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I. INTRODUCTION

More than seventy years ago, Roscoe Pound pointed to the antagonistic relationship between judge-made common law and acts of the legislature: "Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers."[1] Ironically, there may be even more truth to this sentiment today than in Dean Pound's time. Although the interrelation between legislation and the common law has long concerned legal scholars,[2] neither scholarly output nor the passage of time has eliminated the tension between our two modes of lawmaking. While on the one hand this conflict can be identified as a necessary part of our system of checks and balances, when taken to its extreme, it can thwart the symbiotic relationship between courts and legislatures.

Perhaps the most significant area of concern today arises as courts consider whether to imply a private civil remedy based on legislative flat. Particularly within the realm of federal regulation, some courts have recently tended to disregard the force of legislation by unduly denying private remedies that would serve to redress federal wrongs. Indeed, in light of five recent Supreme Court

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1. Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908).

2. *See, e.g.,* Horack, *The Common Law of Legislation,* 23 IOWA L. REV. 41 (1937); Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS (1934); Pound, *supra* note 1; Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4 (1936).

decisions,[3] a critical reexamination of the federal judiciary's interpretation of the implied rights doctrine is justified. As will be demonstrated below, however, although recent cases bring to the implication problem a much needed framework for analysis, they should not be taken to signal either a death knell or a moratorium on federally implied rights of action.

A second age-old basis of tension that runs through the implication issue results from the courts' desire to further the interests of federalism while at the same time avoiding undue infringement upon the province of the states' judicial and legislative bodies.[4] This tension has been continually recognized as a significant factor in the determination of whether to imply a federal private right of action.[5] Judicial cognizance of the possible overreach of federalism is not of recent vintage. In fact, the incursion of federalism was first held to have reached unconstitutional dimensions in *Erie Railroad Co. v. Tompkins*,[6] which outlawed federal common law in cases determined under federal diversity jurisdiction. A large body of federal common law continues with regard to federal question jurisdiction,[7] however, and the current trend in the federal implication cases can be more readily placed in perspective when viewed in conjunction with this expansive development of federal common law. Unfortunately, both the courts and commentators have failed to consider adequately the interrelation between these two lines of federal cases. Accordingly, after analyzing the current status of the implication rationale, this Article will examine the relevance of the

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3. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Davis v. Passman, 442 U.S. 228 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

4. There has been extensive debate concerning the impact of federalism on the American judicial and political systems. The surrounding issues have been elegantly drawn since this country's inception, and it is therefore unnecessary to retread the path except insofar as the debate relates directly to the subject matter of this article. On the general issue of federalism, see CROSSKEY, POLITICS AND THE CONSTITUTION (1958); ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1836); THE FEDERALIST PAPERS. For a complete survey of the problems of federalism as they relate to the judicial system, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973). *See also* D. CURRIE, FEDERAL COURTS, CASES AND MATERIALS (2d ed. 1975); C. MCCORMICK, J. CHADBOURN & C. WRIGHT, CASES AND MATERIALS ON FEDERAL COURTS (6th ed. 1976); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

5. *See* Part VI *infra*.

6. 304 U.S. 64 (1938). *See generally* Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Hill, *The Erie Doctrine and the Constitution* (pts. 1-2), 53 NW. U.L. REV. 427, 541 (1958).

7. *See* Part VI *infra*.

continually developing federal common law.

The section that follows briefly examines the theoretical bases for and early jurisprudence of the implied rights doctrine. That examination is followed by a discussion of the developing criteria utilized by the Supreme Court. Then the Article focuses upon the recent implication cases to illustrate the current judicial elucidation of prior amorphous standards. Finally, as noted above, the Article looks to the federal common law and its relationship to the implication process.

II. Reflections on the Relative Roles of Statutes and the Courts

Before embarking upon an analysis of the current federal jurisprudence, it is most helpful to be reminded of the proper respective roles of the courts and legislatures as they combine to formulate a unitary system of private law.[8] Dean Pound[9] was not the only observer to point to what has been described as the "instinctive antagonism toward legislation."[10] This antagonism not only affects the manner in which courts approach statutory interpretation in general, but also appears within the context of the implication process itself.

Implication of a private remedy based upon penal legislation is an off-shoot of the doctrine of negligence per se. Both commentators[11] and courts[12] have long debated the proper balance between

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8. On both general and more specific levels of analysis, the tension between courts and legislatures and the process of judicial statutory construction has long been a topic of scholarly analysis. The discussion contained in this section is not an attempt to review this vast field of knowledge, but rather to point to the primary competing theories and considerations. For more detailed treatments of the issues surrounding statutory interpretation, see J. Cohen, Materials and Problems on Legislation (2d ed. 1967); H. Reed, J. MacDonald, J. Fordham & W. Pierce, Materials on Legislation (3d ed. 1973); J. Sutherland, Statutes and Statutory Construction (3d ed. 1943); de Sloovere, *Steps in the Process of Interpreting Statutes*, 10 N.Y.U. L.Q. Rev. 1 (1932); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947); Freund, *Interpretation of Statutes*, 65 U. Pa. L. Rev. 207 (1917); Friedmann, *Statute Law and Its Interpretation in the Modern State*, 26 Can. Bar Rev. 1277 (1948); Radin, *Early Statutory Interpretation in England*, 38 Ill. L. Rev. 16 (1943); *A Symposium on Statutory Construction*, 3 Vand. L. Rev. 365 (1950).

9. *See* text accompanying note 1 *supra*.

10. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 Minn. L. Rev. 361 (1932).

11. *See generally id.*; Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 Harv. L. Rev. 453 (1933); Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317 (1914).

12. *See* E. Harper & F. James, The Law of Torts § 17.6 (1956); W. Prosser, The

legislatively mandated standards of conduct and those established by common-law torts. Traditionally, the negligence per se debate has revolved around the amount of weight, if any, to be given to the statutorily defined standard of conduct.[13] Since the abolition of a federal common law in diversity cases,[14] the negligence per se approach appears to be of much less value, for the only alternative for federal courts under such an analysis would be to look to the legislation as impliedly creating its own statutory tort. One might argue, however, that negligence per se principles should nonetheless be applied to federal statutes whose enactment predates the *Erie* decision. The rationale would be that Congress, aware of negligence per se principles, knew that its criminal legislation would necessarily have an effect upon the most analogous federal common-law remedy. This position may be stronger in the case of a statute that contains an express grant of federal jurisdiction. In fact, in some instances post-*Erie* decisions have gone so far as to imply a remedy based upon such a jurisdictional provision.[15] This approach, however, has recently been discredited, at least within the context of the Investment Advisers Act of 1940.[16]

In his seminal work on tort liability based upon penal legislation, Dean Thayer argued that the implication issue was totally separato from this negligence theory. In Thayer's opinion a criminal statute should never be used to *create* civil liability:

> Proper regard for the legislature includes the duty both to give full effect to its expressed purpose, and also to go no further. The legislature could, if it chose, have provided in terms that any one injured by a breach of the statute

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LAW OF TORTS § 36 (4th ed. 1971).

13. The current approach of the courts can be gleaned from § 286 of the RESTATEMENT (SECOND) OF TORTS (1965):

> § 286. When Standard of Conduct Defined by Legislation or Regulation Will be Adopted
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> 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 that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

14. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

15. *E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

16. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). *See* text accompanying notes 196-206 *infra*. As is pointed out in Part VI, *infra*, an analogue to the negligence per se approach can and should coexist with the implication doctrines that are currently in vogue.

> should have a remedy by civil action. Such a provision is familiar in criminal statutes. Its omission in this instance must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it.[17]

While Thayer's strict constructionist approach has no doubt left its imprint on the current jurisprudence, it has nevertheless been repeatedly repudiated as a general proposition by the courts.[18] Commentators, too, have sharply contested Thayer's rigid approach and have found fault with his basic premise. Essentially, Thayer's argument fails to grasp the fact that the *expressio unius est exclusio alterius* rationale, like any canon of statutory interpretation, has a correlative conflicting canon.[19] Consequently, while Thayer's philosophy has been echoed by many eminent jurists,[20] it is now common for courts to seek out the legislative purpose of statutes under judicial scrutiny. Moreover, although it has been suggested that even this inquiry must be framed as narrowly as possible, there can be no doubt that legislative purpose should and does have a role to play in statutory interpretation and, hence, in the implication process in particular.[21]

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17. Thayer, *supra* note 11, at 320.

18. For a most striking example, see the Minnesota experience discussed in note 111 *infra.*

19. For a classic demonstration of this proposition, see the 26 correlative "thrusts" and "parries" of the "diplomatic tongue" of statutory interpretation in Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,* 3 VAND. L. REV. 395, 401-06 (1950). *See also* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts,* 75 COLUM. L. REV. 1299 (1975).

20. *E.g.,* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 533 (1947): "no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature."

21. Holmes, *The Theory of Legal Interpretation,* 12 HARV. L. REV. 417, 419 (1899): "We do not inquire what the legislature meant; we ask only what the statute means." As Breitel said, this is far from an easy task, but it is a necessary starting point:

> The suggestion that legislative intent and purpose be followed provokes the plaint that intent and purpose are frequently intent. This represents a failure to recognize that there are levels of legislative intent and purpose, just as there are levels of generalization in the stating of propositions of law.
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> Of course, there is no legislative intention specifically with respect to every statute, and every part of every statute. In the enactment of statutes there is delegation, too, with respect to sponsorship and draftsmanship, just as there is delegation to the courts to implement statutes. The legislature expects that statutes will be drafted by others, not only by its arms, such as committees and commissions, but also by agencies and individuals outside the legislature. In such situations the intent, purpose, and draftsmanship of others is adopted as its own by the legislature. On this theory *there is no statute without a legislative intent or purpose. It is a glib superficiality to suggest otherwise.*

C. BREITEL, THE COURTS AND LAW MAKING IN LEGAL INSTITUTIONS TODAY AND TOMORROW 27

In discussing the question of statutory interpretation, Jerome Frank argued that courts should refrain from undue literalism when confronted with a statute:

> Centuries ago, Aristotle illuminatingly discussed the problems of statutory interpretation. When judges today grumble that invariably their difficulty in learning the meaning of statutes is the fault of the legislature, they should be told to recall that long ago he wrote that on many subjects a wise legislature will deliberately use vague and flexible standards. Most of the modern expositions of legislative construction are but restatements, with here and there a bit of embroidery, of what Aristotle said. For instance, recent essays on "gaps" in legislation, on "unprovided cases," and on the "equity" of a statute, rely on sources which in turn are glosses on passages in the Stagarite's writings. That despite the centuries of discussion we still have no precise answers to these and cognate problems stems from the fact that statutory interpretation is not a science but an art.[22]

Frank believed that while in some instances "literal interpretation of a [statute] is indubitably correct," often it "will yield a grotesque caricature of the legislature's purpose."[23] Learned Hand agreed with this view and was critical of an overly inflexible judiciary: "[O]ne of the surest indexes of a mature and developed jurisprudence [is] not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[24] Similarly, in searching for the appropriate scope of remedies for statutory violations, the courts have properly rejected Thayer's suggested per se rule against implication of private causes of action.

This is not to say that the courts should be overly imaginative in creating civil remedies. Perhaps, as recent cases indicate,[25] the judiciary should take a conservative stance in this regard. A court should examine the statutory regulation in question as a whole before determining whether a remedy should be implied as *necessary* to *effectuate* the legislative purpose.[26] As additional remedies

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(Paulsen ed. 1959). *See also* de Sloovere, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U. L.Q. REV. 407 (1932); Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1932); Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940); Tunks, *Assigning Legislative Meaning: A New Bottle*, 37 IOWA L. REV. 372 (1952); Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR REV. 1 (1938).

22. Frank, *supra* note 8, at 1259 (footnotes omitted).

23. *Id.* at 1262.

24. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

25. *See* Parts IV & V *infra*.

26. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In the words of Benjamin Cardozo: "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts

will, by their very nature, frequently further the legislative purpose, the key to the proper standard is the *necessity*—rather than merely the desirability—of such a remedy. Similarly, the remedy must effectuate rather than merely supplement or strengthen the statutory purpose. If there is any one single element running through the recent implication cases, it is the requirement of legislative intent to provide a private remedy. Accordingly, the task for the courts is not an easy one. They must heed the express dictates of the legislation and not lightly imply a private right of action in the face of legislative silence.[27] Nevertheless, in certain cases the overall legislative history, purpose, and scope of the statutory scheme may compel implication of a private cause of action even though the statute itself is mute on this point.

III. The Problem Defined: An Overview of Implication Under the Securities Acts and the Protection of Civil Rights

It has been nearly sixty-five years since the Supreme Court first addressed the question of implying a private remedy from federal prohibitory legislation,[28] and in the years that have followed that first decision, both the Court and the lower courts have been increasingly active in the implication area.[29] Most of the cases decided in the first fifty years of this period denied the availability of implied private relief.[30] The judicial attitude changed, however, in 1964, when in *J.I. Case Co. v. Borak*[31] the Supreme Court adopted an extremely expansive approach to the implication process. By 1975, the Court realized that it was time to find a replacement for the ad hoc approach that typified post-*Borak* decisions; consequently, in the seminal case of *Cort v. Ash*[32] it attempted to formulate general principles of implication. In the five years since *Cort*,

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together and in their relation to the end in view." Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1934) (Cardozo, J., dissenting).

27. It has been suggested that legislative intent is not and should not be a necessary part of the implication process: "[T]he process of implication . . . is neither limited by affirmative legislative 'intention' nor is [it] necessarily a process of statutory construction." Mowe, *Federal Statutes and Implied Private Actions*, 55 Or. L. Rev. 3, 7 (1976). However, not even the *Borak* Court has gone this far. As will be seen throughout this Article the question of legislative purpose is most germane to implication.

28. Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

29. *See* authorities cited in notes 36-37 *infra*.

30. *See* text accompanying notes 101-15 *infra*.

31. 377 U.S. 426 (1964).

32. 422 U.S. 66 (1975).

federal courts on all levels have sought to refine its approach. Most of the activity has involved interpretation of federal securities laws by lower federal courts, but an equally significant body of case law has developed with respect to private remedies in the area of civil rights as well. An understanding of the historic development of the private rights doctrine, in both the securities and civil rights context, would then be helpful in comprehending the overall problem that many courts now face.

A. *The Evolution of Private Remedies Under the Securities Laws*

In 1946 Judge Kirkpatrick, in *Kardon v. National Gypsum Co.*,[33] recognized an implied private right of action arising out of SEC rule 10b-5.[34] This decision became the springboard for one of the most significant judicial revolutions in history. Even beyond its impact on the securities laws, *Kardon* has been described as the "first major breakthrough" for implied rights since the seminal *Rigsby* decision thirty years earlier.[35] In addition to planting the acorn for the oaken remedy under rule 10b-5,[36] *Kardon* set the stage for the recognition of several other implied rights of action under the securities acts.[37] For example, three years after *Kardon*, another district court recognized a private remedy under the parallel antifraud provision contained in section 17(a) of the Securities Act of 1933.[38] Similarly, despite several earlier lower court deci-

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33. 69 F. Supp. 512 (E.D. Pa. 1946).

34. 17 C.F.R. § 240.10b-5 (1980). Rule 10b-5 is the administrative embodiment of the Securities and Exchange Act's general antifraud provision that outlines manipulative and deceptive practices in connection with the purchase or sale of a security. *See* section 10b-5 of the Exchange Act, 15 U.S.C. § 78j(b) (1976). *See generally* A. BROMBERG, SECURITIES LAW: FRAUD, SEC RULE 10b-5 (1977).

35. Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. Mo. K.C. L. REV. 292, 293 n.4 (1972). *See* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916), discussed in the text accompanying notes 94-96 *infra*.

36. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). *See generally* A. BROMBERG, *supra* note 34; Joseph, *Civil Liability Under Rule 10b-5—A Reply*, 59 NW. U.L. REV. 171 (1964); Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U.L. REV. 627 (1963).

37. *See* 2, 5 L. LOSS, SECURITIES REGULATION 932-56, 2879-925 (2d ed. 1961, 2d ed. Supp. 1969). *See also* authorities cited in note 73 *infra*.

38. Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949). *See* 15 U.S.C. § 77q(a) (1976). Although not yet formally recognized by the Supreme Court, most circuit and district courts that have faced the issue have acknowledged the section 17(a) remedy. *See generally* Hazen, *A Look Beyond the Pruning of Rule 10b-5: Implied Remedies and Section 17(a) of the Securities Act of 1933*, 64 VA. L. REV. 641 (1978).

sions to the contrary,[39] the Supreme Court followed the lead of Judge Kirkpatrick in *Kardon* and in 1964 acknowledged an implied remedy under the proxy regulation provisions of section 14(a) of the 1934 Securities Exchange Act.[40] The Court also later gave its express sanction to the 10b-5 action[41] and over the years handed down a series of opinions that collectively established a broad range of expansive remedies.[42]

Following the liberal implication approach taken by the Supreme Court, the lower federal courts likewise began and have continued to recognize implied remedies under various sections of the securities acts. For example, in addition to expanding the scope of the antifraud remedies for purchases and sales of securities[43] and for inaccuracies in proxy material disseminated to solicit shareholder votes,[44] the courts recognized a remedy for investors who were injured by misstatements made in the course of a corporate takeover by way of a tender offer.[45] The lower federal courts also expanded their implication efforts into the areas of trust indentures,[46] the margin rules affecting securities purchased on credit,[47]

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39. *E.g.*, Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961).

40. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* 15 U.S.C. § 78n(a) (1976). *See generally* 5 L. Loss, *supra* note 37, at 2880-83 (2d ed. Supp. 1969).

41. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971).

42. *E.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

43. Rule 10b-5 probibits fraud and misstatements in connection with the purchase or sale of a security. 17 C.F.R. § 240.10b-5 (1980).

44. *See* authorities cited in note 40 *supra*.

45. *E.g.*, Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). *See* Note, Chris-Craft: *The Uncertain Evolution of Section 14(e)*, 76 COLUM. L. REV. 634 (1976). In 1968, the Williams Act Amendments to the Securities Exchange Act of 1934 introduced various filing and disclosure requirements with regard to tender offers for the shares of a publicly traded company. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976). *See generally* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462 (1969). More specifically, § 14(e) imposes broad antifraud proscriptions against all transactions in connection with a tender offer. 15 U.S.C. § 78n(e) (1976). Recently, the Supreme Court has cut back, if not all together elimmated the § 14(e) remedy. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), discussed in the text accompanying notes 171-73 *infra*. *See also* Note, *Private Rights of Action for Damages under Section 13(d)*, 32 STAN. L. REV. 581 (1980).

46. *E.g.*, Zeffiro v. First Pa. Banking & Trust Co., 623 F.2d 280 (3d Cir. 1980). *See generally* Dropkin, *Implied Civil Liability Under the Trust Indenture Act: Trends and Prospects*, 52 TUL. L. REV. 299 (1978).

47. *See* Marrero v. Banco di Roma (Chicago), [Current Binder] FED. SEC. L. REP. (CCH) ¶ 97,584 (E.D. La. April 8, 1980); Martin v. Howard, Weil, Labouisse, Friedricks, Inc., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 97,586 (E.D. La. March 26, 1980). *See generally* Climan, *Civil Liability Under the Credit-Regulation Provisions of the Securities Exchange Act of 1934*, 63 CORNELL L. REV. 206 (1978).

and the regulation of investment advisers.[48] The courts have even gone so far as to imply avenues for private relief under stock exchange and broker dealer self-governing rules.[49] Moreover, this activity has not been limited to the recognition of additional remedies; the courts have also been quite liberal in redefining the parameters of previously created remedies.

While the lower federal courts have continued to expand remedies under the securities acts,[50] the Supreme Court itself, however, has shifted direction. The result has been the development of two distinct lines of federal jurisprudence—one at the Supreme Court level, the other in the circuit and district courts.[51] The Court has not only cut back on the scope of existing implied remedies;[52] it has also curtailed its recognition of additional implied avenues of relief.[53] Most recently, in *Transamerica Mortgage Advisors, Inc. v. Lewis*,[54] the Court curiously denied the existence of an implied private damage remedy while at the same time it recognized a right of rescission. This narrowing trend seems generally consistent with the Court's frequently stated concern over overcrowded federal

48. *See generally* Note, *Private Cause of Action Under Section 206 of the Investment Advisers Act*, 74 MICH. L. REV. 308 (1975).

49. *See generally* Lashbrooke, *Implying a Cause of Action for Damages: Rule Violations by Registered Exchanges and Associations*, 48 U. CIN. L. REV. 949 (1980); Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM L. REV. 12 (1966); Comment, *Private Actions Under the Suitability and Supervision Duties of Exchange and Dealer Association Rules: The Fraud Requirement*, 16 SAN DIEGO L. REV. 773 (1979). A further possible area for implication is the recently adopted Foreign Corrupt Practices Act, Pub. L. No. 95-213, tit. 1, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff (Supp. I. 1977)). *See generally* Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085 (1979). For a discussion of implied remedies under the Commodity Exchange Act, *see* text accompanying notes 238-81 *infra*.

50. *E.g.*, Alabama Farm Bureau Mut. Cas. Ins. Co. v. American Fidelity Life Ins. Co., 606 F.2d 602 (5th Cir. 1979); Kidwell v. Meikle, 597 F.2d 1273 (9th Cir. 1979); Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

51. *See* Hazen, *Corporate Mismanagement and the Federal Securities Acts' Antifraud Provisions: A Familiar Path With Some New Detours*, 20 B.C. L. REV. 819 (1979).

52. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (deception or manipulation is required in a 10b-5 action); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) (giving a relatively narrow reading of the materiality requirement of § 14(a)); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (requiring scienter in 10b-5 actions); Blue Chip Stamps v. Manor Drng Stores, 421 U.S. 723 (1975) (the 10b-5 plaintiff must be either a purchaser or seller of the securities in question). *See generally* Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1977).

53. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (denying a remedy under section 17(a) of the Securities Exchange Act of 1934); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (denying a remedy in the hands of a competing tender offeror under section 14(e) of the Exchange Act).

54. 444 U.S. 11 (1979) (decided under section 206 of the Investment Advisers Act of 1940).

dockets.

B. *Implied Rights in the Civil Rights Context*

Beyond the cases arising in the securities area, the other recent major exception to the no-implication trend has been found in cases involving the protection of federal statutory[55] or constitutional[56] individual and civil rights. In the same year in which *Kardon* was decided, the Supreme Court in *Bell v. Hood*[57] was asked to recognize a private remedy on behalf of a plaintiff who asserted a violation of his fourth and fifth amendment rights by federal officers. Although there is an express federal damage remedy for constitutional torts committed by state officials,[58] the Court was confronted with complete congressional silence with regard to federal officials. Although it did not reach the merits of the plaintiff's claim, the Court recognized the implied remedy and indicated that the crux of the issue was the invasion of a federally protected right:

> Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[59]

While the Court's flexible "necessity" test in *Bell* was to reappear later within the more general context of statutory implication,[60] it was initially viewed as limited to constitutional considerations.

Fifteen years after *Bell*, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[61] the Court erased any questions left unanswered by its prior ruling by permitting a private plaintiff to recover for a violation of his constitutional rights. The special status given by the Court to claims of interference with

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55. Cannon v. University of Chicago, 441 U.S. 677 (1979).

56. Davis v. Passman, 442 U.S. 228 (1979).

57. 327 U.S. 678 (1946).

58. 42 U.S.C. § 1983 (1976).

59. 327 U.S. at 684 (footnotes omitted). *See generally* Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968).

60. *See* Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962), discussed in the text accompanying notes 103-06 *infra*.

61. 403 U.S. 388 (1971). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

federally protected individual and civil rights was further highlighted by two recent decisions. In *Davis v. Passman*[62] the Court declared that the implication of remedies under the constitution is not limited by the doctrines it has developed with regard to statutory implication. Additionally, in *Cannon v. University of Chicago*[63] the Court recognized an implied remedy to protect a statutory grant of civil rights. As will be developed more fully below,[64] *Cannon,* like *Transamerica* and the numerous cases interpreting the securities acts, represents a significant departure from the restrictive approach previously taken by the Burger Court. It is too early to know whether the areas of investor protection and civil rights constitute a *sui generis* approach or, alternatively, if those are simply recent examples of a more generalized emerging theory of implication.

C. *Recent Development of the Implication Doctrine*

In addition to *Transamerica* and *Cannon* the Supreme Court decided two other cases dealing with statutory implication in 1979.[65] This bevy of activity makes the time right for an examination of the current methodology. The implication problem generally has sweeping ramifications for federal jurisprudence, as it encompasses a broad range of substantive areas subject to federal legislation. For example, the Supreme Court has permitted private litigants to vindicate their federal rights through implied remedies for violation of labor relations legislation,[66] interference with federally guaranteed voting rights,[67] denial of civil and constitutional rights,[68] and discrimination.[69] The lower federal courts have been active in an even broader range of substantive areas.[70]

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62. 442 U.S. 228 (1979).

63. 441 U.S. 677 (1979).

64. *See* text accompanying notes 176-84 *infra.*

65. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

66. *E.g.,* Tunstall v. Brotherhood of Locomotive Firemen and Eng'rs, 323 U.S. 210 (1944).

67. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

68. Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

69. Cannon v. University of Chicago, 441 U.S. 677 (1979).

70. *See* Mowe, *supra* note 27, at 9-10:

> In the wake of landmark decisions in labor representation, communications interception and divulgence, racial discrimination in airline passenger service, and securities law, federal courts in recent years have extended the doctrine [of implied remedies] to civil rights in housing, labor-management relations, political contributions and expend-

Commentators have, for the most part, examined the implication process solely within the confines of particular statutory provisions.[71] While this type of ad hoc approach may be quite helpful, it does not facilitiate an appreciation of a pervasive underlying pattern that might predict the course of future implication cases. Several observers have suggested that, as a general proposition, the creation of implied causes of action in the federal courts has slowed considerably, if not come to a halt.[72] An examination of the history of implication,[73] however, especially when read in light of the most recent Supreme Court pronouncements, does not mandate this conclusion.

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itures, welfare review, natural gas service, hospital facilities, admiralty, voting rights, patent fraud, and non-racial discrimination in airline passenger service. There have also been continuing developments in the original landmark areas.

(footnotes omitted).

71. *E.g.*, Climan, *supra* note 47; Dropkin, *supra* note 46; Lashbrooke, *supra* note 49; Lowenfels, *supra* note 49; Siegel, *supra* note 49; Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U. L. REV. 758 (1974); Note, *Implying a Civil Remedy from 15 U.S.C. § 1674(a)*, 54 NEB. L. REV. 744 (1975); Note, *The Decline of the Implied Private Cause of Action, Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41 (1977); Note, *supra* note 45; Note, *Implied Consumer Remedy Under FTC Trade Regulation Rule—Coup de Grace Dealt Holder in Due Course?*, 125 U. PA. L. REV. 876 (1977); Note, *Private Rights of Action for Handicapped Persons Under Section 503 of the Rehabilitation Act*, 13 VAL. U.L. REV. 453, 476-92 (1979); Comment, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413 (1972).

72. *See* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976); Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Mowe, *supra* note 27; Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978). *See also* Goldstein, *A* Swann *Song For Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978). *But see* Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33 (1979).

73. For earlier discussions that trace the development of the implication process in the federal courts see Armstrong, *Expressio Unius, Inclusio Alterius: The* Fagot-Gomez *Private Remedy Doctrine*, 5 GA. L. REV. 97 (1970); O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231 (1964); Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. MICH. J.L. REF. 294 (1976); Note, *Implied Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976); Comment, *Implying Private Causes of Action from Federal Statutes:* Amtrak *and* Cort *Apply the Brakes*, 17 B.C. INDUS. & COM. L. REV. 53 (1975); Comment, *Private Rights from Federal Statutes: Toward a Rational Use of* Borak, 63 NW. U.L. REV. 454 (1968); Comment, *Private Rights and Federal Remedies: Herein of* J.I. Case v. Borak, 12 U.C.L.A. L. REV. 1150 (1965); Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975). *See also* Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243 (1978).

As noted earlier, several recent cases have illustrated an increased divergence on the part of lower federal courts from the conservative trend that has dominated the Supreme Court's implication holdings since *Borak*.[74] There can be no doubt that many federal courts are resisting the Court's recent rulings. Whether this apparent split between the Court and the lower courts is desirable necessarily depends upon proper identification of the current high court position. The present dichotomy is, of course, anomalous to the extent that the Supreme Court's opinions are read as placing a moratorium upon implied remedies. This view, however, is an unduly rigid interpretation of the Court's current approach. While there is no question that the Court is setting relatively narrow parameters for implied rights of action, it continues to acknowledge that private remedies have a place in the enforcement scheme of federal statutes.

The part of this Article that follows contains an examination of the implication process as it has developed in the federal courts. As will be seen, the Supreme Court has gone through a cyclical pattern of expansion and contraction in implying remedies with respect to a wide range of substantive areas. Accordingly, it is not possible to glean a single unified theory from the sixty-five years of Supreme Court activity. There are, however, a number of recurring themes, and it is possible to view all of the diverse approaches as part of a loosely defined pattern that was formulated into a four part test in *Cort v. Ash*.[75] In turn, it was the *Cort* decision that set the stage for the Court's further refinement of its approach to legislative implication.[76]

IV. The Federal Implication Cases: The Development of a Refined Method of Analysis

The implication of private remedies from legislative prohibitions has long been recognized both by courts[77] and commenta-

74. *See generally* Climan, *supra* note 47; Dropkin, *supra* note 46; Hazen, *supra* note 38; Lashbrooke, *supra* note 49; Note, *supra* note 48; Comment, *supra* note 49. *See also* Note, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. Mich. J.L. Ref. 294 (1976).

75. 422 U.S. 66 (1975).

76. *See* Part V *infra*.

77. *E.g.*, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); Couch v. Steel, 3 E. & B. 402, 118 Eng. Rep. 1193 (Q.B. 1854). In addition to the federal cases discussed herein there is a well-established body of state court decisions that recognize the implied remedies doctrine. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); B.F. Farnell Co. v. Monahan, 377 Mich. 552, 141 N.W.2d 58 (1966); Zerby v. Warren, 297 Minn. 134, 210

tors[78] as a proper function for the courts. The relevant cases can be divided into two distinct lines. First, there are those in which the statutory standard is borrowed by the courts for use in traditional common-law actions.[79] The classic example is Justice Cardozo's pronouncement that an unexcused failure to comply with safety appliance legislation is not merely evidence of negligence but "negligence in itself."[80] While this rationale was the basis of the early federal implication cases in the securities area,[81] it has now fallen into disrepute.[82]

Since the abolition of a general federal common law in *Erie Railroad Co. v. Tompkins*,[83] the federal courts have no independently existing causes of action in which to apply the statutory standard of care.[84] Although state courts may still be free to utilize the federal statutory standard in a negligence suit, this, of course, does not aid the private litigant in cases in which the federal courts are granted exclusive subject matter jurisdiction.[85] There is, however, a substantial body of federal common law that survives *Erie*.[86] Even aside from a negligence per se approach, the Supreme Court has on at least one occasion recognized a statutory grant of exclusive jurisdiction as a possible basis for creating an implied

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N.W.2d 58 (1973). For a discussion of the impact of the federal decisions upon state jurisprudence see Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243 (1978).

78. *E.g.*, Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932). *See* Part II *supra*.

79. *See* RESTATEMENT (SECOND) OF TORTS § 286, which is reproduced in note 13 *supra*.

80. Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920). *See generally* W. PROSSER, LAW OF TORTS (4th ed. 1971); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949).

81. *E.g.*, Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

82. *E.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). *See* Part VI *infra*.

83. 304 U.S. 64 (1938).

84. As Justice Douglas aptly observed: "[W]e are not in the free-wheeling days antedating *Erie* . . . ." Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963). The common law necessarily allows much greater flexibility in fashioning new rights and remedies. *Cf.* Note, *supra* note 77, at 1252-53 (1978) ("unlike federal courts, state courts can amplify legislative policy without worrying whether the statute enunciating the policy authorizes the new cause of action").

85. For example, the Securities Act of 1933 grants concurrent jurisdiction to the state courts while the 1934 Exchange Act speaks in terms of federal exclusivity. *Compare* 15 U.S.C. § 77v (1976) *with* 15 U.S.C. § 78u(e) (1976).

86. *See* Part VI *infra*.

right of action in *J.I. Case Co. v. Borak.*[87] While this aspect of the *Borak* decision has been dismissed as merely an isolated pronouncement,[88] its continued utility as an implication technique should not be underestimated.[89]

The second line of federal implication cases is clearly distinct from the negligence per se approach and depends upon the identification of a legislative intent to create a private remedy.[90] Although this second approach to implication has at times led to the creation of broader private remedies, on the whole this line of cases has in fact been responsible for the current apparent constriction of implied remedies.

In 1854 Lord Campbell echoed the rule that when a violation of a statute causes damage to a private party in excess of the general public wrong, a private remedy exists: "[I]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."[91] The United States Supreme Court accepted this rationale in 1916 and has been grappling with the problem ever since. In *Texas & Pacific Railway Co. v. Rigsby*[92] the Supreme Court expressly adopted Lord Campbell's analysis by choosing to recognize an implied remedy for injuries resulting from a violation of the Federal Safety Appliance Act.[93] The Court reasoned that:

> A disregard of the command of the statute is a wrongful act, and where it results in damages 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 . . . . This is but an application of the maxim, *ubi jus ibi remedium* [where there is a right, there is a remedy].[94]

As is always the case, one can point to a countervailing maxim, in this instance *expressio unius est exclusio alterius,* which, not surprisingly, was relied upon heavily by the Court sixty years later as the basis for denying the existence of an implied private remedy

87. 377 U.S. 426, 428 (1964).

88. *See* Comment, *Implying Private Causes of Action From Federal Statutes:* Amtrak *and* Cort *Apply the Brakes,* 17 B.C. INDUS. & COM. L. REV. 53 (1975).

89. *See* text accompanying notes 255-56, 272-73 *infra.*

90. *See* text accompanying notes 17-27 *supra.*

91. Couch v. Steel, 3 E. & B. 402, 411, 118 Eng. Rep. 1193, 1197, (Q.B. 1854). *See also* Thayer, *supra* note 11.

92. 241 U.S. 33 (1916).

93. Ch. 196, 27 Stat. 531 (1893), *as amended* 45 U.S.C. §§ 1-16 (1976).

94. 241 U.S. at 39-40.

under the Amtrak Act.[95]

While it has been asserted that the above two maxims may be fashioned into a workable standard that would allow implied actions only when there are no express statutory remedies,[96] the Supreme Court's recognition of implied remedies for both violations of the securities laws[97] and transgressions of individual civil rights[98] belies such an approach. Evidence of the fact that the absence of express remedies equally is not in itself outcome determinative is found in the Court's refusal in *T.I.M.E. Inc. v. United States*[99] to recognize an implied right of action under the Motor Carrier Act.[100] In denying the existence of a private remedy, the *T.I.M.E.* opinion significantly qualified the implication doctrine by rigidly pointing to the absence of an express remedy as evidence of congressional intent to protect the new trucking industry from the impact of extra-agency relief.[101] The *T.I.M.E.* Court's reasoning, when read in conjunction with *Rigsby,* demonstrates that presumptions of statutory interpretation, while facilitating argumentation of the issues, fail to state a generally applicable test, thereby inviting judges to formulate decisions based upon an elusive, if not outrightly fictional, legislative intent.[102] The most elucidating example

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95. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). *See* note 102 *infra;* Comment, *supra* note 88.

96. *See* text accompanying notes 90-95 *supra.*

97. *E.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *But see* Cannon v. University of Chicago, 441 U.S. 677, 736 (1979) (Powell, J., dissenting): "*Borak,* rather than signaling the start of a trend in this Court, constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute."

98. *E.g.,* Cannon v. University of Chicago, 441 U.S. 677 (1979). *See* 42 U.S.C. § 1983 (1976).

99. 359 U.S. 464 (1959).

100. 49 U.S.C. §§ 301-327 (Supp. II 1978). There are express remedies, however, in parallel federal regulations. *See* 359 U.S. at 470. *See also* text accompanying notes 183-84 *infra.*

101. 359 U.S. at 477-78 n.18. *See* Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication,* 123 U. PA. L. REV. 1392, 1426 (1975). *See generally* O'Neil, *Public Regulation and Private Rights of Action,* 52 CALIF. L. REV. 231 (1964). The *T.I.M.E.* decision also rested heavily on the Court's reluctance to interfere with the primary jurisdiction of the ICC. 359 U.S. at 474. *See* Mowe, *supra* note 27, at 20; Pillai, *supra* note 72, at 30-31; Comment, *The Doctrine of Primary Jurisdiction and the* T.I.M.E. *Case,* 27 U. CHI. L. REV. 536 (1960). The primary jurisdiction doctrine was to resurface as a basis for denying the existence of a private remedy. *See* text accompanying notes 157-59 *infra.*

102. Even the *Amtrak* Court that relied upon the *expressio unius* maxim conceded that it was only the first step in legislative interpretation:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be

is found in the fact that just three years after the *T.I.M.E.* decision, the Court in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*[103] recognized an action under the same section of the Interstate Commerce Act.[104] The *T.I.M.E.* case involved a shipper's after-the-fact complaint against allegedly unreasonable rates, whereas *Hewitt-Robins* dealt with a carrier's unlawful routing practices that affected a plaintiff who presumably was within the class for whose *especial* benefit the statute was enacted.[105] The *Hewitt-Robins* decision was heralded as a return to the liberal test of damage to an intended beneficiary.[106] The panoply of standards, however, confused the implication process. Consequently, with the more doctrinaire maxims of legislative interpretation proving to be unhelpful, the Court continued to attempt to refine the *Rigsby* test until its decision in *Cort v. Ash.*[107] *Cort* established a four factor test that has governed all subsequent cases.[108]

The key to the *Rigsby* analysis lies not only in the Court's reliance on the ever elusive factor of legislative intent, but more specifically upon the question of whether the legislation was enacted for the "especial benefit" of a particular class.[109] This principle is reflected in the first prong of the *Cort* test[110] and has become a firmly embedded tenet of statutory analysis.[111] Unfortunately, the

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done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940). Accordingly, we turn to the legislative history of § 307(a).

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).

103. 371 U.S. 84 (1962).

104. 49 U.S.C. § 316 (1976).

105. 371 U.S. at 87. *See* O'Neil, *supra* note 101, at 239-44; Comment, *supra* note 101, at 1428.

106. O'Neil, *supra* note 101, at 269-70.

107. 422 U.S. 66 (1975). *See* text accompanying notes 160-61 *infra*.

108. *See* notes 161-64 *infra* and accompanying text.

109. It has been suggested that this is an overly restrictive limitation: "It is not clear that this insistence upon the ranking of legislative beneficiaries, with the resultant denial of protected status to all but the top-ranking beneficiary, serves any useful purpose or is required by the common law precedent." Pillai, *supra* note 72, at 20.

110. *See* text accompanying note 163 *infra*.

111. A most striking example is Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973), in which the Minnesota Supreme Court recognized an implied remedy for violation

most recent Supreme Court decisions jeopardize the proper function of this factor insofar as "the common law 'especial' beneficiary has been transformed from an enabling tool into an exclusionary rule."[112] Even as an exclusionary rule, however, the especial beneficiary rationale serves as one method of divining the legislative purpose.

The fifty years following *Rigsby* produced relatively few cases in which the Supreme Court recognized an implied private remedy. While Justice Powell claimed that the only implication activity during this time arose out of one "especially strong" line of litigation,[113] several decisions that implied remedies in favor of the government were decided during this period.[114] Also, in a series of cases the Court implied a broad set of remedies under the Railway Labor Act of 1926.[115] For the most part, however, Powell was cor-

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of a statute prohibiting the sale of glue to minors. The *expressio unius* argument was particularly poignant here since in the Civil Damage Act the legislature had created express liability in an analagous setting for the illegal sale of liquor. *See* Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972). The court in *Zerby* nevertheless found that the glue sale statute did not create negligence per se but rather "absolute liability." For a further, related example, see Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), in which the court implied a remedy against a tavern owner for having served an intoxicated patron notwithstanding New Jersey's repeal of its civil damage act.

112. Pillai, *supra* note 72, at 23.

113. Cannon v. University of Chicago, 441 U.S. 677, 733 (1979) (Powell, J., dissenting).

114. *Id.* at 733 n.3. It must be remembered that the history that follows is limited to Supreme Court cases and does not include the numerous circuit and lower court decisions implying private remedies that have been left undisturbed by the Supreme Court. *See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (discrimination in violation of the Civil Aeronautics Act of 1938); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (publication of telephone messages in violation of the Federal Communications Act of 1934); Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973) (violation of Natural Gas Act); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969) (retaliatory tactics in violation of the Fair Labor Standards Act); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (violation of the Securities Exchange Act of 1934). *See* text accompanying notes 33-36 *supra*.

115. As described by Justice Powell:

> [T]he Court in *Texas & N. O. R. Co. v. Railway Clerks*, 281 U.S. 548 (1930), upheld an injunction enforcing the Act's prohibition of employer interference in employees' organizational activities. . . . [T]he Court in *Virginia Railway Co. v. Railway Employees [sic]*, 300 U.S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steel v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), and *Tunstall v. Locomotive Firemen & Enginemen [sic]*, 323 U.S. 210 (1944), the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts.

Cannon v. University of Chicago, 441 U.S. 677, 733-34 (1979) (Powell, J., dissenting) (citation omitted). The Railway Labor Act continued to be an active area for implication. *See, e.g.*, International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963); Burke v.

rect in asserting that the Court was unreceptive to arguments in favor of implication.[116] That trend shifted, though, in 1964, almost fifty years after *Rigsby*.

In *J.I. Case Co. v. Borak*[117] the Court gave its first express sanction to an implied remedy under the Securities Exchange Act's proxy antifraud rules. Following the rationale laid down in *Rigsby*, the Court looked to the legislative purpose and identified the "especial beneficiaries" of federal proxy regulation:

> The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13. . . . [The] broad remedial purposes are evidenced in the language of the section . . . . While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.[118]

The Court noted the extent to which the SEC's overburdensome workload precluded effective enforcement of the proxy rules.[119] Consequently, the Court concluded that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action."[120] As will be demonstrated below, even under the more stringent language utilized by the Court in later cases, the *Borak* ruling was not an aberration as has been suggested by Justice Powell.[121] Although the Court did not search for express evidence of congressional intent to support its result, it believed that the legislative scheme on its face, especially when viewed in light of the statute's underlying purposes, evidenced such an intent. Thus, it is incorrect to assert, as some have,[122] that the *Borak* Court ignored this most important aspect of the *Cort* test for implying remedies.

In the wake of *Borak*, the Court in *Wyandotte Transportation Co. v. United States*[123] implied a private remedy under section 15

Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970).

116. *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 956-76 (1975). *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J., concurring).

117. 377 U.S. 426 (1964).

118. *Id.* at 431-32.

119. *Id.* at 432.

120. *Id.*

121. Cannon v. University of Chicago, 441 U.S. 677, 736 (1979) (Powell, J., dissenting).

122. *See, e.g.*, Comment, *supra* note 88; Comment, 63 NW. U.L. REV. 454, 463 (1968).

123. 389 U.S. 191 (1967).

of the Rivers and Harbors Act of 1899.[124] As had been the case in *Borak*, the *Wyandotte* opinion examined the statute as a whole and found that the express criminal sanctions were not adequate "to ensure the full effectiveness of the statute which Congress had intended."[125] The Court also enlarged the scope of the *Rigsby* especial plaintiff test by requiring that the *injury* be "of the type that the statute was intended to forestall."[126] Although some commentators have categorized the "*Borak-Wyandotte* approach" as a departure from past practices,[127] these two cases appear consistent with the Court's continued emphasis on both legislative intent and the focus of the prohibitory provision in question.

If the *Borak-Wyandotte* emphasis upon the necessity of private remedies to effectuate the statute's purpose is viewed as giving the courts a free hand to supplement statutory remedies, the principle definitely constitutes a departure from the mainstream analysis. Given that private remedies will always aid enforcement of penal statutes, such a reading would remove almost all limitations on the courts' implication authority. Neither *Borak* nor *Wyandotte* went this far, however. Both of these decisions were heavily dependent upon a finding of legislative intent. While it was necessary to both decisions that the implied remedy not thwart the statutory scheme,[128] such a finding was not, standing alone, sufficient to justify implication. In both cases the Court paid the same heed to legislative design that is still necessary under *Cort* and its progeny.

Following the *Borak* decision, in 1970 the Court in *Mills v. Electric Auto-Lite Co.*[129] reaffirmed the breadth of the proxy rules' private remedy. The next year, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[130] the Court recognized an implied remedy against a federal official for violation of a plaintiff's fourth amendment rights. In 1971 the Court also recognized an implied remedy for violations of SEC rule 10b-5.[131] The Court

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124. 33 U.S.C. § 409 (1976).

125. 389 U.S. at 202.

126. *Id.*

127. *E.g.*, Note, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. MICH. J.L. REF. 294, 299-301 (1976). *See also* Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

128. *Cf., e.g.*, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), discussed in the text accompanying notes 147-54 *infra*.

129. 396 U.S. 375 (1970).

130. 403 U.S. 388 (1971).

131. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971).

reaffirmed the broad scope of the 10b-5 action in the 1972 case of *Affiliated Ute Citizens v. United States.*[132] These cases further demonstrate that *Borak* cannot accurately be described as an aberration. It should be noted, however, that because of its constitutional base, *Bivens* has since been placed on a different plane from statutory implication cases.[133] Moreover, Justice Stevens, speaking for the Court in *Cannon,* observed that the 10b-5 remedy might be distinguished because of its twenty-five year history in the lower courts prior to the Supreme Court's decision.[134]

The post-*Borak* period was not limited to simply an increase in lower court activity.[135] The Court itself also began to expand the focus of its activity to areas beyond the securities laws. In *Jones v. Alfred H. Mayer Co.,*[136] the Court implied private remedies under the federal Civil Rights Act beyond the individual suits expressly authorized by section 1983.[137] *Jones* involved a claim against a private party for an injunction to prohibit continued violations of section 1982 of the Act,[138] which guarantees nondiscriminatory treatment with respect to property ownership. Although the express enforcement criteria of section 1983 were not applicable because the defendant was not a state official,[139] the Court upheld the complaint.

Just one year later the Court reaffirmed the position taken in *Jones* with regard to the exclusivity of the express damage remedy

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132. 406 U.S. 128 (1972).

133. Davis v. Passman, 442 U.S. 228 (1979).

134. Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979).

135. *E.g.,* Moses v. Burgin, 445 F.2d 369 (1st Cir.), *cert. denied,* 404 U.S. 994 (1971); Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969). *See* Note, *The Implication of a Private Cause of Action Under Title III of the The Consumer Credit Protection Act,* 47 S. CAL. L. REV. 383 (1974).

136. 392 U.S. 409 (1968). In *Jones* the Court extended the civil remedies under the federal civil rights acts to cover private parties who violated the plaintiff's rights. *Accord,* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Note, *Implication of Civil Remedies Under the Indian Civil Rights Act,* 75 MICH. L. REV. 210 (1976).

137. 42 U.S.C. § 1983 (1976).

138. 42 U.S.C. § 1982 (1976). The section guarantees that people "of every race and color shall have the same right, in every State and Territory of the United States to inherit, purchase, lease, sell, hold and convey real and personal property as is enjoyed by white citizens."

139. The *Jones* decision helped establish that state action under the Civil Rights Acts was to be given a broad interpretation especially with regard to private party defendants. 392 U.S. at 423-24.

of section 1983. In *Sullivan v. Little Hunting Park, Inc.*[140] the Court was faced with a claim for both damages and injunctive relief for violations of the guarantees of section 1982. The decision expanded *Jones* by explicitly relying upon the implication enabling language of *Rigsby*.[141] In reaching this result the Court eschewed a restrictive approach to the implication of private remedies. Similarly, in *Allen v. State Board of Elections*[142] the Court recognized an implied right of action under section five of the Voting Rights Act of 1965.[143]

In *Rosado v. Wyman*[144] the Court was faced with a challenge to a state welfare program that was allegedly inconsistent with the Social Security Act Amendments of 1967.[145] Although the relevant statute contained no private remedy and further provided for administrative control by the Secretary of Health, Education, and Welfare, the Court by-passed the doctrine of primary jurisdiction and upheld the private plaintiff's claim for injunctive relief. Welfare claims akin to the one in *Rosado* essentially involve the protection of civil rights.[146]

While the Court has thus been active in remedying civil rights and securities violations, it has utilized a more restrained mode of analysis in other areas. In *National Railroad Passenger Corp. v. National Association of Railroad Passengers*[147]—the *Amtrak* case—the Court denied a private party's right to challenge Amtrak's discontinuation of service in light of the express grant of similar enforcement power to the Attorney General. In *Amtrak* a private plaintiff alleged that the discontinuance of certain rail service violated the Rail Passenger Service Act of 1970 (the Amtrak Act).[148] In the only portion of the legislation to speak of remedies, section 307(a) of the Act specifically confers upon federal district courts enforcement powers upon petition of the Attorney General.[149] The Court attempted to determine whether there had been

140. 396 U.S. 229 (1969).
141. *Id.* at 240.
142. 393 U.S. 544 (1969).
143. 42 U.S.C. § 1973 (1976).
144. 397 U.S. 397 (1970).
145. 42 U.S.C. § 402(a)(23) (1976).
146. *See, e.g.*, Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).
147. 414 U.S. 453 (1974).
148. 45 U.S.C. § 501-645 (1976).
149. 45 U.S.C. § 547(a) (1976).

a legislative intent to imply a remedy "in light of § 307(a)."[150] The Court pointed to the House of Representatives' rejection of an amendment to section 307 that would have allowed private actions.[151] Most important, however, was the Court's conclusion that a private remedy could "completely undercut" the essence of the Act by permitting undue prolongation of uneconomical passenger rail routes.[152] As the Court noted: "Congress clearly did not intend to replace the delays often inherent in the administrative proceedings contemplated by § 13a of the Interstate Commerce Act with the probably even greater delays inherent in multiple federal court proceedings."[153]

Although it has been suggested that the *Amtrak* case represented a significant retreat from the Court's prior implication rulings,[154] that clearly is not so. Even beyond congressional rejection of a private remedy, the statutory scheme in *Amtrak* stood to be thwarted by private litigants. Additionally, in contrast to *Rigsby* and its more recent progeny, the Court identified no class distinct from the public at large for whose "especial benefit" the legislation had been enacted.

Following on the rails of *Amtrak,* in *Securities Investor Protection Corp. v. Barbour,*[155] the Court was asked to declare the ex-

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150. 414 U.S. at 455.

151. *Id.* at 460-61.

152. *Id.* at 463-64 (footnote omitted):

> If the respondent's view of the Act were to prevail, a private plaintiff could secure injunctive process to prevent the discontinuance of an "uneconomic" passenger train *pendente lite,* which would force Amtrak to continue the train's operation and to incur the resulting deficits and dislocations within its entire system while the court considered the propriety of the proposed discontinuance. Since suits could be brought in any district through which Amtrak trains pass and since there would be a myriad of possible plaintiffs, the potential would exist for a barrage of lawsuits that, either individually or collectively, could frustrate or severely delay any proposed passenger train discontinuance. Even if one court eventually upheld the discontinuance, its judgment would not control a suit brought in another district and would not, in any event, obviate the loss in the interim of substantial sums and the diversion of rolling stock from more heavily traveled routes. This would completely undercut the efficient apparatus that Congress sought to provide for Amtrak to use in the "paring of uneconomic routes." It would also produce the anomalous result of a discontinuance procedure under the Act considerably less efficient than that which existed before, since there would no longer be a single forum that could finally determine the permissibility of a proposed discontinuance. In the place of the state or federal regulatory bodies, the Congress would have substituted any and all federal district courts through whose jurisdictions an Amtrak train might run.

153. *Id.* at 464 (footnote omitted).

154. *See* Comment, *supra* note 88, at 62.

155. 421 U.S. 412 (1975).

istence of a private remedy under the Securities Investor Protection Act (SIPA)[156] against the Securities Investor Protection Corporation (SIPC), the entity formed to protect the interests of customers of bankrupt stock brokerage houses. As in *Amtrak*, the recognition of the asserted private right of action in *Barbour* would in a very strong sense have thwarted the goal of the legislation by allowing courts to impede administrative procedures provided by the Act. On its face the *Barbour* decision rested upon the doctrine of primary jurisdiction.[157] As such the Court merely echoed the approach it had taken sixteen years earlier in *T.I.M.E.*[158] *Barbour* thus reflected *Amtrak's* deference to administrative determination of the relevant issue.

In contrast to the administrative schemes involved in *T.I.M.E.* and *Amtrak*, the Securities Act of 1933 and the 1934 Securities Exchange Act do not grant the SEC a similar basis of dispute resolution. Accordingly, the doctrine of primary jurisdiction does not have a role when the antifraud provisions of those statutes are considered. There were, however, additional justifications for rejection in *Barbour* of a private remedy under the SIPA. The Court placed considerable emphasis upon the congressional formulation and suggested that the primary responsibility for enacting an enforcement scheme rests with Congress. Speaking for the *Barbour* Court, Justice Marshall quickly dismissed the relevance of prior implication cases:

> We need not pause long over the distinctions between this case and those, such as [*Borak*] . . . .
>
> [In *Borak* the Court] concluded that it was "clear that private parties have a right under § 27 [of the Act] to bring suit for violation of § 14(a)". . . .
>
> Unlike the Securities Exchange Act, the SIPA contains no standards of

156. 15 U.S.C. § 78ggg(b) (1971) (current version at 15 U.S.C. § 78ggg(b) (1980)).

157. The Court maintained that:

> the SIPC avoids unnecessarily engendering the costs of precipitate liquidations [of stock brokerage firms]—the costs not only of administering the liquidation, but also of customer illiquidity and additional loss of confidence in the capital markets—without sacrifice of any customer protection that may ultimately prove necessary. A customer, by contrast, cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts.

421 U.S. at 422. *See also* Note, *Administrative Law—Primary Jurisdiction: The Misuse of Primary Jurisdiction Retroactively to Extinguish a Tort Remedy:* Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir. 1975), 8 CONN. L. REV. 584 (1976); Comment, *Private Rights of Action Under* Amtrak *and* Ash*: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1433-34 (1975). *See generally* Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 YALE L.J. 315 (1956).

158. 359 U.S. 464 (1959). *See* text accompanying notes 99-101 *supra*.

> conduct that a private action could help to enforce, and it contains no general grant of jurisdiction to the district courts.[159]

The *Barbour* decision thus found an absence of the requisite legislative intent to create a private remedy. Additionally, congressional failure to include a general grant of federal judicial jurisdiction may have been the most compelling ground for denying relief.[160] In sum, as was the case in *Amtrak* the SIPA legislative scheme on its face belied the existence of an implied private remedy. The Court was thus loathe to invade an area it considered left to legislative prerogative.

After the *Amtrak* and *Barbour* decisions the implication issue became more clearly drawn. With the exception of the more expansive approach taken in the securities and civil rights areas, the Court was retreating from the more expansive *Rigsby—Hewitt-Robins* method of analysis. The result was a great deal of uncertainty as to the Court's true attitude toward implication. The time was thus ripe for a clearer articulation of the standards for analysis.

V. *Cort v. Ash* AND THE RECENT SUPREME COURT REFINEMENTS

A. *The* Cort *Test*

It was against the background of seemingly cyclical expansion and retrenchment of its approach to implication that the Supreme Court unveiled its current method of analysis. *Cort v. Ash*[161] presented a four factor test for the implication of private remedies from federal prohibitory statutes. At issue in *Cort* was a shareholders' derivative action against corporate directors to recover corporate expenditures allegedly made in violation of the Federal Election Campaign Act of 1971.[162] In denying the availability of a private remedy, the Court attempted to synthesize its prior rulings and discerned a four-pronged test from their holdings:

> 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 such a remedy or to deny one? See, *e.g.*, *National*

159. 421 U.S. at 423-24.

160. This is a critical distinction between *Barbour* and *Borak*, as far as the implication issue is concerned; furthermore, the general jurisdictional provision is a crucial element in setting the stage for the development of federal common law. *See* Part VI *infra*.

161. 422 U.S. 66 (1975).

162. Law of June 25, 1948, ch. 645, 62 Stat. 723 (repealed 1976).

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 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).[163]

While the first three factors in the test follow directly from the implication cases cited by the Court, the fourth had never been explicitly considered by the Court before its decision in *Cort*. As will be developed more fully below, the Supreme Court cases that have followed *Cort* have placed considerable emphasis upon this notion of federalism. The fear of undue federalization has been especially acute in the context of securities regulation, in which both state and federal statutes govern various aspects of corporate conduct. The task for the courts in considering such legislation has been to avoid a conflict between the federal and state spheres of influence.[164] Indeed, the *Cort* facts themselves raised the possibility of undue incursion by federal law upon state regulation of corporate governance. While the *Cort* test, then, does not provide a fool-proof formula by which to predict the success or failure of all implication claims, it does present definite guidelines for analysis. Moreover, it provides a useful indication of the current thinking of the Court.

Following *Cort*, a trio of decisions addressing prohibited corporate conduct utilized the same federalism concerns to justify a limitation on the scope of the rule 10b-5 implied remedy. In *Blue Chip Stamps v. Manor Drug Stores*[165] the Court limited use of the private damage remedy to purchasers or sellers of securities. Although acknowledging that the 10b-5 right of action was consistent with the *Borak* rationale,[166] Justice Rehnquist, speaking for the

163. 422 U.S. at 78.

164. The tension that exists in securities regulation is between the state interest in chartering corporate franchises and the federal securities acts' goal of investor protection. The recent Supreme Court cases under the securities acts can be viewed not so much as an across-the-board narrowing of private remedies and the acts' impact in general but rather as an attempt to balance the competing state and federal interests. *See* Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391.

165. 421 U.S. 723 (1975).

166. *Id.* at 729-31.

majority, pointed to the need for clarification of the parameters of the remedy that had been significantly expanded in twenty-five years of district and circuit court decisions.[167] As a result, the Court, couching its retrenchment in terms of the pruning of a judicial oak, limited the 10b-5 remedy to meet the needs of the "especial" beneficiaries of that section's antifraud provisions.[168] After *Blue Chip* the Court further restricted the scope of the 10b-5 remedy by requiring in *Ernst & Ernst v. Hochfelder*[169] that the private plaintiff prove that the defendant acted with scienter. In *Ernst & Ernst* the Court again expressed concern that the 10b-5 remedy had grown too fast within a short period of time. The Court viewed the scienter requirement as necessary to keep the private remedy in line with the congressional purpose of investor protection without unduly burdening the market place.

To complete the trilogy, in *Santa Fe Industries, Inc. v. Green*[170] the Court reversed the Second Circuit's grant of a 10b-5 remedy due to the plaintiff's failure to allege an act of *deception* arising out of the defendant's conduct. The *Santa Fe* decision is especially significant due to its application of the fourth prong of the *Cort* test. The Court first noted that standards of corporate conduct and the correlative rules of fiduciary duty have long been relegated to state corporate law.[171] In refusing to recognize a federal remedy when the defendant's conduct complied with applicable state law, the Court declined to "impose a stricter standard of fiduciary duty than that required by the law of some States."[172]

In *Piper v. Chris-Craft Industries, Inc.*[173] the Court, as it had done in *Blue Chip Stamps*, picked up on the first prong of the *Cort* test by reemphasizing *Rigsby's* requirement that the legislation be directed toward a special class of persons. In *Piper* the plaintiff, an unsuccessful tender offeror, sought damages from the victor in the control battle. The claim, relying on the antifraud provisions of section 14(e),[174] was that the defendants' violative

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167. *Id.* at 737.

168. This refinement becomes clearer in the Court's holding that a competing tender offeror does not have standing to bring an implied action under § 14(e) of the Act. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), discussed in the text accompanying notes 173-75 *infra*.

169. 425 U.S. 185 (1976).

170. 430 U.S. 462 (1977).

171. *Id.* at 479.

172. *Id.* at n.16.

173. 430 U.S. 1 (1977).

174. 15 U.S.C. § 78n(e) (1976) provides:

misstatements and manipulation assured their successes in the takeover battle. The Court identified the focus of the Williams Act disclosure and antifraud provisions as "seeking to broaden the scope of protection afforded to shareholders confronted with competing claims."[175] Because the plaintiff was a competing offeror rather than a shareholder of the target company, it was ruled not to be a member of the "especial" class that the Act was designed to protect; consequently, the cause of action was denied. Although *Piper* clearly presents a restrictive view of implication, the decision is not a throw back to the *expressio unius* analysis, for the majority's rationale virtually invites recognition of a remedy in the hands of shareholders of the target company.

The foregoing securities cases, while helping to establish the viability of the *Cort* approach, actually did little to clarify the specific requirements of the four-part test. Most significantly, all four cases were limiting rather than enabling decisions. By the same token, the most recent round of implication cases, which span several substantive areas, also present a limiting trend. The recent decisions demonstrate that the *Cort* test survives and further that it is not a death knell for implication. There is, however, without doubt, a strong message to the lower federal courts that remedies should not be lightly implied without close scrutiny of legislative intent, statutory purpose, and federal/state tensions. The scorecard for the 1979 Supreme Court cases highlights the uncertainty that remains. Of the five cases, two denied any private remedy, two recognized a basis for implied relief, and one, while recognizing a constitutional remedy, ruled *Cort* inapplicable.

B. Recent Supreme Court Refinements

Examination of the five recent Supreme Court cases reveals ample evidence that the *Cort* test survives as at least one basis for the recognition of an implied right of action. In *Cannon v. Univer-*

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security bolders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

175. 430 U.S. at 34.

sity of Chicago,[176] the plaintiff filed a complaint against two medical schools, alleging violations of Title IX of the Education Amendments of 1972,[177] which bans sex discrimination in all federally aided programs and institutions. The Supreme Court reversed the lower court's[178] denial of a private damage remedy in a decision written by Justice Stevens, joined by three other members of the Court. Explicitly following the *Cort* rationale, the opinion distinguished other recent cases by finding the plaintiff to be within the statute's "especial" class:

> The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra*, and other laws enacted for the protection of the general public. There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.[179]

The impact of *Cannon* can be fully evaluated only by examination of the concurring and dissenting opinions as well as the line-up of the nine Justices. Although both joined in the Court's ruling, Justices Rehnquist and Stewart felt it necessary to make "explicit what seems . . . already implicit in that opinion," namely that "in

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176. 441 U.S. 677 (1979).

177. 20 U.S.C. § 1681(a) (1978) provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

178. 406 F. Supp. 1257 (N.D. Ill. 1976).

179. 441 U.S. at 690-93 (footnotes omitted) (emphasis supplied). Justice Stevens went on to identify the private remedies under § 14(a) and rule 10b-5 of the 1934 Securities Exchange Act as deviations from the pattern of limiting implied remedies to statutes "where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff . . . ." *Id.* at 690 n.13. As noted earlier, it was further observed that the 10b-5 result can be explained as having an historical basis since the federal courts had recognized the remedy for 25 years. Furthermore, in his dissent in *Cannon* Justice Powell characterized *Borak* as an aberration. It would appear that the historical basis alone is too flimsy to warrant a continuation of the expansive liability that exists under 10b-5 and 14(a). Similarly, a closer look at Stevens' analysis shows that these cases are not aberrational. Stevens' characterization of the *Borak* and *Bankers Life* decisions is not that they arose under statutes directed to the general public, but rather that the "especial" benefited class was not expressly singled out on the statute's face, a fact the presence of which has been the most accurate indicator of congressional intent. In *Borak* and *Bankers Life*, as well as in *Piper*, the Court had to look beyond the statute to identify the "especial" class but found the legislative history sufficiently convincing. The lesson to be learned here is that in future cases, without the express statutory designation that existed in *Cannon*, the plaintiff will have to be well armed with clear and convincing legislative history in order to justify implication.

the future [courts] should be extremely reluctant to imply a cause of action."[180] Chief Justice Burger joined in the Court's opinion, providing a majority of four. It should be noted, however, that the two non-participating Justices—Brennan and Marshall—have long been very receptive to a more liberal approach to implication.[181] Therefore, the *Cannon* rationale was not as closely contested as the four to three division might otherwise indicate.

In his dissent Justice White, joined by Justice Blackmun, found evidence that Congress intended the administrative mechanism of Title IX to be the only means of enforcement. White contrasted the language of Title IX with the express private remedies contained in other civil rights statutes.[182] While this approach might be viewed as advocating a return to the doctrine of *expressio unius*, even a literal interpretation of White's opinion cannot go this far. There can be no doubt that the existence of private remedies in parallel legislative schemes will be a significant negativing factor in implication cases;[183] however, as *Cannon* demonstrates, this is not in itself determinative.[184]

In his vociferous dissent in *Cannon*, Justice Powell expressed his view that implication should *never* be the rule. After noting that in the four years since *Cort* there had been at least twenty circuit court opinions recognizing implied actions, Powell considered it time to "reexamine the *Cort* analysis."[185] Powell charged that the *Cort* analysis should be abandoned because it permits a court to determine the desirability of private enforcement using its own expansive views rather than the intent of Congress. As strong as Powell's views may be, however, it is clear that he stands as a minority of one. *Cort* is still the rule and thus the implication process, although significantly refined, has not—and should not—come to a halt. Furthermore, *Cannon*, as the first case after *Cort* clearly to uphold a new private remedy, expands upon the traditional utilization of an implied action to protect individual and civil rights. The decision demonstrates that, even in its most conservative stance, the Court continues to recognize remedies in

180. 441 U.S. at 717-18 (Rehnquist, J., concurring).

181. *E.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (Brennan, J., concurring; Marshall, J., dissenting); Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963) (Brennan, J., dissenting).

182. 441 U.S. at 719-23 (White, J., dissenting). *See* 42 U.S.C. § 1983 (1976).

183. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

184. *See also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). *See* note 100 *supra*.

185. 441 U.S. at 742 (Powell, J., dissenting).

the civil rights area.

An unsuccessful attempt to imply a private remedy had been made in *Chrysler Corp. v. Brown*,[186] which was decided less than one month prior to *Cannon*. In *Brown*, the plaintiff Chrysler Corporation sued to enjoin disclosure of information that it had given the Defense Logistics Agency concerning Chrysler's employment of minorities and women. The plaintiff based its claim alternatively on the Freedom of Information Act (FOIA)[187] and the Trade Secrets Act.[188] The Court unanimously denied both remedies. With respect to FOIA the Court emphasized that it is "exclusively a disclosure statute,"[189] thus distinguishing it from the prohibitory legislation out of which implication normally arises.[190] Additionally, the Court held that neither act was intended to benefit a special class of persons. Finally, the Court relied upon the absence of any congressional intent in FOIA to limit agencies' discretion to disclose rather than withhold information.[191]

Brown is instructive for two reasons. First, neither the Trade Secrets Act nor FOIA were enacted for the benefit of any special class; instead, like the campaigu contribution act at issue in *Cort*, both acts serve to protect the general public. Consequently, *Brown* was not a departure from the expansive trend in civil rights implication litigation. Second, *Brown* repeated the Court's earlier concerns for the proper role of the statutorily created administrative agency. As was the case in *T.I.M.E.* and *Amtrak*, recognition of the plaintiff's claim in *Brown* would have thwarted the congressional purpose of letting the matter rest with the agency, subject to normal channels for judicial review.

Shortly after *Brown* and *Cannon*, the Court held in *Davis v. Passman*[192] that the *Cort* analysis was too restrictive and should be disregarded when implying a federal right of action from the Constitution as opposed to a statute. The four-member dissent, following the Fifth Circuit's opinion below,[193] urged strict adherence to the *Cort* test. Accordingly, contrary to the position urged by Powell in his *Cannon* dissent, *Davis* can be properly categorized as a

186. 441 U.S. 281 (1979).
187. 5 U.S.C. § 552 (1976).
188. 18 U.S.C. § 1905 (1976).
189. 441 U.S. at 292.
190. *Accord*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).
191. 441 U.S. at 293. *See* Note, *Reverse FOIA Suits After* Chrysler*: A New Direction*, 48 FORDHAM L. REV. 185 (1979).
192. 442 U.S. 228 (1979).
193. 571 F.2d 793 (5th Cir. 1978).

further reaffirmation of *Cort*'s continued vitality in appropriate cases (i.e., those dealing with statutory implication). *Davis* logically extends the rationale of *Bivens* and *Cannon* by allowing additional flexibility with respect to constitutional implication and in cases involving civil rights.

The final two cases considered by the Court in 1979 arose under the federal securities laws, with one denying and one recognizing a private remedy. In *Touche Ross & Co. v. Redington*[194] the Court was asked to recognize a private remedy under section 17(a) of the 1934 Securities Exchange Act.[195] The Court pointed out that the section was literally flanked by the express liability provisions of sections 16(b) and 18(a).[196] Even more significant was the fact that section 17(a), like the legislation involved in *Brown*, is purely an affirmative disclosure statute with no prohibitory provisions. This is in sharp contrast to the antifraud provisions that have formed the basis of the recognized implied remedies under the securities acts. Clearly, it is one thing for Congress to mandate the public availability of information and quite another to directly prohibit certain types of conduct—whether fraud or discrimination—that is directed towards a certain class of persons. Interestingly, a suggested dichotomy between prohibitory statutes and those mandating action is far from new, as it dates back to Dean Thayer's writings.[197]

In its opinion in *Touche Ross*, the Court reemphasized that implication does not come easily: "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."[198] Simply put, the *Touche Ross* decision does no more than deny courts the right to ignore willy-nilly the underlying statutory scheme. It should be interpreted properly as a call for greater consideration of the overall legislative history rather than as merely a cue for the courts to stop implying remedies. The most recent of the Supreme Court decisions on point exemplifies this tempered approach.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*[199] the

194. 442 U.S. at 562.

195. 15 U.S.C. § 78q(a) (1976).

196. 442 U.S. at 571-72.

197. Thayer proposed that it was the violation of prohibiting statutes that constituted negligence per se. Thayer, *supra* note 11.

198. 442 U.S. at 578.

199. 444 U.S. 11 (1979).

Court denied the existence of a private damage action under the antifraud proscription contained in section 206(a) of the Investment Advisors Act of 1940.[200] At the same time, however, the Court was willing to imply an equitable action for rescission of prohibited contracts under section 215 of the same Act.[201] This bifurcated result demonstrates beyond any question that the implication process has not been brought to a halt.

Following its earlier teachings, the Court in *Transamerica* first set out to ascertain the legislative intent. Although the history of the Act was entirely silent on the issue of whether Congress intended that the provisions of the Act would be enforced through private litigation,[202] the Court noted that "[s]uch an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."[203] Significantly, this was an emphatic rejection of the *expressio unius* mode of analysis that may have appeared in some of the Court's other recent implication decisions. After reaffirming the teachings of *Cort*, the *Transamerica* Court, in a five-to-four decision, concluded that there was inadequate evidence of congressional intent to provide a private remedy for violations of the Investment Advisors Act's antifraud provisions. The Court was confronted with language in the 1940 legislation that expressly provided a mechanism for judicial and administrative enforcement. Given that statutory pattern, the Court concluded, it was highly unlikely that Congress somehow neglected to include a private damage action.[204] In contrast, both the

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200. 15 U.S.C. § 80b-6 (1976).

201. 15 U.S.C. § 80b-15 (1976). For a recent application of this aspect of the decision to the Securities Exchange Act of 1934, see Marrero v. Banco di Roma (Chicago), [Current Binder] FED. SEC. L. REP. (CCH) ¶ 97,584 (E.D. La. April 8, 1980) (recognizing a remedy under § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1976)). *See generally* Gruenbaum & Steinberg, *Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened*, 48 GEO. WASH. L. REV. 1 (1979).

202. "[T]he legislative history of the Act is entirely silent—a state of affairs not surprising when it is remembered that the Act concededly does not explicitly provide any private remedies whatever." 444 U.S. at 18.

203. *Id.*

204. We view quite differently, however, the respondent's claims for damages and other monetary relief under § 206. Unlike § 215, § 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217 willful violations of the Act are criminal

Securities Act of 1933 and the Securities Exchange Act of 1934 contain express damage remedies in addition to general antifraud proscriptions.

With regard to section 215 of the 1940 Act, the *Transamerica* Court began its analysis by examining the face of the statute and reasoned that "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness . . . be litigated somewhere."[205] The Court then carefully examined both prior cases that implied a right to rescind based upon similar statutory language and general principles of contract law. The Court concluded that Congress intended that aggrieved parties have available an equitable remedy in rescission as a means of having the contract declared void. In relying so heavily on precedent and legislative history the Court seemed to couch its ruling in the broad terms of common-law principles, as had been the case in the seminal 10b-5 *Kardon* decision.[206] In light of the elimination of federal common law by *Erie Railroad Co. v. Tompkins*,[207] the *Transamerica* Court could not merely apply the general law of contracts; therefore, it viewed the 1940 Act as creating a federal private law of investment advisory contracts. In a manner consistent with both *Cort* and *Cannon*, the Court stressed legislative history in order to emphasize the interrelationship of the several *Cort* factors in this instance.[208] While *Transamerica* could arguably be limited to rescission and other equitable remedies, the Court's reaffirmation of the *Cort* rationale negates such a result. In fact, the *Transamerica* result could easily be utilized in the future to recognize a federal remedy for damages resulting from conduct that voids an advisory contract.

The *Transamerica* and *Cannon* decisions, then, represent a continuation of the Court's efforts to imply private remedies in cases in which the four *Cort* factors seem clearly applicable. In

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offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action."

Id. at 19-20 (citations omitted).

205. 444 U.S. at 18.

206. 69 F. Supp. 512 (E.D. Pa. 1946); *see* text accompanying notes 33-36 *supra*. Interestingly, in so ruling, the Court expressly reaffirmed the validity of the *Kardon* decision.

207. 304 U.S. 64 (1938).

208. 444 U.S. at 20-21.

both instances the Court applied the *Cort* analysis and demonstrated its continued vitality. Moreover, while the *Touche Ross* and *Brown* decisions represent denials of private relief, they are readily distinguishable because of the express statutory design in each situation. Indeed, while many recent cases at the circuit court level deny the existence of private remedies, others have shown no reluctance to imply such remedies when to do so would further the congressional intent or statutory policy. As a result, these recent cases demonstrate neither a coolness toward nor an encouragement of private remedies. Therefore, the balanced approach encouraged by *Cort* seems to remain intact. An examination of several of these recent decisions, then, is useful to illustrate *Cort*'s continued vitality.

C. *Recent Circuit Court Applications*

As pointed out in the preceding section, the recent Supreme Court decisions reaffirm the vitality of *Cort* in statutory implication cases. The opinions further have given conflicting signals as to the Court's attitude toward implication in general. It is therefore not surprising that a number of lower federal courts have proceeded with great caution. Even under this cautious approach, however, it is clear that the implication process survives. This is evident not only from the decisions recognizing implied remedies, but also from examination of those instances in which the cause of action is denied. The discussion that follows provides a representative sampling of recent circuit court rulings.

In *Rogers v. Frito-Lay, Inc.*,[209] the Fifth Circuit held that section 503 of the Rehabilitation Act of 1973,[210] which provides that all federal contracts in excess of $2,500 must contain a provision requiring the contractor to "take affirmative action to employ and advance in employment qualified handicapped individuals," does not create a private right of action to remedy alleged discrimination against the handicapped by federal contractors. As the first federal appeals court to rule on the issue, the *Rogers* court began its analysis by noting that:

> Our obligation is to determine, to the best of our abilities, whether Congress intended to create the private right of action plaintiffs seek to bring in fed-

209. 611 F.2d 1074 (5th Cir. 1980), *cert. filed*, No. 79-1810 (May 14, 1980). *See also* Caceres Agency, Inc. v. Trans World Airways, Inc., 594 F.2d 932 (2d Cir. 1979) (denying a private remedy under the Federal Aviation Act for preferential commissions paid to competing travel agents).

210. 29 U.S.C. § 793 (1976).

> eral court; even were we satisfied that some of the *Cort* factors supported implying such a right, we could not do so if unconvinced that Congress intended such a remedy [citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) and Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)].[211]

The court then explained that the analytical framework established in *Cort* "is primarily a guide for the process of statutory construction."[212]

In applying the four-step analysis laid down in *Cort,* the court in *Rogers* rejected as "facile" the argument that, because Congress had the handicapped in mind when it passed the act, an implied right of action under section 503 automatically follows. Instead, the court contended that the section provides no more than a right to petition federal agencies to carry out their duty to ensure that contractors take affirmative steps in employing and advancing the handicapped.[213] The court further stressed that the legislative history failed to suggest any congressional intent to create a private remedy.[214] In the court's opinion the fact that Congress had expressly provided a complete administrative scheme to remedy section 503 violations and that HEW implementing regulations provided explicit details for the operation of the administrative plan "create[d] at least some basis to conclude that a private right of action would be inconsistent with the purposes of the legislative scheme."[215] The lack of any provision in the regulations for a private cause of action suggested to the court "that a private judicial remedy may be difficult to harmonize with the administrative enforcement framework."[216] As was the case in the Supreme Court decisions in *Amtrak* and *Barbour,* the statute contemplated administrative rather than judicial avenues of dispute resolution.

The same court's decision in *Camenisch v. University of Texas*[217] was in harmony with the decisions of all federal courts of appeal that have faced the issue of whether section 504 of the Rehabilitation Act of 1973[218] implies a private right of action to redress discrimination against handicapped persons in federally assisted programs. The Act provides that no otherwise qualified

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211. 611 F.2d at 1078.
212. *Id.* at 1078 n.4.
213. *Id.* at 1079.
214. *Id.* at 1080-84.
215. *Id.* at 1084.
216. *Id.*
217. 616 F.2d 127 (5th Cir.), *cert. granted,* 49 U.S.L.W. 3295 (1980).
218. 29 U.S.C. § 794 (1976).

handicapped individual shall, because of his handicap, be excluded from, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. In upholding the district court's grant of injunctive relief, the *Camenisch* court ruled in favor of a deaf graduate student who claimed that the Act required the University of Texas to provide him with and pay for a sign language interpreter. In addition, the court determined that plaintiff, in order to be entitled to injunctive relief, was not required to exhaust the administrative procedures adopted by the Department of Health, Education, and Welfare to implement the Act.[219] The court, however, made it clear that the right of action being recognized provided only for equitable relief and not for damages. Consequently, the court expressly reserved judgment on the question of whether section 504 created a private right of action in suits for damages.[220]

It is important to note the two major bases for the Fifth Circuit's decision in *Camenisch.* First, the legislative history of section 504 reveals an explicit congressional intent to create a private right of action, and such a right is consistent with the purposes of the statute.[221] Second, with regard to the argument that plaintiff had not exhausted his administrative remedies, the court pointed out that the administrative procedures adopted for enforcement of section 504 are not the final consolidated procedural enforcement regulations that are applicable to all civil rights statutes.[222] The court noted that the HEW administrative procedures in question were not even relevant to private actions for injunctive relief. The administrative framework, the court found, was designed to allow HEW to monitor and, if necessary, terminate federal funds of grant recipients who do not comply with the Act.[223] The court concluded that since the HEW administrative procedures do not provide for specific vindication of *personal rights,* an exhaustion requirement would be inappropriate. Unlike *Rogers, Amtrak,* and *Barbour,* the recognition of an implied private remedy furthered rather than frustrated the administrative regime. Furthermore, since HEW had adopted the same regulations to enforce section 504 as it promulgated to enforce Title IX of the Education Amendments of 1972, the court's holding shared the same rationale as the

219. 616 F.2d at 134.
220. *Id.* at 131 n.4, 132 n.10.
221. *Id.* at 131.
222. *Id.* at 134.
223. *Id.* at 135.

Supreme Court's decision in *Cannon,* which arguably may have recognized a cause of action only for injunctive relief.

Other federal circuits have also recently shown a hesitancy to recognize implied rights of action. For example, both the First and Eighth Circuits refused to infer private remedies from federal housing statutes. In the First Circuit case, *Falzarano v. United States,*[224] tenants of federally subsidized housing projects challenged excessive rents and unsafe conditions, claiming that the landlords were siphoning funds from the projects. The court stated that the suit could not be based upon 12 U.S.C. § 1715*l*(d)(3), which merely proscribes mortgages in excess of the legally permissible per unit limit. An analysis of the *Cort* factors was central to the case. In *Cedar-Riverside Associates v. City of Minneapolis,*[225] the Eighth Circuit also heavily relied upon *Cort* to hold that no private remedy existed under the National Housing Act of 1949. In *Cedar-Riverside,* developers of an urban renewal project claimed that a city unlawfully made changes in the development plan and diverted federal funds to other projects. The court noted that, even assuming that a city has an obligation under 42 U.S.C. § 1441 to exercise its power consistently with the Housing Act, the statute was not enacted for the "especial benefit" of developers and contains no indication of legislative intent to create a right of action.[226] Furthermore, the court claimed, the existence of a private right of action would predictably lead to many suits against local housing authorities, thus thwarting the legislative scheme to upgrade the nation's housing.[227] The court also found that although the developer's essential claim was based on tortious conduct, tort is traditionally a state-law matter.[228] The Eighth Circuit's reasoning is further evidence that the *Cort* test does not herald a new wave of federal remedies.

In another recent case, *Taylor v. Brighton Corp.,*[229] the Sixth Circuit held that section 11(c) of the Occupational Safety and Health Act does not explicitly create a private right of action to redress retaliatory discharges of employees who report safety violations. The case arose after three employees complained to the Secretary of Labor about alleged retaliatory discharges. The Secretary

224. 607 F.2d 506 (1st Cir. 1979).
225. 606 F.2d 254 (8th Cir. 1979).
226. *Id.* at 257.
227. *Id.* at 258.
228. *Id.*
229. 616 F.2d 256 (6th Cir. 1980).

notified two of the employees of his intent not to file suit based on their complaints and took no action with regard to the third employee's case. Thereafter, the employees filed suit in the district court and raised several allegations, the principal one being that the employer had acted in violation of section 11(c) of the Act. Dismissal of all claims except that relating to race discrimination was granted by the district court, which ruled that there was not a private right of action for employee complaints under section 11(c).[230]

The Sixth Circuit, relying upon *Cort,* considered the four familiar criteria in determining whether section 11(c) creates a private right of action. It found that the complaint satisfied two of the criteria: the employees were members of a class of persons that the statute intended to benefit, and retaliatory discharge actions were federal, as opposed to state, concerns.[231] The court held, however, that the OSH Act's legislative history indicated Congress' intent to deny a private right of action.

In evaluating the fourth of the *Cort* factors, the *Taylor* court pointed initially to the statutory language of section 11(c), which made no mention of private enforcement and clearly provided that the Secretary of Labor bring the action after making an initial determination of its merits. The court maintained that the development of the legislation in the Senate indicated Congress' intent that suits by the Secretary of Labor be exclusive in dealing with retaliatory discharge cases.[232]

The court noted that the Senate Committee on Labor and Public Welfare originally provided employees with the opportunity for a public hearing on the record related to the alleged violation and a right to appeal an adverse decision in a court of appeals. This section was changed, however, by the full Senate to a version similar to the present one, which provided only that the Secretary investigate and notify the Review Commission of meritorious complaints. The Senate's version was adopted subject to amendments that specified that the Secretary was to prosecute actions in the district court as opposed to the Review Commission. This "legislative narrowing" indicated Congress' intent to deny alternative remedies, the court stated.[233] The court also rejected the Secretary of Labor's argument that a private right of action should be implied

230. *Id.* at 257-58.
231. *Id.* at 258.
232. *Id.* at 259.
233. *Id.* at 262.

due to lack of sufficient access by individuals to the courts. The court maintained that the Secretary must obtain a legislative amendment in order to guarantee a private right of action.[234] Needless to say, the key to the *Taylor* decision is not a new approach to implication, but rather a finding of legislative intent to deny an implied remedy.

As indicated earlier, the Fifth Circuit has been more inclined than some courts to trim back implied actions under federal statutes. In *Frito-Lay* the court disagreed with other federal circuits by refusing to imply a private remedy under the 1973 Rehabilitation Act. The court has also taken issue with the Seventh Circuit by denying a private cause of action for construction workers under the Davis-Bacon Act. In *United States v. Capeletti Brothers, Inc.*,[235] the court heavily relied upon *Cort*, and placed particular emphasis upon the recent Supreme Court cases. The court emphasized not only the issue of intent to benefit a special class but also the question of whether Congress sought to create a federal right of action in the statute. The court noted that the Act authorizes the government to deny funds from contractors who fail to pay prevailing wages.[236] Furthermore, the legislation permits the Comptroller General to furnish back wages to employees who have had their pay wrongfully withheld. The court also stressed that the Act provides for federal suits based on Miller Act bond requirements. Given that enforcement mechanism, the court concluded, the congressional intent was that the express remedies be exclusive.[237]

Several other recent circuit court opinions have, on the other hand, rejected the Fifth Circuit's approach and continue to uphold private damage remedies. This is especially true for actions brought under the securities acts and related laws. For example, both the Second and the Sixth Circuits have implied a private action under the Commodity Exchange Act. In *Leist v. Simplot*[238] the Second Circuit maintained that Congress' 1974 addition of ad-

234. *Id.* at 264.
235. 621 F.2d 1309 (5th Cir. 1980).
236. *Id.* at 1315.
237. *Id.*
238. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980). *Accord, e.g.*, Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979). *Contra, e.g.*, Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 97,570 (D. Nev. July 1, 1980). *See also* Zeffiro v. First Pa. Banking & Trust Co., 623 F.2d 290 (3d Cir. 1980) (recognizing an implied action under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77vvv(b), 77www) (1976).

ministrative remedies to the Act did not alter a long-standing policy of judicial implication. The court followed *Cort,* and emphasized the second test—whether there is any indication of legislative intent to create or deny a private remedy. After an examination of the legislative history of the 1974 amendment, the court found "overwhelming" evidence that Congress had acknowledged the existence of uniform judicial recognition of private remedies before 1974.[239] The court concluded that it was "unimaginable" that, in light of a half century of securities regulation, Congress intended the 1974 provision to be exclusive.[240] Most importantly, the court remarked that recent Supreme Court decisions that have limited implied rights of action simply "emphasize that the ultimate touchstone is congressional intent and not judicial notions of what would constitute wise policy."[241]

The recent decisions, then, indicate considerable disagreement among the courts as to the proper role of implied private remedies in statutory enforcement schemes. Although this disagreement certainly demonstrates no overwhelming sentiment on the part of the courts to embrace implied remedies indiscriminately, it should, by the same token, not be taken as supporting the contention that implied rights of action have fallen into disrepute. As stated earlier, the most that can be said in evaluation of the recent circuit court opinions is that they continue in the general tenor set by the Supreme Court and reflect the Court's general reluctance to recognize implied remedies in areas other than securities and related regulation and civil rights. The greatest possibilities for implying private rights in the future thus appear to be in these two areas.

In seeking to understand more fully the present status of the implication process, it is important to examine not only the express statutorily related bases for the various opinions of the Supreme Court and the lower federal courts, but the underlying jurisprudential foundations of the decisions as well. While a review of the relevant legislative histories and statutory purposes has played a major role in each of the decisions, the Supreme Court and the circuit courts have also shown an acute awareness of and concern over the potential for conflict whenever consideration is given to implying federal remedies in areas that may have traditionally been left to regulation by the states. Because the Supreme Court's

239. 2 COMM. FUT. L. REP. (CCH) at 24,177.
240. *Id.* at 24,181.
241. *Id.* at 24,184.

recent rulings also raise some basic questions about the role of the federal common law in the implication process, an examination of federal common law is thus in order.

VI. The Role of Federal Common Law

The discussion so far has concerned decisions that, by focusing upon legislative intent, have approached the implication process primarily as a study of the statutory language itself. The first three prongs of the *Cort* test illustrate the emphasis placed upon statutory construction and purpose. The fourth element in the *Cort* analysis, however, presents the broader question of whether the relief sought is in an area that is generally relegated to the state courts. This concern over federalism is the overriding issue that has led the Court to apply the first three elements in a limiting fashion. Furthermore, the fear of creating an undue tension between the federal and state systems of government has plagued the federal judiciary in numerous settings since its inception.[242] The existence of a federal common law is inextricably intertwined with the problem and thus necessarily plays a siguificant role in the implication process. Yet, to date the implication decisions have not addressed this aspect of the analysis.

As was noted earlier,[243] the Supreme Court in its unanimous decision in *J.I. Case Co. v. Borak*[244] based its holding alternatively upon the general jurisdictional provision of the Securities Exchange Act of 1934.[245] In essence, this aspect of the Court's holding permitted the creation of a vast area of substantive federal law based on the existence of a statutory grant of jurisdiction. While a similar analysis was recently rejected in *Transamerica,* the Court there proceeded to distinguish the Investment Advisors Act from the statute at issue in *Borak.*[246] Clearly, a general jurisdictional grant will not by itself justify the implication of a private remedy; however, it can significantly encourage such a result. The *Borak* rationale, when combined with the *Kardon* negligence per se approach,[247] leads to a basis for implication that arguably exists inde-

242. *See generally* C. Wright, Handbook of the Law of Federal Courts § 54 (3d ed. 1976).

243. *See* text accompanying notes 117-22 *supra.*

244. 377 U.S. 426 (1964).

245. Section 27 provides that the federal courts have exclusive jurisdiction of all actions, both on law and equity, that arise under the Act. 15 U.S.C. § 78aa (1976).

246. 444 U.S. at 20-21.

247. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

pendently of the *Cort* analysis: the federal common law.

After the Supreme Court's decision in *Swift v. Tyson,*[248] a substantial body of federal common law developed. In 1938, however, the Court held in *Erie Railroad Co. v. Tompkins*[249] that federal common law in diversity cases was an unconstitutional interference with state sovereignty. In terms of policy, the *Erie* Court was concerned with the absence of uniformity between state and federal courts and the resultant undesirable practice of forum shopping.[250] While *Erie* eliminated much of the federal common law that had developed under the courts' diversity jurisdiction, it explicitly left open the vast area of federal question jurisdiction. To the extent that a federal common law has continued to flourish under this branch of the federal courts' power to decide cases, the *Borak* rationale may still have a significant role to play, notwithstanding *Cort* and its progeny.[251] Accordingly, a brief analysis of the proliferation of the federal common law is in order.[252]

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248. 41 U.S. (16 Pet.) 166 (1842). *See generally* Teton, *The Story of* Swift v. Tyson, 35 ILL. L.F. 519 (1941).

249. 304 U.S. 64 (1938).

250. *Id.* at 74-78. *See generally* C. WRIGHT, *supra* note 242; Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267 (1946); Friendly, *supra* note 6.

251. For example, one commentator has suggested that the *Borak* rationale survives the four-part *Cort* analysis and that it may he used as an alternative hasis for implication: "The need for uniform, nation-wide enforcement of a federal policy is strong justification for implying a federal remedy. Thus, *Borak,* not *Cort,* is the governing precedent . . . in the consumer situation [in light of the Federal Trade Commission Act]. . . ." Note, *Implied Consumer Remedy Under FTC Trade Regulation Rule—Coup de Grace Dealt Holder in Due Course?,* 125 U. PA. L. REV. 876, 915 (1977). *Cf.* Pillai, *supra* note 72, at 26 ("Judicial attention should focus not on what Congress might have intended by its silence, but, rather, on how best to remedy a private injury caused by conduct which Congress did expressly prohibit.")

252. This topic has been explored at length elsewhere and thus the discussion herein is limited to an overview of the development of post-*Erie* federal common law. *See generally* Broad, *Federal Common Law: Protecting State Interests,* 37 FED. BAR. J. 1 (Spring-Summer 1978); Friendly, *supra* note 6; Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption,* 67 COLUM. L. REV. 1024 (1967); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797 (1957); Panel Discussion, *The Future of a Federal Common Law,* 17 ALA. L. REV. 10 (1964). Note, *Exceptions to* Erie v. Tompkins: *The Survival of Federal Common Law,* 59 HARV. L. REV. 966 (1946). For a cataloguing of the post-*Erie* cases and the various fields of substantive law involved, *see, e.g.,* Annot., 31 L. Ed. 2d 1006 (1973).

A somewhat analagous question has been raised with regard to constitutional jurisprudence. There has been considerable debate concerning the propriety of "subconstitutional" decisionmaking by the federal courts in such areas as the fourth and fifth amendment exclusionary rules. *Compare* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975) (advocating the continued development of a federal constitutional common law) *with* Shcrock & Welch, *Reconsidering the Constitu-*

On the same day that *Erie* was handed down, the author of that opinion also put his signature on a decision that recognized the continued vitality of a federal common law in federal question cases. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[253] Justice Brandeis, speaking for the Court, ruled that the apportionment of interstate waters was a matter to be determined by federal common law.[254] Just two years later, the Court in *Deitrick v. Greaney*[255] was confronted with a statute that conferred federal jurisdiction but contained no express private remedy. The case involved a suit by a receiver of a bank against a director to recover on a promissory note given in violation of the National Banking Act. The Court noted that illegality under the statute was a determination for the federal courts to make; hence, the Court set aside any consideration of whether state law permitted the director to plead illegality as a valid defense.[256] The *Deitrick* Court, in establishing that a large body of law remained unchanged after *Erie,* viewed the statutory policy as sufficiently strong to justify the implementation of uniform private remedies. In 1943, three years after *Dietrick,* the Court in *Clearfield Trust Co. v. United States*[257] held that an action on a check issued by the federal government was governed by federal law rather than the local law of negotiable instruments. Significantly, it was the *absence* of a contrary federal statute that convinced the Court to deny the application of *Erie* and eschew state law determination of the issue.[258] Once again, the decision rested upon the implication of a federal remedy in the face of congressional silence. In reaching its result the *Clearfield* Court emphasized the need for a uniform federal rule of law affecting commercial paper.[259] Consideration of the desirability of na-

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tional Common Law, 91 HARV. L. REV. 1117 (1978). *See also* Schrock & Welsch, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

253. 304 U.S. 92 (1938).

254. *Id.* at 110.

255. 309 U.S. 190 (1940).

256. *Accord,* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). Although *Deitrick* has heen alleged on at least one occasion to be an implication case, it clearly is not since it did not create a private remedy. The case more properly is classified as an exception to the *Erie* requirement of state law determination of tlie issues. *See* Note, *supra* note 252, at 970-71.

257. 318 U.S. 363 (1943).

258. "The authority to issue the check had its origin in the Constitution and tlie statutes of the United States and was in no way dependent on [state law] . . . . In [the] absence of an applicable Act of Congress it is for tlie federal courts to fashion the governing rule of law according to their own standards." *Id.* at 366-67.

259. *Id.* at 367. *Accord,* National Metropolitan Bank v. United States, 323 U.S. 454

tional uniformity pays heed to the issues involved in the fourth prong of the *Cort* analysis.

In recent years, the federal common law has continued to proliferate and has extended into numerous substantive areas ranging from nuisance[260] to landlord-tenant law[261] to constitutional rights.[262] It has been suggested that this line of cases presents a six-factor analysis for determining whether, once federal jurisdiction exists by virtue of a federal statute, the question is to be determined by state or federal law.[263] However they may be articulated, the relevant factors boil down to the single question of whether federalization will promote the goal of uniformity. It is this aspect of the continued development of federal common law that relates directly to the *Cort* analysis. In determining whether the subject matter is one generally regulated by the states, the fourth *Cort* factor represents little more than a variation of the problems raised by *Erie* and its progeny.

Judge Friendly, in his discussion of the *Clearfield* decision, highlighted the importance of uniformity to both the federal common-law analysis and the implication process:

> *Clearfield* decided not one issue but two. The first, to which most of the opinion was devoted and on which it is undeniably sound, is that the right of the United States to recover for conversion of a Government check is a federal

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(1945). The federal common law of federal commercial paper continues to flourish. *See, e.g.*, Bank of America Nat'l Trust & Sav. Ass'n v. United States, 552 F.2d 302 (9th Cir. 1977). It has recently been suggested that complete uniformity would be accomplished if the federal courts were to adopt the Uniform Commercial Code into the body of the federal common law. Note, *Federal Commercial Paper and The Federal Common Law,* 14 TULSA L.J. 208 (1978).

260. Illinois v. City of Milwaukee, 406 U.S. 91 (1972). *See generally* Note, *Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions,* 7 ENVT'L AFF. 293 (1978); Note, *Federal Common Law and Interstate Pollution,* 85 HARV. L. REV. 1439 (1972).

261. *See* Note, *Federal Courts—Federal Common Law Determines Lessor's Duty to Convey Possession to Government Standing as Lessee,* 43 FORDHAM L. REV. 1078 (1975).

262. *E.g.*, Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See* text accompanying notes 192-93 *supra*. For a more complete listing of the range of substantive areas see the authorities cited in note 252 *supra*.

263. Certain considerations are likely to invoke the use of federal common law, such as (1) issues involving a dispute between states or protection of a state's sovereign rights; (2) issues related to the operation of federal statutory law or federal policy; (3) issues affecting uniformity of law in areas where federal law applies; (4) issues affecting the duties and operation of the federal government; (5) questions arising under maritime and admiralty claims; and (6) issues concerning international law.

Note, *Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions,* 7 ENVT'L AFF. 293, 296 (1978) (footnotes omitted). *See generally* Friendly, *supra* note 6; Hill, *supra* note 252.

> right, so that the courts of the United States may formulate a rule of decision. The second, over which the Supreme Court jumped rather quickly and not altogether convincingly, is whether, having this opportunity, the federal courts should adopt a uniform nation-wide rule or should follow state law. . . . The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, "to guess what it would have intended on a point not present to its mind, if the point had been present." We cannot expect that we shall always agree with the answer to such a question; we do have a right to expect that the question shall always be put.[264]

Interestingly, the courts can view the role of uniformity in two ways. In the *Erie* sense, uniformity requires that the plaintiff not be able to secure a different result on the same claim by suing in federal rather than state court. On the other hand, uniformity as discussed herein may justify federalization as a means of avoiding disparity between the states. In assessing a statutory grant of jurisdiction it is possible to marshall evidence of congressional intent to assure uniformity in this second sense.

Another significant area of federal common law that intersects with the implication process is that of labor relations. In *Textile Workers Union v. Lincoln Mills*[265] the Supreme Court held that the statutory grant of federal jurisdiction in section 301(a) of the Taft-Hartley Act[266] authorizes creation of a federal common law for the enforcement of promises to arbitrate grievances under collective bargaining agreements. The decision was based on the Court's review of the legislative purpose and a finding that the desirability of consistency in the labor area was sufficient to justify the development of a federal common law. As in all such cases, the easier route for the Court would have been to defer to the previously established state law. The congressional policy of uniformity, however, was held to justify, if not mandate, the creation of this new body of federal law. *Lincoln Mills* demonstrates the judicial concern that in some cases the application of state law by federal courts might operate to defeat rather than to effectuate the goal of uniformity.

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264. Friendly, *supra* note 6, at 410 (footnotes omitted).

265. 353 U.S. 448 (1957).

266. 29 U.S.C. § 185(a) (1976).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

While *Lincoln Mills* is not without its critics,[267] it has been praised as a signal for legislators to leave to the courts the task of guaranteeing federal rules of decision in cases involving the possibility of divergent results. As was observed by Judge Friendly:

> One of the beauties of the *Lincoln Mills* doctrine for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam.[268]

With the present concern for crowded federal dockets, one might well say that it is now the federal courts that are overburdened. Although this shift in workload argues against a swift expansion of implied federal remedies, it does not call for a halt to judicial federalism. Indeed, while critics of implication usually refer to judicial legislation pejoratively, the leeway provided by *Lincoln Mills* has been commended both as a recognition of an intentional congressional "delegation" of power to the courts and as "interstitial legislation."[269] The ramifications of such a method of analysis for the implication of private federal remedies are innumerable.[270]

Cort and subsequent cases require that federal courts look primarily to congressional intent to determine whether a private remedy should exist. In that light, it is interesting to note the impact of *Erie* upon statutes that were enacted in the heyday of the federal common law. For example, the Securities Exchange Act, with its general grant of jurisdiction, was enacted four years prior to

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267. 353 U.S. 448, 460 (Frankfurter, J. dissenting); *See also* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case,* 71 HARV. L. REV. 1 (1957).

268. Friendly, *supra* note 6, at 419.

269. Panel Discussion, *supra* note 252, at 22, 31 (remarks of Dean M. Lindsey Cowen and Professor James C. Kirby, Jr.). In the words of Professor Kirby:

> Dean Cowen has enunciated this same idea but he more accurately called it a "delegation." We are speaking here of a delegation by the Congress to the Judiciary of a portion of its legislative power. In the interest of clarity of analysis we should call it that instead of some sort of federal common law. However, this delegation is not necessarily bad and it is not necessarily new. It has been going on for years in anti-trust legislation. Terms like "restraint of trade" and "unfair competition" have been presented to the federal courts for determination of their exact meaning. What else can we call this process.

Id. at 31.

270. As Judge Friendly predicted, the *Lincoln Mills* approach, if applied to implication under the securities acts, would have far reaching significance. Friendly, *supra* note 6, at 413-14.

Erie. This historical fact cannot be ignored when analyzing, for example, the current significance of the expansive *Borak* rationale. The mere creation of federal jurisdiction in 1934 arguably demonstrated a congressional desire to expand the then proliferating federal common law. The *Transamerica* Court, when faced with a post-*Erie* jurisdictional grant,[271] rejected *Borak* without mentioning *Erie*. This omission, however, did not eliminate the existence of a historical factor, since neither the constitutional basis of *Erie* nor the policy of avoiding forum shopping arose in the context of the federal question issue determined in *Transamerica*.

The *Erie* ruling does not preclude implication based on a federal common-law rationale.[272] Indeed, with respect to pre-*Erie* federal statutes, the creation of exclusive federal jurisdiction may well evidence an intent to promote consistency and prevent forum shopping. In such a case, the statutory grant of jurisdiction would justify adding to the federal common law private remedies that otherwise might languish with states and their respective common-law principles. For example, to leave securities regulation to the common law of fraud and fiduciary obligation would fly in the face of the obvious need for uniformity in an area of deep federal concern.[273] Although under the *Cort* approach such an analysis cannot itself be dispositive, its weight should not be underestimated insofar as it impacts upon issues of congressional intent and federalism. It is far from clear, however, that *Cort* represents the exclusive basis of analysis.[274] Consequently, the negligence per se approach of the *Kardon-Borak* line of cases may have some, although limited, vitality in future implication decisions.

When dealing with individual liberties and federally guaranteed civil rights, the need for uniformity is equally compelling.

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271. 444 U.S. at 14.

272. While the lesson of *Cort* and its progeny is to look for the legislative purpose, congressional silence can be seen as consistent with the expansion of existing federal common-law remedies:

> It is quite possible, though, that the draftsmen considered the existing common law remedies so effective that new private sanctions simply were not needed. This theory would invite the continued recognition of prior remedies that do not impair the regulatory scheme, and would not clearly preclude the implication of new private claims against statutory violations.

O'Neil, *supra* note 73, at 233.

273. *Compare* Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969), *with* Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978), *and* Schein v. Chasen, 313 So. 2d 739 (Fla. 1974).

274. *See* Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355 (1980).

Lack of uniformity from state to state contradicts a meaningful concept of civil rights. Not surprisingly, it is this supposition that has led courts to guard these rights with special vigor. Accordingly, the civil rights area, like federal securities regulation, is a particularly appropriate one for the development of a federal common law of remedies.

The continued vitality and expansion of the federal common law in appropriate situations clearly belies any claim of an across-the-board retreat from federalism. It cannot be denied that concern for overworked federal courts mandates a cautious approach. *Erie,* however, points to the strengths of judicial federalism and provides a countervailing theme to the recent antifederalist approach of the Court. Furthermore, although implication will and should continue to be the exception rather than the rule, even the current Court has recognized two areas in which implication retains its vitality: first, the protection of constitutional[275] or statutory[276] civil rights and second, the safeguarding of investors under the securities and related laws.[277] Recent decisions in these areas are consistent not only with *Cort* but also with the factors that bear upon the more general question of when to recognize a federal common law.

VII. Conclusion and Summary of Recommendations

After nearly sixty-five years of federal jurisprudence of implied remedies, the courts continue to maintain a relatively flexible approach. In that time, however, the courts have gone through periods of expansion and contraction in determining the scope and availability of these remedies. For example, as discussed earlier, in the seminal *Rigsby* case[278] the Supreme Court held that for a private remedy to be implied from prohibitory criminal legislation, the plaintiff must be able to demonstrate that he falls within a class for whose "especial benefit" the statute was enacted. By distinguishing statutes that protect the general public from those with a narrower focus, the Court relied upon the important element of legislative intent. In addition to the especial class require-

275. Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

276. Cannon v. University of Chicago, 441 U.S. 677 (1978).

277. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Zeffiro v. First Pa. Banking & Trust Co., 623 F.2d 290 (3d Cir. 1980). *See* notes 43-49 *supra.*

278. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), discussed in the text accompanying notes 92-94 *supra.*

ment of *Rigsby*, the Court has mandated that the injury alleged be "of the type that the statute was trying to forestall."[279] In view of these two pronouncements by the Court, it might at first glance seem that the number of statutory violations that hold a potential for implication is severely limited.

While this is in part true, it must be remembered that over the years the Court has handed down a number of opinions that have espoused a relatively broad approach to implication, in addition to those that have adopted a more restrained view. In each instance, whether in the expansive context of *Borak*[280] and *Wyandotte*[281] or the more limiting mode of *Amtrak*[282] and *Cort*,[283] the Court was attempting to remain faithful to the legislative intent behind the statute in question. The Court's decisions, then, should be seen not as antagonistic to the implication of private remedies, but instead simply as indicative of the Court's desire to recognize only those remedies that are consistent with, and in furtherance of, statutory objectives. Indeed, *Cort* illustrated an attempt to clarify the implication process by dividing the issue into four factors, three of which bear directly upon legislative intent. *Cort* emphasized, in addition to *Rigsby*'s "especial benefit" requirement, the importance of explicit or implicit evidence of intent to provide a private remedy that is consistent with the overall legislative scheme. By definition, the consideration of congressional intent in this three-fold manner flies in the face of any strict formula for implication. Therefore, *Cort* preserves the flexibility that is so necessary for proper judicial statutory interpretation.[284]

Even after the first three prongs of the *Cort* analysis are satisfied, the clearest of intents will not by itself justify implication in the face of legislative silence. *Cort* raises the additional issue of federalism by asking whether the asserted cause of action and subject-matter concern issues that are traditionally left to state law. In deciding whether to federalize remedies, courts face the same considerations that must be weighed in determining the scope of the

279. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967).

280. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* text accompanying notes 117-22 *supra*.

281. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). *See* text accompanying notes 123-26 *supra*.

282. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See* text accompanying notes 147-54 *supra*.

283. Cort v. Ash, 422 U.S. 66 (1975). *See* text accompanying notes 161-64 *supra*.

284. *See* Part II *supra*.

federal common law.[285] When posed in its limiting sense, the federalization question can be the key to the denial of a private remedy.[286] In contrast, when viewed in its enabling sense—the need for nationwide uniformity—the fourth *Cort* factor can be extremely conducive to implication. In this sense, *Borak* and subsequent federal securities law cases are unquestionably consistent with *Cort*.

The most recent round of Supreme Court cases underscores the viability of *Cort* as well as the continued vitality of implied causes of action in civil rights[287] and securities regulation[288] cases. In the face of these recent rulings, it is simply unrealistic to eulogize the demise of implied federal remedies. Certainly, the repeatedly voiced concern for overcrowded federal dockets presents a counter-balancing factor. There can be no doubt, however, that the lesson to be learned from *Cort* and its progeny is one of judicial restraint, not total abstinence.

Moreover, while much of the implication activity has arisen from prohibitory penal legislation, many of the cases denying the existence of an implied remedy have dealt with statutes that include an administrative superstructure. When Congress has seen fit to impose federal standards under the aegis of an administrative agency an additional element is brought to the implication question. As is the case with the doctrine of primary jurisdiction, the creation of avenues for agency dispute resolution demonstrates a distinct deference to the administrative process and provides an argument against the recognition of a private remedy. When the administrative agency is given exclusive enforcement or dispute resolution power, this limiting rationale, which is akin to primary jurisdiction, is particularly convincing, for the recognition of a private remedy would circumvent the clearly intended statutory scheme.[289] In contrast, when dealing with regulatory schemes that include only express private judicial remedies, as is the case with the Securities Act of 1933 and the 1934 Securities Exchange Act, the primary jurisdiction analogy is inapposite.

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285. *See* Part VI *supra*.

286. *Cf.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (limiting the scope of SEC rule 10b-5's private remedy lest it impinge upon the corporate chartering statutes of the several states).

287. Cannon v. University of Chicago, 441 U.S. 677 (1979). *See also* Davis v. Passman, 442 U.S. 228 (1979).

288. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

289. *E.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See* text accompanying notes 147-54, 186-91 *supra*.

Another pattern that has emerged from the cases is the distinction between prohibitory legislation and that which merely mandates certain affirmative conduct, such as public disclosure of pertinent information. In three of the five cases during 1979 the Supreme Court denied implied remedies based on statutory provisions that were disclosure oriented.[290] One explanation for such a result is that disclosure requirements tend to show legislative concern for the public at large rather than for any particular class of potential private plaintiffs. This distinction in statutory focus has been especially significant in providing the basis for the recognition of some actions but not others in the field of securities regulation. The disclosure/prohibition dichotomy can be viewed as another way of phrasing the *Rigsby* especial class requirement as well as a more specific manner of asking whether recognition of a remedy would be consistent with the overall statutory scheme and purpose.

Although the recent Supreme Court cases have legitimately eschewed a doctrinaire approach, their lack of predictability gives little direct guidance to lower courts. It is clear, however, that the circuit and district courts should not attempt to be overly zealous either in denying or recognizing implied remedies. Their task is to follow the Court's guidelines as closely as possible. As was observed by Judge Frank:

> There is an important difference, usually overlooked by commentators, between the interpretive latitude of the highest courts and that of lower courts. A court like that on which I sit, an intermediate appellate court, is, *vis-a-vis* the Supreme Court, "merely a reflector, serving as a judicial moon." Judges on such a court usually must, as best they can, cautiously follow new "doctrinal trends" in the court above them. As their duty is usually to learn, "not the congressional intent, but the Supreme Court's intent," their originality is often inadvertent.[291]

Given the lack of sophisticated guidelines, the result may well be that the Supreme Court will serve as the ultimate arbiter in each case. Although the result might be a multitude of decisions for the Court, this is as it should be. Because of the sensitive nature of the countervailing implication issues, the Court must be prepared to deal with the age-old tension between legislative and judicial decisionmakers, as well as with the tensions surrounding federalism in general. As the past sixty-five years of Supreme Court cases make

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290. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. at 19-20 (the portion of the opinion dealing with § 206(a)); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

291. Frank, *supra* note 8, at 1271 (citations omitted).

clear, the implication problem belies rigid rules and by its very nature necessarily requires a great deal of case-by-case consideration.

In sum, the Supreme Court has not entered into a new era for implied federal remedies. There is no need to bemoan—or praise—their demise, nor is there reason to herald a new wave of remedies. The recent cases fall into line with earlier doctrine and patterns that have been followed for years—one of general restraint with room for implication in compelling cases. While it is true that the Burger Court's general conservatism has had a limiting impact in implication cases, only two of the five most recent cases outrightly prohibited the implied relief sought. Rather than attempting to identify shifting trends, the lower federal courts should look to the well-established unifying principles that have emerged over time. Only by maintaining the proper balance between the guiding principles and the case-by-case analysis that they require will the courts be able to properly deal with the implication cases as they arise in the future.