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Implying Private Causes of Action From Federal Statutes

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IMPLYING PRIVATE CAUSES OF ACTION FROM FEDERAL STATUTES: *AMTRAK* AND *CORT* APPLY THE BRAKES

INTRODUCTION

The implication of private causes of action from criminal and regulatory statutes that do not expressly provide for such actions is a practice in which the federal courts have long engaged.[1] In recent years, some courts have been increasingly willing to imply private causes of action.[2] This favorable disposition is probably derived from the liberal views on implied remedies[3] expressed by the Supreme Court in *J.I. Case Co. v. Borak.*[4] However, the Court's most recent decisions on the subject, *National Railroad Passenger Corp. v. National Association of Railroad Passengers*[5] (*Amtrak*) and *Cort v. Ash,*[6] appear to be designed to curb the rapid proliferation of implied remedies.[7]

This comment will discuss the doctrine of implied remedies and the new decisions' probable impact thereon. The origin and development of implied remedies will first be examined briefly, beginning with the Court's bold pronouncement in *Texas & Pacific Railway v. Rigsby,*[8] proceeding through the Court's more conservative years following that decision and from these conservative years into the liberal period of the sixties and early seventies. Then the *Amtrak* and *Cort* decisions will be examined closely. Finally, these two cases will be evaluated in light of the opposing viewpoints on the propriety of implied remedies. The proposition will be advanced that the rule announced in these cases — that the implication of a private remedy must be consistent with the evident legislative intent and with the ef-

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[1] Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) is usually cited as the first implied remedy case. *E.g.*, Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act,* 47 S. CAL. L. REV. 383, 403 n.118 (1974).

[2] Note, 51 TEXAS L. REV. 804, 806 (1973).

[3] The phrase "implied remedy" is used in this comment to mean the implication of a private cause of action from a statute not expressly providing one in favor of the plaintiff. This is to be distinguished from the implication of additional remedies in favor of one who already has a private cause of action under a statute, *see, e.g.*, Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). This comment will not deal with the implication of additional remedies, nor with the implication of remedies from constitutional provisions, *see, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[4] 377 U.S. 426 (1964), discussed at notes 17-39 *infra.*

[5] 414 U.S. 453 (1974).

[6] 422 U.S. 66 (1975).

[7] The dissenting judge in the *Cort* circuit court decision viewed *Amtrak* as a clear signal to the lower courts to decelerate the use of implied remedies. Cort v. Ash, 496 F.2d 416, 429 (3d Cir. 1974) (dissenting opinion), *rev'd,* 422 U.S. 66 (1975). The Supreme Court's decision in the *Cort* case goes even further than *Amtrak* in imposing limitations on the use of implied remedies. See discussion accompanying notes 77-101 *infra.*

[8] 241 U.S. 33, 39 (1916). The phrase "social policy approach", as used to describe the *Borak* principle, was coined in Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act,* 47 S. CAL. L. REV. 383, 411 (1974).

fectuation of congressional purpose, and also that the cause of action may not be one traditionally relegated to state law — is desirable. It generally allows a rational and justifiable distinction to be made between cases in which remedies should and should not be implied.

I. ORIGIN AND DEVELOPMENT OF THE DOCTRINE OF IMPLIED REMEDIES

The doctrine of implied remedies is said to have first been applied in the federal courts in *Texas & Pacific Railway Co. v. Rigsby*,[9] decided in 1916.[10] *Rigsby* held that a railroad employee who was injured because the railroad's equipment did not comply with the Safety Appliance Act[11] had a cause of action against the railroad, even though the Act did not expressly provide one.[12] The Court stated: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ."[13] Curiously, this sweeping pronouncement, which appears to allow a private cause of action to be implied in favor of virtually anyone injured by the violation of a federal statute, was not employed to any great extent by the federal courts in the years immediately following *Rigsby*. On the contrary, the creation of an implied remedy was relatively unusual until recent times.[14]

In the sixties and early seventies, federal courts began to imply remedies more freely.[15] The Supreme Court at first continued its cir-

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[9] 241 U.S. 33 (1916).

[10] *E.g.*, Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act*, 47 S. CAL. L. REV. 383, 403 n.118 (1974). It has been suggested that *Rigsby* is not truly an implied remedy case. Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. MO. K.C.L. REV. 292, 293 n.4 (1972). The authors note that *Rigsby* can be viewed as a negligence *per se* case in which the higher standard of conduct embodied in the federal statute was applied to an existing cause of action. *Id.* A later interpretation of *Rigsby* by the Court seems to support this point of view. *See* Tipton v. Atchison T. & S.F. Ry., 298 U.S. 141, 146-48 (1936). In any event, many subsequent cases have adopted and used *Rigsby* to support the creation of an implied remedy. *E.g.*, Wyandotte Trans. Co. v. United States, 389 U.S. 191, 202 (1967); Cort v. Ash, 496 F.2d 416, 422 (3d Cir. 1974), *rev'd on other grounds*, 422 U.S. 66 (1975); Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

[11] 45 U.S.C. §§ 1-16 (1970).

[12] 241 U.S. at 39.

[13] *Id.* This principle is now embodied in RESTATEMENT (SECOND) OF TORTS § 286 (1965).

[14] Some of the few early implied remedy cases are: Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929).

[15] The number of implied remedy cases greatly increased in this period. *E.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Moses v. Burgin, 445 F.2d 369 (1st Cir.), *cert. denied*, 404 U.S. 994 (1971); Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); Pearlstein v. Scudder & Ger-

cumspect attitude toward the use of implied remedies. Thus, for a time the Court limited the implication of remedies to cases in which a specific congressional intent to have the courts provide such a remedy could be discerned.[16] However, this restrictive approach was dramatically altered in *J.I. Case Co. v. Borak*.[17]

The plaintiff in *Borak* was a shareholder in the Case Company. He alleged that the defendants had circulated false and misleading proxy solicitations, in violation of section 14(a) of the Securities Exchange Act of 1934[18] and Rule 14a-9[19] which the Securities Exchange Commission had promulgated thereunder, and that the merger of Case and another corporation had been effected through the use of these unlawfully solicited proxies.[20] The plaintiff sought both a declaratory judgment that the merger was void, and damages for himself and all other shareholders similarly situated.[21] Although section 14(a) did not expressly provide that a private individual might sue to enforce its provisions,[22] the Supreme Court unanimously held that a private action for damages could be maintained.[23]

There is some uncertainty as to the basis of the Court's holding.[24] The decision could arguably rest on either or both of two grounds.[25] The Court stated that the sole question raised was "whether § 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14(a) of the Act."[26] Section 27 grants exclusive jurisdiction to the federal courts over all suits in equity and actions at law brought to enforce any liability or duty created by the Act or the rules

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man, 429 F.2d 1136 (2d Cir. 1970); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

[16] Comment, 63 NW. U.L. REV. 454, 457-58 (1968). *See* Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963); T.I.M.E. Inc. v. United States, 359 U.S. 464, 471 (1959); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[17] 377 U.S. 426 (1964).

[18] 15 U.S.C. § 78n(a) (1970). This section makes it unlawful for any person to solicit any proxy or consent or authorization in respect of any security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[19] 17 C.F.R. § 240.14a-9 (1974). This rule makes it unlawful to solicit any proxy pursuant to a proxy statement which is false or misleading.

[20] 377 U.S. at 429-30.

[21] *Id.* at 430.

[22] 15 U.S.C. § 78u(e) (1970) gives the Commission the authority to bring civil actions to enjoin violations of the Act, or to transmit evidence of violations of the Act to the Attorney General who may, in his discretion, institute criminal proceedings. This is the only means that the Act specifically provides to enforce § 14(a).

[23] 377 U.S. at 430-31.

[24] Comment, 63 NW. U.L. REV. 454, 460-62 (1968).

[25] *Id.* at 460.

[26] 377 U.S. at 428.

thereunder.[27] In a very cursory statement, the Court concluded that section 27 provides private parties with a right to bring suit for violation of section 14(a): "It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. Indeed, this section specifically grants the appropriate District Courts jurisdiction over 'all suits in equity and actions at law brought to enforce any liability or duty created' under the Act."[28] Thus, the Court apparently reasoned that since section 14(a) of the Act imposes a duty on the defendants not to circulate false and misleading proxy statements, and since the plaintiff was suing to enforce that duty, section 27 authorized the plaintiff's action.[29]

However, this reasoning begs the real question which was involved in the case: whether the defendants had a duty or liability *toward the plaintiff,* and if so, whether that duty or liability could be enforced by the plaintiff. section 27 only grants the district courts jurisdiction to entertain suits to enforce the duties or liabilities created by the Act; it does not appear that the section itself was intended to create any duties or liabilities.[30] Thus, the source of the plaintiffs' rights would have to be one of the substantive provisions of the Act, and not this jurisdictional provision.

Courts have differed in their evaluation of the significance of this first part of the *Borak* opinion. While no decision has been found which concludes that the section 27 holding is the sole basis of the *Borak* opinion, there are many decisions in which courts apparently believe that this part of the opinion is an essential element of the holding.[31] This position is arguably incorrect, however, since the Supreme Court itself has almost always interpreted *Borak* as standing for an alternative principle, without giving mention to the section 27 holding.[32]

This "second holding" of *Borak* concentrates on the *necessity* of implying the private cause of action that the plaintiff had asserted. The Court considered section 14(a) itself, and found that the section had been enacted for broad remedial purposes.[33] This was evidenced by the language of the section, which made it unlawful for any person to solicit any proxy in contravention of rules and regulations prescribed by the Commission as necessary or appropriate in the public

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[27] 15U.S.C. § 78aa (1970).

[28] 377 U.S. at 430-31.

[29] Comment, 63 Nw. U.L. Rev. 454, 461 (1968).

[30] *Id.* at 461.

[31] *See, e.g.,* Schiaffo v. Helstoski, 492 F.2d 413, 425-26 (3d Cir. 1974); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 1001 (D.C. Cir. 1973).

[32] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.13 (1968); Wyandotte Trans. Co. v. United States, 389 U.S. 191, 202 (1967). *But see* Cort v. Ash, 422 U.S. 66, 75 n.11 (1975) where the Court places some emphasis upon the § 27 holding in *Borak.*

[33] 377 U.S. at 431.

interest or for the protection of investors.[34] It was noted that while this language made no specific reference to a private right of action, among its chief purposes was the protection of investors.[35] Implied judicial relief is necessary, the Court concluded, to achieve this legislative purpose of protecting investors.[36] It was further stated that because enforcement of the proxy provisions is problematic, private enforcement of the proxy rules is also necessary as a supplement to Commission action.[37] Based on this determination as to the need for implied relief, the Court concluded: "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose."[38] Significantly, the Court did not mention or discuss congressional intent anywhere in the opinion. Thus, *Borak* has been interpreted as establishing a test for implied remedies that does not contain the element of congressional intent.[39]

It is this second branch of the *Borak* case that has often been employed by the federal courts in implied remedy cases.[40] However, some of the courts purporting to apply *Borak* have not confined themselves strictly to the rationale of that case, but have instead liberalized its rule considerably. The recent case of *Stewart v. Travelers Corp.*[41] is illustrative of this trend.

The plaintiff in *Stewart* alleged that he had been discharged by the defendant corporation because his wages had been garnished.[42] The Consumer Credit Protection Act of 1968[43] makes it a crime to discharge an employee for a single garnishment.[44] The plaintiff had first complained to the Department of Labor that his dismissal violated the Act,[45] but no action was taken on the claim.[46] Thereafter, the plaintiff filed a civil action, requesting reinstatement, backpay, punitive damages and attorney's fees.[47] Although the Act does not expressly provide for a private action for civil relief, the Ninth Circuit

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[34] *Id.* at 431-32.

[35] *Id.* at 432.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 433.

[39] Comment, 63 NW. U.L. REV. 454, 463 (1968).

[40] *E.g.*, Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031, 1033 (9th Cir. 1970). *See also* cases cited in note 32 *supra.*

[41] 503 F.2d 108 (9th Cir. 1974).

[42] *Id.* at 109.

[43] 15 U.S.C. §§ 1601 *et seq.* (1970).

[44] 15 U.S.C. § 1674(a)-(b) (1970). The penalty provided for a wilful violation of this subsection is a fine of not more than $1000, or imprisonment for not more than one year, or both.

[45] Under 15 U.S.C. § 1676 (1970), the Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, is charged with the duty of enforcing § 1674.

[46] 503 F.2d at 109.

[47] *Id.*

held that such an action must be implied.[48]

In making this determination, the court said that in the absence of clear congressional intent to the contrary, courts are free to fashion civil remedies where necessary to fully effectuate the congressional purpose.[49] This statment appears to be completely consistent with the principles of *Borak*. However, further inspection of *Stewart* reveals that the test it employed differs materially from the one stated in *Borak*. The court noted that the necessity of implying a remedy would be determined by whether the express remedies provided in the Act fully effectuate the congressional purpose underlying the statute.[50] And, in making this determination, "the initial question is whether the statute's protection *might be enhanced* by allowing private civil relief."[51]

It is submitted that implying remedies where necessary to *effectuate* the congressional purpose is distinctly different from implying remedies where they might *enhance* the congressional purpose. Unless the implication of a private remedy would interfere with the efficient administration of an act,[52] it is difficult to conceive of a situation in which an implied private cause of action might not enhance a statute's protection. Thus, the test used in *Stewart* is one that would almost always justify the implication of a remedy. Apparently, it is this type of free-wheeling approach to implied remedies which *Amtrak* was intended to preclude.[53]

II. THE *AMTRAK* DECISION

Amtrak was an action by the National Association of Railroad Passengers (NARP) to enjoin the discontinuance of certain passenger train routes on the ground that the discontinuance would violate the Amtrak Act.[54] The district court dismissed the action for lack of

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[48] *Id.*

[49] *Id.* at 110, citing Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031, 1033 (9th Cir. 1970).

[50] 503 F.2d at 112.

[51] *Id.* (emphasis added).

[52] The court in *Stewart* recognized that a remedy should not be implied in such a case. *Id.* at 112.

[53] The dissenting judge in the *Cort* circuit court decision viewed *Amtrak* as a signal to the lower courts to decelerate the use of implied remedies. Cort v. Ash, 496 F.2d 416, 429 (3d Cir. 1974) (dissenting opinion) *rev'd*, 422 U.S. 66 (1975). The Supreme Court's decision in the *Cort* case goes even further than *Amtrak* in imposing limits on the use of implied remedies. See discussion at notes 77-101 *infra*.

[54] 414 U.S. at 454-55. The plaintiff alleged that the contract entered into by one of the co-defendant railroads with Amtrak did not comply with the provisions of the Amtrak Act. 45 U.S.C. §§ 501 *et seq.* (1970). The Act prohibited a railroad from discontinuing intercity passenger train service prior to January 1, 1975, unless it had entered into a contract with Amtrak pursuant to § 561(a)(1) of the Act. 45 U.S.C. §§ 561(a), 564(a) (1970). Plaintiff therefore argued that the railroad could not discontinue its passenger service until January 1, 1975, since no valid contract with Amtrak existed. Review of Amtrak's actions allowing the railroad to discontinue its services was not available under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), since the

standing.[55] The Court of Appeals for the District of Columbia Circuit reversed.[56] After finding that NARP had standing,[57] the court held that a private cause of action such as the plaintiff asserted could be implied, even though the Amtrak Act did not expressly provide for such an action.[58] The Supreme Court granted certiorari to determine whether such a private cause of action could be maintained,[59] and decided that it could not.[60]

The Court first noted that the Act expressly authorized only an action by the Attorney General, and a limited private cause of action, in cases involving labor disputes.[61] NARP argued, however, that although the Act authorized certain suits, it did not thereby preclude others. Relying on *Borak,* NARP contended that because railroad passengers were the intended beneficiaries of the Act, the Court should imply a private cause of action whereby they could enforce compliance with the Act's provisions.[62] In replying to this argument, the Court adopted the following two-part test: "It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."[63]

Dealing first with the question of legislative intent, the Court noted that the principle of statutory construction, *expressio unius est exclusio alterius,*[64] would clearly compel the conclusion that Congress intended the remedies created by the Act to be the exclusive means of enforcing the duties and obligations imposed by the Act.[65] It was agreed, however, that the result reached by application of this maxim

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Amtrak Act declares that the National Railroad Passenger Corporation will not be an agency or establishment of the United States government. 45 U.S.C. § 541 (1970).

[55] The opinion of the district court is unreported. 414 U.S. at 455 n.4. The case was consolidated on appeal and reported as Potomac Passengers Ass'n v. Chesapeake & O. Ry., 475 F.2d 325 (D.C. Cir. 1973), *rev'd sub nom.* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

[56] 475 F.2d at 340.

[57] *Id.* at 338.

[58] *Id.* at 340.

[59] 411 U.S. 981 (1973).

[60] 414 U.S. at 465.

[61] *Id.* at 457. 45 U.S.C. § 547(a) provides that the district courts shall have jurisdiction upon petition of the Attorney General, or, in a case involving a labor agreement, upon petition of any employee affected thereby, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation or threat of violation of the Act by the Amtrak corporation or any railroad.

[62] 414 U.S. at 457.

[63] *Id.* at 457-58. It is interesting that the Court cited no cases in support of this statement.

[64] "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th Rev. ed. 1968). The Court interpreted this maxim to mean that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 414 U.S. at 458.

[65] 414 U.S. at 458.

would yield to clear contrary evidence of legislative intent.[66] The legislative history[67] of the enforcement section of the Act[68] was then examined,[69] and it was found that there was evidence of an intent not to allow private actions other than those specifically authorized by the Act.[70] Thus, the explicit legislative history of the enforcement section served to support, rather than contradict, the interpretation accorded by the settled rule of statutory construction.[71]

Although it had concluded that the implication of an implied remedy in this case would have been inconsistent with the evident legislative intent, the Court also considered whether the implication of a private cause of action would be consistent with the effectuation of the purposes that the Act was intended to serve.[72] Relying once again on legislative history, the Court characterized the purpose of the Act as the preservation of passenger train service[73] and stated that one of the means of achieving the Act's purposes was the quick and efficient elimination of uneconomic routes.[74] Allowing private actions to enjoin proposed discontinuances would undercut, rather than complement the efficient apparatus that Congress had provided for Amtrak to use in the paring of uneconomic routes.[75] Thus, it was concluded that no additional private cause of action to enforce compliance with the Act's provisions could be properly inferred.[76]

III. THE *CORT* DECISION

A more elaborate rule governing the use of implied remedies was expressed in *Cort v. Ash*.[77] The plaintiff in *Cort* was a shareholder of Bethlehem Steel Corporation who alleged that the defendants, di-

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[66] *Id.*

[67] *Supplemental Hearings on H.R. 17849 and S. 3706 before The Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. ser. 91-62, at 44 (1970), [hereinafter referred to as *Supplemental Hearings on H.R. 17849 and S.3706*].

[68] 45 U.S.C. § 547(a) (1970).

[69] 414 U.S. at 458-61.

[70] *Id.* at 461. The Court noted that an amendment to the enforcement section of the Act had been proposed that would have given any person adversely affected or aggrieved a right to sue, and that the Secretary of Transportation, who interpreted the existing provision of the Act to allow only suits specifically authorized thereby, had recommended that the proposed amendment not be adopted. *Id.* at 459-60, *citing Supplemental Hearings on H.R. 17849 and S.3706, supra* note 67, at 349. The Court then said: "The Committee's deliberate failure to adopt that proposal, after learning of the Secretary's views, cannot but give weight to the conclusion that the Committee agreed with the Secretary's interpretation of the meaning and effect of the existing language, as well as with his opposition to the proposed change." *Id.* at 461.

[71] *Id.*

[72] *Id.* at 461-64.

[73] *Id.* at 461.

[74] *Id.*

[75] *Id.* at 463

[76] *Id.* at 465

[77] 422 U.S. 66 (1975).

rectors of the corporation, had caused Bethlehem to expend money in the 1972 presidential election campaign in violation of federal law.[78] The plaintiff sought damages on behalf of the corporation, contending that although the election campaign law provided only for penal sanctions, a derivative cause of action for his injuries as a shareholder could be implied.[79]

In reversing the court of appeals' holding[80] that a private cause of action could be implied, the Court relied on a four-part test which expanded upon the two-part *Amtrak* test:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[81]

Applying the first part of this test to the facts of the case, the Court expressed concern as to whether a bare criminal statute could ever be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group.[82] Final resolution of this issue was not necessary, however, because, relying on legislative history, the Court concluded that protection of stockholders was at best a subsidiary purpose of the campaign expenditure laws.[83]

With respect to the second part of the test, the Court found that there was nothing in the legislative history of the statute[84] to suggest a congressional intent to vest in corporate shareholders a federal right to damages for the statute's violation.[85] In situations in which the federal statute had clearly granted certain rights to a class of persons, the Court stated, it would not be necessary for the plaintiff to show a

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[78] *Id.* at 71. Plaintiff alleged that defendants had violated 18 U.S.C. § 610 (1970), *as amended,* (SUPP. II, 1972), which makes it unlawful for any corporation to make a contribution or expenditure in connection with any federal election, and provides criminal penalties of a fine or imprisonment for its violation.

[79] 422 U.S. at 71.

[80] 496 F.2d 416 (3d Cir. 1974). The district court decision, which is unreported, granted summary judgment to the defendants on the ground that they were not liable to plaintiff for the claimed violation of federal law. *Id.* at 418.

[81] 422 U.S. at 78 (citations omitted).

[82] *Id.* at 78-80.

[83] *Id.* at 80-82. The Court relied upon its prior examination of the Act's legislative history in United States v. UAW, 352 U.S. 567 (1957).

[84] 422 U.S. at 82.

[85] *Id.*

legislative intent to create a private cause of action, although it was noted that an explicit statutory purpose to deny such a cause of action would be controlling.[86] But where, as here, it was at least dubious whether Congress intended to vest in the plaintiff rights broader than those provided by state regulation of corporations, the absence of any evidence of congressional intent to allow a private cause of action supported the conclusion that the legislative intent was to continue to entrust to state law the relationship between corporations and their stockholders.[87]

The Court also found that the plaintiff had failed to meet the third part of the test, since the remedy sought would not aid Congress' primary purpose in enacting the statute, which was to assure that federal elections were free fom the power of corporate wealth.[88] Allowing the recovery of derivative damages by a corporation for violation of the statute arguably would not deter the initial violation and certainly would not undo the influence which the use of corporate funds had had on a federal election.[89]

Finally, the Court determined that it would be entirely appropriate to relegate the plaintiff to whatever remedy was created by state law.[90] The regulation of the relationship between shareholders and their corporations is ordinarily a matter of state law. Thus, it was not necessary for federal law to intrude into the states' domain in this case, in light of the fact that the existence of a derivative cause of action for damages would not aid the primary goal of the statute.[91]

IV. THE MEANING AND IMPACT OF *AMTRAK* AND *CORT*

Although the *Cort* test is set out in four parts, in fact it contains only three distinct elements: the implied private cause of action must be consistent with legislative intent, it must be consistent with the purposes underlying the statute, and it must not be a cause of action traditionally relegated to state law.[92] This last element is the only addition that *Cort* makes to the *Amtrak* test. The statement in *Cort* that a plaintiff must be a member of the class for whose especial benefit the statute was enacted is not a new element of the test for an implied remedy, but rather an alternative way for the plaintiff to show that the implication of a private cause of action in his favor would be consistent with legislative intent. *Amtrak* stated only that the inference of a private cause of action not otherwise authorized by statute must be *consistent* with the evident legislative intent.[93] This statement is capable

[86] *Id.*
[87] *Id.* at 82-84.
[88] *Id.* at 84.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 85.
[92] *Id.* at 78.
[93] 414 U.S. at 457-58.

of supporting two entirely different interpretations. The Court could have meant that there must be evidence of a specific legislative intent to allow the particular remedy sought;[94] or, it could have meant merely that there must be evidence that Congress did not intend the remedies provided by the statute to be exclusive — that Congress was neutral as to whether additional remedies should be allowed.

Which of these two possible interpretations of *Amtrak* is correct is now academic, however, since *Cort* embraces neither of them entirely. Rather, it combines both to produce a new rule with respect to congressional intent: where the plaintiff is a member of the class for whose especial benefit the statute was enacted, he need not show that Congress intended to create a private cause of action in his favor.[95] The Supreme Court is apparently willing to infer this intent from the plaintiff's special status as a member of a protected class.[96] Where, however, the plaintiff is *not* a member of a protected class, he will have to show a specific congressional intent to create a private cause of action in his favor.[97]

What of the plaintiff who is a member of a protected class, but who asserts an implied cause of action under a statute which already provides private remedies? In *Amtrak,* the Court stated that where the statute already provides private remedies, the principle of statutory construction, *expressio unius est exclusio alterius,* would clearly compel the conclusion that the remedies created by the Act were exclusive.[98] This conclusion, however, would yield to clear evidence of contrary legislative intent.[99]

This statement is subject to conflicting interpretations. It could be argued that to establish a contrary legislative intent, the plaintiff in such a case must prove that Congress intended to create a private cause of action in his favor. It is also arguable, however, that to establish a contrary legislative intent, the plaintiff need only prove that Congress did not intend that the remedies provided should be exclusive, thus rebutting the presumption raised by *expressio unius.* Under this interpretation, proof that Congress was at least neutral with respect to additional private remedies would suffice. A close examination of *Amtrak's* language indicates that the latter alternative may be the one intended by the Court. The Court stated that the maxim *expressio unius est exclusio alterius* compelled the conclusion that the remedies provided were intended to be exclusive.[100] Therefore, evi-

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[94] The first alternative was the interpretation given *Amtrak* by the dissenting judge in *Cort,* 496 F.2 at 426-29 (dissenting opinion).

[95] 422 U.S. at 82.

[96] Where there is evidence of an explicit purpose to deny a private cause of action, however, even a member of a protected class will not be allowed a private remedy. *Id.*

[97] *Id.* at 82-84.

[98] 414 U.S. at 458.

[99] *Id.*

[100] *Id.*

dence of a contrary legislative intent would be evidence that the remedies provided in the statute were not, in fact, so intended. Nevertheless, the answer to this question remains uncertain.

Despite these minor ambiguities left by *Amtrak* and *Cort,* the clear intent of the Court in each case appears to have been to slow the rapid proliferation of implied private causes of action. This intent is evident not only from the Court's use of a demanding four-part test, but also from its stringent application of that test to the facts of the *Cort* case.[101] It appears that would-be plaintiffs will have a much more difficult time in the future convincing federal courts to imply private causes of action in their favor. It is submitted, however, that an evaluation of *Amtrak* and *Cort* in light of the competing points of view on implied remedies leads to the conclusion that the *Amtrak-Cort* rule generally makes a rational and justifiable distinction between cases in which implied remedies should and should not be allowed.

V. AN EVALUATION OF *AMTRAK* AND *CORT*

Many reasons have been advanced in support of the implication of private causes of action from federal statutes.[102] All of these may be reduced to one basic contention: the court should imply a private cause of action where it is desirable as a matter of social policy that such a cause of action exist. Advocates of the implied remedies doctrine thus see the courts as architects of social policy in cases where the legislature has failed to act.

Several considerations have been advanced in justification of this "social policy" approach to implied remedies.[103] Perhaps the most important consideration is the perceived need for a private right of action in order to effectuate the purpose of a statute.[104] It is reasoned that if a statutory scheme of enforcement is ineffective in achieving the statute's purpose, an implied private right of action which would aid the enforcement of the statute would be desirable as a matter of social policy.[105] A closely related consideration is the inadequacy of

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[101] The court of appeals applied much the same test in *Cort* as did the Supreme Court, and yet it found that the plaintiff was a member of the class for whose especial benefit the statute was enacted, 496 F.2d at 422, and also that it would be appropriate, in light of the statute's purposes, to afford the plaintiff the remedy sought, *id.* at 423-24. The Supreme Court, applying these tests more stringently, reached opposite conclusions. *See* 422 U.S. at 80-84.

[102] Gamm & Eisberg, *The Implied Rights Doctrine,* 41 U. MO. K.C.L. REV. 292, 297-300 (1972); Comment, 63 NW. U.L. REV. 454, 466-67 (1968); Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act,* 47 S. CAL. L. REV. 383, 411-13 (1974) [hereinafter cited as *Private Cause of Action Under Title III*]; Note, 51 TEXAS L. REV. 804, 806-07 (1973).

[103] The *Borak* principle was described as a "social policy approach" in *Private Cause of Action Under Title III, supra* note 102, at 411.

[104] Gamm & Eisberg, *supra* note 102, at 298; Comment, 63 NW. U.L. REV. 454, 466-67 (1968); *Private Cause of Action Under Title III, supra* note 102, at 413; Note, 51 TEXAS L. REV. 804, 806 (1973).

[105] Gamm & Eisberg, *supra* note 102, at 298; Comment, 63 NW. U.L. REV. 454,

the administrative or criminal remedies available to the agency charged with th law's enforcement.[106] Where one suffers injury to his person or property due to the unlawful acts of another, and the statute violated does not provide compensation to the victim, an implied private cause of action similarly might be desirable as a matter of social policy.[107]

There is a competing viewpoint which maintains that a court should *never* imply a cause of action. This criticism of the implied remedies doctrine may be reduced to two basic contentions: (1) the implication of a private cause of action is an invasion by the judiciary of the legislative function;[108] and (2) the implication of a private cause of action often unfairly subjects the offender to a different type or level of liability than that which the statute expressly imposes on him.[109] The criticism concerning judicial invasion of the legislative domain can be further subdivided into two branches: objections based solely on the theory of the separation of powers;[110] and objections based on supposed institutional shortcomings of the judiciary as a lawmaking mechanism, such as the judiciary's lack of public hearings or debates, and its uncertain public mandate.[111]

The concern in *Amtrak* and *Cort* over the use of implied remedies appears to have stemmed more from the considerations involved in the separation of powers doctrine and the problems of judicial legislation, than from the criticisms concerning the different type or level of liability which may be imposed by implied remedies.[112] While these latter objections are not without merit, they may be answered briefly. The more complicated constitutional objections will then be considered.

A. *Level of Liability*

The concern that the doctrine of implied remedies unfairly sub-

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466-67 (1968); *Private Cause of Action Under Title III, supra* note 102, at 413; Note, 51 TEXAS L. REV. 804, 806 (1973).

[106] Comment, 63 NW. U.L. REV. 454, 469 (1968); *Private Cause of Action Under Title III, supra* note 102, at 413; Note, 51 TEXAS L. REV. 804, 806-07 (1973).

[107] Gamm & Eisberg, *supra* note 102, suggest these additional social policy reasons in support of the implication of private actions: (1) private actions would counteract agency non-neutrality which results from selective enforcement due to limited enforcement resources, *id.* at 299; (2) self-interest would motivate one with a private action to persevere where an agency official might not, *id.* at 299-300; (3) private enforcement would free limited agency resources to deal with the most serious violators, *id.* at 300; (4) private actions would remove blanket immunity that certain anti-social behavior enjoys with respect to criminal laws that are not enforced, *id.*; and (5) a private cause of action would help take the profit out of certain types of violations, *id.*

[108] Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Note, 77 HARV. L. REV. 285, 291 (1963); *Private Cause of Action Under Title III, supra* note 102, at 414.

[109] Note, 77 HARV. L. REV. 285, 291-92 (1963).

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

[111] *Private Cause of Action Under Title III, supra* note 102, at 414.

[112] See text accompanying notes 122 & 123 *infra*.

jects an offender to a type or level of liability different from that which the statute imposes on him is based on the differences between regulatory legislation and tort law.[113] The penalties and remedies prescribed by regulatory statutes are proportionate to the relative seriousness attributed to a particular offense. Tort damages, on the other hand, are generally compensatory rather than based on the degree of fault, and it is therefore argued that the implication of a civil remedy may sometimes inflict a disproportionate punishment.[114] It may be replied to this objection that since the courts create the cause of action, they may also set the limits of the remedy.[115] Where appropriate, damages could be limited to the amount of the defendant's unjust enrichment,[116] while in other instances plaintiffs could be limited to injunctive relief only.[117]

Critics of implied remedies also note that the application of a regulatory statute is often tempered by administrative discretion, a benefit that would be lost if private persons could sue to enforce the statute.[118] This is not, however, a necessary result; the relative importance of discretionary enforcement is one of the factors which courts should take into account in determining whether a proposed private cause of action would be consistent with effectuating a statute's purposes.

Finally, it is argued that a private cause of action might impose liability under a standard of proof lower than that established by the statute.[119] Whereas in a criminal prosecution the government would have to prove its case beyond a reasonable doubt, in an implied private cause of action under the same statute, the plaintiff would have to meet only the preponderance of the evidence test.[120] At the same

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[113] Note, 77 HARV. L. REV. 285, 291-92 (1963).

[114] *Id.*

[115] *Id.* at 296.

[116] It was held in Shapiro v. Merill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974), that tippers and tippees who violate the duty to disclose or abstain from trading will be liable for damages in an implied cause of action under Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), to all persons who, during the period in which the tippers and tippees traded in or recommended trading in the stock concerned, purchased the stock in the open market without knowledge of the material inside information in the possession of the tippers and tippees, despite a lack of privity and reliance. *Id.* at 241. It has been suggested that the damages recoverable in such a case should be limited to the amount of the defendant's unjust enrichment, since a requirement that an illegal trader make whole all those who were in the market during the relevant period would be likely to inflict financial destruction upon the violator. Note, 16 B.C. IND. & COM. L. REV. 503, 512-13 (1975). The court in *Shapiro* left to the district court the task of determining the proper measure of damages. 495 F.2d at 242.

[117] Limiting plaintiffs to injunctive relief may deprive them of the incentive to bring the suit that is provided by the possibility of money damages. Therefore, it may be questioned whether allowing a private action for an injunction would help to make effective the congressional purpose, and if not, whether the cause of action should be allowed at all.

[118] Note, 77 HARV. L. REV. 285, 291-92 (1963).

[119] Gamm & Eisberg, *supra* note 102, at 301.

[120] *Id.*

time, however, the different burdens of proof are predicated upon the relative importance that society attaches to criminal convictions and civil liabilities.[121] Since a suit under an implied private cause of action does not result in the penalty or stigma of a criminal conviction, it is submitted that a defendant in such a suit has no valid claim to the greater protection afforded by the higher burden of proof required in criminal cases.

B. *Deference to Legislative Intent*

The *Amtrak-Cort* rule appears to take into account both the social policy arguments of implied remedy supporters and the judicial legislation objections of the doctrine's critics. The concern in *Amtrak* and *Cort* over the separation of powers doctrine is evidenced by the deference that the court pays to legislative intent, both presumed and explicit. Thus, the Court requires that a plaintiff either be a member of the class for whose especial benefit the statute was enacted, or that he show a specific legislative intent to create a private cause of action in his favor.[122] The Court also employs the maxim *expressio unius* to raise a presumption that it would be inconsistent with legislative intent to imply a private cause of action under a statute which already provides a remedy.[123] Nevertheless, the fact that the Court did not flatly prohibit the use of implied remedies suggests that it might have been more concerned with the *extent* to which the separation of powers has been violated in the past, rather than with the mere fact of its violation. Indeed, the implication of a private cause of action where there is *no* evidence that Congress specifically intended to create such an action — a result which would be permitted under the *Amtrak-Cort* rule[124] — is still essentially an act of judicial legislation, notwithstanding the concern expressed for protected classes and consistency with underlying congressional purposes. It thus appears that the effect and intent of the *Amtrak-Cort* rule is to pay deference to the separation of powers doctrine by limiting, while not eliminating, the use of implied remedies.

It may be that the decision not to bar implied remedies entirely results from the Court's recognition of the highly beneficial use that

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[121] Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. The consequences to the life, liberty and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case. Therefore . . . "[w]here one party has at stake an interest of transcending value — as a criminal defendant his liberty — [the] margin of error is reduced as to him by . . . placing on the other party the burden . . . of persuading the factfinder . . . of his guilt beyond a reasonable doubt.

McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 341(c), at 798 (2d ed. 1972).

[122] 422 U.S. at 82-84.

[123] 414 U.S. at 458.

[124] See text accompanying notes 95 & 96 *supra*.

has been made of implied remedies in the past.[125] Apparently, the Court hesitates to completely eliminate this useful tool of social policy where it can be employed without undue interference with the legislative prerogative. It is submitted that the minimal amount of judicial legislation that will be involved in implying a remedy within the limits of the *Amtrak-Cort* rule is far outweighed by the social policy benefits that will accrue.

It is further submitted that requiring a plaintiff to show that an implied remedy would be consistent with legislative intent is a rational and justifiable factor in distinguishing between cases in which remedies should and should not be allowed.[126] The rule gives due deference to a co-equal branch of the government by requiring the courts to refrain from doing that which Congress intended them not to do. More importantly, however, it leaves the courts free, within the boundaries set by due deference to congressional intent, to consider whether an implied remedy would be desirable as a matter of social policy.

One criticism that can be leveled at the *Amtrak-Cort* test of congressional intent, however, is that its use of the maxim *expressio unius* goes further in paying deference to congressional intent than is either necessary or desirable. Under the *Amtrak-Cort* rule, a plaintiff who is not a member of a protected class has the burden of proving a specific congressional intent to create a private remedy.[127] This requirement renders superfluous the presumption of congressional intent not to allow additional remedies raised by *expressio unius*. On the other hand, a plaintiff who is a member of a protected class does not have to show that Congress specifically intended to create a private cause of action in his favor; it is inferred that an implied remedy would be consistent with legislative intent.[128] If, however, the statute already provides a remedy, *expressio unius* will raise a presumption that Congress intended the remedy provided to be the exclusive means of

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[125] Possibly the best example of the beneficial use to which implied remedies have been put is in the area of securities laws. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Greater Iowa Corp. v. McLendon, 378 F.2d 783 (8th Cir. 1967); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

[126] It is not, however, the only factor. A plaintiff who proves that Congress intended to create his cause of action, but for some reason failed to do so, should be allowed his remedy without more. On the other hand, a plaintiff who merely shows that he is a member of a protected class, and therefore that it would be consistent with legislative intent to imply a remedy, should be required to further justify the remedy sought. Courts should not imply a remedy solely because it would be consistent with legislative intent. See text at notes 49-53 *supra*.

[127] See text accompanying note 97 *supra*.

[128] See text accompanying notes 95-96 *supra*.

enforcing the Act. As noted earlier,[129] it is uncertain whether the plaintiff will then have to prove a specific congressional intent to create an additional private remedy, or merely congressional neutrality with respect to additional remedies.

This use of *expressio unius* is unnecessary in that the court shows sufficient deference for congressional intent by requiring the plaintiff to prove that he is a member of the class for whose especial benefit the statute was enacted. Furthermore, such use of *expressio unius* is undesirable in that it may prevent a plaintiff who has already proved that Congress has granted him certain special rights from obtaining a remedy for the violation of those rights. Although the maxim *expressio unius* is a well established rule of statutory construction, its application should be overridden by the social policy involved in the implication of remedies. It is submitted that once a plaintiff has shown that he has been granted certain rights under a statute, the court's only concern should be whether it is desirable as a matter of social policy for the plaintiff to have a private cause of action to enforce and protect those rights.

C. *Fidelity to Legislative Purpose*

The second element of the *Amtrak-Cort* test is whether it would be consistent with the underlying purposes of the legislative scheme to imply a remedy. On its face, this test seems as undemanding as the one employed in *Stewart* v. *Travelers Corp.*[130] Its application in *Cort,* however, leaves little doubt that the test is intended to be rigorous. The Court did not merely examine whether the private cause of action would be consistent with the Act's purposes, but rather whether the remedy sought would *aid* Congress' *primary* purpose in enacting the statute.[131]. Moreover, the Court was very demanding with respect to whether the remedy sought would aid in the Act's enforcement. It rejected the argument that allowing a private remedy in this case would have a deterrent effect on the persons against whose conduct the statute was directed.[132] Rather, the intent of the Court seems to be to allow the courts to imply a remedy only where one is *necessary* in order to effectuate a statute's purposes. Thus, the *Borak* test[133] has been effectively resurrected.

Implying a remedy only where one is necessary to effectuate a statute's purposes is another rational and justifiable factor in distinguishing between cases in which remedies should and should not be allowed. The approach taken in *Cort* indicates that courts will not be allowed to substitute a sweeping generalization of a statute's purposes

[129] See text accompanying notes 98-99 *supra.*
[130] 503 F.2d 108 (9th Cir. 1974). See text accompanying notes 41-52 *supra.*
[131] 422 U.S. at 84.
[132] *Id.*
[133] See text accompanying notes 17-39 *supra.*

for a more narrow definition plainly indicated by the legislative history.[134] Thus, to the extent that courts are accurate and restrained in defining a statute's purposes, the concern for congressional purpose, like the concern for congressional intent, will mitigate the judicial legislation involved in implying remedies. Moreover, far from being a violation of the separation of powers, implying a remedy where one is necessary to effectuate Congress' purpose is a duty of the courts.[135]

It is submitted, however, that the social policy approach of *Amtrak* and *Cort* is deficient in one respect. In determining whether implying a remedy would be consistent with the underlying purpose of the statute, *Amtrak* and *Cort* appear to concentrate solely on whether an implied remedy would be necessary in order to effectuate Congress' purpose. This question, in turn, seems to depend upon whether the existence of the private action would have a deterrent effect on the type of conduct against which the statute is aimed. The implied remedy's deterrent effect, however, is only one of the factors which the court should consider in determining whether a private remedy would be consistent with the statute's purposes. The court should also consider whether it is desirable, as a matter of social policy, that the victim of illegal activity should be compensated for his injuries.[136] If so, then the court should imply a remedy, even though the deterrent effect of the remedy may be questionable. Clearly, if the intent of Congress was to grant a plaintiff and his class certain special rights, it may very well be consistent with the congressional purpose to give the plaintiff a remedy that provides him with compensation for the invasion of those rights.[137]

D. *State Remedies*

Finally, under *Amtrak-Cort* the cause of action must not be one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.[138] While this concern for federalism might at first seem to be the most restrictive element of the *Amtrak-Cort* test, it is not very restrictive at all. The Court concluded that it was *not*

[134] See note 101 *supra* and accompanying text.

[135] "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[136] *See* Comment, 63 NW. U.L. REV. 454, 466-67 (1968).

[137] It should be noted that only a plaintiff who is a member of a protected class will have the burden, or the opportunity, of showing that the remedy sought would be consistent with the purposes of the statute. The rare plaintiff who can show that Congress intended, but neglected, to create a private cause of action will already have won his case; all others must either show they are members of a protected class, or fail the first step of the *Amtrak-Cort* test.

[138] 422 U.S. at 78.

necessary for federal law to intrude into the states' domain in the *Cort* case, since the existence of a derivative cause of action for damages *would not aid* the primary goal of the statute.[139] It may be inferred that if the remedy sought were found to be consistent with legislative intent and with the statute's underlying purpose, the fact that the cause of action is one traditionally relegated to state law would not preclude the court from implying a remedy. Thus, the Court may well respect states' rights only in cases where it never intended to imply a remedy. It is submitted that this is entirely proper. Unless the federal statute involved exceeds Congress' constitutional authority, the Court is fully justified in implying a federal cause of action for the violation of a valid federal law, once it is found that an implied remedy would be consistent with legislative intent and with the statute's underlying purpose. The last part of the *Amtrak-Cort* test, therefore, will likely become a superfluous appendage, utilized to help justify a decision to deny a remedy, and ignored when a contrary decision has already been made.

CONCLUSION

The Supreme Court's attitude towards implied remedies has undergone a number of changes since the inception of the doctrine in 1916. Presently, the Court appears to intend a more limited use of implied remedies, and it has set forth, in *Amtrak* and *Cort,* a test and a method of application that appear to be designed to accomplish that end. The *Amtrak-Cort* test is a rational means of limiting the use of implied remedies. At the same time it leaves courts free, within the boundaries set by due deference for legislative intent and fidelity to legislative purpose, to imply remedies in cases in which it is desirable as a matter of social policy that a remedy exist. This approach will reduce judicial legislation to a minimum without destroying a very useful tool of social policy.

ROGER J. BRUNELLE

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[139] *Id.* at 84-85.