b).

179. *Musick, Peeler*, 113 S. Ct. at 2091. In addition to sections 9 and 18, the 1934 Act contains three provisions that provide an express private right of action: (1) section 16, 15 U.S.C. § 78p (prohibiting the unfair use of information by directors, officers, and principal stockholders); (2) section 20, 15 U.S.C. § 78t (governing the liability of controlling persons); and (3) section 20A, 15 U.S.C. § 78t-1 (prohibiting the purchase or sale of securities while possessing material, nonpublic information).

The 1933 Act also contains three provisions that provide an express private right of action: (1) section 11, 15 U.S.C. § 77k (prohibiting untrue and misleading statements); (2) section 12, 15 U.S.C. § 77*l* (prohibiting false and misleading statements in connection with the sale of a security); and (3) section 15, 15 U.S.C. § 77o (providing for derivative liability).

180. *Musick, Peeler*, 113 S. Ct. at 2091.

181. *Id.* To support this determination, the Court asserted that all three sections (1) impose direct liability on defendants for their own acts as opposed to derivative liability for the acts of others, (2) involve defendants who violated the securities law with scienter, (3) impose liability on multiple defendants acting in concert in many instances, and (4) were enacted into law by the 73rd Congress. *Id.* at 2090-91.

182. *Id.* at 2091. The Court adopted this implied right to contribution as a matter of consistency and dismissed any concern that such a rule would frustrate the purposes of section 10(b). *Id.*

183. *Id.* at 2091; *see supra* notes 34 & 106 and accompanying text (setting out federal courts of appeal and district courts decisions recognizing an implied right of contribution under section 10(b)).

10(b), or the operation of the securities laws.[184] Accordingly, the Court declared that the contribution rule will stand, absent proof that it frustrates the section 10(b) cause of action or the 1934 Act as a whole.[185]

B. The Dissent: Taking the Traditional Approach

Justice Thomas, joined in dissent by Justices Blackmun and O'Connor, declared that the Court nourished the "'judicial oak'" by cultivating a new branch of section 10(b) actions.[186] The dissent accepted the Court's defined task of ascertaining how the 1934 Congress would have decided the right of contribution if section 10(b) originally contained an express private right of action.[187] The dissent disagreed, however, with the method of analysis by which the Court reached its conclusion.[188]

The dissent reasoned that the Court should not use different standards for interpreting and applying rights of action based on whether their origin is express or implied.[189] The dissent concluded that a proper interpretation and application of a right should be based on an inquiry into statutory text, congressional intent, and legislative purpose.[190] Therefore, the dissent reasoned, the Court should be constrained, absent any compelling reason, from recognizing contribution under section 10(b) beyond the scope intended by Congress.[191]

The dissent criticized the Court for abandoning its stated reluctance to

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184. *Musick, Peeler*, 113 S. Ct. at 2091. This statement contradicts the Court's announced standard of analysis for determining whether there is a right of contribution in cases where the conduct is governed by law. *See supra* text accompanying note 172 (discussing the majority's position that efficiency and equity were irrelevant).

185. *Musick, Peeler*, 113 S. Ct. at 2091-92.

186. *Id.* at 2092 (Thomas, J., dissenting) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975)).

187. *Id.*

188. *Id.* Before turning to the contribution issue, the dissent noted that the language of section 10(b) and rule 10b-5 scarcely suggest congressional intent for an implied cause of action under section 10(b). *Id.* The dissent found no reason, however, to reconsider whether an implied right of action under section 10(b) originally should have been recognized. *Id.*

189. *Id.* at 2092-93. The majority distinguished between the conduct governed by express statutory language and that conduct governed under certain provisions. *See supra* notes 159-63 and accompanying text (discussing the majority's decision to adopt a different standard based on whether a cause of action is express or implied). The dissent suggests that the Court examine congressional intent, statutory language, and legislative purpose as its analytical starting point, no matter what the basis of the action. *Musick, Peeler*, 113 S. Ct. at 2093. In doing so, the dissent rejects the Court's approach of using its authority in a given area of law to decide whether an implied right of action exists.

190. *Musick, Peeler*, 113 S. Ct. at 2093. Conversely, the majority only examined sections 9 and 18 of the 1934 Act in conjunction with the statutory text and legislative purpose of section 10(b). *See supra* notes 175-82 and accompanying text.

191. *Musick, Peeler*, 113 S. Ct. at 2093.

create implied rights of action.[192] Characterizing the contribution right as an element of liability under a section 10(b) action rather than as a separate cause of action, enabled the majority to dodge its implied rights precedents.[193] The dissent explained that the right of contribution is an entirely separate cause of action and does not clarify the elements of a section 10(b) action, unlike, for example, a statute of limitations.[194] Furthermore, the dissent emphasized that adoption of an implied right of contribution may provide a remedy contrary to state laws.[195]

The dissent redefined the issue before the Court as whether congressional intent or federal common law gives the Court authority to expand the class entitled to enforce section 10(b) through private actions, not whether a contribution right is an ancillary issue to a section 10(b) action.[196] The dissent warned that inappropriate extension of section 10(b) actions would weaken the careful design of the express rights Congress provided in other sections of the 1934 Act.[197] Thus, the Court erred by relying solely on sections 9 and 18 of the 1934 Act.[198] The dissent declared that the proper analysis comes from the Court's "well-established" *Northwest Airlines* and *Texas Industries* analysis for determining whether to imply a right of contribution.[199]

Applying this analysis, the dissent concluded that there is no right of contribution under section 10(b).[200] The right of contribution under section 10(b) depends solely upon a statutory interpretation of section

192. *Id.*

193. *Id.*

194. *Id.*; *see supra* notes 84-98 and accompanying text (discussing the Court's establishment of the elements of the section 10(b) cause of action and the methods it used).

195. *Musick, Peeler*, 113 S. Ct. at 2093.

196. *Id.* Where courts seek to create a right of action, the *Northwest Airlines* and *Texas Industries* analytical framework is applied to justify such authority. *See supra* part II.A (discussing the *Texas Industries* and *Northwest Airlines* decisions). Under this analysis, federal courts examine congressional intent through the application of the traditional *Cort* factors. *See supra* notes 59-65 and accompanying text (discussing the traditional *Cort* factors and the application thereof).

197. *Musick, Peeler*, 113 S. Ct. at 2093.

198. *Id.* 2093-94.

199. *Id.* at 2094. Under this analysis, the dissent found that federal courts may create a right to contribution when concluding that Congress intended to create a private right of action, either expressly or by implication, or as an exercise of their power under federal common law. *Id.*; *see supra* notes 113-15 and accompanying text (discussing the *Texas Industries* and *Northwest Airlines* analytical framework).

200. *Musick, Peeler*, 113 S. Ct. at 2094. The dissent agreed with the Court's conclusion that the contribution right recognized in admiralty "has no bearing on the availability of contribution under the elaborate federal statutory scheme governing purchases and sales of securities." *Id.*; *see supra* note 159 (discussing the majority's explanation of prior admiralty decisions). By reaching this conclusion, the dissent seemingly distinguished the Court's power to fashion the federal common law of admiralty, readily recognized as

10(b).[201] Examining the language of section 10(b), its legislative history, its underlying policies, and the structure of the 1934 Act, the dissent found no indication of a contribution right.[202] The dissent reasoned that Congress did not intend to extend protection to a class of individuals who violated the provision.[203] Had Congress intended to provide a contribution right in section 10(b), it would have expressly done so, just as it had in sections 9 and 18.[204] Thus, the dissent concluded that Congress specifically chose not to provide such a right.[205]

The dissent also found that a right of contribution undermines the Court's established policies governing section 10(b).[206] Previous Court decisions limited the right to bring a section 10(b) action to actual purchasers and sellers of securities.[207] An action for contribution, the dissent concluded, would be one level removed from the exchange of securities because it would involve attorneys and accountants who merely advised or facilitated the securities transaction that resulted in a violation of section 10(b).[208]

In conclusion, the dissent reiterated that the issue facing the Court was whether courts have the power to create a cause of action absent legislation.[209] The dissent stated that courts should not treat congressional silence as a license for action,[210] and concluded that section 10(b) does not

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within the jurisdiction of the federal courts, and its power to fashion federal securities law, governed by numerous, far-reaching statutes.

201. *Musick, Peeler*, 113 S. Ct. at 2094.

202. *Id.* at 2094-95. The dissent found no language in either section 10(b) or rule 10b-5 suggesting that there should be a right of contribution among joint tortfeasors. *Id.* at 2094. The dissent explained that "[n]either enactment suggests that Congress or the SEC intended to 'softe[n] the blow on joint wrongdoers' by permitting contribution." *Id.* at 2095 (quoting Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)) (alteration in original). Moreover, the underlying policies of the 1934 Act do not permit a section 10(b) contribution action. *Id.*

203. *Id.*; *see supra* note 54 and accompanying text (discussing the *Rigsby* decision granting an implied cause of action for special classes of plaintiffs).

204. *Musick, Peeler*, 113 S. Ct. at 2095; *see supra* note 178 (quoting the text of sections 9 and 18).

205. *Musick, Peeler*, 113 S. Ct. at 2095. The dissent emphasized that over the years Congress had the ability to provide for such an action. *Id.* The dissent also emphasized that recent congressional amendments to the section 10(b) action, enacted in the Insider Trading and Securities Fraud Enforcement Act of 1988 and in section 27A, see *supra* notes 99-102 and accompanying text, further indicated Congress' conscious choice not to provide a right of contribution. *Musick, Peeler*, 113 S. Ct. at 2095.

206. *Musick, Peeler*, 113 S. Ct. at 2095.

207. *Id.*

208. *Id.*; *see supra* note 96 and accompanying text (discussing the purchaser-seller requirement to have standing to bring a section 10(b) cause of action).

209. *Musick, Peeler*, 113 S. Ct. at 2096.

210. *Id.*

afford a right of contribution.[211]

IV. SEEDING THE FOREST?

Musick, Peeler & Garrett v. Employers Insurance is fitting irony.[212] Although the Supreme Court refused to create an implied right of action in at least eleven of the last fifteen cases before it,[213] the Court nevertheless found it necessary to round out the contours of those implied rights of action that it created previously.[214] In *Musick, Peeler*, the Court performed this unwelcome task, but in doing so, modified significant aspects of its traditional implied rights jurisprudence.[215]

A. Contribution: A Cause of Action or a Remedy

In *Musick, Peeler*, the Court faced a dilemma—either act "most unfairly," by disavowing any authority to allocate damages among persons who jointly commit section 10(b) violations, or disregard its professed

211. *Id.*

212. Despite the six member majority in *Musick, Peeler*, the current Court's dislike of its implied rights jurisprudence is well documented. 3B BLOOMENTHAL, *supra* note 14, § 9:03, at 9-30 (discussing the Court's attitude toward implied rights of action). The summons for the death knell of the implied rights doctrine became notably apparent in 1979 with Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979). Justice Powell argued that the doctrine articulated in *Cort* should be abandoned because it allowed federal courts to assume policy-making authority vested in the legislative branch. *Id.* at 730-31 (Powell, J., dissenting). Justice Scalia and Justice O'Connor also expressed disdain for the implied rights doctrine. *See supra* note 99 (quoting Justice Scalia's concurrence in Thompson v. Thompson, 484 U.S. 174 (1988), in which Justice O'Connor joined). Likewise, Justice Stevens, joined by Justice Souter, dissenting in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, stated that "the Court has undertaken a lawmaking task that should properly be performed by Congress." 111 S. Ct. 2773, 2783 (1991) (Stevens, J., dissenting), *superseded by statute as stated in* G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992). As a matter of fact, Justice Kennedy referred to the Court's approach in Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991), as "a sort of guerrilla warfare to restrict a well-established implied right of action." *Id.* at 2770 (Kennedy, J., concurring in part and dissenting in part).

213. *See supra* note 71 (setting out those decisions in which the Court refused to recognize an implied right of action).

214. *See supra* notes 71-74 and accompanying text (discussing the Court's willingness to round out the contours of recognized implied rights of action).

215. Commentators predicted that the Court would be forced to re-examine its implied rights jurisdiction due to the unduly narrow approach the Court adopted in *Transamerica Mortgage*. *See* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 553, 564 (1981) (discussing how unduly narrow the Supreme Court's implied rights jurisprudence became after *Transamerica*); Schneider, *supra* note 11, at 900 (predicting that the Court could not continue to limit its authority in providing implied rights of action merely because the right of action is implied by the courts); *see also* Joseph M. Hassett, *Contribution in Rule 10b-5 Cases:* Musick, Peeler *and Beyond*, Insights (P-H), Sept. 1993, at 22 (discussing the Court's need to govern the multitude of implied rights readily created under *Borak*).

hostility to implied rights by creating a new right of contribution.[216] Instead of choosing one of these unappealing options, the Court engaged in legerdemain, characterizing contribution as a remedy, thereby finding the Court's restrictive rules inapplicable.[217] The dissent correctly noted that contribution is not a remedy but a separate cause of action.[218] In fact, as the dissent noted, as recently as 1992, the Court treated contribution as a cause of action, not a remedy.[219] The federal courts of appeals and district courts likewise interpreted *Northwest Airlines* and *Texas Industries* as defining contribution as a separate cause of action.[220] However, to be "fair" and "consistent" with its implied rights jurisprudence, the Court in *Musick, Peeler* transformed contribution into a remedy.[221]

Whether a right of contribution is merely a remedy or an entirely new cause of action is significant in determining the outcome of a case. Creation of a new cause of action requires an analysis of such a right under the stringent *Northwest Airlines* and *Texas Industries* framework, which, following *Transamerica Mortgage*, mandates a finding of clear congressional intent.[222] Consequently, application of the modified-*Cort* analysis would

216. Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2088 (1993); *see supra* note 168 and accompanying text (discussing the majority's view that it would be unfair to disavow its authority to recognize an implied right of contribution under section 10(b)).

217. *Musick, Peeler*, 113 S. Ct. at 2088 (stating that "the question before us is the ancillary one of how damages are to be shared among persons or entities already subject to that liability"); *see supra* notes 159-68 and accompanying text (discussing the majority's new approach to its implied rights jurisprudence).

218. *Musick, Peeler*, 113 S. Ct. at 2093; *see supra* notes 192-95 and accompanying text (discussing the dissent's analysis of contribution as a separate cause of action). The dissent reasoned that the creation of a right of contribution involves more than rounding out; it extends the power of the federal courts to resolve disputes involving claims and parties that otherwise would not be in federal court. *Musick, Peeler*, 113 S. Ct. at 2093-94 (Thomas, J., dissenting).

219. *See* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1034-35 n.6 (1992) (distinguishing the standard for implying rights of actions, including contribution, from the standard for implying remedies once a right of action has been established); *see also supra* note 52 (discussing differences between rights and remedies); *cf. supra* note 108 and accompanying text.

220. *See* Employers Ins. v. Musick, Peeler & Garrett, 954 F.2d 575, 577 (9th Cir. 1992) (finding that a right to contribution is a substantive duty and that such claims may be brought in a separate cause of action), *aff'd on other grounds*, 113 S. Ct. 2085 (1993); King v. Gibbs, 876 F.2d 1275, 1280 n.8 (7th Cir. 1989) (disavowing an earlier decision that treated the right to contribution as ancillary to the section 10(b) cause of action in light of *Northwest Airlines* and *Texas Industries*); *see also supra* notes 107-09 and accompanying text (discussing the implied right of contribution as a separate and independent cause of action).

221. *Musick, Peeler*, 113 S. Ct. at 2088, 2090; *see supra* notes 164-67 and accompanying text (discussing the majority's view that contribution is ancillary to an underlying implied cause of action).

222. *See supra* part II.A (discussing the *Northwest Airlines* and *Texas Industries* analyti-

most likely result in dismissal of any implied contribution claim because the tortfeasor was not a member of the class of intended beneficiaries of the statute.[223] The *Musick, Peeler* Court avoided strict application of the modified-*Cort* analysis by determining that contribution is a remedy, not a cause of action.[224]

By making such a determination, the *Musick, Peeler* Court reached a result that appears to be squarely at odds with its previous implied rights of contribution jurisprudence. The Court did not, however, necessarily have to disregard its precedent. Express congressional acknowledgement of the judiciary's authority to fashion the scope of the section 10(b) cause of action could have served as the basis for the Court's decision.[225] The Court simply could have construed this congressional abdication in defining the scope of section 10(b) as giving it a unique right to fashion a contribution remedy under section 10(b)—a right extended to no other statutory scheme.[226]

Alternatively, the Court could have honestly expressed its dislike for implying new rights, but recognized the lower courts' longstanding practice of allowing the right of contribution under section 10(b).[227] This also would have limited the *Musick, Peeler* decision to section 10(b) causes of action.[228] Such an analysis would have helped to ensure that subsequent

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cal framework); *supra* notes 59-70 (discussing the modification of the *Cort* four-part analysis).

223. *See* Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 15 (2d Cir. 1991) (finding that once a court applies this analysis, it is impossible to find an implied right of contribution), *cert. denied*, 112 S. Ct. 3014 (1992); *see also* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 n.31 (1981) (finding that the *Cort* inquiry may end where "neither the statute nor the legislative history reveals a congressional intent to create a private right of action for the benefit of the plaintiff"); *King*, 876 F.2d at 1281 (finding it unnecessary to continue the *Cort* analysis where examination of statutory language and legislative history does not reveal congressional intent to provide a cause of action for the benefit of those parties for whom the statute was enacted).

224. *See* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1035 (1992) (finding that the analysis for creating a cause of action is analytically distinct from that used for fashioning a remedy); *see also supra* note 52.

225. *See supra* notes 99-102 and accompanying text (discussing congressional abdication of the definition and maintenance of the section 10(b) cause of action).

226. *See supra* notes 3-7 and accompanying text (discussing the judiciary's limited authority to create federal common law).

227. *See supra* notes 34 and 106 (setting forth federal courts of appeal and district courts decisions recognizing an implied right of contribution under section 10(b)). The Court previously adopted the longstanding practice of the lower federal courts as a basis for its decisions. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (adopting the longstanding practice of courts to establish the purchaser-seller requirement); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (acknowledging the implied right of action under section 10(b) long recognized by the lower federal courts).

228. The *Musick, Peeler* Court's standard for determining what duties are ancillary to

lower court interpretations of *Musick, Peeler* would not result in courts creating new rights of action under the guise of creating remedies.[229]

By defining contribution as a remedy, the *Musick, Peeler* Court exponentially increased the authority of federal courts.[230] The Supreme Court previously acknowledged that the federal judiciary has greater authority to fashion remedies to enforce an existing implied right of action than to create the underlying claim.[231] This authority allows the judiciary to award any appropriate remedy in any implied cause of action brought pursuant to a federal statute.[232] The Supreme Court reiterated, however, that a different standard exists for implying rights of actions.[233]

In *Musick, Peeler*, the Supreme Court blurred a rather clear distinction between causes of actions and remedies.[234] This judicial seed can now be cultivated by lower federal courts, resulting in an expansion of implied rights as long as they are denominated as remedies rather than causes of

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an implied cause of action left unclear whether these duties are limited to the right of contribution. *See* Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2088 (1993); *see also supra* notes 164-67 and accompanying text (discussing the majority's view that contribution is ancillary to an underlying implied cause of action).

229. What is likely to happen may be illustrated by King v. Gibbs, 876 F.2d 1275 (7th Cir. 1989). In *King*, the United States Court of Appeals for the Seventh Circuit found no implied right to indemnification under section 10(b). *Id.* at 1283. The court's analysis turned on whether indemnification was a right or a remedy. *Id.* at 1279-80. The Seventh Circuit disavowed an earlier case that characterized the right of contribution as ancillary to the existing cause of action. *Id.* at 1280. Having concluded that indemnification, like contribution, implicated substantive rights, the court found that a right to indemnification is a cause of action. *Id.* The Seventh Circuit, therefore, applied the *Northwest Airlines* and *Texas Industries* analytical framework and found that no implied right to indemnification existed under section 10(b). *Id.* at 1282.

230. The result is that an action for contribution against violators of section 10(b) effectively becomes an action within the underlying action. *See* Harold S. Bloomenthal, *Rule 10b-5—Contribution, Set-Off, and Contribution Bars*, 15 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 81, 87 (Nov.-Dec. 1993). For example, once a right of contribution is recognized, the courts would have to determine when the statute of limitations would begin to toll, how long the statute of limitations is, whether the third-party defendants violated section 10(b), and how to apportion liability among the joint tortfeasors. *Id.*

231. Creating the underlying action grants a court jurisdiction in cases in which it otherwise would not have jurisdiction. *See* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1037 (1992); *see also supra* note 52.

232. *Franklin*, 112 S. Ct. at 1037.

233. *Id.* at 1034.

234. Justice Cardozo, in Gully v. First National Bank, 299 U.S. 109 (1936), cautioned:

> If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Id. at 118.

action.[235] While the Supreme Court may quickly limit *Musick, Peeler* to its facts in a future decision, the ensuing confusion may prove costly to litigants and force lower courts to deal with unnecessary litigation.[236]

B. Distinguishing Between Express and Implied Rights of Action

On a broader level, *Musick, Peeler* sets forth a new framework that allows federal courts to treat implied causes of action analytically different from express causes of action.[237] Prior to *Musick, Peeler*, the Court rejected distinctions in analysis between express and implied causes of action.[238] Under *Musick, Peeler*, when presented with a request to create

235. A similar situation arose from the Court's 1964 *Borak* decision, resulting in the "hey-day" of the Supreme Court's implied right doctrine. *See* Langmore & Prentice, *supra* note 15, at 1035; *supra* notes 55-58 and accompanying text (discussing the effect of the *Borak* standard); *see also* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (holding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose").

236. Schneider, *supra* note 11, at 901-02 (discussing the consequences ensuing from confusing remedies and implied rights of action). The Supreme Court sought to clarify its standard for determining primary and ancillary issues in seciton 10(b) causes of action in Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994). In *Central Bank*, the Court held that section 10(b) prohibits only primary violations where a defendant engages in manipulative practices or makes material misstatements and does not create ancillary liability for those who merely aid or abet such practices. *Id.* at 1455. Consequently, the distinction between primary liability for aiding and abetting and ancillary liability has become important, whereas little distinction was made before.

The impact the *Central Bank* decision will have on implied rights of action may be far reaching. The dissent in *Central Bank* noted that if no liability for aiding and abetting can arise under a section 10(b) violation, then logically neither can any other form of secondary liability result under section 10(b), including conspiracy, respondeat superior, and other common-law agency theories of liability. *Id.* at 1460 & n.12 (Stevens, J., dissenting).

237. *See supra* notes 159-68 and accompanying text. One commentator suggests that what the Supreme Court is doing is three-fold. Joseph M. Hassett, *Aiding and Abetting Liability for 10b-5 Violations*, 26 Sec. & Comm. Reg. (McGraw-Hill) 152, 155 (Sept. 15, 1993). First, the Court will not imply a new private cause of action outside sections 10(b) and 14(a) of the 1934 Act absent a showing of congressional intent. *Id.* Second, the Court will define the contours of an existing or accepted implied cause of action by examining policy reasons, with or without a showing of congressional intent. *Id.* Finally, the Court will define the contours of the section 10(b) implied cause of action by purporting to determine what the 1934 Congress would have done, while surreptitiously considering policy implications. *Id.* This commentator suggests that the Court seeks to perform these functions with respect to securities laws. *Id.* It appears, however, that the Court may have adopted this approach in more general circumstances. *See infra* note 247 (comparing two Supreme Court decisions considering express and implied rights of action under Title IX and under ERISA).

238. *See* Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (rejecting the argument that a different analysis should be used to determine remedies for implied causes of action than for express causes of action); *cf.* Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2763-64 (1991) (recognizing that "where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely").

an implied cause of action, federal courts must continue to apply the strict analytical framework set forth in *Texas Industries* and *Northwest Airlines*.[239] Conversely, when contribution for an implied cause of action is sought, *Musick, Peeler* allows federal courts to treat the question as ancillary to the underlying implied cause of action, thereby giving courts broad discretion in determining whether to create a right of contribution.[240]

However, the dissent's warning must be heeded.[241] The majority's analysis provides federal courts with immense power to develop so-called remedies and procedural aspects of the implied causes of action recognized thus far by the Supreme Court.[242] The Court exercised this power in *Central Bank v. First Interstate Bank*[243] to promulgate which matters of a section 10(b) cause of action are primary and which are ancillary.[244] The Court explained that its section 10(b) cases can be divided into those that have determined the scope of conduct prohibited by section 10(b) and those that have concerned the elements of the 10(b) private liability scheme.[245] Given the Court's willingness to construe and develop ex-

239. *See supra* notes 159-69 and accompanying text (discussing the majority's decision to distinguish between express and implied causes of action).

240. *See supra* notes 164-68 and accompanying text (discussing the majority's decision to treat a right of contribution as ancillary to an underlying implied right of action).

241. *See supra* notes 209-11 and accompanying text (discussing the *Musick, Peeler* dissent's argument that congressional silence is not a license for judicial action).

242. Since *Borak*, the Supreme Court created implied causes of action under a number of statutes. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 356 (1982) (finding an implied right of action under the Commodity Exchange Act, 7 U.S.C. §§ 1-26); Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (finding an implied right of action under section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1758); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (finding an implied right of action under section 1981 of the Civil Rights Acts, 42 U.S.C. § 1981); Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (finding an implied right of action under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c); J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (finding an implied right of action under section 14 of the 1934 Act, 15 U.S.C. § 78n); *see supra* note 71 (listing Supreme Court decisions creating implied causes of action since *Transamerica Mortgage*); *see also* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1032 (1992) (finding that the implied right of action under section 901 of Title IX supports an implied right to damages).

243. 114 S. Ct. 1439 (1994).

244. *Id.* at 1145-46.

245. *Id.* In reshaping the scope and elements of the section 10(b) cause of action, the Court overruled numerous lower court decisions that had recognized the section 10(b) aiding and abetting cause of action. *Id.* The *Central Bank* Court discerned from the statutory text of section 10(b) that no aiding and abetting liability existed. *Id.* at 1448. This decision demonstrates the extent to which the Court is willing to alter the rights and remedies available to the beneficiaries of the 1934 Act, as well as its willingness to narrowly construe the scope of implied liability under section 10(b). *See supra* note 236 (discussing the implications of the *Central Bank* decision).

isting implied rights of actions,[246] it is likely that federal courts will use their new power to fashion contribution remedies and other rights that *Northwest Airlines* and *Texas Industries* would have prevented them from fashioning if these statutes contained an express cause of action.[247]

C. *The 1934 Congress and the Contribution Issue*

In *Musick, Peeler*, the Court sought to discern whether the 1934 Congress would have allowed contribution under section 10(b) if it had considered the issue.[248] Unfortunately, the Court merely engaged in strict statutory construction, limiting its inquiry to reviewing other sections of the 1934 and 1933 Acts.[249] It recognized two similar sections authorizing contribution and attempted to distinguish those sections lacking such authorization.[250] The Court then concluded that section 10(b) more closely resembled those sections containing contribution rights, and relied upon this resemblance to permit contribution.[251]

This conclusion is suspect because the Court wholly failed to consider what the 1934 Congress would have done in light of the general state of the law of contribution in 1934. The 1992 Supreme Court decision *Franklin v. Gwinnett County Public Schools*,[252] conversely, used a more comprehensive analysis in deciding whether to provide an implied remedy to an underlying implied cause of action under Title IX.[253] In *Franklin*, the Court evaluated the general state of the law before and after Title IX was

246. *See* Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2764 (1991) (stating that the Court has limited power to round out implied causes of action); *see also supra* notes 72-74 and accompanying text.

247. *Compare* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1034-35 (1992) (finding an implied right to monetary damages from an implied right of action under Title IX) *with* Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993) (finding no implied right to monetary damages from an express right of action under ERISA).

248. *See supra* text accompanying note 173 (discussing the majority's standard).

249. *See supra* notes 175-82 and accompanying text (discussing the majority's comparison of section 10(b) to sections 9 and 18).

250. *See supra* notes 175-82.

251. *See supra* notes 175-82. The Court failed to examine the legislative histories of these provisions. If it had done so, the Court would have discovered that sections 9 and 10 were treated similarly in congressional debates when Congress was considering the enactment of the 1934 Act. Thel, *supra* note 78, at 430. The Court also would have considered that the 1934 Congress intended section 10(b) to serve as a "catch-all" provision. *See supra* note 76 (discussing references to section 10(b) in the legislative history of the 1934 Act). The Court, therefore, reasonably could have concluded that contribution should have been provided in section 10(b) because sections 9 and 10(b) are so closely related.

252. 112 S. Ct. 1028, 1035 (1992).

253. *Id.* at 1035-36. Similarly, the Supreme Court in Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994), examined the state of aiding and abetting law before the 1934 Act was promulgated to find that the 1934 Congress would not have attached aiding and abetting liability to section 10(b). *Id.* at 1451-52.

enacted, and after the underlying implied cause of action was created, to determine what the enacting Congress would have done.[254]

A similar analysis should have been made in *Musick, Peeler* to determine whether the 1934 Congress would have provided a right of contribution under section 10(b). If the Court had done so, it is less likely that it would have been able to create such a right without considering policy issues, since a right to contribution was not generally recognized under the common law in 1934.[255] At that time, the rule in all but four common law jurisdictions was that there was no right to contribution between joint tortfeasors.[256] Thus, the 1934 Congress understood that a right of contribution did not exist unless explicitly provided for within a statute. An historical review rarely reveals that the omission of a particular remedy was merely an oversight, or that Congress believed that the courts would recognize an implied remedy thereby making it unnecessary for Congress to expressly create such a remedy.[257] If Congress intended to provide a right of contribution under section 10(b), it could have expressly recognized one, as it did in sections 9 and 18.[258]

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254. *Franklin*, 112 S. Ct. at 1035-36. The *Franklin* Court determined that Congress was fully aware that the Court recognized an implied right of action under Title IX. *Id.* at 1036. The Court further determined that two congressional amendments to Title IX validated its earlier decision to provide an implied right of action. *Id.* Similarly, the *Musick, Peeler* Court acknowledged congressional validation of its authority to define the scope of the section 10(b) implied cause of action. *See supra* notes 169 and accompanying text (discussing the majority's acknowledgement of its authority to define the scope of the section 10(b) cause of action).

255. Until this century, contribution among tortfeasors was not recognized under English or American common law. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. a (1979). During the twentieth century, however, many American jurisdictions rejected the common law rule either by statute or by judicial decision. As a result, approximately 40 jurisdictions now allow for contribution among tortfeasors. See Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 86-87, nn.16-17 (1981) and RESTATEMENT (SECOND) OF TORTS § 886A cmt. a (1979), for a thorough discussion of the trend in American courts and state legislatures to recognize a right to contribution.

256. *See Northwest Airlines*, 451 U.S. at 87 n.17; *see also* Francis H. Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936). The four jurisdictions adopting a judicially created right to contribution before the enactment of the 1934 Act were: Louisiana, Quatray v. Wicker, 151 So. 208 (La. 1933); Pennsylvania, Goldman v. Mitchell-Fletcher Co., 141 A. 231 (Pa. 1928); Minnesota, Underwriters at Lloyds v. Smith, 208 N.W. 13 (Minn. 1926); and Wisconsin, Ellis v. Chicago & N.W. Ry., 167 N.W. 1048 (Wis. 1918).

257. *See* Merrill, *supra* note 3, at 51; *see also* Langmore & Prentice, *supra* note 15, at 1041 (explaining that, in light of the legal landscape in 1933, the omission of the right of contribution in a statutory scheme was the norm, while the inclusion was an "aberration"); Thel, *supra* note 78, at 385, 431 (arguing that Congress in fact intended the SEC to regulate section 10(b), thereby distinguishing it from other sections of the 1934 Act).

258. Support for this notion is found in the Court's *Transamerica Mortgage* and *Touche Ross* decisions, which held that when a court seeks to discern congressional intent through an examination of other provisions within an act, it would be improbable that Congress

Finally, the *Musick, Peeler* Court disingenuously ignored serious policy questions underlying its recognition of a contribution right, and even contradicted its own analysis on this point.[259] The Court found that it possessed the authority to treat contribution as an ancillary question to the section 10(b) implied right of action because it would be "unfair" to tortfeasors sued under section 10(b) for the Court to refuse to allow them to obtain contribution from joint tortfeasors.[260] But deciding what is fair is a policy decision.[261] The Court expressly refused to consider other equally relevant policy questions, such as equity and efficiency, in determining whether to create an implied right to contribution.[262] The Court returned to policy questions at the conclusion of its opinion, however, stressing that its holding will stand only so long as the right of contribution does not adversely affect the efficiency of the section 10(b) action.[263]

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was "absentminded" in not including such right in the provision in question when other provisions expressly provided for such a right. *See supra* notes 66-70 and accompanying text; *see also* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 n.11 (1981) (finding "[t]hat Congress knows how to define a right to contribution is shown by the express actions for contribution" under various sections of the 1933 and 1934 Acts).

259. In Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991), the Supreme Court expressly stated that if faced with a claim to round out the scope of an implied right of action, it will consider policy reasons to determine the outer limits of that right. *Id.* at 2764. Surprisingly, the Supreme Court in *Musick, Peeler* faulted the parties for devoting considerable portions of their briefs to discussing the policy considerations of contribution. Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085, 2089 (1993).

260. *Musick, Peeler*, 113 S. Ct. at 2088; *see supra* note 168 and accompanying text.

261. In *Texas Industries*, the Supreme Court explained that it was unable to imply a right of contribution because the policy questions presented required a "range of factors to be weighed," which is "a matter for Congress, not the courts, to resolve." *Texas Industries*, 451 U.S. at 646. The Court concluded that "[a]scertaining what is '*fair*' in this setting calls for inquiry into the entire spectrum of [an area of] law, not simply the elements of a particular case or category of cases." *Id.* at 646-47 (emphasis added).

262. *Musick, Peeler*, 113 S. Ct. at 2089; *see supra* note 172 and accompanying text. *But see supra* note 259 (discussing the Supreme Court's consideration of policy issues in defining the contours of an implied right of action).

263. *See supra* note 184-85 and accompanying text (discussing the majority's decision that its rule of contribution is an effective remedy). The tension prevalent in *Musick, Peeler*—whether the Court should consider policy issues—brings to bear the same concerns the Court faces in creating federal common law. *See* Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 575-76; *see also supra* notes 3-7 and accompanying text (discussing the judiciary's authority to create federal common law). By deciding policy issues and identifying them as such, the Court confronts its lawmaking function. *See supra* note 4 (discussing separation of powers concerns). Historically, when the Supreme Court confronted such policy issues, as in *Texas Industries* and *Northwest Airlines*, it rejected the judiciary's role in deciding policy as well as narrowly construing its authority to create federal common law. *See* Smith, *supra*, at 613-14; *see also supra* note 261 (discussing the Court's rejection of a policy making function). But the *Musick, Peeler* Court avoids such a direct confrontation, while still considering policy issues. *See supra* notes 259-62 and accompanying text. Consequently, *Musick, Peeler* may

V. Conclusion

The Supreme Court in *Musick, Peeler & Garrett v. Employers Insurance* finally acknowledged the existence of an implied right to contribution under section 10(b). The Court correctly undertook this jurisprudence to be fair to tortfeasors. It did so, however, at the cost of rendering its strict implied rights jurisprudence inapplicable where remedies are concerned. The blurring of the distinction between rights and remedies risks giving the judiciary broad authority to transform substantive rights into remedies when seeking to provide relief through an implied cause of action. Paradoxically, *Musick, Peeler* seems to give the judiciary virtually unlimited power to impose contribution for violations of statutes in which Congress failed to create an express cause of action, but little if any power to imply contribution for a cause of action that Congress expressly created.

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be a signal that the Court's restrictive view of the judiciary's function in creating federal common law is shifting.