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I. Introduction

With increasing frequency in recent years private individuals who feel themselves injured by a violation of a particular statute have requested courts to imply a cause of action for the violation. Judicial implication of a private cause of action for violation of a statute has its roots in the ancient English common law doctrine of *ubi jus, ibi remedium*—where there is a right, there is a remedy.[1] This principle was recognized by the Supreme Court of the United States as early as 1803,[2] but was used sparingly until the post-World War II era, when proliferation of federal regulatory legislation gave rise to its invocation by private litigants seeking redress for statutory violations. During the tenure of Chief Justice Earl Warren, the Supreme Court utilized the doctrine to create private remedies for violations of a broad spectrum of regulatory legislation.[3] Recent decisions of the Supreme Court[4] under the leadership of Chief Justice Warren Burger, however, have signalled the end of this liberal approach. These cases reflect a philosophy of judicial restraint and reluctance to broaden

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** B.A. 1967, Boston University; J.D. 1970, University of Michigan. Messrs. McMahon and Rodos, both members of the Philadelphia Bar, recently participated as counsel before the Supreme Court of the United States in Cort v. Ash, 422 U.S. 66 (1975), in which the issue of judicial implication of a private cause of action was decided.

1. BLACK'S LAW DICTIONARY 1690 (rev. 4th ed. 1968).
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
3. Perhaps the most widely litigated of the judicially implied remedies are those arising under the federal securities laws. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
4. Cort v. Ash, 422 U.S. 66 (1975); Securities Inv. Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Pass'r Corp. v. National Ass'n of R.R. Pass'rs, 414 U.S. 453 (1974).

the jurisdiction of the federal judiciary in striking contrast to the philosophy of the Warren Court. Consistent with this philosophy of restraint is the Court's adoption of previously disfavored techniques of statutory interpretation and a preference for administrative remedies expressly provided by Congress.

This article will describe the common-law origins of the doctrine of implied causes of action and its development in the United States and will culminate with a study of the Burger Court's approach to the issue.

II. Judicially Created Remedies at Common Law

Two hundred years ago Blackstone wrote, "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[5] English courts have long provided a private, legal remedy for statutory violations. In the 1703 case of *Anonymous*[6] an individual sued for damages, alleging a violation of a statute that contained no express remedy. In support of its implication of a remedy, the court reasoned that

> where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy . . . .[7]

Similarly, in *Rowning v. Goodchild*[8] plaintiff sued for damages resulting from defendant-postmaster's failure to deliver mail. Plaintiff alleged that the statutes that established the postal system required the delivery of mail to the addressee's residence and that defendant's practice of leaving it at the post office to be picked up by each addressee violated the statute. The defense argued that the statute itself contained an express and, therefore, exclusive remedy in the form of a fine. This contrasted with the statute in *Anonymous*, which contained no express remedy. Unfortunately without analysis of the issue, the court held that defendant-postmaster had violated the law and that the express criminal remedy did not bar plaintiff's action.

The first detailed analysis in English law of the judicial implication of a private remedy is found in *Couch v. Steel*.[9] The statutes in that case imposed an obligation upon ship owners to furnish certain medicines on board ships making international voyages. Plaintiff, a

5. 3 W. BLACKSTONE, COMMENTARIES *23.
6. 87 Eng. Rep. 791 (Q.B. 1703).
7. *Id.*
8. 2 Black. W. 906 (1773).
9. 118 Eng. Rep. 1193 (Q.B. 1854).

seaman on one of defendant's ships, became ill at sea. He alleged that an insufficient supply of medicines on board had aggravated his illness. None of the statute's provisions expressly created a private remedy for damages. One provision did provide, however, that individuals convicted of violating the statute were liable for a penalty, a portion of which was paid to the person who reported the violation. Even though plaintiff might have been considered an informer and, thus, entitled to part of the statutory penalty, a separate, private cause of action for money damages was implied.

In considering and rejecting various objections to the implication of a private cause of action, the court enunciated a rule that foreshadowed American decisions 100 years later. Noting that "compensation for private special damage seems not to have been contemplated" by the statute,[10] the court reasoned that the statutory purpose was to benefit seamen, such as plaintiff, and that the expressly provided remedy did not suit that purpose. Rather than providing compensation to injured seamen, the statutory penalty was simply "a punishment for the non-performance of the public duty."[11] The court distinguished another case in which a private cause of action had not been implied from a statute, stating that in the earlier case the statute at issue was not intended to benefit a class of persons of which plaintiff was a member.[12] By its analysis the court established two elements of the doctrine of implied, private causes of action that remain a part of the law today: (1) plaintiff must be a member of a class of persons the statute was designed to protect; and (2) the expressly provided remedy must be insufficient to fulfill the stautory purpose.[13]

III. Development of the American Doctrine of Implied Causes of Action

The British legal system had been implying private causes of action in statutes not specifically authorizing private suits for well over 200 years before the United States Supreme Court directly considered the matter in 1916.[14] Then, another forty-three years passed before the Court again confronted the issue in a major decision.[15] Beginning in 1959 and continuing through 1971, however, the

10. *Id.* at 1197.
11. *Id.*
12. *Id.*
13. *E.g.*, Cort v. Ash, 422 U.S. 66 (1975).
14. Texas & Pac. Ry. v. Rigsby, 241 U.S 33 (1916).
15. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959).

Supreme Court decided a number of important cases implying private causes of action.[16] Most of these were decided during Earl Warren's term as Chief Justice.[17] They reflected a willingness on the Court's part to go beyond the statutes involved to create private remedies that Congress had not expressed an intent to grant. In the process of creating judicial remedies for violation of statutes, the Court enunciated certain requirements for the implication of a private cause of action. First, plaintiff must be a member of the class for whose benefit the statute was enacted.[18] Second, implication of a cause of action must further the congressional purpose in enacting the statute and the court should consider whether legislative history supports implication.[19] Last, the penalties or remedies provided under the statute must be inadequate to assure its complete effectiveness.[20]

A. Member of the Class for Whose Benefit the Statute Was Enacted

Following English legal precedent,[21] in 1916 the Supreme Court ruled that plaintiff must be a member of the class for whose benefit the statute was enacted to sue for its violation.[22] In *Texas & Pacific Railway Co. v. Rigsby*[23] the Supreme Court reasoned that a

> disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.[24]

In *Rigsby* the plaintiff, a switchman working in defendant's railroad yards, was taking railway cars to the repair shop when he fell from a box car because of a defective handhold. He sued the railroad for damages under section 2 of the 1910 amendment to the Federal Safety Appliance Act.[25] Defendant argued that although other sec-

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16. *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narc., 403 U.S. 388 (1971); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Hewitt-Robins Inc. v. Eastern Freight-ways, Inc., 371 U.S. 84 (1962); T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959).

17. *See* note 16. The authors have included Bivens v. Six Unknown Named Agents of Fed. Bureau of Narc., 403 U.S. 388 (1971), in the discussion of the Warren Court decisions. Although Chief Justice Burger was on the Court at the time *Bivens* was decided, Justices Powell and Rehnquist were not and the majority and concurring opinions represent the approach taken by the Warren Court.

18. *E.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

19. *E.g.*, Hewitt-Robins Inc. v. Eastern Freight-ways, Inc., 371 U.S. 84 (1962).

20. *E.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

21. *See* notes 5-12 and accompanying text *supra.*

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

23. *Id.*

24. *Id.* at 39.

25. This section provided,

> All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped

tions of the Act contained penal provisions, neither section 2 nor any other section provided private causes of action. The Court dismissed defendant's arguments and held that a railroad switchman obviously was a member of the class the statute was enacted to protect. Since he was injured through defendant's disregard of the statute, he could sue for damages.[26]

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[27] the Court granted an implied cause of action to the largest class possible—all individuals in the United States. Plaintiff sued federal narcotics agents for their allegedly unconstitutional conduct, arguing that by entering and searching his apartment and arresting him without a warrant or probable cause, the agents violated the fourth amendment of the United States Constitution. In permitting the private cause of action, the Court held that the fourth amendment's guarantee that all citizens shall be free from unreasonable searches and seizures is a federal right that courts should protect by entertaining private damage suits against persons who infringe upon that right.[28]

Voicing the minority's opposition to this expansive application of the doctrine, Justice Blackmun argued, "I . . . feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases."[29] As will be seen below, this sentiment has now gained further support on the Court. The Court's willingness in *Bivens* not only to open the courthouse doors to private suits by implying a cause of action, but also to open the courthouse doors to potentially everyone in the United States, is indicative of the liberal philosophy of the Warren Court.

B. Implication Furthers Congressional Purposes

A major area of inquiry for courts implying private causes of action is the congressional purpose in enacting the statute at issue. Legislative history is the primary tool in determining this purpose.

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with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders.

Id. at 37.

26. *Id.* at 40.
27. 403 U.S. 388 (1971).
28. *Id.* at 393.
29. *Id.* at 430.

This determination is no simple task, however, because legislative history usually contains little or no discussion of or reference to private causes of action. Logically, if Congress had considered the matter and had wished to permit private lawsuits, it most probably would have provided for them in the statute.

Two strikingly similar cases that resulted in directly contrary decisions by the Supreme Court illustrate the significant liberalization of the implied cause of action doctrine by the Warren Court. Both decisions were based on judicial interpretation of congressional purpose in the same statute. In *T.I.M.E. Inc. v. United States*[30] motor carriers certified by the Interstate Commerce Commission were sued under the Motor Carrier Act of 1935 by shippers of goods who challenged the reasonableness of the carriers' charges. Section 217 of the Act required carriers to file their transportation charges as tariffs with the ICC. These tariffs remained effective until suspended or changed in accordance with specified procedures and carriers were forbidden to charge or collect any other rate.[31] The government argued that subsections 216(b) and (d) of the Act created a judicially enforceable right in a shipper to be free from unreasonable charges[32] and that a private cause of action should be implied for violation of that right. The Court rejected this contention, however, holding that a private cause of action would not be implied. By examining the legislative history of the Motor Carrier Act, the Court found that amendments that would have made common carriers liable for damages to persons injured by violations of the Act had been offered and rejected. In addition, the Court noted the ICC's consistent position that nothing in the Act created statutory liability for unreasonable rates.[33] The Court concluded that there was nothing in the statute or its history that would support a private cause of action.

Just three years later, however, the Supreme Court was again presented with a private suit alleging violations of the Motor Carrier Act and reached a different result. In *Hewitt-Robins Inc. v. Eastern Freight-ways, Inc.*[34] the Court held that a private cause of action

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30. 359 U.S. 464 (1959).
31. *Id.* at 465.
32. *Id.* at 468. These sections provided,

> (b) It shall be the duty of every [such] common carrier . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto . . . .
>
> . . .
>
> (d) all charges made for any service rendered or to be rendered by any [such] common carrier . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful . . . .

Id. at 469.
33. *Id.* at 471.
34. 371 U.S. 84 (1962).

should be implied. One reason for the contrasting decisions in the two cases is the different treatment of legislative history in determining congressional purpose. *Hewitt-Robins* involved a shipper's action under the Motor Carrier Act to recover the difference in rate charges resulting from a carrier's practice of carrying unrouted, intrastate shipments on its interstate routes at higher rates than those applicable to its intrastate routes. The action was stayed by a federal district court pending a review by the ICC of the reasonableness of the practice.[35] The ICC found it unreasonable. The court then dismissed plaintiff's complaint because the Act did not provide a remedy;[36] the court of appeals affirmed.[37] Both courts based their decisions on *T.I.M.E. Inc. v. United States.*[38]

Notwithstanding its recent decision in *T.I.M.E.* the Supreme Court reversed and distinguished the earlier case. The litigation in *T.I.M.E.* was directed at the reasonableness of the rates charged. In that situation the Court found that the Act itself provided protection for shippers against unreasonable rates and that these express remedies precluded judicial implication.[39] In *Hewitt-Robins,* however, it was a routing practice that was being attacked.[40] The Court decided, therefore, that allowance of a damage action would not hamper efficient administration of the Act. Moreover, the Court found that a judicial remedy would be a useful adjunct to the expressly provided administrative remedies.

> [T]he allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize 'cease and desist' proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act.[41]

Examining the same legislative history the Court reached a different result than it had in *T.I.M.E.* Justice Clark noted that exercise of the judicial remedy would support and be in "nowise inconsistent with" the overall purpose of the Act as illustrated by its

35. *Id.* at 84-85.
36. 187 F. Supp. 722 (S.D.N.Y. 1960).
37. 293 F.2d 205 (2d Cir. 1961).
38. *See* notes 30-33 and accompanying text *supra.*
39. 359 U.S. 464, 469-72 (1959).
40. 371 U.S. at 88.
41. *Id.*

legislative history.[42] The use of the phrase "nowise inconsistent with" evidenced a significant change in the standard for implying a private cause of action. In *T.I.M.E.* the question had been whether legislative history would *support* the implication of a cause of action, but in *Hewitt-Robins* the question was whether implication of a private cause of action would be *inconsistent* with the congressional purpose.

This approach to legislative history—that is, looking to the history for an indication that Congress wanted to bar private suits and judicially implying private causes of action in the absence of such indication—was followed in *Wyandotte Transportation Co. v. United States.*[43] In that case several barges were sunk in the Mississippi River. The federal government raised one barge at great expense after its owner, Wyandotte Transportation Company, abandoned the vessel. The United States then sued Wyandotte for costs of removal. Under the Rivers and Harbors Act the owner of a sunken craft has a duty to remove it and "failure to do so shall be considered as an abandonment . . . and subject the same to removal by the United States . . . ."[44] The statute did not provide, however, that the United States could recover for expenditures in raising vessels.[45] Nevertheless, the Court stated,

> There is no indication anywhere else—in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law—

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42. *Id.* at 89. Although Justice Clark's opinion discusses and distinguishes *T.I.M.E.*, possibly the most telling reason for the different result was the change in the makeup of the Court—the arrival of what came to be known as the Warren Court. In 1959 the majority in *T.I.M.E.*, who held that there was no private cause of action under the Motor Carrier Act, consisted of Justices Frankfurter, Whittaker, Harlan, Brennan and Stewart. The minority, who argued for implication of a private cause of action, consisted of Chief Justice Warren and Justices Black, Douglas and Clark. In the 1962 *Hewitt-Robins* decision the four Justices who dissented in *T.I.M.E.* again held that a private cause of action should be implied. They were joined in this decision by Justice Goldberg, who had replaced Justice Frankfurter, and Justice Brennan, the only member of the Court to change his decision from *T.I.M.E.* to *Hewitt-Robins.* Dissenting in *Hewitt-Robins* were Justices Harlan and Stewart, who were in the majority in *T.I.M.E.*, and Justice White, who had replaced Justice Whittaker.

43. 389 U.S. 191 (1967).

44. 33 U.S.C. § 409 (1970). This section provides in its relevant part,

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit to cause to be sunk, vessels or other craft in navigable channels . . . . And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

45. 389 U.S. at 198-200.

> that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility.[46]

The Court concluded that the United States was a principal beneficiary of the Act[47] and implied a cause of action to recover costs incurred in removing the barge.

Thus, as in *Hewitt-Robins*[48] the Court looked to legislative history for an indication that Congress wished to *preclude* the implication. Absent this negative indication the Court assumed the function of fashioning remedies to achieve what it considered the overall purpose of the Act.[49] Naturally this approach facilitated the introduction of policy considerations into statutory interpretation throughout the federal judicary. As Justice Harlan pointed out in *Bivens*,

> In resolving that question it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.[50]

Justice Harlan recognized that the Supreme Court had granted the judiciary broad powers, not unlike legislative powers, to imply causes of action to promote social goals embodied in statutory law.

In the twelve years from *T.I.M.E.* to *Bivens* the investigation of legislative history developed from a study of whether Congress could be said to have authorized private suits to a study of whether implication of suits was inconsistent with legislative intent. Absent an indication that Congress wished to preclude private suits, the Warren Court used legislative history not as an aid in statutory construction, but as a springboard for creation of judicial remedies.

C. Express Remedies Inadequate To Insure Statute's Effectiveness

Another criterion used by the Warren Court was whether the express remedies contained in the statute were sufficient to accomplish the legislative purpose. For example, in *Wyandotte*[51] defendant-shipowners contended that because the statute itself contained specific and exclusive remedies, there could be no private cause of action. Although agreeing that the Act contained criminal penalties, the Court rejected this argument:

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46. *Id.* at 200.
47. *Id.* at 202-04.
48. *See* notes 34-42 and accompanying text *supra.*
49. 389 U.S. at 200.
50. 403 U.S. 388, 407 (1971).
51. 389 U.S. 191 (1967); *see* notes 43-47 and accompanying text *supra.*

> That section contains only meager monetary penalties. In many cases, as here, the combination of these fines and the Government's *in rem* rights would not serve to reimburse the United States for removal expenses. It is true that § 16 also provides for prison terms, but this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign.[52]

This inquiry into the sufficiency of express remedies often ranges beyond a review of the type of penalty provided. Frequently, the Court examined the agency involved in the statute's enforcement to determine if it had the resources or determination to protect adequately the class for whose benefit the statute was enacted. In *J.I. Case Co. v. Borak*[53] the Court found that private enforcement of proxy rules was a necessary supplement to action by the Securities and Exchange Commission since the SEC did not have the resources to examine independently all facts set out in proxy materials. The Court equated shareholder litigation with antitrust treble damage actions; both were said to promote effective enforcement of the legislation. Similarly, in *Allen v. State Board of Elections*[54] the Supreme Court concluded that if each citizen were required to rely solely on litigation brought by the Attorney General, the goal of the Voting Rights Act would not be achieved. Like the SEC the Attorney General was handicapped by a limited staff and was unable to move quickly and effectively to insure compliance with the Act.[55]

This approach marked a definite departure from that taken in *T.I.M.E.*[56] In that case the Court held that permitting an attack on rates would be inconsistent with the extensive statutory scheme of regulation.[57] In *Borak* and *Allen*, however, even though Congress had established extensive remedies for specific problems, the Court nonetheless reviewed those remedies to determine their sufficiency in fulfilling the legislation's purpose. Upon finding these remedies insufficient, it augmented them by implying a private cause of action.

In summary, the cases decided by the Warren Court evinced an inclination to involve the judiciary in the formulation of remedies to effectuate what the Court considered important social policies embodied in various statutes. Legislative history was utilized to determine congressional policy. If the Court did not discern a clear indication that Congress wanted to preclude a private cause of action, it judicially created remedies to fit the perceived purpose of the legislation.

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52. 389 U.S. at 202.
53. 377 U.S. 426 (1964).
54. 393 U.S. 544 (1969).
55. *Id.* at 556.
56. *See* notes 30-33 and accompanying text *supra.*
57. 359 U.S. 464, 471-72, 474-75 (1959).

IV. A New Direction—The Burger Court

The Warren Court's judicially active approach fashioned civil remedies for private parties from statutes regulating activities ranging from interstate water transportation[58] to the solicitation of proxy votes.[59] In sharp contrast are the recent decisions of the Supreme Court[60] that indicate the Burger Court's distaste for the increased case load generated by this approach. Three times in the last two years the Court has heard and decided cases in which implication of private causes of action was at issue. Each time the Court refused to imply a cause of action. These cases mark a distinct change in the attitude of the High Court toward implication of private causes of action and signal a new era in which federal courts will refuse to entertain private suits based on statutes that do not expressly grant private remedies.

The new direction taken by the Supreme Court can be illustrated best by comparing the three recent decisions with the decisions of the courts of appeals[61] in the same cases. Understandably the lower court decisions followed the prior Supreme Court holdings discussed above.[62] This comparison also frames a clear image of the High Court's attitude not only toward the doctrine of implication of private causes of action, but also toward fundamental questions of statutory interpretation and the relationship of the judiciary to administrative agencies.

A. Decisions of the Courts of Appeals

In the Rail Passenger Service Act of 1970[63] Congress declared that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance" with the provisions of the Act.[64] The Act further provided that prior to January 1, 1975, no

58. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); *see* notes 43-49, 51-52 and accompanying text *supra.*

59. J.I. Case Co. v. Borak, 377 U.S. 426 (1964); *see* note 53 and accompanying text *supra.*

60. Cases cited note 4 *supra.*

61. Ash v. Cort, 496 F.2d 416 (3d Cir. 1974); SEC v. Guaranty Bond & Sec. Corp., 496 F.2d 145 (6th Cir. 1974); Potomac Pass'rs Ass'n v. Chesapeake & O. Ry., 475 F.2d 325 (D.C. Cir. 1973).

62. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narc., 403 U.S. 388 (1971); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

63. 45 U.S.C. §§ 501-644 (1970).

64. *Id.* § 642.

intercity passenger trains could be discontinued unless the railroad had entered into a contract with the National Rail Passenger Service Corporation, commonly known as Amtrak,[65] which was given authority to permit discontinuances. In *Potomac Passengers Association v. Chesapeake & Ohio Railway Co.*,[66] known as the *Amtrak* litigation, two appeals were consolidated from orders dismissing two similar actions brought by associations of rail passengers against railroads and Amtrak seeking to enjoin discontinuation of rail service. The Amtrak Act contained no express authority for this kind of suit.

In reversing the dismissals the court of appeals characterized the question before it "as an issue in determining who is a proper plaintiff to assert that a corporation created by the government is violating its statutory authority."[67] The court considered the tripartite standing test enunciated by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*,[68] but felt that the only aspect of that test requiring detailed analysis was whether there was any evidence that Congress intended to preclude standing for a private plaintiff.[69] While this approach was less stringent than some of the earlier decisions of the Supreme Court,[70] it directly followed the Court's statement in *Hewitt-Robins*[71] that a private cause of action will be implied when it was not inconsistent with the overall purpose of the Act as determined by an examination of legislative history.[72] Thus, under the court of appeals approach only explicit evidence that "Congress intended to deny standing to injured and aggrieved pas-

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65. *Id.* § 564(a).

66. 475 F.2d 325 (D.C. Cir. 1973), *rev'd sub nom.* National R.R. Pass'r Corp. v. National Ass'n of R.R. Pass'rs, 414 U.S. 453 (1974).

67. *Id.* at 329. The court was conscious that its approach might be objected to on the grounds that these actions were brought against private railroad companies as well as the semipublic Amtrak corporation and that this approach generally was applied to situations in which courts were reviewing actions of administrative agencies. In addressing this problem the court noted,

> The fine distinction among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law . . . . Fortunately, however, we need not resolve these problems here, for in this case analysis of all these doctrines leads to the same conclusion—allowing adjudication of the merits.

Id.

68. 397 U.S. 150 (1970). The court of appeals stated that test as follows:

> (1) whether the plaintiff has alleged that he suffered injury in fact, economic or otherwise . . . , (2) whether the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . and (3) whether judicial review has been precluded by the legislature . . . .

475 F.2d at 329 (citations omitted).

69. 475 F.2d at 331.

70. *See, e.g.*, T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959). The court concluded that this liberal test should apply "[b]ecause of Amtrak's quasi-public character, and the consequential public interest in ensuring that its actions conform to its legislative mandate . . . ." 475 F.2d at 330.

71. 371 U.S. 84 (1962).

72. *Id.* at 89.

sengers"[73] would bar the action. The court searched for and failed to find this positive indication on the face of the statute, in the legislative history, and in the overall purposes of the Act.

Section 307 of the statute[74] authorized suits by the Attorney General and by railroad employees and their representatives to enforce the Act. The court considered whether the maxim of judicial construction, *expressio unius est exclusio alterius*,[75] required holding that by expressly granting remedies to the Attorney General and employees, Congress intended to exclude private remedies to others injured by violation of the Act. Rejecting application of the *expressio* maxim, the court reasoned that the two expressly granted remedies were not evidence of congressional intent to preclude private suits. Expressly granting a remedy to the Attorney General indicated only that Congress was ensuring that that officer could sue for "what otherwise might be viewed as private rights."[76] Expressly granting a remedy to employees only indicated congressional concern that employees have standing under the Act and that this authority to sue be broader than that of other potential plaintiffs.[77] Thus, nothing in the statute was found to indicate a congressional intent to deny standing to private plaintiffs.

Nor was the court persuaded by legislative history that Congress intended to preclude private suits. During hearings on the bill that became the Rail Passenger Service Act of 1970, an amdendment was introduced that would have made it clear that any person injured by a violation could sue.[78] The amendment was never adopted. Appellees argued that this was a clear indication of congressional intent to preclude private suits.[79] The court found no explanation of the amendment's failure in the legislative materials, however, and concluded that "[i]nterpretation of statutes cannot safely rest upon changes made in congressional committee without explanation."[80]

Finally, the court examined the purposes of the Act and concluded that permitting a private plaintiff to sue would not contradict

73. 475 F.2d at 337.
74. 45 U.S.C. § 547 (1970).
75. "Expression of one thing is the exclusion of others." BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968).
76. 475 F.2d at 332.
77. *Id.* at 333.
78. *Supplemental Hearings on H.R. 17849 & S. 3706 Before the Subcomm. on Transp. & Aero. of the House Comm. on Interstate & Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970).
79. 475 F.2d at 335.
80. *Id.*

them.[81] The court discerned these purposes to include permitting railroads to "discontinue uneconomical trains that were draining their resources,"[82] while preventing "complete abandonment of intercity rail passenger service."[83] Appellees argued that permitting all injured persons to sue for violations of the Act would cripple the railroads with massive litigation expenses. The court's response was that "[a]chievement of Congress' objectives plainly requires compliance with the provisions of the Amtrak Act, and judicial review of Amtrak's actions is necessary if compliance is to be assured."[84]

This detailed analysis by the court of appeals in *Amtrak* was based on the *Data Processing* test,[85] a test originally applied to challenges of administrative agency actions.[86] The court noted, however, that a private cause of action in the instant case would be equally justifiable under any other test.[87] Thus, the court of appeals decision in *Amtrak* can be seen as a liberal application of the implication doctrine. A private cause of action was implied because the court found no clear indication of congressional intent to the contrary and no indication that implication would infringe on the primary jurisdiction of administrative agencies.

The Court of Appeals for the Third Circuit adopted an equally liberal approach in *Ash v. Cort.*[88] In this case a registered voter and shareholder of Bethlehem Steel Corporation sued the directors and the corporation for alleged violations of a federal prohibition on corporate campaign contributions.[89] Plaintiffs sought injunctive and monetary relief, alleging that defendants had used and were continuing to use corporate funds to purchase advertisements supporting the 1972 presidential campaign of Richard M. Nixon. The lower court granted defendants' motion for summary judgment. On appeal plaintiff-appellant argued that he was injured both as a stockholder and as a voter by the expenditure of corporate funds. The court of appeals framed the issue as whether plaintiff had an implied cause of action under the Federal Corrupt Practices Act, which makes it a crime for a corporation to spend its funds on political campaigns.[90] That statute does not expressly provide for private suits by injured shareholders or voters.[91]

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81. *Id.* at 336-38.
82. *Id.* at 337.
83. *Id., quoting* H.R. REP. No. 1580, 91st Cong., 2d Sess. 3 (1970).
84. 475 F.2d at 337.
85. *See* note 68 *supra.*
86. *See* note 70 and accompanying text *supra.*
87. 475 F.2d at 329.
88. 496 F.2d 416 (3d Cir. 1974), *rev'd,* 422 U.S. 66 (1975).
89. 18 U.S.C. § 610 (1970).
90. *Id.*
91. The court first held that the action was not moot and that plaintiff as a voter and stockholder had standing to sue. 496 F.2d at 419-20.

Charting its course the court of appeals stated the rule governing implied causes of action as follows:

> To find a cause of action 'implied' in a statute, we must determine (1) that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and (2) that it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought.[92]

In determining whether an implied cause of action is appropriate in light of a statute's purposes, legislative intent plays a significant role. As the Third Circuit stated,

> Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent . . . . *Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies of affording litigants a particular remedy.*[93]

The problem in *Cort*, like the problem in *Amtrak*, was the lack of clear legislative intent.

The statute in *Cort* contained an express criminal remedy[94] as well as a civil remedy to be pursued by the Attorney General.[95] Therefore, the maxim *expressio unius est exclusio alterius*[96] was invoked to urge the court to deny a private right of action. The court rejected application of the *expressio* maxim, noting that in a number of decisions the Supreme Court had found an express criminal remedy no bar to implication of a private right[97] and that the express criminal penalty of the statute in question could not be viewed as a remedy for the harm inflicted upon plaintiff. Furthermore, the court reasoned that while the Attorney General was given a civil cause of action for violation of title III of the Act, this case was brought for a violation of title II and the presence of a limited civil remedy in title III did not indicate legislative intent to exclude a private remedy in another part of the statute.[98]

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92. 496 F.2d at 421.
93. *Id.* (emphasis added, citation omitted).
94. 18 U.S.C. § 610 (1970).
95. 2 *id.* § 438(d)(1)-(5).
96. "Expression of one thing is the exclusion of others." BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968).
97. 496 F.2d at 422. The court cited as examples Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), and Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).
98. 496 F.2d at 422.

The court went on to consider whether implication of a private right would "effectuate the act and whether any 'collateral' considerations counsel withholding this remedy."[99] Reasoning that the statute sought to prevent corporate campaign contributions, the court concluded that the "relative expeditiousness" of a private remedy would promote that end.[100] Furthermore, the court noted that "the politician whose election if facilitated by a violation of § 610 may be in charge of the statute's enforcement."[101] Therefore, the court concluded that the Act's purpose would be served by permitting private suits.[102]

A review of legislative history demonstrated to the court that the legislature was motivated by two considerations in enacting the federal prohibitions on corporate campaign contributions: protecting the federal election process; and preventing corporate officials from contributing corporate funds to political parties.[103] Thus, as a voter and shareholder plaintiff was within the class of persons the Act was designed to protect[104] and a private right of action was inferred.[105]

In *SEC v. Guaranty Bond & Securities Corp.*[106] (hereinafter referred to as *"SIPC"*), the SEC brought an action against a broker-dealer, alleging net capital violations of the federal securities laws.[107] A receiver was appointed to take charge of all Guaranty's assets. Later the receiver filed a petition for an order directing the Securities Investor Protection Corporation (SIPC) to intervene in the action and afford customers of Guaranty the benefits of the Securities Investor Protection Act of 1970.[108] The major issue of the case was whether the statute could be applied to the instant situation since actions of Guaranty had occurred prior to the passage of the Act,[109] but the court also held that the receiver, as the representative of the broker-dealer's customers, could force the SIPC to meet its obligations under the statute.[110] The court reasoned that

> [T]he lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C., evidences an intent

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99. *Id.* at 423.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 422; *see* United States v. CIO, 335 U.S. 106, 113 (1948); 40 CONG. REC. 96 (1906) (remarks of President Theodore Roosevelt).
104. 496 F.2d at 422.
105. *Id.* at 424. Judge Aldisert wrote a forceful dissent. *Id.* at 426-29.
106. 496 F.2d 145 (6th Cir. 1974), *rev'd sub nom.* Securities Inv. Protection Corp. v. Barbour, 421 U.S. 412 (1975).
107. Securities Exchange Act § 15(c)(3), 15 U.S.C. § 78o(c)(3) (1970).
108. 15 U.S.C. §§ 78aaa-*lll* (1970).
109. The court of appeals held that it could be applied to Guaranty. 496 F.2d at 149-50.
110. *Id.* at 150.

> by Congress that the statute should not be . . . narrowly construed . . . .[111]

As demonstrated above, these decisions of the courts of appeals reflected a judicial disposition to create remedies in support of perceived legislative objectives. They were a logical extension of the Supreme Court decisions of the previous ten years. The Supreme Court granted petitions for writs of certiorari in *Amtrak*,[112] *Cort*,[113] and *SIPC*.[114] Taken together, the High Court's decisions in these cases represent a distinct change in the attitude of the Court toward implied causes of action.

B. The Burger Court's Decisions

The Supreme Court's first venture into the area under the leadership of Chief Justice Warren Burger came in the *Amtrak* case.[115] The Supreme Court approached the problem as follows:

> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.[116]

The most striking aspect of this decision is that the Supreme Court did not use a substantially different analysis from that used by the court of appeals, but using the same analysis the Court arrived at the opposite conclusion.

The Court first concluded that "the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the act."[117] The court of appeals had decided that § 307(a) was only evidence of congressional intent to insure that additional remedies were available.[118] The Supreme Court then analyzed the legislative history of the Act and, like the court of appeals, noted that a proposal to permit unlimited private suits was made to

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111. *Id.*
112. 411 U.S. 981 (1973).
113. 419 U.S. 992 (1974).
114. 419 U.S. 894 (1974).
115. National R.R. Pass'r Corp. v. National Ass'n of R.R. Pass'rs, 414 U.S. 453 (1974).
116. *Id.* at 456.
117. *Id.* at 458.
118. 475 F.2d at 333.

the House committee during hearings and rejected.[119] The Court recognized that the hearing transcript did not indicate the opinion of any committee member on the proposal to permit private suits, but stated, "[I]t is surely most unlikely that the members of the Committee would have stood mute if they had disagreed with it."[120] Thus, the Supreme Court found the committee's mute response to support the contention that Congress intended to grant no private causes of action under the Act. This same legislative history, however, had previously been dismissed by the court of appeals as ambiguous and an insufficient basis from which to deduce legislative intent.[121]

Finally, the Supreme Court considered whether implication of a private cause of action would be consistent with the Act's purpose of achieving economic viability for the basic rail passenger system.[122] The Court reasoned that creating private causes of action would also create the "potential . . . for a barrage of lawsuits that, either individually or collectively, could frustrate or severely delay any proposed passenger train discontinuance."[123] The Supreme Court decided to entrust enforcement to the agency created by the Act. Judicial proceedings were thought to be more burdensome than helpful.[124] This reflected a confidence in administrative agencies not shared by the court of appeals. In direct contradiction the court of appeals had held that judicial action was necessary to ensure compliance and would be less burdensome than agency procedure.[125]

The essential difference between the two decisions in *Amtrak* was the attitude of the courts. While the court of appeals relied on the utility of judicial access, the Supreme Court relied on the legislatively created administrative procedures. While the court of appeals was willing to create a cause of action in the absence of a contrary legislative intent, the Supreme Court was hesitant. Finally, while the court of appeals refused to accept an approach to legislative interpretation that would restrain judicial implication of a cause of action when a statute provided specific remedies, the Supreme Court welcomed it.

These same themes were evident in the Supreme Court's decisions in *Cort v. Ash*[126] and *SIPC*.[127] As described above, the issue

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119. 414 U.S. at 458-61; *see* notes 80-82 and accompanying text *supra*.
120. 414 U.S. at 460.
121. 475 F.2d at 335; *see* notes 78-80 and accompanying text *supra*.
122. 414 U.S. at 461, *quoting* H.R. REP. No. 1580, 91st Cong., 2d Sess. 3 (1970). The court of appeals stated that another purpose of the Act was to prevent complete abandonment of rail service. 475 F.2d at 337.
123. 414 U.S. at 463.
124. *Id.* at 463-64.
125. 475 F.2d at 337 & n.13.
126. 422 U.S. 66 (1975).
127. 421 U.S. 412 (1975).

confronting the Court in *SIPC* was whether a receiver appointed to wind up the affairs of an insolvent brokerage house could sue to compel the Securities Investor Protection Corporation, a private membership corporation created by Congress, to meet its obligations under the statute. One section of the statute establishing the SIPC allowed the SEC to sue in federal court to compel the Corporation to act.[128] Citing its decision in *Amtrak*[129] the Court held that this express remedy precluded an implication of a private right.

> As with Amtrak, so with SIPC, Congress has created a corporate entity to solve a public problem; it has provided for substantial supervision of its operations by an agency charged with protection of the public interest—here the SEC—and for enforcement by that agency in court of the obligations imposed upon the corporation.[130]

In *SIPC* and *Cort* the Court reiterated its reluctance to imply a remedy when another is expressly provided. The decisions underscored the Court's belief that administrative remedies are more effective than judicial relief in promoting statutory purposes. As the Court stated in *SIPC*,

> By this policy [of deferring intervention until a clear showing is made that customers need the Act's protection], the SIPC avoids unnecessarily engendering the costs of precipitate liquidations—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 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.[131]

For this reason the Court decided that a judicial remedy would not be consistent with its perception of the purpose of the Securities Investor Protection Act.

Similarly, in *Cort v. Ash* the Supreme Court ruled that all complaints by citizens or stockholders for injunctive relief against corporate campaign financing should go to the Federal Election Commission.[132] As to damage suits, the Supreme Court again ana-

128. Securities Investor Protection Act § 7(b), 15 U.S.C. § 78ggg(b) (1970).
129. 414 U.S. 453 (1974).
130. 421 U.S. at 420.
131. *Id.* at 422.
132. 422 U.S. 66, 77 (1975). The Federal Election Commission was created by the Federal Election Campaign Act Amendment of 1974, Act of Oct. 15, 1974, Pub. L. No. 93-443, tit. II, § 208(a), 88 Stat. 1280. Although not in effect at the time of the court of appeals decision, the Supreme Court applied the 1974 amendments as

lyzed the legislative history of the statute and arrived at a conclusion opposite the one reached by the court of appeals. The court of appeals had looked to the Court's opinion in *United States v. CIO*,[133] in which the history of this legislation had been examined and found to have been motivated by two considerations—protecting the electoral process and preventing the use of the corporate funds for campaign contributions.[134] The court of appeals considered prevention of this misuse of funds and the consequent protection of shareholders as more than an incidental purpose.[135] The Supreme Court, however, reviewed the same history, as reported in *United States v. UAW*,[136] and concluded that protecting shareholders was but an incidental purpose of the legislation.[137] Just as in *Amtrak* the court did not criticize the lower court's use of legislative history; it simply disagreed on the conclusions to be drawn therefrom. Since the issue of implication of a private right of action arises only when legislative history is unclear, it is not surprising that different courts with different legal philosophies analyzed the same legislative history and arrived at opposite conclusions.

Thus, in *Amtrak, SIPC*, and *Cort* the Supreme Court did not enunciate any novel formulation of the doctrine of implication of a private cause of action. Instead the Court indicated a preference for denying the federal courts jurisdiction of disputes arising under these statutes. The only new aspect of these decisions was a statement in *Cort* that the following issue must be decided in the negative before a private cause of action will be implied: "[I]s 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?"[138] The court in *Cort* answered in the affirmative, stating that insofar as plaintiff was suing as a shareholder, the action most closely resembled a state ultra vires cause of action or one for breach of fiducuiary duty.[139] Again, one discerns a distinct disinclination for expanding the jurisdiction of federal courts.

Such judicial reluctance was foreign to the Warren Court. In fact, a review of *J.I. Case Co. v. Borak*[140] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[141] demonstrates that a

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intervening law under authority of United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

133. 335 U.S. 106 (1948).
134. 496 F.2d at 422.
135. *Id.* at 423.
136. 352 U.S. 567 (1957).
137. 422 U.S. at 79-80.
138. *Id.* at 78.
139. *Id.* at 84.
140. 377 U.S. 426 (1964).
141. 403 U.S. 388 (1971).

similar approach was proposed by defendants, but rejected by the Court. The more recent cases evince the Burger Court's decision to retreat from the judicial activism of the Warren Court and to permit settlement of disputes by judicial and administrative bodies other than federal courts.

V. The Future of the Doctrine

The Supreme Court has not formulated a new rule in its recent decisions refusing to imply private causes of action. That the Court reached decisions directly opposite to those reached by the courts of appeals is a result of attitudinal and philosophic differences. The decisions provide little guidance to courts considering the issue in the future, but certain conclusions can be drawn. First, the Supreme Court demonstrated great reluctance to expand the jurisdiction of the federal judiciary, preferring existing agency and state court remedies. Second the Court restricted the scope of judicial implication by adopting an approach to statutory interpretation that requires the judiciary to act only on explicit directions from the legislature. The role of legislative history has been left ambiguous in this analysis. In the absence of a clear indication of legislative intent, the statute's history can support opposite conclusions. In all probability the judicial philosophy of the Burger Court has and will decide the issue.

A. Restriction of Federal Jurisdiction

In *Amtrak, SIPC,* and *Cort* the Supreme Court refused to extend the jurisdiction of federal courts to disputes arising under the statutes involved. In each case the statutes expressly provided various administrative remedies.[142] These administrative remedies were given the Court's approval while private litigation was found to be of dubious utility.

> This [private litigation establishing precedent in one district that would not bind courts in another] would completely undercut the efficient apparatus that Congress sought to provide for Amtrak to use in the 'paring of uneconomic routes.' It would also

142. In *SIPC* the Securities Investor Protection Act provided that the SEC could bring suit to compel SIPC to comply with its statutory responsibilities. 15 U.S.C. § 78ggg(b) (1970). In *Amtrak* section 307 of the Rail Passenger Service Act provided for civil suits by the Attorney General and any railroad employees to prevent violation of the Act. 45 U.S.C. § 547 (1970). In *Cort v. Ash* the Federal Election Campaign Act Amendment of 1974 provided for administrative relief. 2 U.S.C.A. §§ 437g-h(a) (Supp. 1976).

> 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.
>
> 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.[143]

Moreover, additional deference has been given to state court remedies by the requirement for judicial implication added by *Cort v. Ash*.[144] Further erosion of federal jurisdiction can be expected in areas traditionally relegated to state law. In sum, these decisions constitute a clear signal that the Court is ready to expand agency and state court jurisdiction at the expense of the federal courts.

B. Statutory Interpretation: Revitalization of the Expressio Maxim

In each of these decisions the Supreme Court held that expressly provided remedies precluded an implication of other remedies from the statute.[145] While admitting that the maxim *expressio unius est exclusio alterius* must yield to a clear indication of legislative intent,[146] the Court in *Amtrak* cited the 1929 decision of *Botany Worsted Mills v. United States*[147] for the proposition that " '[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' "[148] In *SIPC* the Court referred to its *Amtrak* decision and rested its conclusion that only the expressly provided remedies can be pursued, in part, on the proposition that an "express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature."[149]

In citing a 1929 decision for support of the *expressio* maxim, the Court avoided numerous decisions of more modern vintage that have criticized the maxim and deemphasized its role in statutory interpreta-

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143. 414 U.S. at 463-64.

144. *See* notes 138-39 and accompanying text *supra*.

145. In *Cort v. Ash* the only specific remedy, apart from criminal penalties, was found in the 1974 amendment that established an administrative procedure for seeking injunctive relief. The Court held this to be the exclusive remedy for all injunctive actions. 422 U.S. at 76. The Court also held that the express criminal penalties did not necessarily preclude a private suit. *Id.* at 79.

146. 414 U.S. at 458.

147. 278 U.S. 282 (1929).

148. 414 U.S. at 458, *quoting* Botany Mills v. United States, 278 U.S. 282, 289 (1929).

149. 421 U.S. at 419.

tion.[150] In one such decision, *SEC v. C.M. Joiner Leasing Corp.*,[151] the Supreme Court stated that rules of statutory construction, such as the *expressio* maxim,

> come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . .[152]

The Supreme Court did, of course, look to the general purpose of the statutes at issue in arriving at its recent decisions not to imply private causes of action. It would be incorrect to say, therefore, that these decisions, like the decisions referred to in *Joiner Leasing*,[153] came from a source hostile to the legislative process. Indeed, great reliance on the legislative process is evident in the Supreme Court's decisions in that the Court preferred expressly created legislative remedies to implied judicial ones. Yet its statutory construction was restrictive. The return to the *expressio* maxim was perhaps also motivated by doubts about the efficacy of private litigation, cynicism regarding the judicial process, and a reaction to the philosophic stance of the courts of appeals, which led those courts to supplement legislation freely with judicially created remedies.

C. Use of Legislative History

As demonstrated earlier, the High Court reached conclusions opposite those of the courts of appeals from the same legislative history without enunciating a significantly different test for implication of private causes of action. The explanation lies in part in the differing approaches to legislative history.

In *Amtrak* the legislature's lack of response to a proposal to add explicit private remedies was found by the court of appeals to be no indication that the legislature intended to bar these

150. *E.g.*, SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943); FTC v. Standard Motor Prods., Inc., 371 F.2d 613, 617-18 (2d Cir. 1967); Hunt Foods & Indus., Inc. v. FTC, 286 F.2d 803, 807 (9th Cir. 1960), *cert. denied*, 365 U.S. 877 (1961); Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 719 (E.D. Pa. 1963).

151. 320 U.S. 344 (1943).

152. *Id.* at 350, *quoted* at 475 F.2d at 332.

153. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

remedies.[154] The Supreme Court, however, reached the opposite conclusion.[155] Similarly, the court of appeals in *Cort* concluded that the legislative history showed that protection of corporate funds was one of two equally important purposes of the legislation,[156] but the High Court examined the same legislative history and found that protection of stockholders was, at best, a secondary concern.[157] The confusion about the impact of legislative history is understandable: the issue of an implied cause of action arises only when a statute is mute on the point and the issue is difficult only when the legislative history is unclear. Even in *Amtrak*, a case in which the Legislature considered and rejected a private cause of action, the legislative history is of dubious aid. As the Supreme Court stated, "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment . . . ."[158]

It is submitted that legislative history usually will be of no help to courts confronted with the issue of whether to imply a private cause of action. The court's approach to that history is of far greater significance. Moreover, the Supreme Court's decisions in *Amtrak, SIPC*, and *Cort* will not provide a clear guide. Indeed, the *Amtrak* decision did not guide the Courts of Appeals for the Third and Sixth Circuits in *SIPC* and *Cort*: although *Amtrak* had been decided prior to their decisions, both courts implied private causes of action.[159]

VI. Conclusion

The Supreme Court has clearly taken a new direction in implying private causes of action. The Court is motivated by a

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154. 475 F.2d at 334-36.
155. 414 U.S. at 459-60.
156. 496 F.2d at 422.
157. 422 U.S. at 79-80.
158. United States v. Wise, 370 U.S. 405, 411 (1962).
159. The court of appeals in *SIPC* made no reference whatsoever to the Supreme Court's decision in *Amtrak*. *See* 496 F.2d 145 (6th Cir. 1974). In *Cort*, however, the Third Circuit reviewed the *Amtrak* decision at length. The majority held that *Amtrak* would apply only if there were some express civil action remedy that could be said to redress plaintiff's injury. The court held there was none under the Federal Election Campaign Act. 496 F.2d at 421.

Judge Aldisert in dissent relied exclusively on *Amtrak* and found that there should be no private causes of action. He saw the *Amtrak* decision as a "definite signal to the courts of appeal and district courts to decelerate use of . . . [the reasoning in] *J.I. Case Co. v. Borak* . . . to find implied civil remedies not expressly authorized by Congress." 496 F.2d at 426-27. Judge Aldisert continued,

> I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of J.I. Case Co. v. Borak, *supra*, and an overgenerous use of Justice Black's overgenerous quotation in Bell v. Hood, 327 U.S. 678, 685, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946), that 'federal courts may use any available remedy to make good the wrong done.' I am convinced that the Amtrak court consciously and deliberately applied the brakes and meant exactly

judicially conservative philosophy quite different from that of the Supreme Court during the term of Chief Justice Earl Warren. Chief Justice Burger's dissent in *Bivens* foreshadowed this change in philosophy:

> I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.[160]

This attitude obviously leads the Court to defer to congressional intent as expressed in legislative history. Under the judicially active Warren Court the absence of express legislative intent was interpreted to permit the judiciary to fashion remedies to further social and statutory policies.[161] Under the Burger Court, however, the absence of express legislative intent militates against implication.[162] To support its conservative approach the Court has exhumed the *expressio* maxim of statutory construction, which enables it to rule that expressly provided remedies are the exclusive remedies available to injured persons. Moreover, in *Cort v. Ash* the Court added a new element to the doctrine: now a party must show that his case is not one traditionally within the purview of the state courts.[163] These elements of the Burger Court's decisions are consistent with the often expressed view of the Chief Justice that the case load of the federal judiciary should be reduced.[164]

Although it may be foolhardy to predict the result of future suits seeking implication of private causes of action, the authors believe that two points can be made. First, with the Supreme Court as it exists today, if a statute provides for participation by an administra-

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what it said when it declared that a 'private cause of action not otherwise authorized by the statute' may not be implied in the absence of clear 'evidence of legislative intent.'

496 F.2d at 429.

160. 403 U.S. at 411-12.

161. *E.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967).

162. *E.g.*, Cort v. Ash, 422 U.S. 66, 82-84.

163. *Id.* at 78.

164. For example, the Chief Justice advocates abolition of the mandatory jurisdiction of the Supreme Court, three-judge district courts, and diversity jurisdiction. Remarks of the Chief Justice at the Annual Meeting of the American Law Institute, May 20, 1975.

tive agency and such participation in any way would effectuate the congressional purpose of the statute, the Court will not imply a private cause of action. Second, if an express remedy is provided to a private party, it is unlikely that the Supreme Court will expand this remedy by implication to other private plaintiffs unless there is clear evidence in the legislative history that Congress wished to grant standing to these other plaintiffs.

The recent Supreme Court decisions have a fundamental importance that extends far beyond the present Court's treatment of the ancient practice of judicially creating remedies to vindicate legal rights. The decisions clearly demonstrate a trend away from the willing involvement of the Court in private disputes to promote social and statutory policies. They also illustrate a conservative view of the judiciary's position vis-a-vis other branches of government that now appears to dominate the Court and that is certain to influence its decisions for years to come.