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Implied Private Actions Under Federal Statutes - The Emergence of a Conservative Doctrine

IMPLIED PRIVATE ACTIONS UNDER FEDERAL STATUTES—THE EMERGENCE OF A CONSERVATIVE DOCTRINE

Actions based on statutes now comprise the bulk of any federal court's case load.[1] As a result of increasing federal regulation plaintiffs now can file suit under a multiplicity of federal statutes. These statutes typically provide an express remedy for the party and confer jurisdiction on the court to hear the complaint. In certain areas, however, Congress has prohibited specific action or imposed specific duties, without delineating the rights of private parties or providing for an express private civil remedy. When this type of statute is violated the courts must decide if the injured plaintiff has a cause of action: it must determine whether to imply a private right of action from the statute.

Private rights of action have been implied under many federal statutes,[2] and the basic premise of implication is accepted, in theory, by almost all courts.[3] Courts have failed to agree, however,

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1. Justice Frankfurter described the trend as follows:

> Inevitably the work of the Supreme Court reflects the great shift in the center of gravity of law-making. . . . But even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero.

Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527 (1947). *See also* Peck, *Our Changing Law*, 43 CORNELL L.Q. 27, 31 (1957).

2. *See, e.g.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (Voting Rights Act of 1965); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (Rivers and Harbors Act of 1899); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Securities Exchange Act of 1934); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944) (Railway Labor Act); Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972) (Public Health Service Act); Reitmeister v. Reitmeister, 162 F.2d 619 (2d Cir. 1947) (Communications Act of 1934); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971) (Corrupt Practices Act); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969) (Fair Labor Standards Act); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (Securities Exchange Act of 1934); Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); Geismar v. Bond & Goodwin, 40 F. Supp. 876 (S.D.N.Y. 1941).

For many years the courts relied on the tort analogy. In Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940), the Court held that the Securities Act of 1933 did not restrict the purchaser to a money judgment. In reaching this conclusion, however, the Court did not consider how such an implied remedy would effectuate legislative intent. *See also* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944); United States v. Perma Paving Co., 332 F.2d 754, 758 (2d Cir. 1964); Odell v. Humble Oil & Refining Co., 201 F.2d 123, 127 (10th Cir. 1953); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Remar v. Clayton Sec. Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949).

3. *See* Bell v. Hood, 327 U.S. 678, 684 (1946) discussed in text accompanying notes 10 & 11 *infra*. *But see* United States v. Madison County Bd. of Educ., 326 F.2d 237, 242 (5th Cir. 1964).

on the requisite circumstances for implying a right of action. Three recent Supreme Court cases have attempted to resolve this discord and to establish a workable test for implied rights of action.[4] This Note will review the history of the doctrine of implication and analyze the effect of these cases and the wisdom of this new trend they attempt to establish.

HISTORICAL SURVEY OF THE DOCTRINE OF IMPLICATION

The Supreme Court announced the doctrine of implied private rights of action in *Texas & Pacific Railway Co. v. Rigsby*.[5] In holding that an injured employee had a private right of action for damages under the Federal Safety Appliance Act,[6] the Court defined the doctrine in broad terms: "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 . . . ."[7] Although this statement of traditional tort theory[8] was sufficient for *Rigsby*, as federal statutes and regulations increased significantly in number and in complexity after 1930,[9] it proved an inadequate standard by which to decide questions of implied rights of action.

In a 1946 decision, *Bell v. Hood*,[10] the Supreme Court, in allowing recovery of damages for a violation of constitutional rights, stated a liberal rule for vindicating federal rights: "[W]here federally protected rights have been invaded, it has been the rule from the begin-

4. Cort v. Ash, 422 U.S. 66 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (Amtrak).

5. 241 U.S. 33 (1916). Some have traced the doctrine to the early English case, Couch v. Steel, 118 Eng. Rep. 1193 (Q.B. 1854). *See* Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045 (1960). *See also*, Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

6. Ch. 196, 27 Stat. 531 (1893), *as amended*, 45 U.S.C. §§ 1-16 (1970).

7. 241 U.S. at 39.

8. *See* RESTATEMENT OF TORTS § 286 (1934); *see also*, W. PROSSER, TORTS § 36 (4th ed. 1971).

9. The federal securities law was one of the first areas in which the courts found implied private remedies. *See, e.g.*, Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

In Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943), the Court recognized that if an act created a right there must be some method of enforcing it, *id.* at 300, but nonetheless held that as Congress had the prerogative of deciding how rights created by statute should be enforced, the specification of one remedy normally would be understood to exclude another. *Id.* at 301. This holding is the first example of the Court's applying the rule of construction—*expressio unius est exclusio alterius*— to deny implication. Important later applications of this rule are discussed in notes 150-59 *infra* & accompanying text.

10. 327 U.S. 678 (1946).

ning that courts will be alert to adjust their remedies so as to grant the necessary relief."[11] Although this statement provided substantial support for plaintiffs who claimed implied rights of action, it failed to provide useful criteria for determining whether a private right of action was implied in particular statutes.

The law, therefore, remained unsettled in this area. A series of decisions in the 1950's, in which the Supreme Court refused to imply a private right of action, evidenced dissatisfaction and disagreement over implication.[12] Proffering different grounds for denial in each case,[13] the Court did not attempt to formulate a test to establish when such rights should be implied. The strong dissents in these cases highlight the lack of consensus as to the proper criteria for deciding the question of implication.[14] Because none of these cases articulated a test for determining when to allow a private right of action,[15] the lower federal courts remained in conflict.[16]

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11. *Id.* at 684.

12. 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).

13. In *Montana-Dakota Utilities*, the Court held the question of reasonable rates did not create a private cause of action. They recognized the danger of involvement in administrative rate-making determinations, holding that as the FPC set the rate the Court could not alter it. The Court in *Nashville Milk* held that sections 4 and 16 of the Clayton Act did not permit a private right of action under the Robinson-Patman Act for sales at an unreasonably low price. The Court read the legislative history as supporting their proposition that sales at unreasonably low prices were subject to only the criminal penalities of section 3 of the Act.

The Court again refused to become involved in a rate case in *T.I.M.E.*, holding that the legislative prescription of reasonable rates created criterion for administrative application rather than a "justiciable legal right." The Court further supported its holding by reasoning that as private remedies were expressly provided in other parts of the Act, yet none was provided in the section pertaining to motor carriers, Congress must have intended to foreclose such private actions.

14. Each case was decided by a 5-4 margin. In his dissent in *Nashville Milk* Justice Douglas urged the Court to imply a private action because he read the legislative history as permitting such. 355 U.S. at 383. In *T.I.M.E.*, Justice Black espoused permitting a right of action because he felt the Act did not negate common law remedies. 359 U.S. at 480. For a discussion of this separate problem of the survival of common law remedies, see O'Neil, *Public Regulation and Private Rights of Action*, 52 CAL. L. REV. 231 (1964).

In perhaps the most perspicacious discussion of implication in these three cases, Justice Frankfurter, dissenting in *Montana-Dakota Utilities*, specified certain factors to examine in determining whether to imply a private right of action. He felt a private action should be "appropriate to effectuate the purposes of a statute." 341 U.S. at 261. If this were satisfied, then a court should deny implication only if such actions would interfere unduly with administrative agencies or impose responsibilities on the courts that they were not equipped to handle. *Id.* at 263.

15. In one later case, Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962), the Court did indicate some factors, other than the tort theory, it might deem significant in

Then in 1964, the Court adopted a liberal position in *J.I. Case Co. v. Borak,*[17] holding that a private party could bring a derivative action[18] for the use of false and misleading proxy statements, in violation of section 14(a) of the Securities Exchange Act of 1934.[19] In so holding, the Court emphasized the broad remedial purposes of the Act, deeming private enforcement a "necessary supplement" to effectuate the congressional purpose.[20]

Three years later, in *Wyandotte Transportation Co. v. United States,*[21] the Court reemphasized its *Borak* position and clarified the pivotal factors in determining whether to imply a private right of action: (1) whether the interests of the plaintiff were within the class protected by the statute; (2) whether the harm that had occurred was of the type the statute was intended to prevent; and (3) whether criminal liability was adequate to ensure the effective enforcement of the statute.[22] Although only the last of these factors differs from

implying a private right of action, that is, consistency with effective administration of the Act and with legislative intent. "Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." *Id.* at 89. The Court recognized that there was a common law right for a carrier to ship by the cheapest route available and held that survival of a damage claim for misrouting was consistent with the Act. These factors did not evolve as a test for implying a private right of action because they were not stated clearly in the opinion. Moreover, one year later the Court denied implication of a right of action without applying or distinguishing these factors. Wheeldin v. Wheeler, 373 U.S. 647 (1963).

16. *Compare* Brown v. Bullock, 194 F. Supp. 207, 224 (S.D.N.Y.), *aff'd,* 294 F.2d 415 (2d Cir. 1961) ("Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention."), *with* Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543, 545 (9th Cir. 1954) (applying the *expressio unius est exclusio alterius* rule to deny implication). Courts continued to imply private rights of action in federal regulatory statutes. *See, e.g.,* Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961) (allowing private action under section 14(a) of Securities Exchange Act of 1934, but denying right for derivative action); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960) (allowing private action under SEC Rule 10b-5 and section 10(b) of Securities Exchange Act of 1934); Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956) (Civil Aeronautics Act of 1938); Reader v. Hirsch & Co., 197 F. Supp. 111 (S.D.N.Y. 1961) (margin requirements of the Securities Exchange Act of 1934).

Other courts denied such private actions. *See, e.g.,* Wheeldin v. Wheeler, 373 U.S. 647 (1963); United States v. Madison County Bd. of Educ., 326 F.2d 237 (5th Cir. 1964); Beury v. Beury, 127 F. Supp. 786 (S.D.W.Va. 1954).

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

18. *Id.* at 430-32. In so holding the Court overruled Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961), which had allowed a private action but denied that it could be derivative.

19. The actions of the defendant also were in violation of SEC Rule 14a-9.

20. 377 U.S. at 432-33.

21. 389 U.S. 191 (1967).

22. *Id.* at 202. In so deciding the Court also found that the existence of a private right of action was not contrary to the intent of the Act. *Id.* at 200. If this characteristic had been

the long recognized tort theory of the Restatement,[23] the clarity of the Court's pronouncement rendered the *Borak-Wyandotte* test influential.[24]

Despite its wide acceptance application of the test entailed problems. Because of its expansiveness, courts were able to manipulate the factors to justify their decisions. The three enunciated factors, standing alone, are too susceptible of diverse interpretations and applications to be effective.[25] Many courts criticized the expansiveness of the *Borak-Wyandotte* test;[26] some sought to circumvent it.[27] The test, as applied by the courts, was inadequate in

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added to the three factors, the *Borak-Wyandotte* test would have been more functional. *See* notes 166-68 *infra* & accompanying text.

23. *See* RESTATEMENT (SECOND) OF TORTS § 286(a), (c) (1965).

24. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969) (Voting Rights Act of 1965); Euresti v. Stenner, 458 F.2d 1115, 1117-18 (10th Cir. 1972) (Hill-Burton Act); Burke v. Compania Mexicana De Aviacion, 433 F.2d 1031, 1033-34 (9th Cir. 1970) (National Railway Labor Act); Gomez v. Florida State Empl. Serv., 417 F.2d 569, 576 (5th Cir. 1969) (Wagner-Peyser Act); New York City Coalition for Community Health v. Lindsay, 362 F. Supp. 434, 439 (S.D.N.Y. 1973) (Public Health Service Act); Young v. Harder, 361 F. Supp. 64, 71 (D. Kan. 1973) (Uniform Relocation Act); National Ass'n for Community Dev. v. Hodgson, 356 F. Supp. 1399, 1403 (D.D.C. 1973) (18 U.S.C. § 1913 (1970)); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 813 (D.D.C. 1971) (18 U.S.C. §§ 608-09 (1970)); Fagot v. Flintkote Co., 305 F. Supp. 407, 410-14 (E.D. La. 1969) (Fair Labor Standards Act). *See* Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1396 (1975).

25. *Compare* Gomez v. Florida State Empl. Serv., 417 F.2d 569, 576 (5th Cir. 1969) (Wagner-Peyser Act intended to benefit migrant farm workers), *with* 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 993 (D. Conn. 1973) (purpose of same Act to encourage cooperation between states and federal government, thus, no private right of action for migrant farm workers).

26. One of the earliest criticisms of the test was made by two new Justices of the Supreme Court in their first consideration of an implied private right of action. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411, 430 (1971) (Burger, C.J., & Blackmun, J., dissenting). *See also* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998 (D.C. Cir. 1973); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 893-95 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Colligan v. Activities Club of N.Y. Ltd., 442 F.2d 686, 693 (2d Cir. 1971); Pearlstein v. Scudder & German, 429 F.2d 1136, 1145 (2d Cir. 1970) (dissenting opinion), *cert. denied*, 401 U.S. 1013 (1971).

27. Perhaps the leading case to distinguish the *Borak-Wyandotte* rationale is Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973), in which the court stated that private rights of action would be implied only when the law creating the right provided for no remedy or for a "grossly inadequate" remedy. *Id.* at 1392-93. By thus limiting the scope of the *Borak-Wyandotte* "inadequacy" test, the court justified its denial, *id.* at 1393-94. *See also* Western v. Hodgson, 359 F. Supp. 194, 200 (S.D.W. Va. 1973).

Lower courts also frequently used statutory construction or the rule of *expressio unius est exclusio alterius* to deny implication. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-89, 1002 (D.C. Cir. 1973); Chavez v. Freshpict Food, Inc., 456 F.2d 890, 893-95 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686 (2d Cir. 1971); Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971); Reid v. Mann,

that it failed to consider an important variable in statutory interpretation: legislative intent.[28] The omission created inconsistencies because it remained unclear whether to imply a right when confronted with (1) frustration of legislative intent;[29] (2) the existence

381 F. Supp. 525, 526-27 (N.D. Ill. 1974); Western v. Hodgson, 359 F. Supp. 194, 200-01 (S.D. W. Va. 1973); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057, 1059 (W.D. La. 1972); Bass Angler Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412, 415 (N.D. Ala. 1971). For a further discussion of the use of the maxim *expressio unius* see notes 150-59 *infra* & accompanying text.

Other courts used the existence of alternative federal or state remedies to limit strictly the inadequacy factor and thereby deny implication. *See, e.g.*, Breitwieser v. KMS Industries, Inc., 467 F.2d 1391, 1394 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973); Chavez v. Freshpict Food, Inc., 456 F.2d 890, 895 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Rogers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389, 1393 (5th Cir. 1970); Reid v. Mann, 381 F. Supp. 525, 528 (N.D. Ill. 1974); Western v. Hodgson, 359 F. Supp. 194, 201 (S.D.W. Va. 1973); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 991-92 (D. Conn. 1973); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057, 1060 (W.D. La. 1972).

Still other courts evaded the *Borak-Wyandotte* test by strictly limiting the class of intended beneficiaries. *See, e.g.*, Vanderboom 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).

28. Although this factor was not expressly included in the *Borak-Wyandotte* test the Court has asserted that in each case implication would be consistent with the statutory purpose. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (consistent with broad purpose to allow private citizens to enforce); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967) (no contrary legislative intent found); J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964) (broad remedial purposes emphasized). The importance of legislative intent as a factor was foreshadowed also in two earlier Supreme Court cases: Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 89 (1962); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting).

The more recent lower federal court cases implying private rights of action all have stressed that private action should be consistent with the purposes of the statute. *See, e.g.*, Stewart v. Travelers Corp., 503 F.2d 108, 110-14 (9th Cir. 1974); Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 680 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973); Fagot v. Flintkote, 305 F. Supp. 407, 413-14 (E.D. La. 1969).

Courts also have used legislative intent to justify implication. *See, e.g.*, New York City Coalition for Community Health v. Lindsay, 362 F. Supp. 434, 439 (S.D.N.Y. 1973); Young v. Harder, 361 F. Supp. 64, 71 (D. Kan. 1973); National Ass'n for Community Dev. v. Hodgson, 356 F. Supp. 1399, 1403-04 (D.D.C. 1973); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 813 (D.D.C. 1971); Arnesen v. Raymond Lee Org., Inc., 333 F. Supp. 116, 118 (C.D. Cal. 1971).

Similarly, several cases denying an implied right of action have stressed the importance of legislative intent. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 1002 (D.C. Cir. 1973); Acevedo v. Nassau County, 500 F.2d 1078, 1083-84 (2d Cir. 1974); Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971); Reid v. Mann, 381 F. Supp. 525, 528 (N.D. Ill. 1974); Western v. Hodgson, 359 F. Supp. 194, 200 (S.D.W. Va. 1973); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057, 1059 (W.D. La. 1972); Bass Angler Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412, 415 (N.D. Ala. 1971).

For further discussion of this problem, see notes 160-69 *infra* & accompanying text.

29. This problem is raised inferentially in Holloway v. Bristol-Myers Corp., 485 F.2d 986,

of potentially conflicting legislative goals;[30] or (3) legislative silence as to private action.[31] Thus, a redefinition of standards for determining whether to imply a private right of action was required.

THE IMPLICATION DOCTRINE IN RECENT SUPREME COURT CASES

Amtrak[32]

In *Amtrak* the plaintiff Association, which represented railroad passengers, challenged the discontinuance by the Central of Georgia Railway Company of several passenger trains, urging that this reduction of passenger service violated the Rail Passenger Service Act of 1970 (Amtrak Act).[33] The District Court had dismissed the action[34] upon finding that the plaintiffs lacked standing under section 307 of the Act, which provides for enforcement suits by the Attorney General or, in cases involving a labor agreement, by employees or their representatives.[35] The Court of Appeals for the District of Columbia Circuit reversed in an opinion that addressed both the issue

997-98 (D.C. Cir. 1973) and Pearlstein v. Scudder & German, 429 F.2d 1136, 1147 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 401 U.S. 1013 (1971).

30. *Compare* Gomez v. Florida State Empl. Serv., 417 F.2d 569, 576 (5th Cir. 1969), *with* 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 992 (D. Conn. 1973).

31. For an example of the confusion this creates, *compare* Burke v. Compania Mexicana De Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970), *with* Chavez v. Freshpict Food, Inc., 456 F.2d 890, 894 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

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

33. 84 Stat. 1327, 45 U.S.C. § 501 *et. seq.* (1970). The Act prohibited discontinuance of passenger trains prior to January 1, 1975, unless the railroad had entered into a contract with Amtrak under which Amtrak would take over the railroad's entire responsibility for intercity rail passenger service. Because Central of Georgia, but not its parent corporation, Southern Railway Co., had entered into such a contract, the plaintiffs claimed that no proper contract existed to permit Central's reduction in passenger train service. 414 U.S. at 454-55, 455 n.3.

34. The decision of the district court was not reported.

35. 45 U.S.C. § 547(a):

> If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct or threat.

of standing and the question of an implied right of action.[36] Because the issue of standing in this case is not entirely distinct from that of an implied right of action,[37] the appellate discussion of both issues is of interest.

In considering standing, the court appropriately invoked the three part test of *Association of Data Processing Service Organizations, Inc. v. Camp (Data Processing).*[38] The plaintiffs clearly met the first requirement, having suffered injury in fact by being deprived of desired passenger train service.[39] Reasoning that railroad passengers were the intended beneficiaries of the Amtrak Act, the court also concluded that the plaintiffs met the second part of the test because they were within the "zone of interests" to be protected by the relevant statute.[40] Whether Congress had intended to bar judicial review, the third step in the *Data Processing* test, was a more difficult question than the first two. By using the "strong judicial presumption in favor of judicial review,"[41] however, the court was able to resolve this question in favor of the Association.

In determining that judicial review was not barred, the court analyzed the Act itself, its legislative history, and its purpose. The defendant's contention that, under the maxim *expressio unius est exclusio alterius,* the express grant of a remedy to the Attorney General and to employees precluded a remedy to others was rejected. The court deemed the maxim "only an aid to statutory construction, not a rigid rule of law."[42] Similarly, that a congressional

36. National Ass'n of R.R. Passengers v. Central of Georgia 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) (Amtrak).

37. *See* notes 106-11 *infra* & accompanying text.

38. 397 U.S. 150 (1970). The three part test requires: (1) that the plaintiff allege he suffered injury in fact, economic or otherwise, *id.* at 152; (2) that the plaintiff is within the zone of interests protected by the relevant statute, *id.* at 154-55; and (3) that judicial review has not been precluded by the legislature, *id.* at 156.

39. 475 F.2d at 330. A number of the organization's members were from Georgia and would suffer from this discontinuance of intercity rail passenger service.

40. *Id.* at 330-31. The court found support for this conclusion in its reading of the congressional findings and declaration of purpose of section 101 of the Amtrak Act, 45 U.S.C. § 501 (1970). In its reversal, the Supreme Court later would disagree with the court of appeals on this issue. *See* 414 U.S. 453, 461 (1974); *see also* notes 53-58 and 160-69 *infra* & accompanying text.

41. 475 F.2d at 331, *citing* Barlow v. Collins, 397 U.S. 159, 166 (1970).

42. 475 F.2d at 331. The court cited several Supreme Court and lower federal court decisions that argued for limited use of the maxim. *Id.* at 331-32. Furthermore, the court read the statutory provision as an authorization for the Attorney General to bring suit: "By singling out the Attorney General, Congress did not attempt to provide the sole means for litigating violations of the Act, but merely emphasized, even to the point of redundancy, that

subcommittee considered, but did not adopt, a proposed amendment to the Act expressly providing for redress at the urging of any aggrieved party, was given little weight because the court was unwilling to draw inferences from the unexplained failure of the legislature to adopt a proposed amendment.[43] As to the purposes of the Act, although the court recognized that one of the objectives was to facilitate elimination of uneconomical passenger trains, it emphasized the primary goal of saving passenger trains from extinction, concluding that enforcement by parties other than the Attorney General was not only consistent with, but also required to effect this objective.[44]

Significantly, in deciding whether Congress intended to preclude suits by parties not expressly given standing in the Amtrak Act, the court did not start from a neutral position, "but rather from a strong presumption in favor of judicial review."[45] Similarly, in dictum specifically addressing the question of the plaintiff's implied right of action, the court of appeals accepted the premise that a finding of an implied right of action was reasonable, "absent express and definite indications to the contrary . . . ."[46] From this premise, the conclusion that the plaintiffs had a proper right of action followed almost immediately, for the lack of express and contrary congressional intent had been determined during the prior inquiry into standing.

The Supreme Court's decision, reversing and remanding *Amtrak* to the District of Columbia Circuit, did not begin analyzing the dispute from a position so favorable to the plaintiff's cause. Writing for the majority, Justice Stewart identified the threshold issue as

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the Attorney General had broad powers to seek equitable relief under the Act." *Id.* at 332. The court also noted that the inclusion of employee representatives' right to sue expressly was merely emphasis that "labor's authority to sue is much broader." *Id.* at 333.

43. *Id.* at 335, *quoting* the rationale for this conclusion in United States v. Wise, 370 U.S. 405, 411 (1962): "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment . . . including the inference that the existing legislation already incorporated the offered change."

44. 475 F.2d at 337.

45. *Id.* at 331.

46. *Id.* at 340. At the time, many courts accepted this basic premise. *See, e.g.*, Burke v. Compania Mexicana De Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970); National Ass'n For Community Dev. v. Hodgson, 356 F. Supp. 1399, 1403-04 (D.D.C. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407, 412 (E.D. La. 1969). *But see* Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

The court also noted increasing acceptance of the "private Attorneys General" theory in support of private enforcement actions. 475 F.2d at 340.

the existence of a cause of action,[47] thus avoiding the liberal standing tests of *Data Processing*.[48] Furthermore, in accepting the plaintiff's argument that a right of action by private parties should be implied under the criteria of *Borak*,[49] the Court imposed an additional criterion: that the inference of a private cause of action "must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."[50] Finally, the decision stressed the principle that if legislation expressly provides a particular remedy or remedies, courts should not extend the coverage of the statute "to subsume other remedies."[51] In noting that this reflection of the ancient *expressio unius* maxim "must yield to clear contrary evidence of legislative intent,"[52] the Court, in effect, established the rule that a right of action should not be inferred unless clear evidence of supporting legislative intent could be found. Beginning with this negative presumption, the Court examined the same legislative history that the court of appeals had considered[53] and concluded Congress had intended that private rights of enforcement not be created by the Amtrak Act.[54] In corroboration of this stance, the Court deemed private rights of action inimical to the purposes of the statute. Contrary to the conclusions of the court of appeals and of Justice Douglas in his dissent,[55] the majority concluded that the Act's principal objective was a workable system of passenger rail service, which could be achieved only by the elimination of uneconomical routes.[56] Opening the district courts to private parties who could challenge every discontinuance therefore would lead to protracted litigation, thus destroying

47. 414 U.S. at 456.

48. *See* notes 38-41 *supra* & accompanying text.

49. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). The *Borak* test for implied rights of action is discussed in notes 17-24 *supra* & accompanying text.

50. 414 U.S. at 458. *See* notes 14 & 15 *supra*.

51. *Id.*

52. *Id.*, *citing* Neuberger v. Commissioner, 311 U.S. 83, 88 (1940).

53. 414 U.S. at 458-60. *See* note 43 *supra* & accompanying text.

54. The Court considered that an amendment before the House Committee would have authorized suit by any "person adversely affected or aggrieved," but that the Secretary of Transportation opposed allowing such private actions and the Committee then turned down this amendment. The Court read this as deliberate preclusion of private enforcement. 414 U.S. at 460-61.

55. Both concluded that the Act's primary purpose was to protect rail passengers. *See* National Ass'n of R.R. Passengers v. Central of Georgia Ry., 475 F.2d 325, 331 (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) (Amtrak); 414 U.S. at 471 (Douglas, J., dissenting).

56. 414 U.S. at 461, *quoting* H.R. REP. No. 91-1580, 91st Cong., 2d Sess. 3 (1970).

the efficient administrative system the Act attempted to establish.[57] The majority also concluded that because the Amtrak system was subject to the scrutiny of the Attorney General and Congress, private actions would be unnecessary.[58]

Justice Douglas' dissent in *Amtrak*[59] underscores the majority's shift from the traditional view that "judicial review 'is the rule, and nonreviewability an exception which must be demonstrated,' " to a presumption of nonreviewability.[60] By rejecting the distinction between the issues of right of action and right of standing,[61] Justice Douglas argued strongly for application of the *Data Processing* test.[62] Moreover, in convincing arguments that the Attorney General has but limited authority to bring actions under the express statutory mandate and could not possibly prosecute every violation of the Act, the dissent stressed the need for private actions to enforce the Act.[63]

This pointed restatement of the "private Attorneys General" rationale highlights the principal weakness in the reasoning of the majority opinion—the conclusory statement that policing by the Attorney General is sufficient.[64] Despite substantial precedent asserting inadequacy of enforcement as a primary factor in implication decisions,[65] the majority opinion largely ignored this consideration. Furthermore, although the majority departed from the *Borak-Wyandotte* rationale,[66] it failed to indicate what weight it should be given in the future. On the other hand, the dissent failed to consider realistically the impact unfettered private actions would have on the organizational scheme Congress intended to establish under the Act.

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57. 414 U.S. at 462-64.

58. *Id.* at 464. By implication, this conclusion rejects application of the "private Attorneys General" rationale. *See* note 46 *supra.*

59. 414 U.S. at 466.

60. *Id.* at 469, *quoting* Barlow v. Collins, 397 U.S. 159, 166 (1970).

61. *Id.* at 467.

62. *Id.* at 469. The *Data Processing* test is discussed in note 38 *supra.*

63. 414 U.S. at 470-71.

64. *Id.* at 464.

65. *See, e.g.,* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967); J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946).

66. *See* text accompanying notes 17-24 *supra.*

The Securities Investor Protection Corporation (SIPC) Litigation[67]

In the Securities Investor Protection Act of 1970 (SIPA),[68] Congress created the Securities Investor Protection Corporation (SIPC) as a non-profit, private membership corporation, vested, under specified conditions, with the authority to bring liquidation proceeding against failing brokerage firms, to protect the investor-customers.[69] Congress committed supervision of the SIPC to the Securities and Exchange Commission, expressly affording the SEC a right of action to compel the SIPC to discharge its statutory obligations.[70]

Guaranty Bond and Securities Corporation, a registered broker-dealer, had been placed in receivership by a district court. When the appointed receiver sued to compel intervention by the SIPC, the court joined the issue of whether a right of action by a private party was impliedly created by the SIPA.[71] Although it recognized the receiver's right of action, the district court denied relief, holding that the Act did not apply to the brokerage firm.[72] The Court of Appeals for the Sixth Circuit, however, determined that the Act did apply to Guaranty Bond & Securities Corporation.[73] Although it accepted the district court's decision that the receiver had standing, the court of appeals provided few reasons for doing so. The court gave little consideration to the *Data Processing* test, mentioning it only in a footnote.[74] In the pertinent part of the opinion, however, the court clearly relied on the presumption in favor of private actions, the prevailing view in the federal courts.[75] Because this pre-

67. SEC v. Guaranty Bond & Sec. Corp., 496 F.2d 145 (6th Cir. 1974), *rev'd sub nom.* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

The case was argued in the court of appeals on December 12, 1973, almost a month before the Supreme Court's decision in *Amtrak* (January 9, 1974). For this reason and because the court of appeals saw the primary issue as standing, the court did not deal with *Amtrak*.

68. 84 Stat. 1636, 15 U.S.C. §§ 78aaa *et. seq.* (1970).

69. A concise discussion of the background and objectives of the SIPA appears in *SIPC*, 421 U.S. at 415-17. The SEC and the independent securities industry organizations are required to notify the SIPC when a registered broker-dealer is in financial difficulty. If the SIPC then finds that this party is in danger of failing to meet its obligations and is showing signs of financial irresponsibility, it can move for a liquidation proceeding in a district court.

70. Section 7(b) of the SIPA, 15 U.S.C. § 78ggg(b) (1970), provides that in event the SIPC fails to use its funds to benefit the customers of a member broker-dealer the SEC can move in a district court to compel the SIPC to discharge its obligations.

71. 496 F.2d at 146.

72. *Id.*

73. *Id.* at 149.

74. *Id.* at 150 n.6.

75. "We are persuaded, however, that the *lack of express language of exclusivity* in provid-

sumption had been rejected firmly by the Supreme Court in *Amtrak*, reversal was forseeable.

Justice Marshall's opinion announcing reversal followed the analytical approach of *Amtrak* in establishing as prerequisites to implication: (1) identification of the threshold issue as that of the implied right of action,[76] and (2) existence of extrinsic evidence that Congress intended to allow private actions.[77] As in *Amtrak*, the Court first held private actions to be inconsistent with congressional intent and objectives,[78] and then proceeded to distinguish earlier decisions upholding implied rights of action.[79] Both *Borak*,[80] which dealt with violation of the Securities Exchange Act of 1934 in the solicitation of proxies, and *Allen*,[81] which arose under the Voting Rights Act of 1965, were readily distinguished; in both of those cases, not only was the need for supplemental private actions apparent to the Court and to the agencies given express enforcement authority, but also no harm to the intended congressional scheme was anticipated from the use of private actions.[82]

The emphasis in *SIPC* on effectuation of the legislative objectives, including both the ultimate goals and the regulatory devices intended to achieve these goals, suggests that, of the traditional rules of statutory construction, the one actually relied upon by the Court was not *expressio unius*, as expressly mentioned in *Amtrak*, but the "mischief" rule, that is, "to make such construction as shall suppress the mischief, and advance the remedy . . . ."[83]

Cort v. Ash[84]

In *Cort*, the plaintiff, a stockholder of Bethlehem Steel Corporation and a registered voter, instituted an action against the corpora-

ing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C., evidences an intent by Congress that the statute should not be as narrowly construed as the appellees [S.E.C. & S.I.P.C.] urge." *Id.* (emphasis supplied; footnotes omitted). *See* note 46 *supra* & accompanying text.

76. 421 U.S. at 415.

77. *Id.* at 420-21.

78. *Id.* at 423.

79. *Id.* at 423-24.

80. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* notes 17-20 *supra* & accompanying text.

81. Allen v. State Bd. of Elections, 393 U.S. 544 (1969). This case was relied on by Justice Douglas, in his dissenting opinion in *Amtrak*, 414 U.S. at 469.

82. 421 U.S. at 423-25. The Court also noted that the Securities Exchange Act of 1934, relevant to *Borak*, contained both a general grant of jurisdiction to the district courts and standards of conduct that could be enforced by private actions. *Id.* at 424.

83. Heydon's Case, 76 Eng. Rep. 637, 638 (1584).

84. 422 U.S. 66 (1975), *rev'g* 496 F.2d 416 (3d Cir. 1974).

tion's directors, on his behalf and derivatively on behalf of the corporation, alleging illegal corporate expenditures prior to the 1972 federal election[85] and seeking injunctive relief and damages.[86] In the first post-*Amtrak* case to consider the implication issue, the Court of Appeals for the Third Circuit, reversing the district court's summary judgment for the defendants, implied a right of action from a statutory section providing for criminal sanctions but not for civil remedies. The court interpreted *Amtrak* restrictively, concluding that its rule against judicial expansion of an expressly stated and particular statutory remedy would apply only to "a remedy that may logically be said to be exclusive."[87] Not finding the criminal sanctions to be thus "exclusive",[88] the court held for the plaintiff after analyzing the question in view of both the *Borak-Wyandotte* factors[89] and the additional criterion required by *Amtrak*, consistency between private suits and legislative objectives.[90] Judge Aldi-

85. 18 U.S.C. § 610 (1970), *as amended* 18 U.S.C. § 610 (Supp. II 1972).

> It is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . . Congress are to be voted for . . . .

The next paragraph of the section prescribes criminal penalties for violation of the section.

86. 422 U.S. at 71. Initially, the plaintiff's complaint also included a claim under Delaware law, based on the same allegations of corporate misconduct, but this claim later was dropped. *Id.* at 72.

87. 496 F.2d at 421.

88. *Id.* at 421-22. In *Amtrak*, the statute provided for civil redress by suit by the Attorney General. *See* note 35 *supra* & accompanying text.

The court recognized that if the legislature, either expressly or impliedly, had demonstrated some intent "to grant or withhold a cause of action" then this intent would govern. 496 F.2d at 421. But this was as far as the court's reading of *Amtrak* would go; realizing the Supreme Court's use of the *expressio unius* logic was unclear the court would carry it no further. *Id.* at 421 n.3. It did not believe that the maxim had become the controlling law, reasoning that: "This rule of statutory construction does not alter the process used to determine if a cause should be infered in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can fairly be implied." *Id.* (footnote omitted).

89. *See* notes 21-24 *supra* & accompanying text.

90. After examining the construction that had been given to the predecessor of section 610 the court found that Ash, the plaintiff, was within the class the statute was designed to benefit—as a citizen-voter and as a shareholder—and that corporate campaign contributions were clearly the evil the statute was designed to prevent. 496 F.2d at 422. In so doing it rejected the defendants' argument that because section 610 actually was intended to benefit the public in general no cause of action could be implied. This argument was rejected on the basis of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), in which a private cause of action had been found to be implied by the fourth amendment's protection against unreasonable searches and seizures. *Id.* at 422-23.

The court examined the "propriety" of inferring a private cause of action from the statute

sert's dissenting view that *Amtrak* was a definite signal to the lower federal courts to "decelerate" reliance on the language of *Borak* in finding implied civil remedies,[91] proved, however, to be the more accurate appraisal of the judicial trend.

In a carefully drafted opinion, Justice Brennan, speaking for a unanimous Court, reversed the court of appeals.[92] The Court did not uphold the plaintiff's right to maintain an action as citizen-voter because intervening law[93] required that remedies for the future violations of the type in question be pursued through the newly established Federal Election Commission. In denying the plaintiff's second implied cause of action for damages as a shareholder, however, the court enumerated the critical factors in the form of a four-part test:

> First . . . 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?[94]

In applying the test, the Court first considered the legislative history, determining that stockholders were but subsidiary beneficiaries of the legislation, which "was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders."[95] Secondly, although the legislative history contained no suggestion of an intent either to create or to deny a federal right to damages, the Court found support there for the conclusion "that the expectation, if any, was that the relationship between corporations and their stockhold-

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and found implication to be proper on two grounds. First, private rights of action would effectuate the purposes of the statute, because it could be expected shareholders would oversee corporate expenses carefully. Secondly, the more rapidly moving civil process would be more effective in preventing violations that would be more likely to occur shortly before elections. *Id.* at 423-24.

91. 496 F.2d at 426-27.

92. 422 U.S. 66, 68-9 (1975).

93. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

94. 422 U.S. at 78 (citations omitted).

95. *Id.* at 82.

ers would continue to be entrusted entirely to state law."[96] Thirdly, the plaintiff's claim was rejected because allowing a stockholder to maintain such a derivative action would not further the purposes of the Act. A private right of action could not prevent the harm of corporate campaign contributions because recovery of damages, the only remedy available to the plaintiff, could be awarded only after the money had been used for the forbidden purpose.[97] Fourthly, the commitment of funds by investors with the understanding that except for a few, express responsibilities imposed by federal law, state law would govern internal corporate matters, was deemed a bar to a federal cause of action.[98] The argument is that investors who are on notice that state law controls may not have recourse under any federal statute. *Borak*, which did involve state law to some extent was distinguished by the congressional intent to supersede, as much as was constitutionally permissible, state corporate law of proxy regulation.[99]

In response to the defendant's argument that a statute creating only a penal remedy cannot be construed to create a right of action for any particular class, the Court cited *Wyandotte*,[100] *Borak*,[101] and *Rigsby*[102] as supporting the proposition that a criminal penalty "does not necessarily *preclude* a private cause of action for damages."[103] The Court distinguished these three cases, however, on the ground that each involved a "statutory basis for inferring that a civil cause of action of some sort lay in favor of someone."[104] The Court nevertheless was unwilling to go further and state that a bare criminal statute never could support an implied cause of action.[105]

96. *Id.* at 83-84.
97. *Id.* at 84.
98. *Id.* at 84-85.
99. *Id.*
100. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). *See* notes 21-24 *supra* & accompanying text.
101. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* notes 17-20 *supra* & accompanying text.
102. Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916). *See* notes 5-7 *supra* & accompanying text.
103. 422 U.S. at 79.
104. *Id.* (footnote omitted).
105. *Id.* at 80.

THE "NEW LAW" OF IMPLICATION

When To Make the Implication Decision

In *Amtrak*, Justice Stewart's majority opinion specified that, if claimed under the implication doctrine, the right to bring the action must be determined before the question of the plaintiff's standing or that of jurisdiction is addressed, "for it is only if such a right of action exists that [the court] need consider whether the [plaintiff] had standing to bring the action and whether the District Court had jurisdiction to entertain it."[106] The logic of this rule is compelling, provided that the issues are distinct. In the dissent, however, Justice Douglas found no substantive difference between the questions of "right of action" and of "standing" or "jurisdiction" in *Amtrak*.[107] These divergent conclusions apparently result from differing concepts of standing. The breadth of the standing doctrine, as understood by Justice Douglas, is evidenced by his majority opinion in *Data Processing*.[108] Of the three tests for standing described in that case, the first, whether the plaintiff has suffered injury in fact, goes to the constitutional requirement of a true controversy. The two additional questions—whether the plaintiffs were arguably within the zone of interests protected by the statute, and whether judicial review is precluded—overlap the issue of the implied right of action.[109]

The importance of the ostensibly procedural rule announced in *Amtrak* is that the determination of the plaintiff's right to bring the action will be made separately, according to more restrictive criteria, rather than under a broad view of standing and under the liberal tests of *Data Processing*. Thus, in future cases involving an implied right of action, *Data Processing* may well not constitute a significant precedent, for when the right of action has been evalu-

106. 414 U.S. at 456.

Initial determination of the right of action had not been the uniform practice in the lower federal courts. *See, e.g.*, Peoples v. United States Dep't of Agric., 427 F.2d 561, 564 (D.C. Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 927 (2d Cir. 1968); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 808 (D.D.C. 1971); Organized Migrants in Community Action, Inc. v. James Archer Smith Hosp., 325 F. Supp. 268, 270 (S.D. Fla. 1971).

107. "Whatever the merits of the distinction between these three concepts may be in some situations, the difference here is only a matter of semantics." 414 U.S. at 467.

108. *See* note 38 *supra*.

109. *See* notes 38-41 *supra* & accompanying text.

ated according to the criteria of *Cort v. Ash*,[110] the critical questions of *Data Processing*, other than that of a true controversy, will have been answered.[111]

The Court's New Attitude: Restricting Access to the Federal Courts

Undeniably, the Court has become more restrictive in allowing implied rights of action; but beyond this more conservative outlook is a new attitude of greater scope. Not only has the Court begun to limit a potential plaintiff's entry into the system of federal courts through a refusal to imply private rights of action, but it also has limited access to the courts through use of the doctrines of standing[112] and justiciability.[113] This reflects the view that the Court of the 1970's favors a more restricted role for the federal judiciary in the constitutional scheme of separation of powers.[114]

This new conception is evinced in the Supreme Court's latest use of the standing doctrine to deny judicial remedies to parties seeking vindication of their rights through the courts.[115] To so use standing is an abrupt departure from prior practice, as it was only with *Flast v. Cohen*[116] in 1968 that the Court adopted a liberal view of standing.[117] Moreover, even more recently, the Court announced the lib-

110. 422 U.S. 66 (1975).

111. Restriction of the standing doctrine to the question of the plaintiff's actual injury was urged by Justice Brennan in his dissent in the companion case decided with *Data Processing*, Barlow v. Collins, 397 U.S. 159, 168 (1970).

112. *See* Schlesinger v. Reservists Comm., 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

113. Laird v. Tatum, 408 U.S. 1 (1972).

114. This new attitude was demonstrated by the then new members of the Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

115. *See* note 119 *infra.* & accompanying text.

116. 392 U.S. 83 (1968).

117. For a time after *Flast v. Cohen* the Court reduced its use of the standing doctrine to prevent plaintiffs from seeking to adjudicate in the federal courts. In *Flast* the Court distinguished an earlier holding that had denied taxpayer standing to challenge government expenditures, Frothingham v. Mellon, 262 U.S. 447 (1923), suggesting that *Frothingham's* bar to taxpayer suits was merely a policy limitation and not a constitutional prohibition, 392 U.S. at 93-94. Chief Justice Warren reasoned that standing had a constitutional basis grounded in the "case or controversy" requirement of Article III, which focuses on deciding if the plaintiff is a proper party to bring the action, rather than on the substantive issues. *Id.* at 94-101. Proceeding from this argument he then espoused a two part "nexus" test that was applied to allow taxpayer standing. *Id.* at 102-05. Thus the move toward "open courts" had begun. For an example of this "open court" viewpoint, see *id.* at 111-12 (Douglas, J., concurring).

eral standing test of *Data Processing.*[118] Yet in 1974 the Court, by rejecting the plaintiffs' standing in two cases decided the same day, demonstrated a new conservative outlook regarding standing.[119]

Although these recent decisions did apply the tests of the earlier liberal cases and possibly could be reconciled with them, the language of the majority opinions evidences a more restrictive approach to standing. Chief Justice Burger's majority opinion in *United States v. Richardson*[120] illustrates this conservatism:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[121]

Throughout these cases Chief Justice Burger and Justice Powell stressed that the judiciary's role is limited and that too great an assumption of jurisdiction is both unconstitutional and incompati-

118. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). In this case, the Court allowed the plaintiff organization to challenge certain regulations established by the Comptroller of the Currency because the members of the organization had suffered injury in fact, were protected under the statute, and judicial review was not precluded. *Id.* at 152-56. In so holding the Court declined to follow the more restrictive legal interest test. Justice Douglas, writing for the majority, aptly described the trend with his observation that, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest . . . ." *Id.* at 154. *See also* Barlow v. Collins, 397 U.S. 159 (1970). The only dissenter in these two cases was Justice Brennan who favored a more liberal test.

119. Schlesinger v. Reservists Comm., 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). In *Richardson* the Court resurrected the *Frothingham* rationale and concluded that because plaintiff was pursuing only a "generalized grievance" the requisite standing was not present. 418 U.S. at 176-77. Using the test of *Flast v. Cohen* the Court further reasoned that the plaintiff's standing as a taxpayer was inadequate because there was no logical nexus between the status asserted and the claimed failure to require reporting of CIA expenditures. The plaintiff failed to establish this nexus for two reasons. First, his challenge was not to a statute under the taxing and spending power but rather to a regulatory statute. Second, there was no allegation that the funds were being spent in violation of any specific constitutional limitation on the taxing and spending power. 392 U.S. at 175. *Schlesinger* involved a challenge to the Armed Forces Reserve membership of certain members of Congress as being in contravention of the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2. Here the Court rejected the district court's contention that the law of standing no longer had any vitality and overturned the partial grant of summary judgment by the court of appeals. Because the plaintiff's injury was only "abstract" and generalized, the Court held it was insufficient to support a finding that the plaintiffs had citizen standing. 418 U.S. at 217-22, Warth v. Seldin, 422 U.S. 490 (1975), continued the trend toward a more conservative standing doctrine.

120. 418 U.S. 166 (1974).

121. *Id.* at 179.

ble with the democratic system of government.[122]

Analogous to these recent limitations on the standing doctrine are the Court's restrictions of the scope of the implied private right of action under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.[123] In *Blue Chip Stamps v. Manor Drug Stores*[124] the Court upheld the *Birnbaum* rule[125] and limited the class of plaintiffs in these actions to actual purchasers or sellers. The Court's decision was based, at least in part, on pragmatic "policy considerations"[126] reminiscent of the concerns voiced by the majority in *United States v. Richardson* and *Schlesinger v. Reservists Committee.*[127] Then in *Ernst & Ernst v. Hochfelder*[128] the Court, though again recognizing the validity of the implied private right of action under Rule 10b-5,[129] held that negligent conduct alone was insufficient to maintain an action.[130] The Court thus significantly narrowed the scope of this right of action. Although the holding was based on a reading of the legislative intent[131] it was evident that "policy considerations" again controlled the outcome.[132]

Throughout these recent cases dealing with standing, the scope of the 10b-5 cause of action, and implied private rights of action generally, the Court repeatedly has stressed factors that reflect a conservative approach to the function of the federal courts, the proper role of the federal courts in relation to the state courts, the proper role of the courts in relation to Congress, and the limitations of the federal courts in light of the potential burdens on the judicial system. Apparently a majority of the Court believes that the doctrine of standing and, probably, the closely related doctrine of im-

122. *See* Schlesinger v. Reservists Comm., 418 U.S. 208, 222 (1974); United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

123. *See generally* Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); Note, *Implied Liability Under the Securities Exchange Act,* 61 HARV. L. REV. 858 (1948).

124. 421 U.S. 723 (1975).

125. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952). *See also* 9 LOYOLA L.A. L. REV. 666 (1976).

126. 421 U.S. at 737-48. The Court focused on the availability of a remedy under state law, the danger of vexatious suits, problems of proof of damages, and the potential for abuse of the federal courts.

127. *See* note 119 *supra* & accompanying text. *See also* note 114 *supra.*

128. 96 S. Ct. 1375 (1976).

129. *Id.* at 1382 & nn. 14 & 15.

130. *Id.* at 1383-91.

131. The Court noted that Congress did not adopt a uniform negligence standard throughout the Act, *id.* at 1384, and that the express civil liabilities created by the Act each contains its own standard of fault necessary for recovery, *id.* at 1388.

132. *See, e.g., id.* at 1391 n.33.

plication must be applied with restraints or the judicial process will be abused. Perhaps the most striking contrast between this more limited view and that held previously can be seen by comparing Justice Black's often quoted rule that "where federally protected rights have been invaded, it has been the rule from the beginning that *courts will be alert to adjust their remedies so as to grant the necessary relief*",[133] with Chief Justice Burger's recent, less generous statement that "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[134]

The Governing Standards of Implication

That the factors enunciated in *Cort* are to control is evident; determining what these standards imply, however, is problematic. Clearly, the first factor, that the plaintiff be an intended beneficiary of the statute, is of long standing; in every case considering implication the Court has required that the plaintiff be such an intended beneficiary.[135] But the Court's treatment of this factor in *Cort* indicates that a plaintiff will have difficulty proving that the statute created a federal right in his favor.[136] Under this new rule a party seeking to pursue an implied right of action must demonstrate either that the statute was intended to benefit him or to invest some right in him or that the statute established a regulatory scheme governing the rights and duties of the parties before the court.[137]

The second factor, relating to legislative intent, appeared in *Amtrak* and in *SIPC* as a requirement that an affirmative intention to create a cause of action exist.[138] In *Cort* this rather extreme approach was rejected although "an explicit purpose to *deny* such cause of action would be controlling."[139] The Court limited the *expressio unius* rule to the facts of *Amtrak*, noting that in the cases cited by petitioners[140] the legislative history contained specific evi-

133. Bell v. Hood, 327 U.S. 678, 684 (1946) (emphasis supplied).

134. Schlesinger v. Reservists Comm., 418 U.S. 208, 227 (1974).

135. *See, e.g.*, Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916).

136. The opinion suggests that a "clearly articulated federal right in the plaintiff . . . or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard. . ." must be shown. 422 U.S. at 82.

137. *Id.*

138. SIPC, 421 U.S. at 421; Amtrak, 414 U.S. at 457.

139. 422 U.S. at 82.

140 Amtrak, 414 U.S. 453 (1974) and T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).

dence supporting an inference that the express remedies were exclusive. The Court reasoned that no such exclusionary intent could be inferred in *Cort,* because the statutory provision in issue had been in existence years before Congress provided civil remedies for other sections of the Act.[141]

That the implication of a private right of action be consistent with the Act's purpose is the third element of the *Cort* test. The Court's use of this factor demonstrates that a private cause of action can be implied only if it would in no way produce consequences that might undermine the underlying statutory scheme.[142] In *Cort,* the absence of even implicit legislative intent was interpreted as supporting the status quo in which state law controlled corporate-shareholder relations nearly exclusively.[143] Such a conclusion from a blank record supports denial of an implied right of action based on statutory provisions of long standing; for the absence of private actions is the status quo.

The final element in the *Cort* test is whether the "cause of action is one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law."[144] In limiting the intrusion of federal law into areas that should be controlled by state law the Court again appears to be motivated by a strong belief that the federal courts are courts of "limited jurisdiction".[145]

Critical Analysis of the Cort Factors

The long-standing requirement that the statute in question benefit the plaintiff seeking an implied cause of action by creating some right in him[146] is a proper consideration in the implication question. For the courts to grant parties not within the scope of a statute's protection a right to sue thereunder truly would be judicial legislation; such implied rights would circumvent the legislative intent, and could produce results directly contrary to the statute's purposes.[147] Courts often have recognized this limit to the doctrine of implication; as the Court noted in *Cort,* in cases in which implica-

141. 422 U.S. at 82 n.14.

142. *See* SIPC, 421 U.S. at 419.

143. 422 U.S. at 83-84.

144. *Id.* at 78.

145. *See* notes 111-15 *supra* & accompanying text.

146. *See* note 135 *supra* & accompanying text.

147. If in *Amtrak* the true beneficiaries of the Act clearly had been the railroads, it would have been improper for a federal court to have considered implication.

tion has been allowed there has been some evident statutory basis.[148] Although a plaintiff must be able to bring his proposed cause of action within the scope of a statute[149] before such a right of action will be implied, this factor alone will not justify implication.

Unlike this first element of the *Cort* test, the required search for some express or implied indication that Congress intended either to grant or to deny a private right of action is not sound. Reliance on this factor in denying implication usually entails one of two approaches: use of the maxim *expressio unius est exclusio alterius* or an attempt to find some evidence that Congress considered private rights of action.[150] Both of these approaches are inappropriate in considering implication. Doctrinally, implication is based on the presumption that Congress either did not consider the remedy or was unable to determine what remedies would be needed because the legislation encompassed areas not previously considered.[151] Consequently, examining a statute's history in searching for some specific indication is unwarranted; implied rights of action are founded on a presumption of congressional silence.

Before its revival in *Amtrak*, certain courts, either expressly or inferentially, had relied on the *expressio unius* maxim to deny implication of private rights of action.[152] Use of this rule of statutory construction, however, is unwise, especially in making such a com-

148. 422 U.S. at 78. *See* text accompanying notes 100-04 *supra*.

149. If the cause of action claimed is not within the scope of a statute, then the plaintiff must bring it within some constitutional provision conferring such a right. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946).

150. Both approaches were used in *Amtrak*. 414 U.S. at 457.

151. "The weaknesses of the court as a lawmaker . . . are less serious when conduct has already been proscribed by the legislature and only an additional remedy is sought. Making its decision in relation to an existing and functioning statute, the court may be in an even better position to assess the need for supplemental civil relief than was the legislature at the time of enactment." Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963). For another lucid statement of the theory behind implication, see Sierra Club v. Morton, 400 F. Supp. 610, 622 (N.D. Cal. 1975).

152. For instances in which courts expressly asserted the rule to defeat implication, see Howard v. Furst, 238 F.2d 790, 793 (2d Cir. 1956); Consolidated Freight-Ways, Inc. v. United Truck Lines, 216 F.2d 543, 545 (9th Cir. 1954); Western v. Hodgson, 359 F. Supp. 194, 201 (S.D.W. Va. 1973).

Other courts have used the rule to deny implication without mentioning the rule specifically. *See, e.g.*, T.I.M.E., Inc. v. United States, 359 U.S. 464, 471-72 (1959); Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301 (1943); Breitwieser v. KMS Industries, Inc., 467 F.2d 1391, 1394 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 893-94 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057, 1059 (W.D. La. 1972); Acorn Iron & Supply Co. v. Bethlehem Steel Co., 96 F. Supp. 481 (E.D. Pa. 1951).

plex determination as that of implied private rights of action. In cases in which implication is not an issue, the rule of *expressio unius* has been criticized and strictly limited. Given the nature of the legislative process, often resulting in compromise and ambiguous language, and given the complexity of statutes and schemes of regulation, such a factor, which focuses only on the express terms of the statute, is of limited use, especially if the statute has broad remedial purposes.[153] *Expressio unius* is a rule reflecting a conservative view of the scope and of the desirability of statutory law;[154] indeed, the only purpose ever served by applying the maxim is to restrict statutory provisions. Its use usually justifies a decision actually made because of a personal policy preference, and precludes consideration of all relevant factors. Apparently, a majority of courts would refuse to consider it controlling for the purpose of establishing legislative intent because the rule often establishes nothing but only raises further questions.[155]

Not only has the rule of *expressio unius* been rejected generally, but also, courts repeatedly have refused to apply the maxim in implication cases.[156] Whether defined liberally or strictly, implication requires the court to look beyond the express language of the statute.[157] As the *expressio unius* rationale includes a presumption

153. *See,* HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1173-74 (temp. ed. 1958).

154. The Supreme Court has recognized that rules of statutory construction such as this "come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." National Ass'n R.R. Passengers v. Central of Georgia Ry. Co., 475 F.2d 325, 332 (D.C. Cir. 1973), *quoting* SEC v. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943), *rev'd sub nom.* National R.R. Passenger Corp. v. National Ass'n R.R. Passengers, 414 U.S. 453 (1974) (Amtrak).

155. *See* HART & SACKS, *supra* note 153; Note, *Implying Civil Remedies From Federal Regulatory Statutes,* 77 HARV. L. REV. 285, 290-91 (1963).

156. *See, e.g.,* Stewart v. Travelers Corp., 503 F.2d 108, 110-12 (9th Cir. 1974); Fratt v. Robinson, 203 F.2d 627, 632 (9th Cir. 1953); Fagot v. Flintkote Co., 305 F. Supp. 407, 414 (E.D. La. 1969).

For examples of courts, which though denying implication in the specific case, recognized the validity of the doctrine, see Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1951); Remar v. Clayton Sec. Corp., 81 F. Supp. 1014 (D. Mass. 1949); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

157. *See* note 151 *supra.* For an example of a case denying implication although recognizing the doctrine as valid, see Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

against any such extension of statutes, it is inherently inimical to implication. No case adopting this rule as controlling ever has inferred a private right of action. In *Amtrak* this restrictive principle was used to raise an almost irrebutable presumption against implication.[158] Although such a severe construction was not applied in *Cort*, restrictive application of the principle was not expressly rejected. Relying on *Amtrak*, courts, therefore, may deny additional private enforcement actions in cases in which the statutes involved provide limited, express civil remedies.[159]

Admittedly, legislative intent as derived from the statutory language, legislative history, and overall statutory scheme do contribute to the implication decision. This contribution, however, does not require any search for specific intent relating to private rights of action. Although the Court in *Cort* rejected *Amtrak*'s incorrect approach,[160] it continued to argue that if the legislative history suggested an intent to deny private actions, this would control the implication issue.[161] The realities of the legislative process and the limits on the usefulness of legislative history, however, weigh against any such reliance on mere indications of congressional will.

Even if private rights of action were considered by Congress, in few cases would there be a clear indication of actual intent. Most bills receive such detailed consideration only before a committee or subcommittee; even an unambiguous statement by a witness or a committee member would be meager evidence on which to allow or to deny implication, for the stated intent could not be imputed to the other members of that committee. *Amtrak* exemplifies the difficulties in interpreting legislative history. Statements made by labor representatives, a letter from the Secretary of Transportation, and a subsequent language change all were relied on by the Supreme Court in searching for legislative intent.[162] Such factors, however, are inconclusive. Although the Secretary apparently opposed pri-

158. *See* notes 51-54 & 77 *supra* & accompanying text. The degree to which the Court relied on the *expressio unius* principle in *SIPC* is not entirely clear. *See* note 83 *supra* & accompanying text.

159. *See generally* Loss, *The SEC Proxy Rules In The Courts*, 73 HARV. L. REV. 1041, 1045-58 (1960).

In implying rights of action under the Securities Exchange Act of 1934 courts evidently reject the *expressio unius* approach, for the Act does contain provisions with express civil remedies (§§ 9(e), 16(b), and 18). *See, e.g.*, Fratt v. Robinson, 203 F.2d 627, 632 (9th Cir. 1953).

160. *See* notes 51-54 *supra* & accompanying text.

161. 422 U.S. at 82.

162. 414 U.S. at 460-61.

vate enforcement, it is as likely that the committee did not adopt his position, but rather, intended the wording of section 307 to be merely an authorization for the Attorney General to enforce the Act.[163] Similarly, in most cases legislative history is equally susceptible to such diverse interpretations.

The *Cort* test suffers from this reliance on legislative history even though in precluding implication it would use only evidence of an intent to deny a private right of action. For, as legislative history readily can be interpreted divergently, it is apt to be used to justify a decision actually based on the judge's personal policy views.[164] Conversely, however, any decision as to implication cannot ignore legislative intent. The proper application of legislative intent is enunciated in the third requirement in *Cort* that a private right of action may be implied only if it is consistent with the purposes of the statute. Indeed, this requirement is the Court's most significant addition to the law of implication.[165]

Because the *Borak-Wyandotte* test lacked any such factor,[166] overbroad implications of rights of action resulted.[167] Clearly, consideration of the compatibility of a private action with the underlying statutory scheme is a necessary limitation. For example, in *SIPC* enforcement by the customers of a broker-dealer would have qualified under each step of the *Borak* rationale; yet, as the Court demonstrated, such private actions would have contravened the purpose of the SIPA, leaving investors unprotected.[168] If courts were allowed to frustrate the legislative will through implication of private rights of action inconsistent with the statute's purposes, they would be circumventing the constitutional system of separation of powers by acting as both the lawmakers and the interpreters of the law.

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163. This possible interpretation of the legislative history was suggested by the court of appeals. 475 F.2d at 332. The Supreme Court dealt neither with this contention nor with the court of appeals' suggestion that if only the Attorney General could sue, then Amtrak could not sue for violations of the Act. 475 F.2d at 333.

164. *See* note 27 *supra* & cases cited therein.

165. Although this factor was first clearly established in recent cases it had been suggested by other courts. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967); Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 89 (1962); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 263 (1951) (Frankfurter, J., dissenting); Stewart v. Travelers Corp., 503 F.2d 108, 112 (9th Cir. 1974); Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 679 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973); Arnesen v. Raymond Lee Org., Inc., 333 F. Supp. 116, 118 (C.D. Cal. 1971).

166. *See* notes 25-31 *supra* & accompanying text.

167. For a discussion of this potential danger, see Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

168. 421 U.S. at 423.

When the statute in question has more than one purpose,[169] a private right of action to serve one of these purposes might be inconsistent with another of the statute's purposes. Such a situation mandates judicial restraint; if this conflict exists a court should refuse to inject itself into the legislative sphere, and thus should deny implication. The legislature then would be forced to reconcile the statutory goals and to provide for the desired and necessary remedies.

The final standard established by *Cort,* whether the cause of action was one usually controlled by state law, also had been suggested by other courts but never so specifically stated. These courts denied implication because available rights of action under state law provided the plaintiff an adequate remedy.[170] Reliance on this factor stemmed from several considerations: pragmatism, federalism, and the existing *Borak-Wyandotte* test.

As discussed earlier, many courts were dissatisfied with the liberal implication rationale, at least in part because it contributed to the increased workload and backlog in the federal courts.[171] Because the number of federal statutes and regulations were multiplying rapidly, an increasing number of parties seeking to have their rights vindicated under these statutes called for the right of private enforcement. Existing remedies under state law, which could be pursued in state courts, provided grounds for declining implication, at least in cases in which federal law had not completely superseded that of the state. Although not specifically raised by any court, in some cases courts did consider federalism.[172] Because federal courts operate only as courts of limited jurisdiction, they should not readily invade areas in which state issues and interests predominate. Moreover, state courts provide sufficient means for the vindication of rights properly governed by state law. Therefore, if the plaintiff had no express federal remedy it was entirely logical to relegate his claim to the state courts.

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169. This problem was suggested in *Amtrak.* It appeared equally as plausible that the Act was designed to provide the railroads with an efficient means of discontinuing uneconomical routes as that it was designed to protect the passengers.

170. *See, e.g.,* Colligan v. Activities Club of N.Y., 442 F.2d 686, 693 (2d Cir. 1971); Rogers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389, 1393 (5th Cir. 1970); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 991-92 (D. Conn. 1973); Beury v. Beury, 127 F. Supp. 786, 789-90 (S.D.W. Va. 1954).

171. *See* note 26 *supra* & cases cited therein.

172. This is the presumption underlying Rogers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389, 1393 (5th Cir. 1970).

Reliance on state remedies to deny implied private rights of action under federal statutes also evolved from the "adequacy of existing remedies" element of the *Borak-Wyandotte* test.[173] Although there the element was described in terms of the adequacy of criminal liability,[174] many courts, reasoning correctly, discerned that the important concern was that a private right of action not be implied if it was unnecessary.[175] Thus, if the plaintiff's injury could be remedied adequately under state law an implied federal right of action was inappropriate. Theoretically, implication is based upon the contention that because proscription of private rights of action would thwart the statutory goals, the courts must imply such actions because presumably, the legislature would not have passed an unworkable law.[176] Thus, the existence of sufficient state law protection destroys the basis for implication.

Although this element reflects legitimate concerns surrounding the issue of implication, it raises certain problems that courts have yet to resolve completely. For example, if constitutionally proper federal legislation preempts existing state law then the federal law will control and state remedies become irrelevant. But if the federal law does not completely abrogate state law and dominates in only certain areas, the question arises as to what effective state remedies remain. The Court in *Cort* recognized this problem and suggested an answer.[177] Distinguishing *Borak,* the Court noted that there committing plaintiff's action to state law might have frustrated the federal statute's purposes. In *Cort,* however, because the state remedy only allowed for recovery of damages after the fact, it did not limit the effect of corporate funds on federal elections. Under *Cort,* resolution of the problem must be determined by the nature of the state cause of action and by the purpose of the federal statute.[178] Because cases might exist in which it would be unclear whether state remedies interfere with the federal statute *Cort* suggests that even a possibility of interference is sufficient to allow the plaintiff

173. *See* note 22 *supra* & accompanying text.

174. As set forth in *Wyandotte* this requirement read: "that criminal liability was inadequate to ensure full effectiveness of the statute which Congress had intended." 389 U.S. at 202.

175. *See* note 170 *supra* & cases cited therein.

176. "Of course the statute must be fairly treated; and if a private action is necessary to carry it into effect, the legislature must be credited with the intent to provide such a remedy." Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317, 331 (1914).

177. 422 U.S. at 84-85.

178. *Id.*

an implied federal right of action rather than consigning him to the state's courts.[179]

Although considered indirectly via the state law factor the *Cort* standards for implication conspicuously lack one factor required for a proper test: necessity,[180] an essential element in many implication decisions since *Borak*.[181] Necessity or inadequacy of existing enforcement not only has precedential support as an important element in implication, it also is logically required. Without such a factor implication could at once be too broad or too strict. For although a plaintiff could fulfill all the other requirements of the *Cort* test, implication nonetheless might be improper, for example, if an administrative agency is adequately enforcing the statue.[182]

Thus, the Court's failure to include specifically the necessity formulation of *Borak-Wyandotte* might produce results inconsistent with the legislative purposes. This omission is remedied partially, however, by applying the state law and consistency factors. As such, except for the dubious element requiring a search for specific legislative intent as to private rights of action, the *Cort* test is theoretically sound. It remedies the unlimited *Borak-Wyandotte* test by including the restriction that implication be consistent with the legislative scheme; it rectifies the too narrow holding of *Amtrak* and *SIPC* by restricting the use of the *expressio unius* rule.

The Cort Standards in the Lower Federal Courts

The lower court decisions will demonstrate the true impact of the *Cort* test. Previous standards of implication have appeared functional when announced by the Supreme Court but have foundered as unmanageable in the daily activities of the lower federal courts. Thus any weaknesses inherent in the Court's new test will be reflected in its use in the district courts and circuit courts.

Since *Cort,* a majority of the courts confronting implication have

179. Discussing *Borak* the Court noted that if the plaintiff could not have a private action and the state afforded no remedy for misleading proxy use " 'the whole purpose of section 14(a) of the Securities Exchange Act of 1934 *might* be frustrated.' " *Id.* at 85, *quoting* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (emphasis supplied).

180. *See* note 176 *supra.*

181. *See, e.g.,* Stewart v. Travelers Corp., 503 F.2d 108, 113-14 (9th Cir. 1974); Gomez v. Florida State Empl. Serv., 417 F.2d 569, 576 (5th Cir. 1969); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 813 (D.D.C. 1971). This factor was stressed also by Justice Harlan in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 406 (1971) (Harlan, J., concurring).

182. *See, e.g.,* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989, 997-98 (D.C. Cir. 1973).

attempted to apply its standards,[183] though some have ignored them.[184] Several courts have noted the restrictive implications of the *Cort* standards;[185] others have stressed policy considerations similar to those prevalent in the Supreme Court's opinions.[186] Of the two potential problems noted above, only one appears serious. No court has had difficulty with examining the legislative intent. This element generally has been handled as suggested by the Court of Appeals for the Third Circuit in *Ash v. Cort*;[187] that is, it would be considered relevant or controlling only if a specific indication of legislative intent to preclude private rights of action was found.[188]

The problem that has arisen is the uncertainty generated by the omission of a necessity factor. Since *Cort,* implication of private rights of action has been both denied and allowed based on the lack of or presence of necessity to grant such a right of action.[189] Given the precedential and theoretical support for this factor,[190] lower courts apparently will not soon cease to consider this in their implication decisions. But beyond this, the lack of a clear policy regarding the position of "necessity" in the implication framework has engendered confusion with respect to one specific situation; when existing state remedies exist concurrently with a federal scheme of rights and remedies courts have disagreed as to the propriety of relegating plaintiffs to their state remedies or of allowing them to

183. *See, e.g.,* Polansky v. Trans World Airlines, Inc., 523 F.2d 332 (3d Cir. 1975); McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975); De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4 (N.D. Tex. 1976); Rauch v. United Instruments, Inc., 405 F. Supp. 442 (E.D. Pa. 1975); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975).

184. *See* Evans v. Kerbs & Co., 411 F. Supp. 616 (S.D.N.Y. 1976); Guernsey v. Rich Plan, 408 F. Supp. 582 (N.D. Ind. 1976).

185. Goldman v. First Fed. Sav. & L. Ass'n, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975).

186. Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 876 (N.D. Cal. 1975) (stressing large number of potential claims and subsequent burden on the federal courts).

187. 496 F.2d 416 (1974). *See* notes 87-89 *supra* & accompanying text.

188. *See, e.g.,* Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 336 (3d Cir. 1975); De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4, 6-7 (N.D. Tex. 1976); Rauch v. United Instruments, Inc., 405 F. Supp. 435, 439 (E.D. Pa. 1975); Sierra Club v. Morton, 400 F. Supp. 610, 623 (N.D. Cal. 1975).

189. *See, e.g.,* Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975) (denying implication); Rauch v. United Instruments, Inc., 405 F. Supp. 435, 440 (E.D. Pa. 1975) (allowing implication); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 876 (N.D. Cal. 1975); Sierra Club v. Morton, 400 F. Supp. 610, 625 (N.D. Cal. 1975) (allowing implication); Network Project v. Corporation for Pub. Broadcast., 398 F. Supp. 1332, 1338 (D.D.C. 1975).

190. *See* notes 180-82 *supra* & accompanying text.

bring federal actions.[191] Because the decision in each case will require examining the relations between the federal and state law, it is evident that there is little chance for consensus or for an unambiguous test. At best courts will have to consider the effect on the federal statute of limiting plaintiffs to their state remedies. Given the Supreme Court's present view, it probably will be necessary that the federal statute be rendered unenforceable unless private rights of action are allowed and that the statute clearly preempt the relevant state law.

CONCLUSION

The history of the doctrine of implication in the courts has been marked by confusion and conflict. A lack of consensus as to what are proper considerations in making the decision of whether to imply a private right of action is the basis of this problem. Those standards that have been suggested in the past have not provided proper limits; the lower federal courts have not had a single clear test to follow. In a series of recent cases culminating in *Cort,* the Supreme Court has attempted to establish standards to govern correctly the implication issue and settle some of the existing problems in this area. Although the new approach is conservative, the Court has succeeded in fashioning a workable test. With restraint in applying the legislative history element and with the added criterion of the necessity of private actions, this test should prove to be a useful and manageable guide for courts when they are faced with a plaintiff seeking access to the federal courts under an implied cause of action.

191. *Compare* Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975), *with* Rauch v. United Instruments, Inc., 405 F. Supp. 435, 440-42 (E.D. Pa. 1975).