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Emerging Standards for Implied Actions Under Federal Statutes

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EMERGING STANDARDS FOR IMPLIED ACTIONS UNDER FEDERAL STATUTES

The recent proliferation of federal legislation has created many situations where a party, suffering injury as a result of another's conduct in violation of a criminal or regulatory statute, is unable to bring a civil cause of action based upon the provisions of the statute.[1] In such cases, the courts often find that a civil cause of action has been implied by the legislature, although not expressly provided for in the statute.[2] The inference of a civil cause of action by a court has sometimes been attacked as constituting improper judicial legislation.[3] The more widely accepted view is that, by recognizing a civil action implied by the legislature as a part of the statutory scheme, a court effectuates the overall legislative goal by adjusting the form of relief that courts may grant under the statute.[4]

Until the recent Supreme Court decision in *Cort v. Ash*,[5] however, the federal courts had failed to develop a single, uniform set of standards to determine when a court should find a civil cause of action implied by Congress.[6] Instead, varying presumptions regarding legislative intention and

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[1] *See, e.g.*, Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Comment, *Private Rights from Federal Statutes: Toward a Rational Use of Borak*, 63 NW. U.L. REV. 454 (1968).

See also Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Thayer, *Public Wrongs and Private Action*, 27 HARV. L. REV. 317 (1914).

[2] *See, e.g.*, Note, *supra* note 1.

[3] Note, *supra* note 1, at 285, 291; Comment, *supra* note 1, at 456 n.15. A basic objection to the implication process is its alleged usurpation of the legislative function. Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting).

[4] *See* Note, *supra* note 1, at 291. Since the limits of an implied remedy are determined by the court, a variety of types of relief, including damages and injunctive relief, have been granted in implied action litigation. Different considerations operate in determining the propriety of granting implied injunctive or damage relief. For example, the danger involved in awarding monetary damages, especially punitive damages, is the imposition of an excessive penalty, because the measure of damages will be fixed by the extent of the injury, rather than by a statutory provision. Similarly, in granting injunctive relief, the court must exercise its traditional discretion to minimize the possibility of interference with a statutory enforcement program. *Id.* at 296-97.

[5] 422 U.S. 66 (1975).

[6] Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1396 (1975). State courts are split on whether to accept the doctrine of implied remedies. *See* Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. MO. KAN. C.L. REV. 292 (1972). Several leading jurisdictions allow implied remedies. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); Laczko v. Jules Meyers, Inc., 276 Cal. App. 2d 293, 80 Cal. Rptr. 798 (1969); B.F. Farnell Co. v. Monahan, 377 Mich. 552, 141 N.W.2d 58 (1966); Caso v. Gotbaum, 67 Misc. 2d 205, 323 N.Y.S.2d 742 (Sup. Ct. 1971).

rules of statutory construction were applied,[7] and as a consequence of this judicial disunity, the results reached, particularly in the lower federal courts, frequently lacked consistency.[8]

This article will examine the theoretical basis for finding implied causes of action in legislation and the development of the implication doctrine in the federal courts. In particular, the *Cort* case will be discussed, both in terms of the standards articulated by the Supreme Court in dicta and the potential impact of *Cort* on the law of implied remedies.

I. DEVELOPMENT OF THE IMPLICATION DOCTRINE PRIOR TO *Cort v. Ash*

A. Theoretical Basis of the Doctrine

Civil law courts have traditionally regarded legislative enactments as embodiments of general legal principles and have commonly applied statutes by analogy to circumstances which are not within the exact statutory terms.[9] In contrast, American courts have construed statutes narrowly, believing that statutory law was, unlike the common law, not a source of general principles applicable in different types of cases.[10] Historically, except in the field of negligence, American courts have been reluctant to venture beyond the express statutory sanctions in order to impose liability for failure to abide by statutory standards of conduct.[11] To the extent that civil remedies are found to be implicit in criminal or regulatory statutes, the implication doctrine departs from the traditional Anglo-American judicial treatment of statutes and resembles the civil law practice.

The implication doctrine represents an extension of the traditional practice of inferring negligence causes of action from statutory standards of

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[7] *Compare* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (Civil in personam relief held not to be precluded by the criminal penalties provided by section 15 of the Rivers and Harbors Act of 1899) *and* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Civil relief available to stockholder for injuries resulting from violations of the section 14(a) of the Securities Exchange Act of 1934 bar on the use of false and misleading proxy statements) *with* National R.R. Passengers Corp. v. National Ass'ns of R.R. Passengers, 414 U.S. 453 (1974) [hereinafter referred to as *Amtrak*] (Section 307(a) of the Amtrak Act held to provide the only civil remedies for violations of the Act, thus precluding additional civil actions by aggrieved rail passengers *and* T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (Post-shipment challenge to the reasonableness of properly filed rates by shipper of goods by motor shipper not allowed under the Motor Carrier Act of 1935).

[8] *Compare* Simpson v. Sperry Rand Corp., 350 F. Supp. 1057 (W.D. La. 1972), *vacated on other grounds*, 488 F.2d 450 (5th Cir. 1973), *and* Western v. Hodgson, 359 F. Supp. 194 (S.D.W. Va. 1973) *with* Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974), on the question of whether a private cause of action can be inferred from the Consumer Credit Protection Act of 1968, § 1674(a), 15 U.S.C. § 1674(a) (1970).

[9] Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936).

[10] *Id.*

[11] *Id.*

conduct to non-negligence contexts.[12] The theory of implied actions, however, also is founded upon a judicial recognition of the duty to enforce the purpose of a statute.[13] Whereas Congress enacts a statute in order to accomplish particular goals, the courts enforce the statute on a case-by-case basis and ensure the ability of the expressly provided sanctions to effectuate the legislative purposes.[14] Statutory sanctions and remedial provisions may be ineffective in accomplishing the legislative goals because of the failure of Congress to consider all of the particular circumstances in which the general provisions of the statute would apply. It can be argued that as a deliberative body that determines general policy, Congress is institutionally incapable of enacting statutes with detailed remedial provisions. Similarly, the lack of effective remedies may be attributed to a legislative poverty of imagination on the topic of remedial provisions. On the other hand, a lack of specific remedies may indicate that, since the institutional role of Congress consists of the establishment of legal rights and standards of conduct, Congress has delegated to the federal courts the responsibility of providing the remedies necessary to protect congressionally created rights. Accordingly, in order to effectuate the goals of a statute, where the express remedies are inadequate for that purpose, the court may find a civil remedy implied in the legislative scheme.[15] By granting the right to assert the traditional judicial remedy of a civil action,[16] the court, functioning as a "coordinate lawmaker,"[17] engages in a form of "remedial creativity."[18]

The common law implication doctrine originated with the English case of *Couch v. Steel*,[19] where the court found a civil cause of action in favor

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[12] Comment, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413, 430 n.85 (1972). This idea is also embodied in RESTATEMENT (SECOND) OF TORTS § 286 (1965). Section 286 provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
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> a. to protect a class of persons which includes the one whose interest is invaded, and
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> b. to protect the particular interest which is invaded, and
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> c. to protect the interest against the kind of harm which has resulted, and
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> d. to protect that interest against the particular hazard from which the harm results.

[13] Note, *Implying a Civil Remedy from 15 U.S.C. § 1674(a)*, 54 NEB. L. REV. 744, 749 (1975).

[14] Note, *supra* note 1, at 291.

[15] *Id.*

[16] *See, e.g.*, Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 402-03 n.4 (1971) (Harlan, J., concurring).

[17] Note, *supra* note 1, at 291.

[18] Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts*, 117 U. PA. L. REV. 1, 33 (1968).

[19] 118 Eng. Rep. 1193 (Q.B. 1854). *Couch* is no longer followed in England. F. POLLOCK, TORTS 158 n.(m) (1939). The modern English view considers statutory silence on the question of civil liability to militate against implied civil liability. *See generally* Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960).

of an ill sailor implicit under a criminal statute requiring shipowners to maintain a proper supply of medicine on board.[20] The court reasoned that

> in every case where a statute enacts, or prohibits a thing for the benefit of a person, [that person] shall have a remedy . . . for recompense of a wrong done him contrary to said law.[21]

In addition to recognizing that the violation of the statute involved both a public wrong and a private wrong, the court, in deciding to infer the existence of a private cause of action, also noted that a denial of the implied action would deprive the plaintiff of any remedy.[22]

The United States Supreme Court first invoked the implication doctrine in *Texas & Pacific Railway v. Rigsby*,[23] where the Court allowed a railroad worker recovery for personal injuries resulting from a violation of the Federal Safety Appliance Act[24] by his employer.[25] The Court found that Congress promulgated the Act to protect railroad employees. The Act expressly provided that injured parties were presumed not to have assumed the risk of injury, indicating that Congress contemplated civil actions by employees based on employer negligence, to which assumption of risk is ordinarily an affirmative defense.[26] The Court stated the test for finding an implied civil action as follows:

> A 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.[27]

Although the Supreme Court's approach in *Rigsby* achieved general acceptance in the federal courts,[28] they recognized that the *Rigsby* decision could not provide a comprehensive set of standards. Since most criminal or regulatory statutes are intended to protect or to benefit some specific group, strict application of the bare *Rigsby* formulation would result in the inference of civil remedies from nearly all statutes.[29] By not requiring an examination of the efficacy of other available means of enforcement, the

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[20] The duty was imposed under 7 and 8 Vict., ch. 112, § 118.

[21] 118 Eng. Rep. at 1197.

[22] *Id.*

[23] 241 U.S. 33 (1916).

[24] 45 U.S.C. §§ 1-7, 11-15 (1970).

[25] *Rigsby* was overruled in Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934), where the Court held that the Federal Safety Appliance Act no longer serves as the basis of an implied civil action. The reversal is attributable to the proliferation of state legislation giving workers redress in similar situations under state law. *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798-806 (2d ed. 1973); Note, *supra* note 1, at 285.

[26] 241 U.S. at 40.

[27] 241 U.S. at 39. The Court viewed the case as one in which the *ubi jus ibi remidium* ["Where there is a right, there is a remedy. . . ." BLACK'S LAW DICTIONARY 1690 (4th ed. 1968)] maxim applied. 241 U.S. at 40.

[28] *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975).

[29] *See, e.g.*, Ash v. Cort, 496 F.2d 416, 429 (3d Cir. 1974) (Aldisert, J., dissenting), *rev'd*, 422 U.S. 66 (1975).

Rigsby test neglects to focus inquiry upon the need for an implied remedy, apparently limiting investigation to establishing injury to the plaintiff and the inclusion of the plaintiff within the protected class.[30] Similarly, by assuming that an implied remedy would be consistent with the statutory purpose, no analysis was accorded to the potential impact of an implied remedy on the effectuation of other, possibly conflicting, statutory goals.[31]

Prior to the *Cort* decision, however, the federal courts had not generated more comprehensive standards. Although the general *Rigsby* formulation was accepted, the result reached by a court depended upon a variety of conditions, including the language of the statute in question; congressional policy goals evidenced by the statute and the legislative history; the nature and efficacy of the enforcement scheme; the presence or absence of an indication of congressional intent on the question of private remedies; and the equities of each particular case. One commentator argued that the approach employed by a court with respect to the significance of an absence of legislative expression of intent regarding private actions is a function of its predetermination of whether or not to permit a civil cause of action.[32] Courts varied the emphasis accorded to the numerous considerations, depending upon whether a civil action was to be inferred or denied. One line of cases stressed the need of the intended beneficiaries of the statute for redress from violations of the statute and the need for remedies sufficient to effectuate congressional objectives, and found civil actions implied by Congress in the statutes considered.[33] Another line of cases curtailed

[30] Comment, *supra* note 6, at 1394.

[31] *Id.* at 1394-95.

[32] Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight, or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441, 443 (1974).

[33] *See, e.g.*, Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Victim of illegal search, seizure and arrest held to state a federal cause of action under the fourth amendment to recover damages upon proof of injuries resulting from the agents' violation of the fourth amendment); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Civil relief to stockholder held available for injuries resulting from a violation of the section 14(a) of the Securities Exchange Act of 1934 bar on the use of false and misleading proxy statements); Tunstall v. Brotherhood of Locomotive, Firemen & Enginemen, 323 U.S. 210 (1944) (Minority group union members held entitled under the Railway Labor Act to a remedy in damages for violations of a union's duty to represent workers without racial discrimination).

Accord, Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974) (Civil damage remedy available to employee discharged for one wage garnishment in violation of section 1674(a) of the Consumer Credit Protection Act of 1968); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970) (Former employee of employer subject to the Railway Labor Act held entitled to civil action for reinstatement and damages resulting from discharge for union organizational activities where employee was not a union member because his employee unit was excluded from the certification election); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (Migrant workers who accepted employment through employment system established by the Wagner-Peyser Act held entitled to civil remedies for violations of the Act); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969) (Employee unlawfully discharged for testifying at a proceeding under the Fair Labor Standards Act held entitled to a civil suit for damages under the Fair Labor Standards Act for his unlawful discharge); Kardon v. National Gypsum

implied civil remedies by emphasizing restrictive rules of construction and the adequacy of existing remedies.[34]

The differing results also reflected conflicting attitudes toward the exercise of judicial power to accomplish implicit legislative goals. A key assumption underlying the view favorable to implied remedies was that Congress, in the absence of a contrary expression of intent, meant to allow civil causes of action by parties injured by another's violation of a criminal or regulatory statute.[35] Under this view, courts were free to infer civil remedies unless restricted by a contrary legislative expression or act.[36] The opposing view was that in the absence of an expression of legislative intent to allow civil actions, no civil remedies could be inferred.[37] The former approach viewed a legislative history silent on the issue of civil actions as permitting implied remedies since a legislative intention to preclude such remedies had not been expressed,[38] while the more restrictive view perceived such a legislative history as manifesting a legislative intent to preclude a civil remedy.[39]

J.I. Case Co. v. Borak[40] and *Wyandotte Transportation Co. v. United*

Co., 69 F. Supp. 512 (E.D. Pa. 1946) (Stockholders held entitled under the Securities Act of 1934 to recover damages resulting from fraudulent inducement to sell their stock for less than its true value).

[34] *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) (Customers of failing brokerages held not entitled to a civil action compelling the SIPC to initiate liquidation proceedings against the failing brokerage under the Securities Investor Protection Act of 1970); National R.R. Passengers Corp. v. National Ass'ns of R.R. Passengers, 414 U.S. 453 (1974) (Section 307(a) of the Amtrak Act held to provide the only civil remedies for violations of the Act, thus precluding additional civil remedies by aggrieved rail passengers); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (Post-shipment challenge to the reasonableness of properly filed rates by shipper of goods by motor shipper not allowed under the Motor Carrier Act of 1935); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) (Private action held not available under sections 4 and 16 of the Clayton Act for sales at unreasonably low prices for the purpose of eliminating competition, because such practices are unlawful only under section 3 of the Robinson-Patman Act which provides only for penal sanctions); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) (No civil action to recover past unreasonable utility charges implied in the Federal Power Act).

Accord, Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972) (No civil cause of action for damages resulting from violation of the Farm Labor Contractor Registration Act available due to the exclusive nature of the penal sanctions of the Act); Odell v. Humble Oil & Refining Co., 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953) (No civil action for damages implied from the criminal obstruction of justice statute (18 U.S.C. § 1503 (1970)) where plaintiffs were discharged by their employer after being subpoenaed to and testifying before a grand jury investigating the activities of the employer).

[35] *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 512-14 (E.D. Pa. 1946).

[36] *E.g.*, Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033-34 (9th Cir. 1970).

[37] *See, e.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir. 1972).

[38] *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970).

[39] *See, e.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir. 1972).

[40] 377 U.S. 426 (1964).

States[41] exemplify the favorable attitude toward implied remedies. *Borak* involved an alleged violation of section 14(a) of the Securities Exchange Act of 1934,[42] which makes the use of false or misleading proxy statements illegal. One basis for holding that an implied civil cause of action exists under the statute was found in section 27 of the Act which gives the federal courts jurisdiction over any duties or liabilities arising under the Act.[43] Additionally, the Supreme Court found that Congress intended section 14(a) to have "broad, remedial purposes."[44] Notwithstanding the absence of specific reference to private actions in this section, one of its main purposes was the "protection of investors," a congressional objective which requires "the availability of judicial relief where necessary" in order to achieve its end.[45] The implied civil remedy was also justified by the inability of the Securities and Exchange Commission to adequately enforce section 14(a) without private actions as "necessary supplement[s] to Commission action."[46]

In *Wyandotte*, the Supreme Court held that the criminal sanction of section 15 of the Rivers and Harbors Act of 1899,[47] which proscribes the negligent sinking of a ship in navigable waterways, was not an exclusive remedy under the statute, but that the United States could bring a civil action to recover from the owner of the sunken vessel the costs of removing the vessel from the waterway. An implied civil remedy was found despite the absence of express legislative intent to allow such relief. The Court articulated a set of criteria for determining when an implied remedy should be found. First, the expressly provided criminal sanctions must be inadequate "to ensure the full effectiveness of the statute which Congress had intended."[48] This criterion mandates an analysis of the actual effectiveness of the enforcement program and a determination of the legislative intent. Second, the interest of the plaintiff must be within the protection of the statute. Finally, the injury must be "of the type that the statute was intended to forestall."[49] The *Borak-Wyandotte* approach has been followed in a number of cases.[50]

In several cases, the Supreme Court refused to find implied remedies by

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[41] 389 U.S. 191 (1967). *See also* Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 371 U.S. 84 (1962); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1034 (9th Cir. 1970); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399, 1403-04 (D.D.C. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

[42] 15 U.S.C. § 78n(a) (1970).

[43] 377 U.S. at 430-31.

[44] *Id.* at 431.

[45] *Id.* at 432.

[46] *Id.*

[47] 33 U.S.C. § 409 (1970).

[48] 389 U.S. at 202.

[49] *Id.*

[50] *See, e.g.*, Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1034 (9th Cir. 1970); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399, 1403-04 (D.D.C. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

narrowly construing the language and the purposes of statutes.[51] In *Montana-Dakota Utilities v. Northwestern Public Service Co.*,[52] the Court refused to find an implied civil action which would have allowed recovery of unreasonable past utility rate charges under a statute which made unreasonable rate charges unlawful.[53] The Court held that an implied remedy to recover unreasonable rate charges would be incompatible with the statutory scheme delegating the determination of reasonable rates to an administrative agency, since the agency was not empowered to grant reparations for past overcharges. The Court reasoned that since the federal judiciary lacked the power to make rate determinations, an implied remedy would be an "improvisation"[54] not intended by Congress. In effect, the requested remedy sought to obtain indirect agency action on a matter which Congress withheld from the range of direct agency action.

In *T.I.M.E., Inc. v. United States*,[55] the Court refused to infer a civil cause of action in favor of a shipper seeking to recover past unreasonable charges from a motor carrier on the ground that whereas the sections of the Interstate Commerce Act[56] covering rail and water shippers expressly allow a civil remedy for unreasonable past charges, the section of the Act governing motor carriers[57] does not provide a private remedy. Given this omission in the statutory language, the Court held that it could not impute to the Congress the intention to grant the requested remedy.

National Railroad Passenger Corp. v. National Association of Railroad Passengers[58] *(Amtrak)* further demonstrates the use of restrictive attitudes in denying implied civil remedies. The Amtrak Act,[59] except in cases involving labor agreements, expressly provides only the Attorney General with the right to institute a civil action.[60] The Court held that express provision of the remedy to the Attorney General precluded the inference of a civil action in favor of the plaintiffs. The legislative history of the Act also evidenced an intent to preclude civil remedies.[61] Additionally, the Court determined that the proposed implied remedy would conflict with the Act's policy of streamlining the processes for eliminating unproductive rail routes in order to save the overall passenger system.

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[51] *See, e.g.*, T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).

[52] 341 U.S. 246 (1951).

[53] 16 U.S.C. § 824d(a) (1970).

[54] 341 U.S. at 255.

[55] 359 U.S. 464 (1959).

[56] 49 U.S.C. § 1 *et seq.* (1970).

[57] 49 U.S.C. § 301 *et seq.* (1970).

[58] 414 U.S. 453 (1974).

[59] 45 U.S.C. § 501 *et seq.* (1970).

[60] 45 U.S.C. § 547(a) (1970).

[61] 414 U.S. at 457, 464-65. *But see* the lower court's opinion in *Amtrak*, Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co., 475 F.2d 325, 336-37 (D.C. Cir. 1973), *rev'd sub nom.* National R.R. Passengers Corp. v. National Ass'ns of R.R. Passengers, 414 U.S. 453 (1974), in which the legislative history of the Amtrak Act was held inconclusive on the question of whether the Congress intended to allow the general public to seek redress for violations of the Act by means of private civil actions.

II. *Cort v. Ash*

Cort v. Ash[62] is the first decision to attempt to articulate comprehensive standards to be used in determining the appropriateness of inferring a civil cause of action from a criminal or regulatory statute. The *Cort* guidelines represent an effort to reconcile the sometimes conflicting approaches discussed in part I of this note. In this respect, the differing opinions in *Cort* at the district and appellate levels are illustrative of the general judicial disunity on the issue.

Cort involved a stockholder derivative suit against the directors of the Bethlehem Steel Corporation instituted by Richard A. Ash, a United States citizen and registered voter, and owner of fifty shares of Bethlehem stock.[63] The complaint alleged that Bethlehem had expended corporate funds for partisan political advertisements[64] in violation of the Federal Corrupt Practices Act of 1925 as amended by the Federal Election Campaign Act of 1971.[65] This statute prohibits the use of corporate funds in federal political campaigns and provides criminal sanctions for violations.[66] Ash sought immediate and prospective injunctive relief against further corporate expenditures in political campaigns and compensatory and punitive damages in favor of the corporation.[67]

The district court denied the request of Ash for a preliminary injunction and concluded that Ash had failed to establish the likelihood of irreparable harm and the substantial probability of success on the merits, two of the requisite preconditions for preliminary injunctive relief.[68] The district court found the primary purpose of the prohibition against corporate expenditures in federal campaigns was to assure "a popularly elected government,"[69] and that the protection of stockholders was only a secondary concern of the statute, thus requiring a substantial showing by plaintiff of a congressional

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[62] 422 U.S. 66, 78 (1975).

[63] *Id.* at 71-72.

[64] The advertisements in question included excerpts from a speech given by Stewart S. Cort, Chairman of the Board of Bethlehem Steel Corporation. Mr. Cort urged Americans to mobilize "truth squads" in order to combat irresponsible political rhetoric in the 1972 election campaigns. The advertisements were published in August and September of 1972 in several leading magazines, including *Time, Newsweek,* and *U.S. News and World Report,* and in nineteen local newspapers serving areas in which Bethlehem had production facilities. The $500,000 cost of the advertising was paid from the general funds of the corporation.

[65] 18 U.S.C. § 610 (Supp. III, 1973).

[66] *Id.* The following penalties are prescribed: (1) $5,000 maximum fine against any corporation or labor union violating the Act; (2) $1,000 maximum fine and/or one year imprisonment for every officer or director of any corporation or officer of any labor organization who consents to any contribution or expenditure by the corporation or labor organization and any person who accepts or receives any contribution; (3) $10,000 maximum fine and/or two years maximum imprisonment if the violation was willful.

[67] A second count in the original complaint stated a claim for *ultra vires* acts by the corporate directors. This claim was omitted from the amended complaint when the district court required the posting of $135,000 security. *See* note 168 and accompanying text *infra.*

[68] 350 F. Supp. 227 (E.D. Pa. 1972).

[69] *Id.* at 231.

intent to allow an implied action. Noting that the power of enforcement was expressly vested in the Department of Justice and that the sanctions are penal in character, the district court held that no private cause of action could be inferred from the statutory scheme due to the exclusivity of the penal sanctions. In a later, unreported order, the district court granted defendants' motion for summary judgment, reciting only that no material dispute of fact existed, and that the defendants were not liable to plaintiff for the alleged violation.[70]

The Court of Appeals for the Third Circuit affirmed the denial of the preliminary injunction on the ground that the finding of the district court that plaintiff would not suffer irreparable harm from the denial of the preliminary injunction was not clearly erroneous.[71] It reversed, however, the decision of the district court granting the motion for summary judgment.[72] The court of appeals found that a private cause of action, "whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief," was a proper means of seeking redress for violations of the prohibition against the use of corporate funds in federal elections.[73]

The court of appeals utilized a two-part test for determining whether a cause of action could be inferred from a statute. First, the enactment violated must be designed to protect "a class of persons including the plaintiff from the harm of which plaintiff complains."[74] Secondly, the requested relief must comport with the furtherance of the objectives of Congress in enacting the statute. In the absence of an indication of legislative intention to provide civil actions, the court should determine the propriety of the remedy in terms of its effectuation of the underlying policies of the statute. The court of appeals viewed the *expressio unius est exclusio alterius*[75] maxim invoked in *Amtrak* merely as an aid in deciding when congressional intent to preclude a private remedy could be inferred, not as a conclusive presumption that no civil remedy should exist.[76]

Although recognizing *Amtrak* as an instance in which the Congress clearly indicated its intention not to permit a civil action, the court of appeals limited its application to situations where the remedy provided by statute "may logically be said to be exclusive."[77] Thus, *Amtrak* was distinguishable on the ground that the Amtrak Act[78] expressly provides for civil actions to be

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[70] Ash v. Cort, 496 F.2d 416, 418 (3d Cir. 1974).

[71] Ash v. Cort, 471 F.2d 811 (3d Cir. 1973).

[72] 496 F.2d 416 (3d Cir. 1974).

[73] *Id.* at 424.

[74] *Id.* at 421.

[75] "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1968).

[76] The court also questioned the extent to which *Amtrak* relied upon the *expressio unius est exclusio alterius* maxim. 496 F.2d at 421 n.3. It observed that the *Amtrak* Court, after stating the *expressio unius* maxim, also found legislative intent to withhold a civil remedy and determined that the requested remedy would be inconsistent with the policies of the Act.

[77] 496 F.2d at 421.

[78] 45 U.S.C. § 547 (1970).

maintained by the Attorney General, whereas the federal election statute provides only criminal sanctions.

In applying the *Borak-Wyandotte* standards, the court of appeals found that, as a voter, plaintiff Ash was within the class of intended beneficiaries of the Act, and that, as a stockholder, he was a member of the class secondarily protected by the statute.[79] Also, the harm of which Ash complained, the use of corporate funds in a federal election campaign, was the harm that the Act sought to forestall. In concluding that its first standard had been satisfied, the court of appeals rejected the contention that Congress, in a statute designed to protect the general public, could not have implied a civil action.[80] Acceptance of this contention would foreclose any possibility of a civil action being inferred from a criminal statute, since most criminal statutes aim to protect the whole community. The court's finding that the plaintiff, as a registered voter, was protected by the statute would have been undermined by the acceptance of this argument, and the court of appeals would have been compelled to find that plaintiff was sufficiently protected by the Act to be entitled to a civil action solely on the basis of his status as a stockholder. The court conceded, however, that "[t]he breadth of the protected class is . . . relevant to the propriety of allowing criminal sanctions, rather than private actions, to enforce a statutory prohibition . . . ."[81] This concession indicated the reluctance of the court of appeals to embrace the logical implication of its view: an inferred civil action to correspond to each criminal statute.[82] Examining the purposes of the statute and the practical difficulties of enforcing the criminal sanctions in the area of political contributions, the court determined that an implied action would be consistent with the effectuation of the goals of the statute. Finally, the court of appeals noted that there were no "countervailing reasons" for denying a private remedy, such as possible interference with the operations of a regulatory agency.[83]

Judge Aldisert dissented from the decision.[84] Interpreting *Amtrak* as a signal to restrict the use of implied remedies in federal courts, he viewed the majority decision as a defiance of *Amtrak*. He reasoned that the rationale of *T.I.M.E., Inc. v. United States*[85] should control on the ground that,

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[79] The court of appeals proffered two reasons for rejecting the argument that it would be improper to infer a cause of action from a statute which allegedly provided only secondary protection to the plaintiff as stockholder. First, while acknowledging the possible impropriety of inferring an action in favor of an incidental beneficiary, the court stated that the protection of stockholders was not a mere incidental purpose of the statute. United States v. CIO, 335 U.S. 106, 113 (1948). Second, the protection of the plaintiff need not be the primary purpose of an act in order to justify the inference of a civil remedy. J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964).

[80] The court cited Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) for this proposition. *But see* Odell v. Humble Oil & Refining Co., 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953).

[81] 496 F.2d at 423.

[82] *See* note 88 and accompanying text *infra*.

[83] 496 F.2d at 424.

[84] *Id.* at 426-29.

[85] 359 U.S. 464 (1959).

although plaintiff brought his suit under Title II of the Federal Election Campaign Act of 1971,[86] which contains no express civil remedy, Title III[87] contains an authorization for the Attorney General to maintain a civil action on behalf of the United States. Judge Aldisert argued that the Title III action supplemented the Title II penal sanctions, and concluded that the failure of Congress to include civil remedies under Title II should be construed to mean that Congress did not intend to permit a civil action. Judge Aldisert also maintained that to grant an implied remedy to plaintiff Ash as a registered voter was to find an implied cause of action "for every individual, social, or public interest which might be invaded by violation of any criminal statute."[88]

In a unanimous decision, the Supreme Court reversed the court of appeals.[89] Invoking the principle that the Court must decide cases according to the law existing at the time of the decision,[90] the Court held that the enactment of the Federal Election Campaign Act Amendments of 1974,[91] which created a Federal Election Commission empowered to bring civil injunctive action under Title II, required reversal of the court of appeals decision with respect to the requested injunctive relief. The Court also reversed the finding that derivative damage relief was a proper remedy for violation of section 610, holding that derivative damage relief was not available to the stockholder for the 1972 violations of section 610, because relief should be sought under the state law of corporations, which traditionally governed the stockholder-corporation relationship on the issue of breach of fiduciary duty claims.

In dictum, the Court listed four criteria that are relevant in determining whether a civil remedy is implicit in a criminal or regulatory statute not expressly providing such relief.

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create or to deny one? *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) *(Amtrak)*. Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See, e.g., Amtrak, supra; Securities Investor*

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[86] 18 U.S.C. § 610 (Supp. III, 1973).

[87] 2 U.S.C. § 438(d) (1)-(5) (1970).

[88] 496 F.2d at 429. Judge Aldisert continued:

> If the 'ambit of protection' test were to be applied to every criminal statute by the court, then it would follow that, given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute.

Id.

[89] Cort v. Ash, 422 U.S. 66 (1975).

[90] *Id.* at 76-77, *citing* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974).

[91] 2 U.S.C. §§ 437c-h, 438 (Supp. IV, 1974).

> *Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *cf. J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment).[92]

Conceding that provision for criminal sanctions in a statute does not automatically preclude the implication of a private civil cause of action, the Court noted that in *Rigsby, Borak,* and *Wyandotte* there existed a statutory basis for the inference that a private cause of action lay in favor of someone. In contrast, section 610 of the Federal Election Campaign Act of 1971 is "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone."[93] The Court, however, expressly refused to say that "a bare criminal statute can *never* be deemed sufficiently protective of some special group as to give rise to a private cause of action by a member of that group."[94] In the instant case, however, the Court noted that

> the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors all either are not helpful or militate against implying a private cause of action.[95]

The statutes which section 610 superseded[96] were based upon two policies: the need to "destroy" the influence of corporate financial contributions on federal elections, and the belief that it is wrong for corporations to make political contributions with corporate funds without stockholder consent.[97] Plaintiff Ash relied on the second consideration in bringing his derivative action,[98] and claimed that the protective attitude shown to stockholders proves that the statute provides stockholders with a federal right not to have corporation funds contributed for political campaign purposes.[99] The Court refuted this claim with a discussion of the legislative history of the Federal Election Campaign Act of 1971 and its predecessor statutes.[100] It concluded that the protection of stockholders is only a secondary or subsidiary purpose of the statute.[101] The primary goal of the

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92 422 U.S. at 78.
93 *Id.* at 79-80.
94 *Id.* at 80.
95 *Id.*
96 Act of January 26, 1907, 34 Stat. 864; Federal Corrupt Practices Act of 1925, 43 Stat. 1070.
97 422 U.S. at 80, *citing* United States v. CIO, 335 U.S. 106, 113 (1948).
98 *Id.* at 81.
99 *Id.*
100 Act of January 26, 1907, 34 Stat. 864; Federal Corrupt Practices Act of 1925, 43 Stat. 1070.
101 422 U.S. at 81.

statute is the elimination of the influence of corporate contributions upon federal elections. The legislation was not directly concerned with the relations between the shareholders and the corporation, and the plaintiff, as a stockholder seeking derivative damages, therefore, did not belong to a class for whose especial benefit the statute was enacted.[102]

The legislative history of section 610 contains nothing to indicate a congressional intent to provide stockholders with a federal right to damages for infractions. Yet the Court acknowledged that

> in situations in which it is clear that the federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to deny such cause of action would be controlling.[103]

Additionally, the Court doubted that Congress intended to provide corporate stockholders with federal rights that were broader than the rights granted by state corporation laws.

Acknowledging the judicial duty to provide the remedies needed to effectuate the legislative purpose,[104] the Court stated that the requested derivative damage would not promote the realization of the main congressional purpose. The recovery of derivative damages for violation of section 610 would not diminish the effect of illegal corporate contributions upon a past election and would not necessarily have a deterrent effect upon prospective violations.[105] The Court based its dubious conclusion that derivative relief would not deter violations of section 610 on its opinion that such a remedy would merely allow corporate officials to "borrow" company funds for a period of time pending a compelled repayment.[106] This negative assumption as to the effectiveness of an implied remedy as a deterrent is in sharp contrast with the attitude of the *Borak* Court and reflects a lack of curiosity on the part of the Court in ascertaining what effect an implied remedy might actually have on corporate behavior. In effect, the Court was avoiding an argument that favors implication of a remedy. Thus, in the view of the Court, an implied derivative damage remedy would not reduce the potential influence of corporate donations upon federal elections.

Finally, the Court found it appropriate for state law to govern the claims of the plaintiff. Unless federal law imposes special responsibilities upon the corporation in its dealings with its stockholders, state law controls the

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[102] *Id.* at 82. The Court added that

> in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff, *e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, *supra,* or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, *e.g.*, J.I. Case Co. v. Borak, *supra.*

Id.

[103] *Id.*

[104] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[105] 422 U.S. at 84. *But cf.* Borak, 377 U.S. at 433-34.

[106] 422 U.S. at 84.

stockholder-corporation relationship.[107] Given that the primary purpose of section 610 was to curtail the corporate influence in federal elections, not to engage in the general regulation of state-created corporations, the Court found that the relegation of shareholders to state remedies for the illegal use of corporate funds in federal elections would not frustrate the goal of the statute.[108]

III. THE MEANING OF THE *Cort* STANDARDS

A. Especial Benefit

The first requirement is that the plaintiff be a member of a class " 'for whose *especial* benefit the statute was enacted.' "[109] A secondary statutory purpose of protecting the plaintiff or his class is insufficient to satisfy the especial benefit test.[110] The requisite especial benefit may be shown by the existence of a comprehensive legislative system controlling the interaction between the plaintiff class and the defendant class,[111] such as the control of the Securities and Exchange Commission over transactions between vendors and purchasers of securities.

The especial benefit standard represents a departure from the *Borak-Wyandotte* intended beneficiary approach to the extent that the intended beneficiary approach did not require that the protection of the plaintiff class be the primary goal of the statute.[112] For example, in *National Association for Community Development v. Hodgson*,[113] a coalition of four lobbying

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[107] *See, e.g.*, Miller v. American Telephone & Telegraph Co., 507 F.2d 759 (3d Cir. 1974). If state law allows the use of corporate funds in state elections, stockholders are on notice of such use. There is no need for redress under federal law. The Court stated that it was

> necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

422 U.S. at 85. *See* notes 146-58 and accompanying text *infra*. However, the fact that state law allows the use of corporate funds in state elections is arguably irrelevant to the federal interest in preventing the injection of corporate funds into federal election campaigns. The federal interest might be sufficiently important to warrant a federal implied cause of action for violation of the federal statute, regardless of state provisions regarding elections.

[108] The statute at issue in *Borak* was distinguished as a deliberate

> intrusion of federal law into the internal affairs of corporations; to the extent that state law differed or impeded suit, the congressional intent would be compromised.

422 U.S. at 85.

[109] *Id.* at 78, *quoting* Texas & Pac. R.R. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis supplied by the Court).

[110] *Id.* at 78, 80-82. *But cf.* J.I. Case Co. v. Borak, 377 U.S. 426, 431-34 (1964); Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970).

[111] 422 U.S. at 82. *See also* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in which plaintiff was allowed a federal civil remedy for damages for the violation of his fourth amendment right of immunity from unreasonable searches and seizures.

[112] *E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964); Ash v. Cort, 496 F.2d 416, 423 (3d Cir. 1974), *rev'd*, 422 U.S. 66 (1975).

[113] 356 F. Supp. 1399 (D.D.C. 1973).

organizations representing the unemployed sought injunctive relief under a statute[114] making it a crime to use a government subsidy grant for purposes of lobbying in Congress. Although arguably the primary purpose of the statute is to protect the integrity of Congress and not to confer a special benefit on a lobbying group, the court found that the interest of the plaintiffs fell "within that class of interests which the statute was intended to protect."[115]

Under the intended beneficiary approach several dangers existed. Plaintiffs could be found to be beneficiaries of a statute although the allegedly intended benefit would be negligible.[116] The overexpansion of the classes of plaintiffs eligible for relief under implied actions might have the effect of subjecting the defendant class to a degree of liability unintended by Congress.[117] This potential danger is particularly evident in federal regulatory statutes which adopt nationwide, federal standards or requirements.[118]

The *Cort* especial benefit guideline imposes more stringent standards upon plaintiffs requesting an implied civil action. It attempts to limit access to the federal judicial forum to plaintiffs seeking redress for an injury to a justiciable federal right. The especial benefit standard responds to the concern that implied remedies had become too readily available to plaintiffs with negligible claims to protection under the intended beneficiary approach. Similarly, the criterion serves to delineate the parameters of civil liability, which is a pressing need as regulatory statutes affect more hitherto unregulated areas of conduct. Also, by withdrawing the availability of implied remedies from secondary or incidental statutory beneficiaries, the especial benefit standard blunts the criticism that the inference of civil remedies constitutes a usurpation of legislative power since implied remedies will only be found in favor of plaintiffs whose interests are shown to be the primary concern of Congress in enacting the legislation.

Alternatively, it can be argued that the especial benefit factor is an artifice. The difficulty of ascertaining whom Congress regarded as an especial beneficiary, in contrast to a mere intended beneficiary, reduces the difference between the intended beneficiary concept and the especial benefit factor to a matter of semantics. Since the especial benefit factor often will be unable to distinguish intended and especial beneficiaries, to focus upon such an elusive and potentially illusory distinction will divert attention from the central question of the propriety of an implied remedy. Arguably, therefore, the especial benefit factor is not a viable measurement of legislative intent and eligibility for an implied action, but is an imprecise, judicially imposed requirement that will function as a device by which courts may

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[114] 18 U.S.C. § 1913 (1970).

[115] 356 F. Supp. at 1404.

[116] *See, e.g.*, Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970).

[117] *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 747-48 (1975). *See also* note 4 *supra*.

[118] *E.g.*, Doak v. City of Claxton, 390 F. Supp. 753, 758 (S.D. Ga. 1975); *cf.* Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972).

deny implied actions in circumstances otherwise favorable to the inference of a civil action.

B. Legislative Intent

Requests for implied remedies occur when no express remedy is granted under the terms of the statute. The language of the statute or the legislative history rarely explains the failure to provide a civil cause of action.[119] Rather than construe the silence of a statute on the issue of civil actions as precluding such actions, however, courts generally seek to divine the intention of the legislature as to whether the statute should allow a private action. Although such judicial efforts to discover the legislative intention have been criticized,[120] the *Cort* opinion's inclusion of the leglislative intent standard reaffirms its integral role in the implication process.

In support of the legislative intent factor, the *Cort* opinion cites *Amtrak*. In *Amtrak*, the Supreme Court determined that the legislative history and policies of the Amtrak Act indicated a specific, negative legislative intent to preclude private actions.[121] Additionally, *Amtrak* invoked the principle of statutory construction that "when legislation expressly provides a particular remedy or remedies," the coverage of the statute should not be expanded "to subsume other remedies."[122] The *expressio unius est exclusio alterius* maxim would yield, however, to "clear contrary evidence of legislative intent."[123] Thus, the Court in the *Amtrak* opinion concluded that both the *expressio unius* and the legislative history approaches yielded the same conclusion.[124] *Cort* strikes a balance between the *Amtrak* approach and the view that allows implication in the absence of a legislative intent to deny the implied action.[125] Although the *Cort* standards look to explicit or implicit indication of legislative intention to deny or to allow a private action, the circumstances in which this inquiry into legislative intent is operative are limited. An intention to permit or create a private remedy

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[119] O'Neil, *Public Regulation and Private Rights of Action*, 52 CAL. L. REV. 231, 233 (1964).

[120] Justice Cardozo assailed an effort to divine legislative intent as a "process of psychoanalysis." United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting). Similarly, Professor Williams has characterized it as a "process of looking for what is not there." Williams, *supra* note 19, at 244. According to Dean Prosser, the result of the process is the discovery of an intent that is a "fiction, concocted for the purpose." W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS 191 (4th ed. 1971).

[121] 414 U.S. at 459-61. *But see* note 61 *supra*.

[122] 414 U.S. at 458.

[123] *Id.*

[124] *Id.* at 461. The *Amtrak* invocation of the *expressio unius* principle was followed in People for Environmental Progress v. Leisz, 373 F. Supp. 589 (C.D. Cal. 1974). In that case, the rejection of proposed amendments that would have permitted private actions was deemed indicative of the legislative intent and "most persuasive in the circumstances." *Id.* at 591-92.

[125] *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). Similarly, in National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973), the court stated that in the absence of a specific intent, it would "extract congressional intent from analogous legislation." *Id.* at 1403.

need not be shown where it is evident that some rights have been created in a class by federal law.[126] By so limiting the scope of the search for an indication of legislative intent, the Supreme Court apparently accepts, in part, the view that implication is permissible in the absence of a positive indication of legislative intent. In effect, where the plaintiff is clearly vested with federal rights under the statute, the legislative intent criterion is subsumed into the especial benefit test.

The legislative intent factor thus serves a limited function in practice. In accordance with the *Amtrak* decision, the Supreme Court recognized that, notwithstanding the creation of federal rights in the plaintiff class, an expressed legislative intention to withhold a private cause of action would predominate.[127] Where the Congress has in some manner shown an intent not to allow a private cause of action, as occurred in the legislative history of the Amtrak Act, none may be implied. Yet, in the *Borak* situation where the securities laws clearly created federal rights in the plaintiffs and there was no indication of legislative thought on the question of private remedies, the Supreme Court would allow implication without requiring a showing of an intent to allow such relief.

The *Cort* opinion also explained the use of the *expressio unius* maxim in *Amtrak* and *T.I.M.E.* In both of those cases, the legislative histories of the statutes in question supported the inference from the *expressio unius* principle of statutory construction that the expressly provided remedies were to be exclusive. The record of section 610, however, lacks any congressional discussion of private enforcement of this provision, or of the exclusivity of the express remedies. For this reason, the Supreme Court rejected the suggestion advanced by the defendant in *Cort* and by Judge Aldisert of the circuit court in his dissenting opinion that an inference should be drawn from the fact that Title III of the 1971 Act provides some private means of relief[128] of an intention to deny any private remedy with respect to the criminal provisions amended in Title II. Another reason for rejecting this attempt to invoke *expressio unius* was the Court's belief that it would be "odd" to infer from the actions of Congress in enacting Title III in 1971 "any intention regarding the enforcement of a long-existing statute [section 610]."[129] Accordingly, the Court viewed this effort to invoke *expressio unius* as "entirely unilluminating,"[130] given the lack of a supporting legislative history and the fact that the statutes were enacted at different times.

C. Consistency with the Legislative Purpose

An implied civil remedy must be "consistent with the underlying purposes of the legislative scheme."[131] To determine the propriety of inferring

[126] *See* note 103 and accompanying text *supra.*
[127] Cort v. Ash, 422 U.S. 66, 82 (1975).
[128] 2 U.S.C. § 438(d)(1)-(5) (Supp. II, 1972).
[129] 422 U.S. at 82-83 n.14.
[130] *Id.*
[131] *Id.* at 78.

a civil remedy, therefore, the courts must ascertain the goals of Congress in enacting the statute. This standard and the legislative intent guideline comprise a cumulative, two-step analysis. Where it is determined that Congress intended to preclude civil remedies, the consistency with the legislative purposes question is subsumed into the legislative intent inquiry and answered in the negative. Where there is no indication of a preclusive legislative intent or where the statute has created some rights in the plaintiff class, however, it is necessary to examine whether the requested civil remedy would be in accordance with the underlying purposes of the legislative scheme. In effect, the consistency guideline is operative as the second phase of the inquiry into the compatibility of the civil remedy with the overall legislative scheme.

In *Securities Investor Protection Corp. v. Barbour*[132] *(SIPC),* the Supreme Court refused to infer a private cause of action under the Securities Investor Protection Act of 1970[133] in favor of customers of failing brokerages who sought a court order to compel the Securities Investor Protection Corporation to initiate liquidation proceedings against a failing brokerage. The purposes of the statute were found to be the stabilization of the securities business by halting the domino effect that failing brokerages have on other brokerages and the protection of brokerage customers. The Court found that the requested remedy would further destabilize the securities industry by enabling customers to compel the initiation of liquidation proceedings against an embattled brokerage, thus guaranteeing the failure of the brokerage and increasing the brokerage industry's vulnerability to complete collapse under the domino theory. Since Congress vested the Securities Investor Protection Corporation with the discretion to initiate such proceedings, to permit a private action might interfere with the exercise of these discretionary powers.[134]

Similarly, in *Amtrak*, the two statutory purposes were found to be the preservation of rail passenger service and the establishment of an expeditious method of discontinuing uneconomical routes.[135] Since an action by rail passengers, the ultimate beneficiaries of the Amtrak system, to enjoin the discontinuance of a route would frustrate the goal of efficient elimination of unproductive routes and would endanger the overall goal of preserving a viable rail passenger system, the Supreme Court refused to grant the remedy. Justice Douglas dissented, viewing the primary purpose of the

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[132] 421 U.S. 412 (1975).

[133] 15 U.S.C. § 78aaa (1970).

[134] The Court stated that

> Congress' primary purpose in enacting the SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose.

421 U.S. at 421. *Borak* was distinguished on the ground that the Securities Investor Protection Act, unlike the Securities Exchange Act, does not contain standards of conduct "that a private action could help to enforce" and it also lacks a "general grant of jurisdiction to the district courts." *Id.* at 424.

[135] 414 U.S. 453, 461-62 (1974).

statute to be the protection of "the people who ride the trains,"[136] which was a purpose that the majority "in its dedication to legalisms" had overlooked.[137] By denying an implied remedy and stressing the primacy of the procedures for paring unwanted routes, the Court, Justice Douglas contended, was facilitating the advance of existing bureaucracies to their goal of "administrative absolutism."[138]

In *Calhoon v. Harvey*,[139] the Supreme Court refused to permit action by union members under the Labor Management Reporting and Disclosure Act of 1959[140] for alleged violations of statutory standards for union elections. Section 402 of the Act, which permits the Secretary of Labor to bring suits for such violations at his discretion, was deemed to provide the exclusive remedy for such violations. The Court reasoned that an implied remedy would frustrate the legislative purpose of utilizing the expertise and the discretionary powers of the Secretary of Labor in order to reach a settlement of the controversy without litigation. In a concurring opinion, Justice Stewart noted that by construing the statute so as to preclude any preelection litigation, the majority was "sharply" reducing "meaningful protection for many of the rights which Congress was so assiduous to create."[141]

The *Cort* analysis requires the judiciary to examine the statutory scheme for conflicting purposes and modes of enforcement. Before a court may infer a private remedy, it must determine not only that the legislature has not indicated an intent to deny such remedies, but also that the proposed remedy would be compatible with the objectives of the legislation and the enforcement scheme provided by Congress. The determination of such compatibility involves a judicial assessment of the legislative purposes, the need for protecting the discretionary powers of agencies vested with enforcement capabilities, and the potential impact of private civil action on the overall scheme.

In many cases, a cause of action has been implied to remedy the inadequacy of the express statutory means of enforcement to effectuate the legislative purpose.[142] For example, in *Borak,* the victim of a misleading proxy was granted an implied remedy in part because of the inability of the Securities and Exchange Commission to monitor all proxies and enforce adequately the prohibition against deceptive proxies.[143] In effect, a plaintiff becomes a private attorney general through the device of the implied civil action.[144] While *Cort* did not examine the efficacy of the en-

[136] *Id.* at 471.
[137] *Id.*
[138] *Id.* at 472.
[139] 379 U.S. 134 (1964).
[140] 29 U.S.C. § 401 *et seq.* (1970).
[141] 379 U.S. at 146.
[142] *See, e.g.,* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).
[143] 377 U.S. at 430-35. *See* notes 42-46 and accompanying text *supra.*
[144] *See also* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

forcement efforts of the section 610 criminal sanctions, because it found that the plaintiff was not an especial beneficiary of the Act and that state law controlled the stockholder-corporation relationship on the issue of derivative relief, the tenor of *Cort*, the cases cited therein, and related developments[145] seem to indicate that the supplemental enforcement by a private attorney general concept is not as favored as it was in the 1960's following *Borak*.

D. State Concern

Whether the requested implied cause of action involves concerns traditionally governed by state law must also be determined. An implied federal cause of action may be inappropriate where such state law interests and remedies exist. For example, the stockholder plaintiff in *Cort* sought redress for an alleged misuse of corporate funds. The availability of traditional state actions for breach of fiduciary duty and the commission of *ultra vires* acts influenced the Supreme Court's conclusion that the inference of a federal cause of action from an election law providing expressly for penal sanctions would constitute an improper and unnecessary interference with the traditional state regulation of corporations.

In *Wheeldin v. Wheeler*,[146] the Supreme Court refused to infer a federal civil remedy for abuse of process from the statute[147] governing the issuance of congressional subpoenas by the House Un-American Activities Committee, because abuse of power suits are governed by state common law tort actions. With respect to the creation of common law rights by the federal judiciary, the Court stated, "we are not in the free-wheeling days ante-dating

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[145] *See, e.g.*, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) in which the Court refused to construe the private attorney general concept as a "grant of authority to the judiciary to jettison the traditional rule against" awarding attorney's fees to the prevailing party in a suit "whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.* at 263.

Cort is representative of the recent trend of the Court that has diminished the opportunities in which class action and public interest litigation can be maintained in federal courts. Rather than diluting the substantive bases of such suits, the Court has imposed stringent conditions on the exercise of the substantive legal rights. The plaintiff in the public interest suit must now allege and show an actual injury to himself in order to have standing to sue. Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972). Similarly, in class action litigation, each plaintiff must satisfy the jurisdictional amount or be dismissed from the case; no aggregation of claims by class action plaintiffs to meet the jurisdictional amount is allowed. Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). The Court has imposed other disincentives on the exercise of legal rights in the public interest and class action areas. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In this context, the *Cort* limitations on the availability of implied civil actions continue the efforts of the Court to channel public interest and class action litigation away from the federal courts and into the state courts. *See also* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976).

[146] 373 U.S. 647 (1963).

[147] Legislative Reorganization Act of 1946, Pub. L. No. 601, ch. 753, House Rule XI(1)(q)(2), 60 Stat. 828.

Erie R. Co. v. Tompkins."[148] Congress had not empowered the federal courts to create " a federal common law for abuse of process."[149] An additional consideration was the limited scope of the statute in question, which merely authorized the issuance of subpoenas without rendering federal officials liable for acts done " 'under color,' but in violation, of their federal authority."[150] In *Borak*,[151] the Court held that, regardless of the fact that state law issues might have to be decided incidentally, the rights granted by the Securities Exchange Act of 1934[152] were federal in nature. A federal remedy is required to protect a federal right since the policy of the Act would be frustrated if neither federal nor state law provided a remedy for actions made unlawful under a federal provision. Similarly, in *Bivens*,[153] the Court declined to relegate the plaintiff to state law trespass or invasion of privacy remedies for alleged violations of rights guaranteed by the fourth amendment. A federal remedy was deemed necessary because the interests protected by the state remedies might be "inconsistent or even hostile" to the interests protected by the fourth amendment.[154] In both *Bivens* and *Borak*, the nature of the federal right involved warranted the implication of a federal civil remedy.

In essence, the state concern standard represents a specialized inquiry into whether the implication of a federal remedy would be consistent with the underlying policies of the statute. Where a federal cause of action would infringe upon state legal concerns, such an action, absent an overriding federal interest, could not be squared with the goals of the statute or the traditional structure of the federal system. Also, the state concern standard may operate to preclude a federal implied cause of action where it would simply duplicate existing state remedies. Even before *Cort*, federal courts had considered the state interest and the availability of state remedies in deciding whether to permit a federal implied action.[155] For example, in the job-related injuries field, federal courts have refused to invade the province of state workmen's compensation systems.[156] Similarly, the courts

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148 373 U.S. at 651.

149 *Id.* at 651-52.

150 *Id.* at 652.

151 377 U.S. 426 (1964).

152 15 U.S.C. § 78n(a) (1970).

153 403 U.S. 388 (1971).

154 403 U.S. at 394-95.

155 *See, e.g.*, Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974); Breitwieser v. KMS Indus., Inc., 467 F.2d 1391, 1394 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir. 1972); Doak v. City of Claxton, 390 F. Supp. 753, 758 (S.D. Ga. 1975); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco Growers Agricultural Ass'n, 352 F. Supp. 986, 992 (D. Conn. 1973). *Breitwieser* held that

> where Congress has provided a remedy but we are urged to formulate a more extensive one, it is appropriate to look . . . to appellants' remedies under state law to determine if additional federal relief is necessary to implement Congress' intent . . . .

467 F.2d at 1394.

156 *See, e.g.*, Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974); Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973).

have declined to find a federal remedy when an action could have been brought under a state statute[157] or when the requested remedy was based on facts which presented a simple breach of contract claim over which the state court had jurisdiction.[158] Moreover, in determining the consistency of a remedy with statutory purpose and legislative intent, courts have examined the potential impact on state enforcement schemes and the availability of state remedies throughout the nation.[159]

The connection between the state concern factor and consistency with the purpose of the statute is evidenced in *Cort* by the recognition of instances in which the federal interest overrides the state law concern. The Court approved the inference of a civil cause of action in *Borak*, for instance, because Congress clearly intended the statute to be "an intrusion of federal law" into a state law area.[160] Commonly, the federal interest which justifies the inference of a federal remedy instead of recourse to state remedies is the need for uniform, nationwide enforcement.[161] Without such uniformity of enforcement, the goals of the statute might not be realized.[162] The interest in a federal remedy also predominates where the federal statute, in effect, creates a new liability for which there exists no analogous state cause of action.[163]

E. Interrelatedness of the Criteria

The *Cort* opinion listed four criteria to be considered in determining whether an implied remedy should be found. The breakdown into four separate factors conceals both the areas of overlap among them and the essential two-pronged inquiry of the *Cort* considerations. Similarly, the listing of four separate factors may also give rise to the erroneous inference that all of the factors are of equal weight and importance. Basically, the *Cort* tests determine just two facts: whether the plaintiff is a proper party to be granted an implied remedy and whether the granting of the remedy would be in harmony with and in support of the policies of the statute. These two inquiries are cumulative in nature.

The especial benefit criterion, which determines whether the plaintiff is eligible for an implied remedy, is the threshold test. In *Cort*, for example, the finding that the plantiff was not an especial beneficiary of the statute was dispositive of the case, and the Court referred to the other factors as a

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[157] *See, e.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir. 1972).

[158] *See, e.g.*, Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco Growers Agricultural Ass'n, 352 F. Supp. 986, 991-92 (D. Conn. 1973).

[159] *See* note 107 and accompanying text *supra*.

[160] Cort v. Ash, 422 U.S. 66, 85 (1975).

[161] *See, e.g.*, Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring); J.I. Case Co. v. Borak, 377 U.S. 426, 435 (1964); Mortimer v. Delta Air Lines, 302 F. Supp. 276, 279 (N.D. Ill. 1969); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (S.D. Cal. 1961).

[162] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 435 (1964).

[163] Note, *supra* note 1, at 292.

means of reinforcing its initial conclusion.[164] Thus, failure to satisfy the threshold especial benefit test renders unnecessary an inquiry into the propriety of an implied action. In order to classify a plaintiff as either an especial or a secondary beneficiary of a statute, however, it will be necessary to examine the policies and purposes of the statute. To this extent, therefore, the threshold especial benefit inquiry overlaps the inquiry into legislative intent and the consistency of the requested relief with the statutory scheme.

If an especial benefit is found, the other criteria ascertain the propriety of inferring a civil remedy. As *Amtrak* and *SIPC* indicate, the fact that a plaintiff is a primary beneficiary of an enactment constitutes, standing alone, insufficient grounds for the inference of a civil action.[165] In other words, satisfaction of the especial benefit criterion is a necessary, but not a sufficient, basis for obtaining an implied remedy. The legislative intent criterion excludes implied remedies which are contrary to the expressed intent of Congress, whether or not the statute especially benefits the plaintiff class. When Congress has not expressly indicated its intent to preclude civil remedies, the legislative goals criterion requires that the requested remedy would not conflict with the purposes or the enforcement scheme of the statute. Both of these criteria involve the judiciary in the task of determining the congressional purpose from often ambiguous and inconclusive legislative histories and from statutory language which occasionally is less than complete in articulating the concerns and motives of Congress. *Cort* does not eliminate the possibility of judicially imputed legislative intent and statutory goals.[166] Thus, while the especial benefit requirement performs the critical threshold function of limiting the class of eligible plaintiffs, the other factors are the most significant determinations since the inference of a remedy in conflict with the congressional intent and scheme would constitute an example of improper judicial legislation.

The state concern factor actually is another aspect of the intent and consistency considerations. As the factual context of *Cort* indicates,[167] it may also serve as a means of limiting access to the federal court system and discouraging forum shopping between state and federal courts. In *Cort*, the plaintiff pursued a federal implied remedy rather than traditional state remedies. Given the fact that the plaintiff dropped a state *ultra vires* count from his complaint upon being required to post $135,000 security for expenses as dictated by state law,[168] it can be argued that he pursued the federal remedy as a means of avoiding the burdensome security rules of state law, thus obtaining a less expensive forum. In this respect, the state

[164] *See* note 95 and accompanying text *supra*.

[165] *See* notes 58-61, 121-24, 132-35 and accompanying text *supra*.

[166] Professor Loss has commented that "legislative intention in the literal, lay sense is one thing, and the growth of the common law by the interaction of judges' decisions upon legislation is another." Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1054 (1960).

[167] *See* notes 63-67 and accompanying text *supra*.

[168] 422 U.S. at 72. *See* note 67 *supra*.

concern factor ensures respect for available state law remedies and prevents the use of the implied remedy doctrine to convert the federal courts into a cut-rate forum for plaintiffs seeking to circumvent the burdens placed by state law upon the pursuit of a mode of redress.

The *Cort* guidelines articulate the key considerations in the implication process while pointing out the areas in which more stringent standards must be applied.

IV. THE IMPACT OF *Cort*

One significant impact of *Cort* will be in unifying the approaches of the federal courts to the problem of finding an implied civil cause of action in criminal and regulatory statutes. Additionally, the application of the *Cort* criteria will alter the traditional availability of implied remedies. In this respect, *Cort* may be viewed as a signal to the lower courts to find implied remedies less frequently than in the past.

The reliance in *Cort* on the especial benefit factor to deny a remedy to a subsidiary beneficiary of the statutory prohibition against corporate contributions to federal political campaigns restricts the application of the implication doctrine. For example, in *Pearlstein v. Scudder & German,*[169] the court inferred a cause of action that allowed plaintiff margin customers an action for damages against securities brokers who violated the margin requirements of the securities laws.[170] Although the primary purpose of the margin requirements is to alleviate the deleterious effects of excessive accessibility to credit, the court based the remedy on the subsidiary purpose of protecting the small investor from an unscrupulous broker.[171] In light of *Cort*, however, the continuation of such solicitude for the small investor seems unlikely. It can be argued that given the financial purpose of the legislation, such implied remedies in favor of the small investor are inconsistent with the underlying purpose of the legislation. To justify the continuance of such implied actions, it will be necessary to demonstrate that the propriety of implied actions in other areas of securities law, as in *Borak*, attributable to the existence of a comprehensively regulated relationship between vendor and purchaser, applies as well to the area of violations of the margin requirements, despite their primary financial purpose.

Similarly, strict application of the especial benefit factor casts doubt upon the continued availability of implied causes of action to indigent persons under the Hill-Burton Act[172] and regulations promulgated

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[169] 429 F.2d 1136 (2d Cir. 1970).

[170] Securities Exchange Act of 1934, §§ 7c, 29(a), (b), 15 U.S.C. §§ 17g, 78cc(a). (b) (1970).

[171] 429 F.2d at 1147 (Friendly, J., dissenting).

[172] Public Health Service Act § 600 *et seq., as amended,* 42 U.S.C. § 291 *et seq.* (1970). The Act provides federal funds to states and private parties for the construction and modernization of hospital facilities. The express purpose of the Act is "to assist the several states in the carrying out of their programs . . . to furnish adequate hospital, clinic, or similar services to all their people." 42 U.S.C. § 291 (1970).

thereunder.[173] Although admittedly not the sole beneficiaries of the Act, indigent persons have been regarded as "the object of much of the act's concern."[174] For this reason, courts have permitted class actions by indigent persons to compel hospitals to comply with the regulation requiring the provision of reasonable services for poor patients.[175] However, the construction and modernization of hospitals is the primary purpose of the Act, and under the especial benefit test, indigents would be unable to bring an action to enforce the Act. The contention that sick people are the only possible beneficiaries of a hospital program, however rhetorically appealing, oversimplifies the issues by ignoring the existence of potentially conflicting goals which would militate against the implied remedy.

Application of the *Cort* criteria will also influence the type of reasoning and result found in *Gomez v. Florida State Employment Service.*[176] In *Gomez*, the Court of Appeals for the Fifth Circuit found an implied remedy for migrant workers under the Wagner-Peyser Act of 1933[177] and regulations[178] promulgated by the Secretary of Labor pursuant to the Act. The migrant workers alleged that the defendants had deprived them of the benefit of the wages and working conditions promised by the statute and regulations. The court found that the "basic objective" of the Act was the establishment of an interstate system for the "recruiting and transfer of labor,"[179] but that the regulations were intended to protect, and to confer a legal interest upon, migrant workers. Despite the fact that the only sanction expressly provided for breach of the regulations was the termination of federal funds, the court allowed the workers a civil remedy. The court observed that without a civil remedy, the workers would have no protection, since a civil suit under state law would fail to meet their needs. The court found it inconceivable that Congress intended the termination of funds by the state to be the sole sanction for violation of the Act. The court also relied on the private attorney general concept to justify its decision.[180]

Arguably, migrant workers are not the especial beneficiaries of the Act under the *Cort* test. Apart from its basic goal, the Act additionally sought to provide some protection to migrant workers. Yet, the court concedes that the system established by the Act indicates its origins in the "dark days of the economic depression of the 1930s."[181] Thus, it can be argued that

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[173] 42 C.F.R. § 53.111(a) (1975). This regulation provides that recipient hospitals are required to provide adequate services to indigent patients.

[174] Cook v. Ochsner Foundation Hosp., 319 F. Supp 603, 606 (E.D. La. 1973).

[175] *See, e.g.*, Euresti v. Stenner, 458 F.2d 1115, 1116-18 (10th Cir. 1972); Cook v. Oschner Foundation Hosp., 319 F. Supp. 603, 604-06 (E.D. La. 1973). *Euresti* relied upon the legislative history and motivating intent behind the law. *Cook* relied on the language of the provisions and deemed it unnecessary to examine the legislative history.

[176] 417 F.2d 569 (5th Cir. 1969).

[177] 29 U.S.C. § 49 *et seq.* (1970).

[178] 20 C.F.R. § 602 *et seq.* (1975).

[179] 417 F.2d at 571.

[180] An additional basis for the decision was the reliance upon the civil rights acts (42 U.S.C. § 1983 (1970)) as providing a source of an implied remedy. 417 F.2d at 578.

[181] 417 F.2d at 572 n.8.

economic recovery from the Depression, not protection of migrant workers, was the primary purpose of the Act.[182] In this analysis, workers either are not beneficiaries of the Act at all, or are only subsidiary beneficiaries not entitled to an implied remedy under the *Cort* especial benefit criterion.

The *Gomez* case reflects the recent attempts of plaintiffs to utilize implied civil actions to advance the goals of such causes as consumer rights,[183] ecology,[184] minority group rights,[185] and political reform.[186] In cases finding implied remedies in these areas, the courts have relied upon the intended beneficiary and supplemental enforcement by a private attorney general concepts. Moreover, the future of the implied remedy in social reform cases has already been suggested by a line of cases refusing to infer causes of action. These cases, in contrast to *Borak*, stress the availability of state remedies,[187] the interference with the operations of the administrative enforcement mechanisms that such remedies would create,[188] and the absence

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[182] Armstrong, *Expression Unius, Inclusio Alterius: The Fagot-Gomez Private Remedy Doctrine*, 5 GA. L. REV. 97, 125-26 (1970).

[183] *See, e.g.*, Nader v. Allegheny Air Lines, Inc., 512 F.2d 527 (D.C. Cir. 1975) (Civil damage remedy for being bumped off airliner in a discriminatory manner in violation of the Federal Aviation Act of 1958, § 404(b) and regulations promulgated by the Civil Aeronautics Board); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (Private parties have no right of action to enforce the provisions of the Federal Trade Commission Act which prohibit unfair or deceptive acts or practices in commerce); Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 276, 279 (1971) (Advocating the development of a consumer right to private action for injuries from false or deceptive trade practices analogous to the private rights of action recognized under the Securities Exchange Act).

[184] *See, e.g.*, People for Environmental Progress v. Leisz, 373 F. Supp. 589 (C.D. Cal. 1974) (Private parties held to have no right to a civil action to enforce the Federal Insecticide, Fungicide, and Rodenticide Act, because Congress intended to reserve enforcement of the Act to the Environmental Protection Agency and to the Attorney General).

[185] *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (Private citizens have right to bring civil actions against state and local governments under the Voting Rights Act of 1965 to ensure compliance with the Act); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (Migrant workers who accepted employment through employment system established by the Wagner-Peyser Act held entitled to civil remedies for redress of violations of the Act).

[186] *See, e.g.*, Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971) (Private citizens held to have right to civil action seeking injunctive and declaratory relief for alleged violations of the Federal Election Campaign Act criminal provisions limiting campaign contributions and expenditures).

[187] *See, e.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir. 1972) (Civil action under the Farm Labor Contractor Registration Act denied, in part, due to the availability of a state law remedy for the alleged injuries suffered by plaintiff); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco Growers Agricultural Ass'n, 352 F. Supp. 986, 993 (D. Conn. 1973) (No implied civil cause of action under the Wagner-Peyser Act, because the complaint stated a mere breach of contract claim that could be litigated in state courts and failed to state a Wagner-Peyser Act issue).

[188] *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 992-99 (D.C. Cir. 1973) (Civil action by private citizens to enforce the Federal Trade Commission Act prohibition of unfair or deceptive practices in commerce not implied by Act, because such a right of private action would disrupt the enforcement efforts of the FTC). Viewing the Federal Trade Commission as an agency capable of resolving controversies in an expert manner, and usually without litigation, the court observed

of any indication of legislative intent to allow such remedies by private citizens.[189] The criteria articulated in *Cort* seem likely to favor the rationales and results of these latter cases, rather than the social reform cases allowing implied remedies on the basis of concepts derived from *Borak-Wyandotte*.

V. CONCLUSION

Despite the simple principles enunciated in *Couch*[190] and *Rigsby*,[191] the decision whether a private civil cause of action should be inferred from a federal criminal or regulatory statute not expressly providing for one involves resolution of numerous difficult issues. Implication cases often raise the question whether the implied remedy would be a proper exercise of judicial power, either in the context of a potential usurpation of legislative power or in the setting of an interference with the enforcement efforts of administrative agencies. Similarly, the duty of federal courts to provide remedies for the violation of federal rights must be balanced against the concern that overextension of federal statutes through the use of implied remedies will infringe upon the domain of state law. Beyond these considerations, however, there remains the fundamental question whether it is appropriate in the given circumstances to impose a civil liability upon the defendant for the violation of a criminal or regulatory statute that resulted in an injury to the plaintiff. Answering this question demands an examination of the type of behavior prohibited by the statute, the statutory penalties and modes of enforcement, the policies that the legislature sought to effectuate in the enactment, and the possibility that an implied remedy would impose an unreasonable penalty on the defendant. In other words, the court must evaluate the costs, as well as the benefits, that inhere in the inference of a civil cause of action.

The nature of the decisionmaking process in implication cases demands authoritative standards to guide the courts in their deliberations. *Cort v. Ash* has supplied workable standards to be used in the implication process. In accordance with the recent trend of the Supreme Court toward imposing greater limitations on the use of implied remedies, as shown in *Amtrak*[192] and *SIPC*,[193] the overall impact of *Cort* will be to curtail the circumstances in which implication will be permissible.[194] Nonetheless, with *Cort* as the starting point for the emergence of a unified approach for federal courts to follow, the future of the law of implied remedies can avoid the confusion and unpredictability of the past.

—*Gary W. Klotz*

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that the judiciary lacks both the FTC's expertise and flexibility of remedies to achieve the most efficient resolution of a controversy. *Id.* at 998.

189 *See, e.g.*, People for Environmental Progress v. Liesz, 373 F. Supp. 589 (C.D. Cal. 1974) (Legislative intent to preclude private enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act ascertained from the legislative history of the Act).

190 *See* notes 19-22 and accompanying text *supra*.

191 *See* notes 23-27 and accompanying text *supra*.

192 *See* notes 58-61, 121-24 and accompanying text *supra*.

193 *See* notes 132-34 and accompanying text *supra*.

194 *See* note 145 and accompanying text *supra*.