UIC Law Review

Volume 14 | Issue 1 Article 6

Fall 1980

Implied Causes of Action: A New Analytical Framework, 14 J. Marshall L. Rev. 141 (1980)

Robert L. Carter

James E. Cumberworth Jr.

IMPLIED CAUSES OF ACTION: A NEW ANALYTICAL FRAMEWORK

After having been physically assaulted while on an international charter flight, Vern Chumney brought a private civil action against his attackers seeking damages.[1] Chumney contended that the passengers who committed the attack had violated the federal statute which provides criminal penalties for assaults occurring on any aircraft within the special aircraft jurisdiction of the United States.[2] This statute, however, makes no provision for a private action seeking damages. Thus, Chumney's complaint raised the issue of whether a private cause of action can be implied from a statute which provides criminal penalties but does not expressly provide for civil relief.[3]

The theory of implying a cause of action from a federal criminal or regulatory statute was recognized in 1916 by the United States Supreme Court,[4] but it has since developed on a case by case basis without a clear analytical framework.[5] Recently the Supreme Court undertook to articulate a workable formula to ascertain when a cause of action may be implied.[6] Through an analysis and integration of the signifigant implied cause of action cases, a new analytical framework can be developed. This framework can then be applied to the question proffered by Chumney's complaint—whether a private cause of action can be implied from the aircraft assault statute.

HISTORICAL DEVELOPMENT OF IMPLIED CAUSES OF ACTION

The Statutory Tort Principle

The origin of implied causes of action in the United States dates back to *Texas & Pacific Railway Co. v. Rigsby*.[7] The issue

1. Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980).

2. 18 U.S.C. § 13(d) (1976). The jurisdictional statute is 18 U.S.C. § 7 (1976).

3. Chief Judge Edwards noted that the question of implying a private cause of action from a criminal statute is a difficult one to answer. For an excellent history on the theory of implied causes of action, see McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976).

4. Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

5. *See, e.g.*, Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

6. Cannon v. University of Chicago, 441 U.S. 677 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979).

7. 241 U.S. 33 (1916).

before the Supreme Court in *Rigsby* concerned the effect legislative enactments had on the legal relationships between people within the purview of a statute.[8] The plaintiff maintained that if a statute created certain duties owed by one group of people to another group, then it would follow that an injured member of the group to which a duty was owing could bring a civil action for damages based upon the violation of the legislative command.[9] The Supreme Court stated that if the harm caused was of the type that the legislative provision was intended to prevent, then implying a private cause of action on behalf of an injured party was irresistible.[10] The Court in *Rigsby* held that "disregard of the command of a statute is a wrongful act; and where it results in damage to one of the class for whose benefit the statute was enacted, the right to recover damages from the party in default is implied . . . ."[11]

A Constitutional Basis

It has been advanced that the *Rigsby* Court stepped beyond the boundaries of the judicial branch of government by, in effect, taking upon itself the enactment of an additional remedial provision in a statute passed by Congress.[12] Such condemnation of

8. Despite the fact that authorities frequently cite *Rigsby* as the earliest American case where a civil remedy was implied from violation of a penal statute, the language and the facts of the case are sufficiently ambiguous to suggest that the case really only involved the application of the well-established doctrine of negligence per se, where the statute merely sets the standard of conduct by which a reasonable, prudent man would abide. This view of *Rigsby* is supported by the fact that the case was decided under the regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) where federal courts were free to create substantive standards of liability applicable to a common law negligence claim. Such a challenge to the stature of *Rigsby* as the first implied cause of action case has now become academic because the courts have often used the language of the case to support the implied rights doctrine where negligence per se was not involved. *See generally* Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U.M.K.C. L. REV. 292 (1972).

9. This argument was an adoption of the legal analysis used in the English case of Couch v. Steel, 118 Eng. Rep. 1193 (P.B. 1854). The theoretical framework for the doctrine is not new. Over two hundred years ago, Blackstone noted that "[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." 3 W. BLACKSTONE, COMMENTARIES *23.

10. 241 U.S. at 40.

11. *Id.* at 39.

12. Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting). Justice Powell's position, that the doctrine of implied rights is unconstitutional, would be accurate if federal courts were only applying the common law doctrine of negligence per se. According to the doctrine of negligence per se, a legislative enactment may establish the standard of conduct expected of a particular person in a particular situation. Liability will be imputed under negligence per se without the necessity of ascertain-

judicial activism in implying causes of action was predicated upon superficial reasoning. When a legislature declares certain conduct to be unlawful, it not only creates a duty owed to the public at large, but also affects the relationships between groups of people who are the intended beneficiaries of the statute. Therefore, failure of a court to imply a cause of action on the behalf of a beneficiary of a statute would be tantamount to judicial approval of conduct condemned as wrong by the legislature.[13] Such inaction by a court would be irreconcilable with the proper respect due to a co-equal branch of government. The court, in effect, would render duty-creating language in a statute merely laudatory.

In addition to the acknowledgement of the mutual respect for co-equal branches of government, the *Rigsby* Court relied upon the concept of *stare decisis* to support the practice of implying causes of action from federal statutes. The Court stated that the practice was merely an application of the maxim *ubi jus ibi remedium*—where there is a right there is a remedy. In the landmark decision *Marbury v. Madison*,[14] Chief Justice Marshall proclaimed that the maxim occupies such a fundamental place in American jurisprudence as to be deemed the very "essence of civil liberty."[15] Since statutes tend to create new rights, frequently unknown at common law, the Constitution seems to mandate their judicial recognition and enforcement by the means of implying private causes of action.

---

ing the standard of care of the fictitious "reasonable man," assuming that the other elements—duty, causation, and injury—are also present.

There is, however, an essential distinction between negligence per se and an implied cause of action. Under negligence per se the statute merely establishes the standard of care where a common law duty was already in existence. In contrast, according to the implied rights doctrine, the statute may establish an entirely new cause of action where none existed at common law. Implied rights cases are derived from situations where the duty and, hence, the very cause of action were created by statute. Even though there existed no liability for violation of the statute at common law, no matter how unreasonable the conduct.

The distinction between negligence per se and implied causes of action provides a theoretical basis from which the position of Justice Powell can be surmounted. Justice Powell believes *Rigsby* can be read as a negligence per se case and therefore the statutory tort principle and the line of cases which follow it are unconstitutional since the law of negligence, in terms of federal general common law, is non-existent. Not only is Justice Powell ignoring the fact that *Rigsby* relied upon the English implication case, Couch v. Steel, 118 Eng. Rep. 1193 (P.B. 1854), but he also is ignoring the fact that the Court had used *Rigsby* to support the statutory tort principle in cases where negligence per se was clearly not involved. Hence, Justice Powell's argument has been rendered an academic exercise of dubious logic.

13. *See generally* Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

14. 5 U.S. (1 Cranch) 137 (1803).

15. *Id.* at 163.

The Elements of the Statutory Tort Principle

The framework of analysis drawn from these early decisions became known as the statutory tort principle. Not every violation of a statute gives rise to a cause of action under this theory. The law will imply a civil remedy, in the absence of an express provision, only if:

1. there has been a violation of a provision that was intended to benefit a particular class of persons;

2. the plaintiff was a member of the class to whom the legislatively created duty was owed;[16] and

3. the plaintiff's interest that was intended to be protected by the provision has been invaded by the conduct constituting the violation.[17]

---

16. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court granted an implied cause of action to the largest class possible—all individuals in the United States. The plaintiff sued federal narcotics agents for their alleged unconstitutional conduct, arguing that by entering and searching his apartment without a warrant or probable cause, the agents violated his rights under the fourth amendment of the United States Constitution. Allowing the private cause of action to be implied from the fourth amendment, 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 federal courts should protect. *Id.* at 393. Although *Bivens* did not involve a statutory violation, its expansive view of an especial class has been cited with approval by the Supreme Court in a statutory implied cause of action case, Cort v. Ash, 422 U.S. 66, 78 (1975). The plaintiff need not be an individual since a cause of action has been implied in favor of the United States in Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

In more recent cases, however, the Supreme Court has restricted the especial class. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). Lower courts have also avoided applying the statutory tort principle by strictly limiting the class of intended beneficiaries. *See, e.g.*, Vanderbroom v. Sexton, 422 F.2d 1233, 1243 (8th Cir. 1970); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 790 (8th Cir. 1967); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 993 (D. Conn. 1973).

17. The rationale that the harm which provides the basis for the implied cause of action must be the kind that the statute was intended to prevent had its beginnings in the famous English case, Gorris v. Scott, 9 L.R. 125 (Exch. 1874). *Gorris* provided a framework for analysis directed at determining what relationships the legislature intended to affect. It has been suggested the reason American courts unquestioningly followed the decision in *Gorris* is that:

> unlike their predecessors which formed an essential part of the monarch's machinery for providing justice in competition with an increasingly active parliament, courts of 19th Century England and American courts from the beginning were viewed as passive arbiters of private conflict and not as policy-making arms of government.

J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 959 (1975). *See also* 2 HARPER & JAMES, THE LAW OF TORTS § 17.6, at 997-98, 1003 (1956); W. PROSSER, TORTS § 35 (4th ed. 1971). Thus, by determining what relationships the legislature intended to affect, a court determines who are the members of the especial class which, in turn, determines the

Both state and federal courts were slow to adopt the statutory tort principle enunciated in *Rigsby*, and it was not until the 1940's that the doctrine began to achieve wide application in the United States.[18] But, the question still remained as to what weight should be given to express remedial provisions of a statute as evidence that the legislature intended that these express provisions be the exclusive remedy.

The Role of Statutory Construction

The weight a court should give to the existence of express remedies as evidence of Congressional intent against implied causes of action was addressed in *Kardon v. National Gypsum Co.*[19] In *Kardon*, the complaint alleged that due to misrepresentations and suppressions of truth on the part of the defendant, the plaintiffs were induced to sell their stock for far less than its true value. The defendants moved to dismiss on the ground that the complaint failed to state a cause of action against them. They also asserted that the court did not have jurisdiction over them since, without a cause of action, the jurisdictional provision of the Securities and Exchange Act of 1934[20]

---

appropriateness of implication of a private cause of action. Therefore, essential in the Constitutional scheme of separation of powers is the necessity for a court to begin its analysis by addressing itself to identifying the members of the class for whose especial benefit or protection the statute was enacted.

18. *See, e.g.*, Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944); Kardon v. National Gypsum, 69 F. Supp. 512 (E.D. Pa. 1946).

State courts have been somewhat slower to adopt the statutory tort principle. *See, e.g.*, Wolf v. Smith, 149 Ala. 457, 42 So. 824 (1906) (personal injury); Sapiro v. Frisbie, 93 Cal. App. 299, 270 P. 280 (1928) (zoning violation); H. Christiansen and Sons, Inc. v. City of Duluth, 225 Minn. 475, 31 N.W.2d 270 (1948) (obstruction of a waterway); Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458, 154 N.E. 309 (1926) (food labeling).

The principle was also adopted by the RESTATEMENT OF TORTS § 286 (1934) which states the violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and

(b) the interest invaded is one which the enactment is intended to protect; and

(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and

(d) the violation is the legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action.

See also W. PROSSER, TORTS § 36 (4th ed. 1971).

19. 69 F. Supp. 512 (E.D. Pa. 1946).

20. 15 U.S.C. § 78aa (1970).

did not apply. The parties agreed that the defendants had violated section 10(b)[21] and rule 10b-5.[22] At issue, however, was the propriety of implying a civil cause of action for damages on behalf of a single investor who was injured by the violation of the Act.

The district court held that an implied cause of action existed for violations of section 10(b) and rule 10b-5. The court followed *Rigsby*, which had declared that disregard of the command of a statute is a tort, and commented that this rule was "more than a canon of statutory construction."[23] This allowed the court to reject the defendant's argument which was based on the application of the rule *expressio unius est exclusio alterius*—expression of one thing is the exclusion of another.[24]

The defendants in *Kardon* argued that the 1934 Act contained three sections which prohibited certain types of conduct and expressly provided for a civil action by an aggrieved party, whereas section 10(b) did not.[25] Applying the *expressio* maxim, defendants argued that Congressional intent to withhold a civil action could be deduced by their failure to provide for one. In response, the court stated:

> The argument is not without force. Were the whole question one of statutory interpretation it might be convincing, but the question is only partly such. It is whether an intention can be implied to deny a remedy and to wipe out a liability which, normally, by virtue of basic principles of tort law accompanies the doing of a prohibited act . . . . In other words, in view of the general purpose of the act, the mere omission of an express provision for civil liability is not sufficient to negative what the law implies.[26]

Kardon made it clear that an implied cause of action was perceived as fundamental and deeply ingrained in the securities law. Therefore an implied action existed unless the legislation clearly evidenced a contrary intention. By itself, the *expressio* maxim could not be used to supply sufficient contrary legislative intent to deny a private cause of action. The mere fact that a criminal statute imposed criminal sanctions was not sufficient to negate the presumption in favor of allowing a civil action if the statute was enacted for a specified class.[27]

---

21. 15 U.S.C. § 78j(b) (1970).

22. 17 C.F.R. § 240.10B (1980).

23. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

24. Expression of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968). *See also* Botany Mills v. United States, 278 U.S. 282, 289 (1929) (expressio maxim means that when a statute provides for a thing to be done in a particular mode, it includes the negative of any other mode).

25. 15 U.S.C. § 78i(e) (1970); 15 U.S.C. § 78p(b) (1970); and 15 U.S.C. § 78r(a) (1970). All explicitly provide for private causes of action.

26. Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946).

Despite the fact that the statutory tort principle had gained general acceptance in the federal courts, its applicability to claims under specific statutory contexts remained contingent upon the shifting judicial attitude of the Supreme Court. In a series of decisions in the 1950's, the Court refused to imply a cause of action upon the finding of adverse legislative intent.[28] The strong dissents in these cases accented the disagreement as to what factors are dispositive in determining the propriety of implying a cause of action.[29] What became clear under these de-

27. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947). Judge Learned Hand stated:

> Although the Communications Act of 1934 does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of that class, although the only express sanctions are criminal.

Id. at 694.

28. T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).

These cases indicate that the Court was attempting to develop a clear legislative intent test to determine when implication of a private action was appropriate. Yet, logic dictates that seldom does legislative history contain any clear expressions vis-a-vis implication of private damage action. If Congress had considered the question it would have provided express remedies. Hence, the Court was really only marshalling supportive rationale to justify the result. The question can be proffered:

> [w]hether there is such a thing as a discoverable legislative intent. . . . The controversy has centered principally over the relevance and competence of legislative history materials in ascertaining legislative intent as well as the weight which should be accorded them. The Supreme Court not infrequently divides as to what is shown by or may be implied from legislative history.

Comment, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary*, 43 FORDHAM L. REV. 441, 443-44 (1974).

29. All three cases were decided by a five to four margin. Justice Douglas, dissenting in *Nashville Milk*, maintained the Court ought to imply a cause of action because the legislative history could be read so as to permit implication. 355 U.S. at 383. Foreshadowing J.I. Case Co. v. Borak, 377 U.S. 426 (1964), Justice Frankfurter, dissenting in *Montana-Dakota Util.*, argued that a private action ought to be allowed if it was "appropriate to effectuate the purposes of a statute." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951). If this criterion was satisfied, Justice Frankfurter urged that the Court should deny implication only if such actions would interfere unduly with an administrative agency's exercise of its expertise or if it would impose burdens upon the courts which they were not equipped to handle. *Id.* at 263.

In *T.I.M.E.*, Justice Black, in his dissenting opinion, argued that the existence of a savings clause, a provision which preserves pre-existing common law remedies, should be viewed as dispositive evidence of legislative intent to allow implied damage actions. T.I.M.E., Inc. v. United States, 359 U.S. 464, 480 (1979). Such an approach is questionable because a savings clause, as its name suggests, does not purport to create new remedies. Only

cisions was that the statutory tort principle, alone, did not provide a satisfactory test. Greater deference to legislative intent and purpose was necessary.

Implied Causes of Action as a Means to Effectuate Legislative Purpose

In *J.I. Case Co. v. Borak*,[30] the Supreme Court looked to the broad remedial purposes of the federal securities laws to develop a new criterion for implying a cause action. The plaintiff in *Borak* was a shareholder of the Case Company. He alleged that the defendants had circulated false and misleading proxy solicitations in violation of section 14(a)[31] and rule 14a-9[32] of the Securities and Exchange Act of 1934. He further alleged that the merger of Case with another corporation had been effected through the use of these unsolicited proxies. Plaintiff sought both a declaratory judgment holding the merger void, and damages for himself and all others similarly situated. Section 14(a) was silent as to a cause of action. Thus, if the plaintiff was to have relief, the Court would again be faced with fashioning sound criteria for implying a remedy.

In a unanimous decision, the Court held a private cause of action could be maintained by alleging a section 14(a) violation. The Court based its decision on section 27 of the Act which provided for exclusive jurisdiction in federal courts over "all suits in equity or actions at law brought to enforce any liability or duty created under the Act or the rules thereunder."[33] The Court relied upon this broad grant of jurisdiction to conclude that private parties are authorized under section 27 to bring implied damage actions for violations of section 14(a).[34] Such rationale seemed to preempt the basic inquiry under the statutory tort principle of whether section 14(a) created a duty in the defendant to the class of which the plaintiff was a member. The Court looked to the jurisdictional provisions rather than the

two conclusions can logically be drawn from the existence of a savings clause: first, the clause applies only to pre-existing remedies and not implied causes of actions grounded in rights created by federal statute which were not legally recognized at common law, and, second, it applies only to those remedies which are not inconsistent with the act. For a discussion on Justice Black's dissent in *T.I.M.E.*, see Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1420-22 (1975).

30. 377 U.S. 426 (1964).
31. 15 U.S.C. § 78n(a) (1970).
32. 17 C.F.R. § 240.14a-9 (1980).
33. 15 U.S.C. § 78aa (1970).
34. 377 U.S. at 430-31.

substantive section 14(a) as a source of a plaintiff's right to maintain a cause of action under the Act.

Despite the fact that the Court ignored the duty-creating language of section 14(a), the holding was based on more than just the jurisdictional provision. The Court maintained that although section 14(a) did not contain an express cause of action, "among its chief purposes was the protection of investors, which certainly implied the availability of judicial relief where necessary to achieve that result."[35] The Court noted that the Securities and Exchange Commission (SEC), as *amicus curiae*, had advised the Court that it was overburdened with proxy solicitations, making thorough examinations impracticable.[36] Under these circumstances, the Court concluded that it was "the duty of the Courts to be alert to provide such remedies as are necessary to effectuate the congressional purpose."[37]

At this point in the development of the application of implication, the rationale of *Rigsby* and *Borak* gave the Courts sufficient precedent to imply a cause of action in the proper factual situation. *Rigsby* enunciated the statutory tort principle—the plaintiff must be a member of the class of persons the statute was designed to protect. *Borak* held that it was proper for courts to scrutinize the express remedies provided in the statute, and upon a determination that they were inadequate to fulfill the statutory purpose, to imply a private cause of action to effectuate the legislative purpose.[38] Ten years after *Borak*, the Court, with several new justices, re-examined the issue and applied a restrictive approach to the implication of private remedies.[39]

---

35. *Id.* at 432.

36. *Id.* The SEC advised the Court that it examined over 2,000 proxy statements annually and that time did not permit an independent examination of facts set out in the proxy material. This resulted in the acceptance of the representations contained in the statements at their face value. Since the injury which a stockholder suffers from corporate action pursuant to a deceptive proxy statement ordinarily flows from the damage done to the corporation and not from damage done directly to the stockholder, the Court felt that implied derivative actions were within the sweep of § 27, the acts jurisdictional provision. *See generally* Comment, *Private Rights and Federal Remedies: Herein of J.I. Case v. Borak*, 12 U.C.L.A. L. REV. 1150 (1965); Note, *Violation of Proxy Rules: Private Right of Action: Retrospective Relief: J.I. Case Co. v. Borak, 377 U.S. 426 (1964)*, 50 CORNELL L.Q. 370 (1965).

37. 377 U.S. at 433.

38. *Id. See* Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1396 (1975).

39. This restrictive approach was drawn from the philosophy of judicial restraint and reluctance to broaden the jurisdiction of the federal judiciary prevalent on the Burger Court. This view stands in sharp contrast to the liberal philosophy of the Warren Court under whose tenure *Borak* was de-

The Amtrak Test

The issue in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*[40] was whether a cause of action could be implied in favor of railroad passengers under the Rail Service Passenger Act of 1970 (Amtrak Act).[41] That statute created Amtrak as a private not-for-profit corporation to develop a modern rail passenger system.[42] The corporation was permitted to abandon uneconomic routes in accordance with statutorily prescribed procedures and without the approval of the Interstate Commerce Commission or state regulatory agencies.[43] In *Amtrak*, an association of railroad passengers sought to enjoin the discontinuance of certain passenger routes and contended that Amtrak had acted in disregard of the procedures specified in the Act. The Supreme Court viewed the threshold question as whether the Amtrak Act created a cause of action whereby a private party could enforce the duties and obligations imposed by the Act.[44]

Amtrak argued section 307(a), which granted jurisdiction to the district courts to enjoin any violation of the statute "upon petition of the Attorney General of the United States or in the case of a labor agreement, upon petition of any employee affected thereby,"[45] shielded it from judicial review at the behest of passengers. Their position was that the section should be read as evidencing a clear congressional intent to bar anyone, except the Attorney General or an employee, from bringing suit under the Act. Inasmuch as the passengers were not designated parties under section 307(a), they could not bring an action in federal district court. Essentially, the argument was grounded upon the *expressio* maxim of statutory construction—expression of one thing is the exclusion of another.[46] Under the statutory tort principle, this maxim was generally deemed unpersuasive in that the mere omission of an express provision

cided. *See* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976).

40. 441 U.S. 453 (1974).

41. 45 U.S.C. §§ 501-644 (1970).

42. *Id.* at § 501.

43. *Id.* at § 564.

44. National R.R. Passenger Corp. v. National Ass'n R.R. Passengers, 414 U.S. 453, 456 (1974).

45. 45 U.S.C. § 547(a) (1970).

46. BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968). *See also* Botany Mills v. United States, 278 U.S. 282, 289 (1929); Saslaw v. Weiss, 133 Ohio St. 496, 14 N.E. 2d 930, 932 (1938); Fazio v. Pittsburg Rys. Co., 321 Pa. 7, 182 A. 696, 698 (1936) (mention of one thing implies exclusion of another); Little v. Town of Conway, 170 S.C. 27, 171 S.E. 447, 448 (1933) (when certain persons or things are specified in a law an intention to exclude all other from its operation may be inferred).

for civil liability was deemed insufficient to surmount a presumption arising out of a legislatively created duty. The Court felt it was proper to search for legislative intent to create or deny an implied cause of action. Since *expressio* was a means of ascertaining legislative intent from the face of a statute, the maxim's vitality in cases involving implied causes of action was renewed.

The Court, however, did not base its holding solely on the *expressio* maxim. The majority also found legislative intent to deny a private cause of action from the fact that Congress had failed to adopt a proposed amendment which would have expressly provided redress for any aggrieved party under the statute.[47] This factor, combined with a narrow reading of the Act, led the Court to conclude that allowing passengers a cause of action would force Amtrak to maintain uneconomic routes during the pendency of litigation which would delay the modernization of rail service.[48]

The Court's reasoning in *Amtrak* ignored its previous decision in *Allen v. State Board of Elections*.[49] The question presented in that case was whether a cause of action could be inferred under the Voting Rights Act of 1965.[50] The Court allowed a private right of action and held that achievement of the statute's purpose would be "severely hampered" without such remedies.[51] In *Allen*, the Court noted that the designation of the Attorney General of the United States as the enforcing agent was not to be viewed as evidence of legislative intent to exclude private actions.[52] In *Amtrak* the legislative designation of an enforcing authority was deemed to be persuasive evidence of legislative intent to deny an implied right of action; hence, this made *Amtrak* and *Allen* irreconcilable.

The Court's rationale in *Amtrak* indicates a presumption against implication exists when a remedy is expressly provided by Congress. It follows that this presumption could only be rebutted by a finding of some affirmative Congressional intent to

47. National R.R. Passenger Corp. v. National Ass'n R.R. Passengers, 414 U.S. 453, 459-63 (1974).

48. *Id.* at 463. Here, the Court's reasoning could be challenged as being unsound. The Court's analysis of the statutory purpose gave undue emphasis to the discontinuance problem and neglected the concept that one of the other central goals of the Act was to minimize the abandonment of passenger service in the Northeast. Clearly, implication would aid the achievement of this goal by providing a check on the unrestrained discretion of Amtrak in the paring of uneconomic train routes.

49. 393 U.S. 544 (1969).

50. 42 U.S.C. §§ 1973-1973bb (1970).

51. 393 U.S. at 556.

52. *Id.*

provide a remedy. This view stands in direct opposition to the statutory tort principle that where a federal right is created by a statute, a federal remedy must be fashioned by the courts to protect that right.

The Cort Test

In *Cort v. Ash*,[53] the Supreme Court considered whether a derivative action for damages could be implied from criminal provisions of the Federal Election Campaign Act[54] prohibiting corporate expenditures in federal elections. *Cort* arose out of a political advertisement paid for by the Bethlehem Steel Corporation. Ash, a stockholder, individually and derivatively sought an injunction and damages by alleging that the corporation had violated section 610 of the Federal Election Act.[55] The district judge granted summary judgment for the defendants on the initial ground that the plaintiff did not have a private right of action under the statute.[56] On appeal, the Third Circuit Court of Appeals reversed, holding that unless Congress clearly indicated an intent to deny a cause of action, the possible effectuation of the legislative policies underlying the statute was sufficient reason to imply a cause of action.[57] The Supreme Court unanimously reversed the decision.[58]

In reaching its decision, the Court redefined the standard for resolving an implication question. Justice Brennan identified four factors which were relevant in the determination of "whether a private remedy is implicit in a statute not expressly providing for one."[59] The first three factors were drawn from the previous implication cases. *Rigsby* was cited for the first factor, the statutory tort principle—that "the plaintiff must be in the

53. 422 U.S. 66 (1975).

54. 18 U.S.C. §§ 591-607 (1970), *as amended* (Supp. IV 1974).

55. 18 U.S.C. § 610 (1970) (repealed 1976).

56. Ash v. Cort, 350 F. Supp. 227 (E.D. Pa. 1972).

57. Ash v. Cort, 496 F.2d 416 (3d Cir. 1974). In his dissent, Judge Aldisert stated that the statutory tort principle would open the door of federal courts to a multiplicity of such actions "within the framework of every federal criminal statute" in favor of any plaintiff who could show protected status. 496 F.2d at 428 (Aldisert, J., dissenting).

58. The Court also denied the injunctive relief sought by the plaintiff due to an intervening amendment to the Federal Election Campaign Act. The 1974 amendment created a Federal Election Commission with jurisdiction to receive and investigate complaints and with the discretion to refer such complaints to the Attorney General who may seek injunctive relief. In light of this amendment, the Court held that private parties must exhaust administrative remedies before seeking judicial relief. Cort v. Ash, 422 U.S. 66, 75-76 (1975).

59. 422 U.S. at 78.

class for whose especial benefit the statute was enacted."[60] *Borak* was also cited in support of this factor. This indicates that an inquiry into what group could best effectuate legislative purpose would be an appropriate means to determine membership in the especial class. *Amtrak* provided the second factor, posing the question of "whether there is any discernible legislative intent, explicit or implicit, either to create such a remedy or to deny one."[61] The third factor, also drawn from *Amtrak*, was whether an implied action was consistent with the underlying purposes of the legislative scheme.[62] The fourth factor of the *Cort* test proffered a new question; whether the cause of action is one traditionally relegated to state law, in an area basically of concern to the States, so that it would be inappropriate to infer a cause of action based solely on federal law.[63]

---

60. *Id.*, quoting Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916). *See generally* Seng, *Private Rights of Action*, 27 DEPAUL L. REV. 1117 (1978). Professor Seng's belief that the four elements are listed in descending order of importance appears to have a basis in that if the plaintiff is deemed to be a member of the especial class, then a rebuttable presumption in favor of an implied cause of action arises simultaneously.

61. 422 U.S. at 78. Some commentators have suggested that this might be the single principle for which *Amtrak* stood. *E.g.*, Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1401-04 (1975). Certainly this prong of the *Cort* test adopted the "clear legislative intent test," developed by lower courts to resolve implication cases. In Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972), the test was stated as follows:

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

456 F.2d at 894-95. The clear legislative intent test ensured that implication would be employed sparingly. As one court stated, "judicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently." Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973). Congress, by vesting an administrative agency with discretion in enforcing the act's penalty provisions, realized that a court could not be expected to use its discretion in the same manner that an agency would. Accordingly, the court's role with respect to some regulatory statutes should be limited to judicial review of agency action.

62. Cort v. Ash, 422 U.S. 66, 78 (1975). The Court's consideration of this factor seems to indicate that all that is necessary is a generalized search for Congress' attitude towards implied causes of action as manifested in the statutory framework.

63. *Id.* at 85. This concept of the protected enclave of state law has been offered as a general restriction on the reach of the common law power of the federal courts. For a discussion of limiting the range of federal common and federal legislative power see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 97 (1937) (McReynolds, J., dissenting). *See also* Note, *Implying Civil Remedies from Federal Regulatory Statutes* 77 HARV. L. REV. 285, 287-88 (1963).

Application of the Cort Test

In applying the first three factors to the factual situation in *Cort*, the Court departed from its analysis in prior cases. The 'especial benefit' language of *Rigsby* was used to distinguish between the primary and secondary beneficiaries of the statute in question. A stockholder was viewed to be the secondary beneficiary since the statute was aimed at curbing the undue influence which the aggregated wealth of corporations might have on the outcome of federal elections. Additionally, the Court found that another purpose of section 610 was to discourage the use of corporate funds without the consent of the stockholders.[64] The Court ranked the stockholders interest as secondary to that of the corporation's, which was viewed as primary. It held that a primary beneficiary, the corporation, could take advantage of the presumption in favor of implied causes of action, whereas a secondary beneficiary's, the stockholders, assertion of an implied right was dependent upon showing congressional intent to create a cause of action.[65]

This arbitrary refusal to view more than one class as a 'primary' beneficiary seemed at odds with *Rigsby* where the 'especial benefit' rubric was first coined. In *Rigsby*, the statute at issue protected both employees and passengers. Presumably, both groups were primary beneficiaries. The ranking of groups in *Cort* also seemed irreconcilable with *Borak* where stockholders were permitted to bring both direct and derivative suits. Therefore, *Cort* must have modified, *sub silentio*, the holding in *Borak*, making that decision binding precedent only for the facts of that case.[66]

---

64. 422 U.S. at 80.

65. *Id.* at 81. For discussions of *Cort* and the distinctions between primary and secondary beneficiaries see Note, *Federal Courts—Implied Private Action Not Available under 18 U.S.C. § 610 When It Would Intrude on Area Traditionally Committed to State Law Without Aiding the Main Purpose of the Act Court v. Ash, 422 U.S. 66 (1975)*, 25 CATH. L. REV. 447 (1976); Note, *Federal Jurisdiction—Implied Causes of Action—No Private Remedy Available under Federal Election Campaign Act*, 47 MISS. L.J. 156 (1976); Note, *Remedies—Private Right of Action Not to be Implied from Federal Corrupt Practices Act*, 50 TUL. L. REV. 713 (1976).

66. It may be true that a wish to free federal elections from the improper influence of aggregated corporate wealth was foremost in the mind of Congress when it enacted 18 U.S.C. § 610 (1970) (repealed 1976). Yet, this does not alter the fact that the legislative history does disclose a corollary concern for the stockholder's interest in not having to subsidize those contributions. 422 U.S. at 80. By itself, that fact should have been enough to give the plaintiffs, at least presumptively, especial beneficiary status. The primary reason that the plaintiffs should be allowed this status is that "secondary beneficiaries" are usually in the best position to prosecute violations of the statute. *Borak* recognized that an injury to the individual stockholder invariably flows from an injury to the corporation; therefore, to hold that derivative action, which must necessarily be brought by "secon-

The Court, having found that the statute in question created no rights in a specific class so as to give rise to a presumption in favor of implication, went on to apply the next two factors. These factors, involving a search for legislative intent and purpose, generally, would not by themselves provide a basis for implication. Once a court has concluded that a plaintiff must show clear legislative intent, the inquiry virtually ends because had Congress considered attaching a remedy to a particular provision, it would have expressly done so. Therefore, a plaintiff arguing that legislative intent and purpose supported his position, had a dubious position at best.

Along with the three factors garnered from previous cases, the Court added an additional inquiry: whether the cause of action was one traditionally relegated to states so that it would be inappropriate to infer a cause of action based solely on federal law. The Court determined, in the process of isolating the intended beneficiaries from the statute, that it was only the secondary purpose of the Act to discourage use of corporate funds without stockholder consent. Therefore, the Court found that Congress had no intent to preempt state regulation of corporations. Since the use of corporate funds in violation of federal law or for political purposes may be *ultra vires*, or a breach of fiduciary duty, or a violation of state election campaign laws, a federal remedy would be both unnecessary and inappropriate.[67]

Cort purported to merge the statutory tort principle, the *Borak* focus on legislative purpose, and the *Amtrak* clear legislative intent approach.[68] The Court intended, however, that the *Cort* factors be used somewhat restrictively. Such an intention is derived from the Court's application of the test to the facts in *Cort*. By drawing a distinction between primary and secondary beneficiaries, the Court made it clear that causes of action were not to be implied merely to fill a hiatus in the legislative enforcement scheme.[69] Nonetheless, lower courts have applied the

dary" beneficiaries, are not to be implied would be tantamount to a complete denial of private relief. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). Despite the fact a different statutory scheme was involved in *Cort*, the distinction between primary and secondary beneficiaries would always bar implied derivative causes of action. Therefore, by its rationale, *Cort* must partially overrule *Borak*. For a discussion of this aspect of *Borak*, see Note, *SEC Proxy Regulation: Private Enforcement and Federal Remedies*, 64 COLUM. L. REV. 1336 (1964).

67. 422 U.S. at 84.

68. *See generally* Petersen, *Implied Remedies Under Federal Statutes: A New Look*, 80 COM. L.J. 480 (1975).

69. In *Cort*, the Court refused to deal with the convergence of two interests, the primary interests of the voting citizen in fair elections and the secondary interest of a stockholder in his investment, in the same plaintiff. Those two interests, considered complementary in the context of a different

Cort test both narrowly and broadly, seeming to use it only as justification for their result.[70]

A Narrow Interpretation

The Supreme Court's move towards a policy of judicial restraint and its reluctance to broaden the jurisdiction of the federal judiciary has been re-emphasized by its continued narrow interpretation of the first factor of the *Cort* test. For example, in *Piper v. Chris-Craft Industries, Inc.*,[71] the Court held that a plaintiff suing in the dual capacity of a tender-offeror and a shareholder could not maintain an implied cause of action under a statute which, on its face, created a duty only in favor of non-tender-offeror shareholders.[72] The Court reasoned that statu-

statutory scheme in *Borak*, should not be the basis of a distinction as to what plaintiff may assert an implied private cause of action. A secondary beneficiary's cause of action, even in the context of the statute involved in *Cort*, would directly promote the primary purpose of the legislative scheme. If, however, there was a statutory scheme in which the interests of the primary and secondary beneficiaries are repugnant, the second and third factors of the *Cort* test would urge denial of a private right of action. *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 424 (1975).

70. Some courts that have applied *Cort* are: City of Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir. 1979) (Housing Act of 1949); Caceres Agency Inc. v. Trans World Airways Inc., 594 F.2d 932 (2d Cir. 1979) (Fed. Aviation Act of 1958); Bratton v. Shiffrin, 585 F.2d 223 (7th Cir. 1978) (Fed. Aviation Act of 1958); International Union U.A.W. v. National Right to Work Legal Defense and Educ. Found. Inc., 590 F.2d 1139 (D.C. Cir. 1978) (Labor Management Reporting and Disclosure Act of 1959); Vazquez v. Eastern Airlines Inc., 579 F.2d 107 (1st Cir. 1978) (Age Discrimination in Emp. Act of 1967); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978) (Inv. Advisors Act of 1940); McDaniel v. University of Chicago, 548 F.2d 689 (7th Cir. 1977) (Davis-Bacon Act of 1931); United Handicapped Fed'n. v. Andre, 558 F.2d 413 (8th Cir. 1977) (Rehabilitiation Act of 1973); Utah State Univ. of Agriculture and Applied Science v. Bear, Stearns, and Co., 549 F.2d 164 (10th Cir. 1977) (Regulation T of Sec. Exch. Act of 1934); Adams v. Federal Express Corp., 547 F.2d 319 (6th Cir. 1976) (Railway Labor Act of 1926); Kelly v. E.E.O.C., 468 F. Supp. 417 (D. Md. 1979) (no implied right of action against E.E.O.C. for negligent performance of duties); Drake v. Detroit Edison Co., 443 F. Supp. 833 (W.D. Mich. 1978) (Atomic Energy Act of 1954); Hall v. E.E.O.C., 456 F. Supp. 695 (N.D. Cal. 1978) (Title VII); Wolfson v. Baker, 444 F. Supp. 1124 (M.D. Fla. 1978) (NYSE Rule 405); Abernathy v. Schenley Indus., Inc., 420 F. Supp. 1 (W.D. N.C. 1976) (Federal Alcohol Administration Act of 1935); Rauch v. United Instruments, Inc., 405 F. Supp. 435 (E.D. Pa. 1975) (Federal Aviation Act of 1958).

71. 430 U.S. 1 (1977).

72. In *Piper*, suit was brought by Chris-Craft, the unsuccessful offerer in a takeover contest for control of Piper Aircraft. Chris-Craft alleged that the management of Piper, its investment advisor, and the successful offeror, Bangor Punta Corp., had violated § 14(e) of the Securities Exchange Act of 1934. This section makes unlawful any "fraudulent, deceptive or manipulative acts or practices in connection with any tender offer . . . or any solicitation of security holders in opposition to or in favor of any such offer . . . ." The issue presented was whether a party in the dual capacity of tender-offeror and shareholder could maintain a private cause of action for damages under § 14(e) for injury suffered as a result of fraudulent practices.

tory regulation of the especial class, in effect, deprives those same plaintiffs who are members of that especial class of the benefit of the presumption arising under a statutory tort principle. Justice Stevens's dissent, pointed out that such a restrictive reading of the first factor in *Cort* was absurd.[73] He noted that Congress had passed the statutory provision at issue to expand the especial class; therefore, a narrow interpretation of the first *Cort* factor deprived those who could only effectuate the purpose of the statute from their right of action.[74] Thus, the majority seemed to be thwarting legislative intent by confining the application of the *Cort* test to the face of the statute,[75] a policy

---

Although the issue in the case was framed in the form of whether § 14(e) implies a private cause of action, the Court decided the cause on the basis of standing to sue.

In writing for the majority, Chief Justice Burger applied *Cort* as a standing test, identifying the especial class Congress intended to benefit. The majority found that § 14(e) was enacted for the benefit of shareholders because it set standards for fair competition during the pendency of a tender offer. Chris-Craft was denied relief. The majority reasoned that only shareholders had standing under § 14(e), and since Chris-Craft had brought this action in its dual capacity of a shareholder and a tender-offeror, it was not a member of the narrow especial class.

73. 430 U.S. at 55.

74. Justice Stevens argued that tender-offerors have sufficient stake in the controversy to satisfy the doctrine of standing. 430 U.S. at 62.

In *Borak*, a unanimous Court held that the 1934 Act implicitly authorized a shareholder to bring an action for recission or damages for violation of § 14(a). Such a remedy was regarded as essential, because the SEC is overwhelmed with its workload. 377 U.S. at 432-33.

Harvey Pitt, General Counsel for the SEC, has commented that the Court's refusal to allow private enforcement actions "could impose a significant manpower burden" on the SEC. Wall St. J., Feb. 24, 1977, at 4, col. 1. This encouragement of private enforcement was also reflected in the SEC's Brief as Amicus Curiae at 12.

75. 430 U.S. at 38-39. In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court finally expressly limited the first *Cort* factor to the face of the statute. The plaintiff, a female, brought suit against two private universities, alleging sex discrimination in violation of § 901(a) of Title IX of the Education Admendments of 1972. Since the statute does not expressly authorize a private right of action, the plaintiff brought it under a doctrine of implication. The Seventh Circuit Court of Appeals, using the *Amtrak* and *Cort* standards, ruled there was no implied cause of action, since § 902 of Title IX provided a remedy. The court concluded that Congress intended § 902 to be the exclusive means of enforcement.

In reversing the court of appeals, the Supreme Court declared that the fact a federal statute has been violated and some person harmed, does not automatically give rise to a private cause of action, Congress must have intended to make a remedy available. Applying the *Cort* test to determine the Congressional intent to supply a remedy, the Court concluded that the plaintiff had a statutory right to pursue her claim.

The Court determined that the threshold question was whether the plaintiff was a member of the "especial class." In their analysis, the Court added a new criterion to the first prong of the test by limiting the search for the "especial class" to the face of the statute. This direction implicitly re-

that would eventually eliminate the theoretical basis for implied causes of action—the statutory tort principle.[76]

IMPLIED CAUSES OF ACTION: A LEGAL THEORY WHOSE TIME HAS PASSED

In *Touche Ross & Co. v. Redington*,[77] the Securities Investor Protection Corporation (SIPC) and a judicially appointed trustee sought to recover money damages from an accounting firm. The brokerage house had misrepresented its assets during the years 1969 to 1973. During those years, Touche Ross had been retained to audit the books of the brokerage house. The audit was required under section 17(a) of the Securities Exchange Act. Section 17(a) requires that an annual report of the financial condition of registered brokerage firms be filed with the Securities and Exchange Commission (SEC). Its purpose is to provide the SEC with an early warning mechanism so that remedial action could be taken to forstall insolvency and lessen adverse financial consequences of investors of a brokerage firm.[78]

The SIPC, pursuant to its statutory authority, had paid the brokerage firm's customers fourteen million dollars when the

---

jects looking beyond the statute to the legislative purpose to determine the enactment's beneficiaries.

In analyzing the statute, the Court found that Congress had unmistakably focused on the benefited class in that the phrase, "no person shall," had previously been held to create new rights. The Court noted that right-duty creating language was the most accurate indictor of the propriety of implying a cause of action. The Court concluded that since the plaintiff was clearly a member of the benefited class, the first part of the *Cort* test was satisfied.

76. In *Cannon*, the majority attempted to reaffirm the statutory tort principle despite the Court's limiting the search for the "especial class" to the face of the statute. In a footnote, the Court stated:

> Not surprisingly, the right- or duty- creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Cannon v. University of Chicago, 441 U.S. 677, 690-91 n.13 (1979).

Despite this apparent reaffirmation that the first *Cort* factor embodied the statutory tort principle, *Cannon* was cited by Justice Rehnquist in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) as authority for eliminating any reliance on tort principle from the law of implication. Justice Rehnquist stated, "[t]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead our task is limited solely to determining whether Congress intended to create the private right of action . . . ." 442 U.S. at 468 (citations omitted).

77. 442 U.S. 560 (1979).

78. 15 U.S.C. § 78q (1976).

firm's insolvency was discovered and its assets had been liquidated. The SIPC sought to recover that amount from Touche Ross. The trustee, Redington, sought to recover an additional fifty-one million dollars in uncompensated losses suffered by customers of the defunct brokerage house. Plaintiffs contended that section 17(a) created a duty flowing from the accounting firm that prepared the annual report to the customers of the brokerage firm. That duty involved preparing a thorough and accurate statement so as to provide the SEC with a means to monitor the financial conditions of brokerage firms. The SIPC and the trustee alleged that Touche Ross had breached this duty and therefore a cause of action, predicated upon a violation of section 17(a), should be implied.[79] The Second Circuit Court of Appeals applying the *Cort* test found that a violation of section 17(a) gave rise to a cause of action.[80] The Supreme Court reversed.[81]

Limiting the Inquiry to the Face of the Statute

Speaking for the Court, Justice Rehnquist began the opinion by stating that the "question of the existence of a statutory cause of action is, of course, one of statutory construction."[82] The inquiry is limited to the face of the statute.[83] Going beyond any previous decision, Justice Rehnquist proclaimed that tort principles could never justify the implication of a damage remedy.[84]

Applying these new rules to the facts in *Touche Ross*, the Court noted that section 17(a) was positioned in the statutory

79. Specifically, the SIPC sought to recover either as subrogee of Weis's customers whose claims it had paid under the Act or as a member of the group directly injured by Touche Ross's mistakes. The trustee asserted that he should recover either by standing in the shoes of Weis's customers, since under the Act his responsibility is to marshal and return their property, or by standing in the shoes of Weis itself, since, he alleged, Weis—as an entity distinct from its conniving officers—was directly damaged by Touche Ross's careless audit.

80. Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978).

81. Touche Ross & Co. v. Redington, 442 U.S. 560, 562 (1979). Justice Rehnquist opened the opinion by noting with seeming disdain that in this term alone the Court had been called on five times to decide whether a private remedy is implicit in a statute not expressly providing for one.

82. 442 U.S. at 568.

83. *Id.*

84. *Id.* This follows from reducing the inquiry to one of statutory construction as to whether Congress intended to create a cause of action. In taking this drastic step which, in effect, closes the door on new implied causes of action, the Court seemed to be responding to Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979). Arguing that the *Cort* test too readily permits implying a civil damge action, Justice Powell stated, "[T]his Court consistently has turned back attempts to create private actions . . . . [O]ther federal courts have tended to proceed in exactly the opposite direction. In the four years since we decided *Cort*, no

scheme so as to implicitly indicate that Congress intended there to be no *implied* action against accountants. The Court pointed out that since sections 9(e), 16(b), and 18(a) all expressly provide for an action, Congress knew how to provide an express remedy when it wished.[85] Since Congress failed to provide a remedy in section 17(a), the Court reasoned that Congress had considered and rejected the provision of a remedy. Such statutory construction was merely an application of *expressio unius est exclusio alterius*—expression of one thing is the exclusion of another.

Under the statutory tort principle approach, the *expressio* maxim was treated as evidence against implication, but not as conclusive.[86] By defining the issue of whether a cause of action should be implied solely as a question of statutory construction, maxims of statutory construction become dispositive. This approach undermines prior implication cases and undercuts the utility of the *Cort* test which went beyond the face of the statute to determine the necessity for an implied cause of action.[87]

In his concurring opinion, Justice Brennan refused to join in the statutory construction rationale of Justice Rehnquist. Instead, by applying the first prong of the *Cort* test to the facts, he concluded that section 17(a) did not create any federal rights in either the SIPC or the trustee.[88] Considering the second *Cort* factor, Justice Brennan found no indication of either explicit or implicit legislative intent to create an implied remedy.[89] There-

---

less than 20 decisions by the courts of appeals have implied private actions from federal statutes." 441 U.S. at 741-42.

85. This seems to be an application of the *expressio* maxim. These sections were deemed not to be a bar to implying a cause of action under either § 10(b) or Rule 10b-5. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

In every recent decision where the Court has denied an implied private cause of action, it has invoked the *expressio* maxim. In relying on the maxim in *Touche Ross*, the Court has ignored cases that have criticized its application. *See, e.g.*, SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) where the 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 doctine that courts will construe the details of an act in conformity with its dominating general purpose . . . .

Id. at 350. *See also* HART & SACHS, THE LEGAL PROCESS (temp. ed. 1958) (rejected the usefulness of the *expressio* maxim).

86. *See* note 37 and accompanying text *supra*.

87. *See generally* Pitt & Israel, *Implied Rights: While ALI Debates, Court Eviscerates*, Legal Times of Wash., Dec. 3, 1979.

88. Touche Ross & Co. v. Redington, 442 U.S. 560, 580 (1979).

89. *Id.*

fore, since "[t]he remaining two *Cort* factors cannot by themselves be a basis for implying a right of action,"[90] Justice Brennan joined in the decision of the Court to deny the plaintiff's claim.

Justice Marshall, in his dissent, disagreed with limiting the application of the *Cort* test to the face of the statute. He pointed out that section 17(a) gives the SEC rulemaking power which it had exercised in promulgating rule 17a-5.[91] This rule directed accountants to verify the broker's financial reports. Since these rules are passed for the protection of investors, and since Touche-Ross violated the mandate of the SEC, Justice Marshall concluded that a cause of action should be implied in favor of the investor's representatives, the SIPC, and the trustee. Rejecting the Court's conclusion, he was unwilling to assume that "Congress simultaneously sought to protect a class and deprived (it) of the means of protection."[92]

Touche Ross could be read as a case limited to its facts. Since the source of the alleged implied cause of action was a general bookkeeping provision found in numerous statutes, the Court may simply have been trying to avoid a deluge of implied cause of action cases.[93] Such a reading of *Touche Ross*, however, is incorrect since the decision seems to build upon a theme only hinted at in prior decisions—the Court would not read a statute "more broadly than its language and the statutory scheme reasonably permit."[94] This theme emerged once again in *Transamerica Mortgage Advisors, Inc. v. Lewis*.[95]

Congressional Intent is Controlling

In *Transamerica*, a shareholder of a real estate investment trust filed three shareholder derivative suits and three class actions for violation of the Investment Advisors Act of 1940 (Act).[96] The Supreme Court granted certiorari to review the question of whether sections 215 and 206 of the Act created a private cause

90. *Id.*

91. 17 CFR § 240.17a-5 (1980).

92. 442 U.S. at 582.

93. Such a reading could be inferred from the fact that *Touche Ross* did not expressly overrule J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In *Touche Ross*, Justice Rehnquist apparently endorsed Justice Powell's dissent against implication in *Cannon* and noted that, although the Court would "not now question the actual holding [of *Borak*], [it would] decline to read the opinion so broadly that virtually every provision of the securities acts gives rise to an implied cause of action." 442 U.S. at 577.

94. 442 U.S. at 578.

95. 444 U.S. 11 (1979).

96. 15 U.S.C. §§ 80b-1-22 (1940).

of action after the Ninth, Fifth, and Second Circuits had all held that under the *Cort* test, a cause of action could be maintained.[97]

The Supreme Court began its analysis by looking at the plain language of section 215, which provides that contracts whose formation or performance would violate the Act "shall be void . . . as regards the rights of the violator and the knowing successors in interest."[98] Because the statute used the word "void," the Court concluded that Congress impliedly intended that a plaintiff could bring an action for rescission. Otherwise, the Court would have had to conclude that, despite the word "void," the legislative intent was that none of the legal consequences of voidness would follow.[99]

Turning to section 206, upon which the plaintiffs' claims for damages rested, the Court initially addressed the question as one of statutory construction. Section 206 broadly prohibits fraudulent practices by investment advisors, making it unlawful for any investment advisor to "employ any device, scheme, or artifice to defraud . . . [or] to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client."[100] In view of the language and legislative history the statute was clearly intended to benefit the plaintiffs, clients of investment advisors. The Court, however, applied the *expressio* maxim to deny any claim for damages relief under section 206.[101]

The Court stated that Congress had expressly provided judicial and administrative means to enforce the statute:

> First, under § 217 willful violations of the Act are criminal 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.[102]

---

97. Lewis v. Transamerica Corp., 575 F.2d 237 (9th Cir. 1978); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977).

98. 15 U.S.C. § 80b-15 (1940).

99. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979). Justice Stewart, writing for the majority, stated:

> In the case of § 215, we conclude that the statutory language itself fairly implied a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere.

Id.

100. 15 U.S.C. 80b-6 (1940).

101. "When a statute limits a thing to be done in particular mode, it includes the negative of any other mode." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979), quoting Botany Mills v. United States, 278 U.S. 282 (1929).

102. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979).

The Court concluded that it is highly improbable that Congress inadvertently failed to mention an intended private cause of action in section 206. This reliance on the *expressio* maxim to bar implication under section 206 seems inconsistent with the Court's implying a right of action from section 215, since the same reasoning should bar implication under the latter section.

The majority justified their holding on the basis of the Act's jurisdictional provision, section 214. The Court noted that section 214 gave the federal courts jurisdiction "of all suits in equity brought to enforce any liability or duty created by"[103] the statute, but it was totally silent as to *actions at law*. Therefore, the conclusion that private rights of action under the Investment Advisors Act of 1940 are limited to actions for recission was consistent with legislative intent as interpreted by looking only at the face of the statute.

Justice White, joined in dissent by Justices Brennan, Marshall, and Stevens, contended that the *Cort* test was stripped of all force and effect.[104] He pointed out that recent decisions of the Court had indicated that while implication questions were limited solely to determining whether Congress intended to create a private right of action, the four factors in the *Cort* test are the criteria "by which this intent must be discerned."[105]

The dissenters argued that a proper application of the *Cort* test in *Transamerica* clearly indicates Congress intended that section 206 should create a private damage action. First, unlike the course followed in *Touche Ross*, the majority conceded that section 206 was enacted for the protection and especial benefit of clients of investment advisors.[106] Under the second prong of the *Cort* test, a court must look only for express or implicit legislative intent to deny any claimed right of action which had arisen by presumption, since a duty was owed to members of an especial class. As the Court had previously held:

> [T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present

103. 15 U.S.C. § 80b-14 (1940).

104. Justice White vigorously asserted that this decision cannot be reconciled with other decisons which recognized implied private actions for damages under securities laws with substantially the same language. By resurrecting distinctions between legal and equitable relief, the Court reached a result that can only be considered anomalous. 444 U.S. at 25-26.

105. *Id.* at 27.

106. In *Touche Ross* Justice Rehnquist, speaking of the statutory provision at issue, said: "By its terms, § 17(a) is forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred. In short, there is no basis in the language of § 17(a) for inferring that a civil cause of action for damages lay in favor of anyone." Touche Ross & Co. v. Redington, 442 U.S. 560, 570-71 (1979).

> one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[107]

The majority found an explicit purpose to deny a cause of action because the Act expressly provides for enforcement proceedings. As Justice White pointed out in the dissent, this finding ignores the Court's previously consistent rejection of the notion that express statutory remedies were exclusive, absent specific support of exclusivity in legislative history.[108] Furthermore, a conclusion predicated upon sections 217, 209, and 203 virtually ignores the fact that identical administrative enforcement powers have previously been declared not to be exclusive.[109]

The Court found an explicit purpose to deny a private cause of action by the omission in the jurisdictional provision, section 214, of any reference to actions at law. This omission is entirely irrelevant since private damage actions under section 206 can be brought under general federal question jurisdiction.[110] A further weakness in this position is that the question of whether a litigant has a cause of action is analytically distinct from, and addressed prior to, the question of what relief a litigant may be entitled to receive.[111] The Court, in implication cases, has often relied on language in *Bell v. Hood*[112] which states 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."[113] Furthermore, where a Court's equitable jurisdiction has been properly invoked, "the Court has the power to decide all relevant matters in the dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."[114]

---

107. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 28 (1979), quoting Cort v. Ash, 422 U.S. 66, 82 (1975).

108. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 29 (1979) (White, J., dissenting).

109. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U. S. 185 (1976) (implied cause of action under § 106 and Rule 10b-5 was held not to be barred by express enforcement mechanisms in the Securities Exchange Act of 1934). The plaintiffs argued in *Transamerica* that the same factual allegations would support both a Rule 10b-5 claim and a § 206 claim under the Investment Advisors Act of 1940.

110. 28 U.S.C. § 1331 (1940).

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

112. 327 U.S. 678 (1946).

113. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 30 (1979), quoting Bell v. Hood, 327 U.S. 678, 684 (1946). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

114. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 30 (1979). *See generally* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Porter v.

Although in *Touche Ross* the Court ignored the third and fourth prongs of the *Cort* test, Justice White, in his dissent, applied them to the facts in *Transamerica*. With regard to the *Cort* standard of whether a private right of action would be consistent with the legislative scheme, Justice White found that implication would not only be consistent, but it was essential to preventing fraudulent practices by investment advisors.[115] Addressing the final consideration in the *Cort* test, whether the subject matter of the implied cause of action has been so traditionally relegated to state law as to make implication inappropriate, Justice White found that only six states had enacted legislation to regulate investment advisors. Of course, this argument does not give deference to the fact that in the majority of states a common law action for fraud is available. Although federal intrusion into areas traditionally left to state law will not lightly be inferred, the dissent noted that the Investment Advisors Act of 1940 was intended to set up federal fiduciary standards which would result in preemption of state power to enforce remedies in areas co-terminous with the scope of federal statutes.[116]

THE DECLINE OF IMPLIED CAUSES OF ACTION

Touche Ross and *Transamerica* completed the erosion of the implied cause of action doctrine enunciated in *Rigsby* and

Warner Holding Co., 328 U.S. 395 (1946); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940).

115. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 34 (1979). Justice White argued in dissent that in the absence of an implied cause of action, victimized clients of investment advisors have little hope of obtaining redress for their injuries. Justice White also quoted Cannon v. University of Chicago, 441 U.S. 677, 707-08 n.41 (1979), where an implied cause of action was deemed appropriate because the especial beneficiaries of the statute are not able to activate and participate in the administrative process contemplated by the statute.

116. The central argument of the plaintiffs was that all the federal securities laws including the Investment Advisors Act constitute a comprehensive regulatory scheme aimed at the elimination of fraud, deception and similar over-reaching. The settled propriety of implying a cause of action under this regulatory scheme is clear; therefore, the failure to do so under § 206 constitute an unjustifiable anomaly.

It is no answer, plaintiffs argued, to say that because the claims stated by the especial beneficiaries of the statute can be restated in terms of traditional common law, implication is barred under the fourth *Cort* factor. All federal claims are necessarily built upon a framework of common law jurisprudence, and there are few, if any, claims for relief that could not be restated in common law form with a mere modicum of semantic imagination. The existence of such available analogies has not prevented the federal courts from recognizing and implying appropriate federal rights, whether under the securities laws such as in *Borak*, or under the laws of trespass such as in Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967). Brief for Respondent, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

Borak. In *Rigsby*, a presumption in favor of implication was created by operation of the statutory tort principle if the plaintiff, injured by a violation of a statute, was a member of the class for whose especial benefit the statute had been enacted. In *Touche Ross*, the Court stated that any reliance on tort principle in implication cases is misplaced.[117] In *Transamerica*, even though the plaintiff was a member of the especial class, he was required to show additional legislative intent before a cause of action would be implied in his favor. These decisions represent a clear signal that any presumption previously recognized in the law in favor of an implied remedy no longer exists.

Similarly, nothing remains of the rationale articulated in *Borak*.[118] *Borak*'s holding expressed a realization that federal courts were in the position to observe the operation of enforcement schemes provided in enactments of Congress. If the enforcement provisions were inadequate to fulfill the substantial social policy embodied in an act of positive law, the Courts should fill in the gaps by allowing private enforcement through the means of implied causes of action.[119] But, the Court firmly stated in *Touche Ross*, that it was not the duty of the federal judiciary to fill any voids left by the legislature in a statutory scheme.[120] Therefore, in *Transamerica* the Court rejected the argument proffered by the plaintiff that the statute at issue constituted part of a comprehensive enforcement scheme aimed at the elimination of fraud and deception in the securities industry which made implication of a remedy under a substantive antifraud provision necessary to fully effectuate the statute's purpose.[121]

---

117. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

118. In Carlson v. Green, 100 S. Ct. 1468 (1980), Justice Rehnquist stated:

> [T]he exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction . . . nor did the *Borak* Court purport to do so. The notion of 'implying' a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to substantive social policy embodies [*sic*] in an act of positive law. . . . In light of this Court's recent decisions in Touche Ross & Co. v. Redington and Transamerica Mortgage Advisors v. Lewis, it is clear that nothing is left of the rationale of *Borak*.

Id. at 1482 n.5 (Rehnquist, J., dissenting) (emphasis original).

119. J.I. Case Co. v. Borak, 377 U.S. 426, 426-28 (1964).

120. Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979).

121. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979) (the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action). The Court has reduced the *Cort* test from a method by which the appropriateness of impli-

The judicial rationale used in *Touche Ross* and *Transamerica* represents a new analytical framework under which the Court has eliminated implied rights.[122] The securities field is currently the most unlikely area where the Court will recognize any new implied rights. While the Court seems willing to continue to recognize damage actions under both sections 10(b)[123] and 14(a)[124] of the Securities Exchange Act, and specifically rules 10b-5[125] and 14a-9[126] thereunder, its acknowledgment of these actions reflects nothing more than a tenuous and potentially shortlived deference to stare decisis.[127] This is especially true since prior decisions which allow such actions to be implied under the statutory tort principle, are inconsistent with the Court's new analysis.[128]

---

cation could be determined to merely several factors which have somewhat limited utility in interpreting legislative intent.

122. The following cases used the *Cort* test in light of *Touche Ross* and *Transamerica* to determine if an action should be implied: CETA Workers v. City of N.Y., 617 F.2d 926 (2d Cir. 1980) (no implied action under the Comprehensive Employment and Training Act of 1978); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980) (no implied action under § 503 of the Rehabilitation Act of 1973); Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979) (no implied action under Nat'l Housing Act of 1934); Cedar-Riverside Assoc., Inc. v. Minneapolis, 606 F.2d 254 (8th Cir. 1979) (no implied action under New Housing Act of 1968); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979) (no implied cause of action under either Rivers & Harbors Act of 1899, Fed. Water Pollution Control Act Amends. of 1972, or Safe Drinking Water Act of 1974); Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979) (no implied action under Rivers & Harbors Act of 1899); Collyard v. Washington Capitals, 477 F. Supp. 1247 (D. Minn. 1979) (no implied action under Immigration and Nationality Act of 1952); Sobel v. Yeshiva Univ., 477 F. Supp. 1161 (S.D.N.Y. 1979) (no implied action for employees of university under Title IX of the Educ. Amends of 1972); Western Colo. Fruit Growers Ass'n, Inc. v. Marshall, 473 F. Supp. 693 (D. Colo. 1979) (no implied action under Wagner-Peyser Act of 1970); National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp. 1256 (S.D.N.Y. 1979) (no implied action under Commodity Exch. Act of 1924).

Two cases, decided prior to *Transamerica*, found an implied cause of action: Demoe v. Dean Witter & Co., 476 F. Supp. 275 (D. Alaska 1979) (allowed an implied action under § 17(a) of Securities Act of 1933); Zeffiro v. First Pa. Banking & Trust Co., 473 F. Supp. 201 (E.D. Pa. 1979) (implied action under Trust Indenture Act of 1939).

123. 15 U.S.C. § 78(j) b (1976).

124. 15 U.S.C. § 78(n) a (1976).

125. 17 CFR § 240.10b-5 (1980).

126. 17 CFR § 240.14a-9 (1980).

127. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (cause of action under § 106 and Rule 10b-5); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (cause of action under § 14a and Rule 14a-9).

128. The Court seems to be determined to end implication under a "tort principle." However, it is not so clear that implication under civil rights is dead. Several implication cases found an implied cause of action in favor of black employees, to remedy discrimination, under the Railway Labor Act. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Fireman & Engineman, 323 U.S. 210 (1944). Twenty-five years passed before the next civil rights case, Allen v. State Bd.

Under the new framework of analysis, the Court will approach an implication issue as merely a question of statutory construction. Under this method, the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—creates a negative presumption against implication by the mere fact that some sections of the statutory scheme provide for express remedies.[129] This presumption can only be overcome by a showing of clear legislative intent to allow implied actions.

To find such legislative intent, the Court will apply the *Cort* test. The first prong of the *Cort* test requires a determination that the plaintiff is a member of the class which is the primary beneficiary of the statutory provision. This determination now must be made from the face of the statute.[130] Even if the plaintiff is found to be a member of the especial class, both legislative history and legislative purpose will be scrutinized for evidence of legislative intent, explicit or implicit, to deny a cause of action.[131]

---

of Elections, 393 U.S. 544 (1969), allowed an implied cause of action, this time under the Voting Rights Act. Lau v. Nichols, 414 U.S. 563 (1974), permitted an implied cause of action for 1800 Chinese-speaking children under Title VI of the Civil Rights Act. What makes *Lau* so interesting is that it was decided just twelve days after *Amtrak*. This seems to indicate that even though the Court was trying to restrict implication in tort areas, it was expanding implication in the civil rights area.

The Court's rationale may be that, in the traditional implication area of "tort principles" only property rights are being protected, whereas in civil rights, the Court is concerned with the protection of personal rights granted by the Constitution or the Civil Rights Act. This rationale is evident in Davis v. Passman, 442 U.S. 228 (1979) (allowed a private action under the fifth amendment); Cannon v. University of Chicago, 441 U.S. 677, 690-93 n.13 (1979); Rosado v. Wyman, 397 U.S. 397 (1970) (allowed a private action to challenge state welfare enactments); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (allowed a private action for violation of the fourth amendment). *See generally* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978).

This approach in allowing private rights under civil rights has not flowed over to the personal rights of the handicapped. Lower courts have been receptive to allowing private actions under the Rehabilitation Act, but the Supreme Court has not as yet decided the issue. The Court had a chance to determine if the Rehabilitation Act implied a cause of action in Southeastern Community College v. Davis, 442 U.S. 397 (1979). Instead of deciding if the Act provides for a private action, the Court refused to express a view.

129. *See* Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 6-7 (1978). For criticism of the *expressio* maxim see HART & SACHS, THE LEGAL PROCESS (temp. ed. 1958) which rejects the usefulness of the *expressio* maxim.

130. Cannon v. University of Chicago, 441 U.S. 677, 689 (1979).

131. *Id.* at 694.

Inasmuch as legislative history is often silent on the issue of implied remedies,[132] the Court will look to the express remedies provided by Congress and to the jurisdictional provision to infer legislative intent to deny relief. The Court will presume that in no case did Congress want the courts to imply a broader remedy than provided expressly in the statute.[133] Hence, if the jurisdictional provision of a statute fails to empower district courts to hear actions at law arising from breach of the statute, the Court will conclude that Congress intended that no damage action be implied.[134]

If no congressional intent can be found to deny relief from the legislative history or the express remedy provisions in a statutory scheme, the Court then will apply the remaining two prongs of the *Cort* test. The third prong requires that the implied cause of action be consistent with the legislative purpose. The Court will reject any argument that implication will be helpful to the statutory purpose, and hence will only use this prong of the test to deny a cause of action where the enforcement of a statute has been vested in an administrative agency or other enforcing authority.[135] Finally, the Court will apply the fourth *Cort* factor, whether the subject matter of the cause of action has been traditionally relegated to state law. This prong has been interpreted to require a court to presume that any gaps in congressional enforcement schemes were intended to be filled by action in the state courts.[136]

The new analytical framework clearly creates an atmosphere unfavorable to implication of private causes of action. Unable to rely upon the statutory tort principle to provide a presumption in favor of an implied cause of action, a plaintiff

132. *Id.*

133. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). *See also* Chiarella v. United States, 100 S. Ct. 1108, 1118 (1980).

134. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). This aspect of the *Transamerica* holding was strongly criticized in Justice White's dissent. *Id.* at 32-33. Furthermore, the mere fact that the legislature did not amend the jurisdictional provision to include actions at law should not be deemed dispositive of legislative intent to foreclose any implied causes of action in that "mute intermediate legislative maneuvers" have inherent limitations as accurate indicators of legislative intent. Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947). The only accurate sources of legislative history are the House and Senate Reports which accompany the legislation to the floor of the Congress. United States v. International Union, UAW-CIO, 352 U.S. 567, 585 (1957); American Airlines, Inc. v. Civil Aeronautics Board, 365 F.2d 939, 949 (D.C. Cir. 1966) (those are perhaps the only documents which can be presumed to have been considered by Congress as a whole).

135. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979).

136. Touche Ross & Co. v. Redington, 442 U.S. 560, 576-79 (1979).

has little chance of persuading any court using the new analysis to imply such a cause of action.

An exception to this judicial roadblock would be in the case of a statute which the Court had previously ruled upon before having adopted the stricter standard. A cause of action under section 10(b) of the Securities Exchange Act would fall into this category. Another probable exception would be in situations where there was clear evidence in the legislative history of a statute favoring implication. This would be a situation analogous to *Cannon v. University of Chicago*[137] where the Court implied a remedy under Title IX of the Education Amendment of 1972. This Title was determined to have been patterned after Title VI of the Civil Rights Act of 1964 under which the Court had previously implied a cause of action. Under these narrow circumstances the Court still seems willing to recognize that Congress was relying on the Court's previous decisions in passing new legislation in which express remedial provisions were not included.

CONCLUSION

The new analytical framework cryptically set forth in *Touche Ross* and *Transamerica* is not really a test for resolving the question of whether an action should be implied from a statute which does not expressly provide for one. Rather, it is an alarming step taken by a slim majority of the Supreme Court Justices[138] who wish to see implication eliminated from federal law. To illustrate that the new analytical framework is a preordained result posing as a test, the new criteria will be applied to the facts in *Chumney v. Nixon*.[139]

The plaintiff, Vern Chumney, was assaulted by several passengers while in transit aboard an aircraft which was within the special aircraft jurisdiction of the United States.[140] Chumney contended that the defendants violated a criminal statute which provides criminal penalties for personal assaults perpetrated on board aircraft. Therefore, he sought to recover compensatory damages on the theory that violation of the statute gives rise to an implied cause of action for said damages.

---

137. 441 U.S. 677 (1979).

138. There was a 5-4 split in *Transamerica*. Justices who are in favor of completing the evisceration of the doctrine of implication are Chief Justice Burger and Justices Stewart, Powell, Blackmun, and Rehnquist.

139. 615 F.2d 389 (6th Cir. 1980).

140. 49 U.S.C. § 1301(34)(d) (1974) defines the special aircraft jurisdiction of the United States.

The aircraft assault statute[141] was passed to protect the safety of passengers aboard United States aircraft.[142] Therefore, Chumney, injured while an aircraft passenger, is one of the class for whose especial benefit the statute was enacted. Addressing the question under either *Rigsby's* statutory tort principle or the *Cort* test, the existence of an especial class creates a presumption in favor of granting Chumney a private right of action. Similarly, under the *Amtrak* analysis, the existence of an implied action for damages would be consistent with the statute's clear-cut purpose of protecting passengers in transit by discouraging assaults on board aircraft. Moreover, under a *Borak* rationale, implication is necessary for effectuating the statute's purpose in that other possible factual situations such as aircraft kidnappings or terrorism cry out for more than a criminal penalty as a deterring factor. Since the legislative history is silent on implied actions and no other indicia of legislative intent to deny implied actions can be found, the rationale of the implication cases—until *Touche Ross* and *Transamerica*—would hold that Chumney's complaint states a cause of action.

Under the new test set forth in *Touche Ross* and *Transamerica*, Chumney's complaint would be dismissed. This new analytical framework denies plaintiffs the benefit of the presumption in favor of implication arising out of the statutory tort principle. Instead, the burden falls on the plaintiff to show congressional intent to create an implied cause of action; legislative history's total silence on implied actions gives Chumney an insurmountable burden of proof. Furthermore, because the statute provides an express criminal penalty, application of the arbitrary maxim of statutory construction: *expressio unius est exclusio alterius*—expression of one thing is the exclusion of another—would provide sufficient implicit evidence of congressional intent to deny an implied cause of action. Therefore, even if Chumney could find some evidence of legislative intent in his favor, he would be denied relief.

The result of analysis under the new analytical framework designed by the Court in *Touche Ross* and *Transamerica* always will be to deny implied causes of action.[143] A slim majority of

141. 18 U.S.C. § 113(d) (1976).

142. Chumney v. Nixon, 615 F.2d 389, 394 (6th Cir. 1980).

143. Some courts do not believe that the Court has developed a new analytical framework. *See, e.g.*, CETA Workers Organizing Committee v. City of New York, 617 F.2d 926 (2d Cir. 1980). The court noted:

> This does not mean, we take it, that cases such as the landmark *J. I. Case Co. v. Borak* in the securities area, *Cannon v. University of Chicago* in the discrimination area, or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* in the constitutional area are somehow sub silentio overruled. Rather, we suppose the Court is send-

the Court is clearly sending Congress a signal that no longer will the Court fill the gaps in legislative enforcement schemes or aid over-burdened administrative agencies to effectuate a statute's goal. This majority, by closing the door on implied causes of action, is saying that rights created by federal statutes are limited in scope and can be enforced only in the manner expressly set forth in the legislation.[144] The failure to compensate victims of statutory violations not only sanctions injustice, but cannot stand in a nation where the "essence of civil liberty" is expressed in the tenet: where there is a right, there is a remedy.[145]

Robert L. Carter
James E. Cumberworth Jr.

---

ing to Congress and the lower courts a message that, in future statutory drafting, more explicitness will be required than was present in these cases. The Court seems to be hitting this political ball back into Congress's court. (citations omitted).

Id. at 932 n.3.

Also, in Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980), the court believed it to be an appropriate step to imply a cause of action in favor of the plaintiff. In reaching its result the court applied the *Cort* test as originally drafted despite citing both *Touche Ross* and *Transamerica*. Such a finding is simply incongruous with the new analytical framework the Supreme Court enunciated in its recent decisions.

144. This seems to follow the dubious logic of Justice Rehnquist in Arnett v. Kennedy 416 U.S. 134 (1974) (The Court could be interpreted as saying that the source of all rights is government and therefore government can limit rights.).

145. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).