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Many federal statutes outline the rights and duties of individuals. A number of these statutes, however, fail to indicate whether Congress intended for a private individual to enforce these rights and duties through the courts.¹ To compensate for this absence of statutory intent, courts have developed the doctrine of implied private rights of action.² The Supreme Court first held in 1916 that private rights of action may be implied from certain statutes.³ This doctrine gained in utility in the early 1960's when the Supreme Court held that lower courts may imply private actions as a remedy when necessary to supplement or to effect the congressional purpose behind a statute.⁴

Beginning in 1975, the doctrine underwent rapid evolution.⁵ In Cort v. Ash,⁶ the Court announced a four factor test for determining whether an implied private action exists under a silent statute:⁷

7. One must take care to differentiate between the question of who may enforce a statutory right and the question of who may enforce a right protected by the Constitution. In Davis v. Passman, 442 U.S. 228 (1979), the plaintiff brought a sex discrimination suit against her former employer, claiming a private right of action for damages for a violation of the due process clause of the fifth amendment. The federal court of appeals applied the four factor Cort test and concluded the plaintiff did not have an implied private right of action under the fifth amendment. Id. at 232.

The Supreme Court held that the use of the Cort test to determine the existence of a private right of action under the Constitution was erroneous. Id. at 241. The Court distinguished statutory rights and obligations established by Congress from the provisions of the Constitution. In determining whether an implied right of action exists under a statute, a
(1) whether the plaintiff is one of the class for whose especial benefit Congress enacted the statute; (2) whether the legislative history of the statute indicates any legislative intent, explicit or implicit, either to create or deny a remedy; (3) whether the underlying purposes of the legislative scheme are consistent with the implication of such a remedy for the plaintiff; (4) whether the cause of action is one traditionally relegated to state law.  

The Court employed Cort's analytical framework for several years, but soon renewed its efforts to restrict the implication of private rights of action. In a series of cases decided in 1979, the Supreme Court undertook a refinement of Cort. While not eliminating the four prong Cort analysis, the Court did determine that the second Cort question, whether Congress intended to create a private action, was "dispositive." A failure to find such intent would render the other questions irrelevant. Consequently, the Court elevated the consideration of a statute's legislative history to a position of paramount importance in the determination process. 

This rapid change in the doctrine has left the lower federal courts with an unsettled method of analysis. The restriction of the Cort analysis, without guidance as to how to determine intent,
gives little direction to lower courts in determining whether to imply a right of action.\textsuperscript{16}

Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.\textsuperscript{17} exemplifies the confusion of lower courts in determining when to imply a private right of action. Curran involved a claim of an implied right of action under the Commodity Exchange Act (CEA)\textsuperscript{18} in light of 1974 amendments to the act. Prior to 1974, courts granted plaintiffs an implied right of action under the CEA.\textsuperscript{19} The 1974 amendments, however, established the Commodity Futures Trading Commission (CFTC),\textsuperscript{20} and gave it the power to operate an administrative reparation procedure that enabled individual investors to recover for injuries resulting from violations of the CEA.\textsuperscript{21}

The United States Court of Appeals for the Sixth Circuit, in a divided decision in Curran, held that an implied private right of action under the CEA was still available to private investors.\textsuperscript{22} In arriving at its decision, the court used a hybrid analysis, involving both an examination of the legislative history of the amendments to discern intent and an application of the four factor Cort test.\textsuperscript{23} This Comment will analyze the circuit court's use of both an intent inquiry and a Cort analysis in light of recent Supreme Court pronouncements, and will submit that this dual analysis reflects the contradictory nature of the most recent Supreme Court decisions concerning implied rights of action.


\textsuperscript{17} 622 F.2d 216 (6th Cir. 1980).


\textsuperscript{19} For discussion of pre-1974 cases, see note 68 & accompanying text infra.


\textsuperscript{21} 7 U.S.C. §§ 18(a), (e) (1976). The reparation procedure also enabled investors to recover for violations of CFTC rules and various exchange rules. Id. § 18(a). For discussion of the legislative history of the CFTC Act, see notes 126-131 & accompanying text infra. The availability of private remedies through the CFTC raised the question of whether the implied right of action survived the 1974 amendments. See note 61 infra.

\textsuperscript{22} 622 F.2d at 236. In July 1980, the Second Circuit became the second federal court of appeals to rule on the survival question. Leist v. Simplot, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. July 8, 1980).

\textsuperscript{23} 622 F.2d at 233.
Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

In Curran, the plaintiffs, a married couple, invested in defendant Merrill Lynch's "Guided Commodities Account Program" in 1973. The program involved commodity trading accounts through which individuals invested in the futures commodity market under the defendant's supervision and guidance. Plaintiffs opened the first of several accounts with an investment of $100,000. Although at first the plaintiffs did realize substantial profits, their accounts began to decline in value. Plaintiff finally "cashed out" of the program with a claimed loss of $175,000 in April of 1974.

Plaintiffs' complaint alleged that the defendant induced them to open an account through misrepresentations and that the defendant subsequently mismanaged the account. Specifically, plaintiffs alleged violations by the defendant of sections 5 and 12(2) of the Securities Act of 1933 for failure to file a registration statement before making an offer and sale of a security. Plaintiffs further alleged fraudulent misrepresentations in violation of section 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

24. Id. at 219. A key question of fact in the case concerned the mechanical operation of the program. Merrill Lynch contended that, under the program, clients would deposit a certain amount of money in individual commodity trading accounts. Id. at 220. Defendant said that although its agents would recommend specific purchases and sales of commodities, the ultimate decision to act rested with the client. Id.

Contrary to the defendant's description of the program, plaintiffs claimed the defendant had represented the program as containing several unique elements: (1) a specific number of investors constituted the program and could not withdraw their investments for 18 months; (2) an individual trader controlled the operation of all the investments and in doing so could control market fluctuations; and (3) the combined buying power of the aggregate investments gave the trader buying power five times greater than an individual investment. For purposes of the appeal only, defendant conceded that the handling of plaintiffs' accounts was discretionary, with trading control being the responsibility of the defendant. Id.

For a discussion of commodities investment accounts in general, see Bromberg, Commodities Law and Securities Law-Overlaps and Preemptions, 1 J. Corp. L. 217 (1976).

25. The plaintiff at one point withdrew over $100,000. 622 F.2d at 220.

26. At the time the plaintiffs closed the accounts, their capital had fallen to approximately $6,000. Id.

27. Id.

28. Id. See note 24 supra.


section 410(a)(2) of the Michigan Uniform Securities Act,\textsuperscript{33} section 6b of the CEA,\textsuperscript{34} and the common law.\textsuperscript{35}

The district court granted partial summary judgment to the defendant, ruling that the accounts were not securities and that therefore the complained of actions did not fall within the purview of federal securities law.\textsuperscript{36} Consequently, the court dismissed plaintiffs' security claims for failure to state a cause of action.\textsuperscript{37} The court also stayed plaintiffs' fraud claims under the CEA because of a mandatory arbitration clause in plaintiffs' investment contract.\textsuperscript{38}

On appeal, the Sixth Circuit affirmed the dismissal of plaintiffs' claims involving federal securities law,\textsuperscript{39} but reversed and remanded the order staying plaintiffs' fraud claims under the CEA.\textsuperscript{40} The court determined that Regulation 180.3,\textsuperscript{41} adopted by the CFTC in 1976, should apply retroactively to invalidate the arbitration agreement in the investment contract.\textsuperscript{42} Remand of the case to the district court prompted the Sixth Circuit to examine sua sponte whether the district court had jurisdiction to entertain a claim based upon an implied right of action under the CEA.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{32} 17 C.F.R. § 240.10b-5 (1980).
\item \textsuperscript{33} Mich. Comp. Laws Ann. § 451.810 (1967).
\item \textsuperscript{34} 7 U.S.C. § 6b (1976).
\item \textsuperscript{35} 622 F.2d at 219.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 218.
\item \textsuperscript{39} The decision of the court concerning federal securities law is not the subject of this Comment.
\item \textsuperscript{40} 622 F.2d at 229.
\item \textsuperscript{41} 17 C.F.R. § 180.3 (1980). The regulation provides, \textit{inter alia}, that a customer must agree to arbitration voluntarily, \textit{but} no voluntary agreement occurred in Curran. 622 F.2d at 226-27.
\item \textsuperscript{42} For an expansive discussion on the retroactivity of Regulation 180.3, see Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F.2d 1174 (2d Cir. 1977).
\item \textsuperscript{43} 622 F.2d at 230-32. The court held that remand of the case to the district court necessitated an examination of the availability of an implied right of action under the CEA after the 1974 amendments because further delay would result from an adverse ruling by the district court on this issue. \textit{Id.} at 230.
\end{itemize}

The court recognized that its review of an interlocutory order normally should involve only "the narrow question of whether the district court abused its discretion and \[that it should\] refrain from intruding into the merits of the case." \textit{Id.} at 230 n.17 (citing Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (1977), cert. denied, 436 U.S. 946 (1978)). The court construed this principle, however, to be a rule of orderly judicial administration and not to be a limit on jurisdictional power. According to the court, this jurisdictional power permits
The court focused its initial inquiry on the legislative history of the 1974 amendments. Finding no evidence of an express congressional intent to extinguish the implied right of action, the court then considered the congressional purpose behind the amendments.

Prior to 1974, self-regulation by the commodity exchanges chiefly served to enforce the CEA in tandem with enforcement by implied private rights of action. By 1974, however, the self-enforcement system began to break down. This weakening of the self-regulatory system, the court found, prompted Congress to enact a more comprehensive regulatory scheme. The court further found that Congress had intended through the amendments to end jurisdictional disputes between the Securities Exchange Commission (SEC) and the Commodities Exchange Commission (CEC) as well as to ensure the CFTC's integrity as an administrative body.

Moreover, the court emphasized that the remarks of the sponsors of the amendments indicated that Congress believed the CFTC would not interfere with implied private actions under the CEA. Noted also by the court was the language of the 1974 amendments that "'nothing in this section shall supersede or limit the jurisdiction conferred on the courts. . . . '" Finally, the court indicated that the CFTC itself never regarded the amendments as abolishing or precluding implied private actions. The court thus

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the consideration of those "aspects of [an] order which would not be independently reviewable by interlocutory appeal." Id. See also Mannsbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979).

The events that formed the basis of plaintiff's complaint occurred prior to the 1974 amendments to the CEA, although plaintiff had filed the claim in 1976. Pre-1974 cases permitted an implied right of action under the CEA. See note 68 & accompanying text infra. The court in Curran, however, determined that "'a court is to apply the law in effect at the time it renders its decision.'" 622 F.2d at 230, n.19 (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)). The court thus determined that survival of an implied right of action after the 1974 amendments would be an issue on remand.

46. 622 F.2d at 231-32.
47. Id. at 232.
48. Id. For a discussion of the remarks of the sponsors of the 1974 amendments, see notes 126-130 & accompanying text infra.
50. 622 F.2d at 232. See 41 Fed. Reg. 18,471 (1976). The court in Curran noted, however,
concluded that "Congress intended to extend further protection . . . , rather than to extinguish existing forms of protection."\textsuperscript{51}

Despite its affirmative findings on congressional intent, the court engaged in further analysis, using the \textit{Cort} four factor test.\textsuperscript{52} First, the plaintiffs, as private commodities investors, were members of the class for whose benefit Congress had enacted the statute.\textsuperscript{53} Clearly, Congress intended to protect individuals such as the plaintiffs from the hardships of market manipulation.\textsuperscript{54} Second, the legislative history of the amendments demonstrated congressional awareness of implied private actions under the CEA and Congress's desire to preserve them.\textsuperscript{55} Third, implied private actions stood in a position of compatibility with the underlying legislative scheme.\textsuperscript{56} Fourth, the implication of a private right of action would not infringe on the states because commodities regulation is a matter of federal, and not state, concern.\textsuperscript{57} The court therefore concluded that the action could be implied under the requirements of \textit{Cort}.\textsuperscript{58}

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\textsuperscript{51} 622 F.2d at 232.

\textsuperscript{52} \textit{Id.} at 233.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{See, e.g.,} 120 \textit{Cong. Rec.} 30,466 (remarks of Sen. Dole); \textit{id.} at 34,998-99 (remarks of Sen. Clark).

\textsuperscript{55} 622 F.2d at 234.

\textsuperscript{56} \textit{Id.} at 234-35. The court based its conclusion on compatibility mostly on CFTC regulations intended to harmonize the administrative reparations procedure with implied actions. \textit{Id.} at 235. \textit{But see note 50 supra.}

\textsuperscript{57} 622 F.2d at 235.

\textsuperscript{58} The court went on to determine that the doctrine of primary administrative jurisdiction would not bar the present action. \textit{Id.} at 235-36. Generally, the doctrine of primary jurisdiction requires that a party first resort to an administrative agency before he may sue on an issue within the competency of that agency. \textit{See Armour \& Co. v. Alton R.R.}, 312 U.S. 195 (1941); Convisser, \textit{Primary Jurisdiction: The Rule and its Rationalizations}, 65 \textit{Yale L.J.} 315 (1956).

In \textit{Curran}, the court declined to apply the doctrine on the ground that the preservation of an implied right of action would not interfere with the rulemaking power of the CFTC and would not impinge on the orderly development of precedent by the agency. \textit{Id.} at 235-36. To reach this decision, the court focused mainly on the need for the special expertise of the CFTC. This examination centered on two prior cases concerning the Commodity Exchange Commission and requests by that agency for stays of private actions. Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289
Judge Phillips dissented on the ground that Congress failed to specify its intent to continue to allow private actions despite the creation of an administrative reparations procedure. He asserted that recent decisions by the Supreme Court compelled a finding of express statutory intent in the language of the statute before a private right of action could be granted.

The Sixth Circuit's decision in Curran reflects the uncertainty that has plagued other federal courts. This uncertainty centers on the method of analysis that courts should apply to determine whether an implied right of action exists under a silent statute.

**IMPLIED RIGHTS OF ACTION**

The Supreme Court first held that certain statutes impliedly au-
thorize private rights of action in *Texas & Pacific Railway Co. v. Rigsby.* In outlining the requirement for implying an action, the Court in *Rigsby* stated: "A disregard of the command of [a] 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 . . . damages . . . is implied . . . ." For nearly fifty years after *Rigsby,* the Supreme Court implied a private cause of action from only one statute. The implied right of action doctrine reemerged in the early 1960's when, in *J.I. Case Co. v. Borak,* the Court developed a two prong analysis for determining whether a silent statute implied a private right of action.

The first prong required a determination of whether the plaintiff was a member of the class meant to be benefitted by the statute. The second prong involved a determination of whether the implication of a remedy was necessary to effect the congressional purpose behind the statute. Using the two prong analysis, federal courts in the late 1960's determined that an implied private right of action existed under the CEA.


63. 241 U.S. at 39. Justice Powell, dissenting in *Cannon v. University of Chicago,* 441 U.S. 677 (1979), argued that *Rigsby* was not truly an implied right of action case. Rather, *Rigsby* was a tort action removed to federal court, and the Court only used the federal statute to define the relevant standard of care under the federal common law doctrine of *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842). 441 U.S. at 732 (Powell, J., dissenting).


65. 377 U.S. 426 (1964). *Borak* involved a stockholder who charged his company's management with effecting a merger through the use of false proxy statements. *Id.* at 429. He claimed a right to a private action for damages under a section of the federal securities law that provided only a criminal penalty. *Id.* at 432.

66. *Id.* at 429.

67. The Court found that one of the chief purposes of the statute was the protection of private investors. This purpose, said the Court, implied the availability of judicial relief to achieve the result desired by Congress. *Id.* at 432. Moreover, the Court determined that private actions can augment the administrative functions of regulatory agencies and that courts "should be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. For further discussion of the *Borak* case, see O'Neil, *Public Regulation and Private Rights of Action,* 52 CALIF. L. REV. 231 (1964); Note, *Private Rights of Action for Commodity Futures Investors,* 55 B.U. L. REV. 804 (1975).

68. See, e.g., *Booth v. Peavey Co. Commodity Serv.,* 430 F.2d 132 (8th Cir. 1970); Arnold
Although several decisions indicated that the Court intended to abandon the two prong test,\(^6\) the actual reformulation did not occur until the landmark case of *Cort v. Ash*.\(^7\) In *Cort*, the plaintiff, a stockholder in Bethlehem Steel Corporation, brought a private action for damages against the president of the corporation for political advertisements paid for by Bethlehem. The plaintiff based his claim on the Federal Election Campaign Act,\(^7\) which provided only a criminal penalty for unauthorized contributions to political campaigns by corporations. In determining whether to imply an action, the Court brought together prior case law to create the four factor test for determining whether an implied right of action existed under a silent statute: (1) whether plaintiff is a member of the class to be benefitted; (2) whether the legislature intended a remedy; (3) whether an implied remedy is consistent with the purpose of the legislation; and (4) whether the area traditionally has been relegated to state law.\(^8\)

Following *Cort*, the Supreme Court employed the four factor test in several decisions.\(^9\) In 1979, however, the Court issued three

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\(^6\) See, e.g., Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453 (1974). These two cases presaged the emergence of legislative intent as a key aspect in implying rights of action. For example, in *Amtrak*, the Court applied both a rule of statutory construction, namely that the expression of a remedy excludes other remedies, and an examination of legislative history to determine that it could not infer a private right of action. 414 U.S. at 458-65.

\(^7\) See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). In *Pueblo*, the plaintiff, an American Indian, brought an action for damages against her tribe based on the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1976). Although the Court found that the plaintiff was a member of the class Congress sought to benefit, the Court held that her action failed to pass the *Cort* test. 436 U.S. at 64.
opinions that called into question the continued validity of the Cort analysis. The first decision, *Cannon v. University of Chicago*,\(^7\) declared that an implied private right of action was available under Title IX of the Education Amendments of 1972.\(^7\)

In *Cannon*, the Court undertook a detailed analysis of the four Cort factors,\(^7\) and concluded that all four factors supported implication of a private action.\(^7\) The last paragraph of the opinion, however, indicated uneasiness with the doctrine of implied rights of action\(^7\) and revealed the Court's preference for statutory language that provides an express remedy.\(^7\) Although noting that in certain "limited circumstances" the failure of Congress to provide express language is not inconsistent with the implication of a private remedy,\(^8\) the Court concluded by stating that Title IX was an "atypical situation" in that it fulfilled all four Cort factors.\(^9\)

The restraining spirit of *Cannon* appeared again in the Court's opinion in *Touche Ross & Co. v. Redington*.\(^8\) In *Redington*, the Court held that an investment broker's customers did not have an implied right of action for damages against the firm's accountants under federal securities law.\(^8\)

The clear intent of Congress to prevent judicial intrusions into tribal sovereignty precluded the implication of an implied right of action. *Id.* at 60.

In *Piper*, the plaintiff, a large corporation, attempted to buy out the defendant, a smaller competitor, through stock purchases. 430 U.S. at 4. When plaintiff's efforts failed, it brought suit alleging violations of federal securities law. *Id.* at 9. The Court applied the Cort analysis and concluded that the plaintiff had failed to meet any of the four requirements. *Id.* at 37. See Pitt, *Standing to Sue Under the Williams Act after Chris-Craft: A Leaky Ship on Troubled Waters*, 34 Bus. Law. 117 (1978).

\(^7\) 441 U.S. 677 (1979).
\(^7\) Id. at 709.
\(^7\) 441 U.S. at 689-709.
\(^7\) Id. at 717.
\(^7\) Id. at 717. Some commentators assert that the last paragraph in *Cannon* may have been added to induce Justices Stewart and Rehnquist to concur in the Court's decision. See Steinberg, *Implied Private Rights of Action under Federal Law*, 55 Notre Dame Law. 33, 38 (1979). In his concurrence, Justice Rehnquist admonished Congress to express its intentions more clearly, and stated "that the ball, so to speak, may well now be in [Congress'] court." 441 U.S. at 718 (Rehnquist, J., concurring).

\(^7\) 441 U.S. at 717.
\(^8\) Id.
\(^9\) Id.
\(^8\) 442 U.S. 560 (1979).
\(^8\) Specifically, the plaintiff in *Redington* claimed a private right of action under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q (1976). This section requires an
In response to the plaintiff's argument that an examination of all four Cort factors would result in a finding in favor of implication, the Court stated that the four Cort factors did not carry equal weight in the analysis. Rather, the inquiry should focus on whether Congress intended to create, either expressly or by implication, a private cause of action. Unless a plaintiff can demonstrate that he is one of the class sought to be benefitted by a statute and that the history of the statute reflects unambiguous congressional intent to grant a private right of action, the courts must not imply one.

In essence, the Court interposed the first two prongs of Cort as threshold criteria requiring affirmative answers before other factors undergo consideration. Furthermore, the Court refined those two prongs. Whether the plaintiff was a member of an especial class for whose benefit the statute was enacted now became an inquiry into whether the statute created a federal right in favor of a private party or prohibited a certain mode of conduct. As for determining legislative intent, the Court stated that implication is less appropriate when a silent statute is contained within an act in which other sections provide express private remedies. When Congress desired to create a private remedy, "it knew how to do so and did so expressly."

investment firm to file annual reports of the firm's financial condition with the SEC. As a receiver presiding over the liquidation of an investment firm, the plaintiff alleged that defendant accountants violated § 17(a) by performing an improper audit of the investment firm's records. 442 U.S. at 565-66. The plaintiff claimed that the improper audit breached a duty the defendant owed the plaintiff and the firm's customers. Id.

84. 442 U.S. at 575.
85. Id. The first three factors of the Cort analysis, said the Court, constitute the factors traditionally relied upon in determining legislative intent. Id. at 575-76.
86. Id.
87. In Redington, consistency of the implied right of action with the statutory scheme, the third Cort factor, did not receive equal consideration with the first two factors. Id. at 577-78. The Court's primary concern focused on the legislative history of the statute and whether a certain class of plaintiffs were benefitted. Id. at 576; see Underwood, supra note 16; Note, Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?, 51 U. Colo. L. Rev. 355 (1980).
88. 442 U.S. at 569. In this case, the Court held, § 17 simply required the filing of reports with the SEC; the section set no standards and established no duties to private parties. Id.
90. 442 U.S. at 572. For a discussion of the conflict between this principle and the Court's
The Court reiterated its emphasis on a threshold inquiry into the question of congressional intent in Transamerica Mortgage Advisors, Inc. v. Lewis. In Lewis, the plaintiff, a shareholder in a mortgage trust association, brought a derivative action against the trust and several investment firms that served as advisors to the trust. He claimed the defendants committed fraud and breached fiduciary duties owed to shareholders in violation of section 206 of the Investment Advisors Act. The plaintiffs reasserted the argument used in Redington that the Court could not confine its analysis to an examination of intent, but also must consider the utility of the private remedy desired as well as whether the area is one traditionally relegated to state law. This argument met with flat rejection because the Court again focused on the first two Cort factors. Although conceding that section 206 proscribed unlawful conduct, thus crossing the first hurdle of creating an especial class to benefit, the Court held that legislative history and statutory construction evidenced no intent by Congress to create a private right of action. "The dispositive question remains whether Congress intended to create any such [private action]. Having answered that question in the negative, [the Court's] inquiry is at an end."

In his dissent, Justice White asserted that the Court's refusal to apply the Cort test ended the analysis in Lewis prematurely. He argued that all four prongs of Cort are the criteria to discern congressional intent and that the Court may reach no conclusions on intent until it examines each of the four factors.

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92. Id. at 13.
94. 444 U.S. at 23.
95. Id. at 23-24.
96. Id. at 19-22.
97. Id. at 24.
98. Id. at 26-27 (White, J., dissenting).
99. Id. Justice White concluded that an implied right of action existed under the Investment Advisors Act. Id. at 36. Also contrary to the majority, White believed that the statutory language evidenced congressional intent to create a private action. Id. at 28-29.
THE INTERPRETATION OF Redington AND Lewis BY THE FEDERAL COURTS

The decisions of Lewis and Redington have divided the circuits in the method of analysis they employ to determine whether a statute supports an implied right of action. The First Circuit has adopted an analysis similar to the analysis used in Curran.100 The Fifth Circuit has concluded that it would use Cort, but that the ultimate duty is to determine congressional intent.101 According to that court, "even if satisfied that some of the Cort factors supported implying such a right, [the court] could not do so if unconvinced that Congress intended such a remedy."102 In a post-Redington case, the Seventh Circuit said that the central inquiry is congressional intent, but proceeded to apply the Cort test.103 The Ninth Circuit, however, has disregarded Cort entirely and has engaged in a new one-step analysis that examines only the legislative history of the subject statute.104

The Sixth Circuit has been inconsistent in its application of the Redington and Lewis decisions. In Ryan v. Ohio Edison Co.,105 the court held that an implied right of action did not exist under the

100. Falzarano v. United States, 607 F.2d 509 (1st Cir. 1979). Plaintiff claimed an implied right of action under the National Housing Act, 12 U.S.C. §§ 1701-1750g (1976). He alleged that the defendants, several federal agencies, violated the provisions of the Act that concern mortgage rates. 607 F.2d at 509. Although the court found no statutory language that either created federal rights in favor of private parties or proscribed behavior, as in Redington, the court still proceeded to apply the Cort test. Id. at 509-10. The Cort test also yielded a negative result. Id. at 510.

101. Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980). In Rogers, the plaintiff, a handicapped individual, brought suit against his former employer, a federal contractor, under § 503 of the Rehabilitation Act, 29 U.S.C. § 793 (1976). The Act requires contractors performing work for the federal government to take steps to employ qualified handicapped persons. The court refused to imply an action under § 793. 611 F.2d at 1085.

102. 611 F.2d at 1078 (citing Lewis and Redington).


104. Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980). In Jablon, the plaintiff, a private investor, sought to base her action against defendant, a stock broker, upon both SEC rules and the rules of the New York Stock Exchange. 614 F.2d at 678. The Ninth Circuit recognized that Lewis and Redington reflect a restrictive approach to the doctrine of implied rights of action. Id. at 679. For this reason, the court considered only the question of congressional intent and did not even cite Cort in its opinion.

105. 611 F.2d 1170 (6th Cir. 1979).
Bankruptcy Act. Following the Redington analysis, the court held that when Congress confers private remedies in certain sections of an act and omits private remedies from other sections, a finding of an implied right of action is precluded under the silent sections. In Chumney v. Nixon, however, the court, in holding that an implied right of action was available under the Federal Aviation Act, used the intent inquiry only as one factor of the Cort test, and placed equal emphasis on the other three factors.

As stated previously, the question of the continued existence of an implied right of action under the CEA has divided the lower federal courts. In the recent decision of Leist v. Simplot, the Second Circuit became the second federal court of appeals to rule expressly on the survival of the private right of action after the 1974 amendments to the CEA. The court conducted an analysis similar to that used in Curran, declaring that Redington gave the question of congressional intent controlling weight, yet still ap-

106. Id. at 1177.
107. See notes 82-90 & accompanying text supra.
108. 611 F.2d at 1177. Although the court did engage in a right of action analysis, what the plaintiffs actually were seeking was the inference of a substantive right. See C. Wright, Law of Federal Courts § 17, at 67 (3d. ed. 1976).
109. 615 F.2d 389 (6th Cir. 1980).
111. 615 F.2d at 394. The court stated that "[i]n . . . recent cases (including Redington and Lewis) the Supreme Court has repeatedly followed and emphasized the Cort test." Id.
112. See note 61 supra.
114. In a recent decision, however, the United States Court of Appeals for the Fifth Circuit held that an implied right of action under the CEA no longer exists. Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980). The court's analysis focused on the question of congressional intent as the "dispositive inquiry" under Redington and Lewis. Id. at 781, 782. Although the court considered the same legislative history that the court in Curran said reflected favorable legislative intent, the Fifth Circuit determined that these "few fleeting references" constituted insufficient grounds for holding that an implied right of action survived the 1974 amendments. Id. at 786.

In Ames v. Merrill, Lynch, Pierce, Fenner & Smith, 567 F.2d 1174 (2d Cir. 1977), and Case & Co. v. Board of Trade of Chicago, 523 F.2d 355 (7th Cir. 1975), the courts presumed the existence of a private remedy under the CEA.

115. 2 Comm. Fut. L. Rep. ¶ 21,051, at 24,177. In an interesting twist on the Redington approach that if Congress wished to created a remedy, it knew how to do so expressly, the court in Simplot posited that Congress knew of prior decisions implying a remedy, and therefore, if Congress wished to deny the implied right of action, it ought to have said so expressly. Id. at 24,173, 24,181.
plying the four factor *Cort* test.\textsuperscript{116} In accord with *Curran*, the Second Circuit concluded that a private action should be implied.\textsuperscript{117}

A district court decision on which both *Curran* and *Simplot* relied was *Smith v. Groover*.\textsuperscript{118} In *Smith*, the court concentrated its preliminary analysis on the legislative history of the amendments.\textsuperscript{119} Based on this examination, the court suggested that Congress had not intended to eliminate the implied right of action.\textsuperscript{120} The court then turned to the *Cort* analysis and found that each factor generated a positive response.\textsuperscript{121}

**Curran in Light of Redington and Lewis**

In *Curran*, the court felt compelled to subject the plaintiffs' claim to the *Cort* test.\textsuperscript{122} Prior to its *Cort* analysis, however, the court conducted a thorough inquiry into congressional intent.\textsuperscript{123} Although the Sixth Circuit never expressly addressed the recent modifications of *Cort*, it took care to make its analysis fall within the parameters of *Redington* and *Lewis*.\textsuperscript{124}

The opinions in *Lewis* and *Redington* placed controlling weight on congressional intent as ascertained from the legislative history of the subject statute.\textsuperscript{125} In regard to the CEA, an intent inquiry yields a favorable finding. The congressional sponsors of the 1974 amendments said on several occasions that the powers given to the CFTC were "not intended to interfere with the courts in any

\textsuperscript{116} Id. at 24,173.

\textsuperscript{117} Id. at 24,189.

\textsuperscript{118} 468 F. Supp. 105 (N.D. Ill. 1979).

\textsuperscript{119} Id. at 108-12. Unlike the plaintiffs in *Curran*, the plaintiffs in *Smith* represented the buyers and sellers of soybean futures at the Chicago Board of Trade. *Id.* at 107. They alleged that the defendants, commodities brokers, engaged in price manipulation in violation of the CEA. *Id.*; see 7 U.S.C. §§ 1-13 (1976).

\textsuperscript{120} 468 F. Supp. at 111-12.

\textsuperscript{121} *Id.* at 112-15.

\textsuperscript{122} 622 F.2d 216, 233 (6th Cir. 1980).

\textsuperscript{123} Id. at 231-32.

\textsuperscript{124} This concern would explain the court's detailed inquiry into the legislative history of the amendments. *Id.* at 231-32. The same concern motivated the Second Circuit to conduct an even greater inquiry in *Leist v. Simplot* 2 COMM. FUT. L. REP. ¶ 21,051, at 24,177 (2d Cir. 1980).

Speaking on behalf of the Senate Committee on Agriculture and Forestry, Senator Talmadge said the amendments hopefully would lighten the burden on the courts, but simultaneously not infringe on their jurisdiction. The intention not to disturb the jurisdiction of the courts found expression in the amendment language that “[n]othing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States or any state.”

Nonetheless, one should also note negative expressions of congressional intent. In 1973, Congress failed to approve three proposed amendments to the CEA that contained provisions for private damage remedies for aggrieved investors. As correctly stated by the court in Smith v. Groover, however, these amendments provided treble damages for CEA violations and are therefore distinguishable from the 1974 amendments. Under the analysis formulated in Redington and Lewis, “what must ultimately be determined is whether Congress intended to create the private remedy asserted.” With congressional intent the ultimate issue, the Sixth Circuit’s application of the four factor Cort test after a positive finding of intent appears superfluous. The first two Cort factors, benefitted class and legislative intent, comprise the new Redington-Lewis analysis. The third factor, consistency with purpose, from the old Borak approach, possibly is now unimportant. In a recent decision, Justice Rehnquist appended a footnote to his dissent declaring that the Court’s decisions in Redington and Lewis destroyed the remnants of the Borak two prong test. Likewise, the final factor, whether the area is traditionally relegated to state law, should be immaterial in the face of a finding of

127. Id.
132. 622 F.2d at 233-35.
133. See notes 87-90 & accompanying text supra.
134. See note 72 & accompanying text supra.
Additional analysis using Cort, however, is reconcilable with the Redington-Lewis analysis. The contradictions between the Supreme Court's decisions in Cannon and Redington necessarily generate further analysis of a questionable right of action. In Redington, the Court declared that it would be less likely to imply a private action from a statute when other sections of the same statutory scheme contain express private remedies. In Cannon, however, the Court held that the presence of other sections of a complicated statutory scheme to provide express remedies should not prove fatal to the implication of a private remedy from a silent section. Moreover, in Cannon the Court said that only an explicit congressional intent to deny a cause of action would be controlling. In Redington, however, the Court declared that when a statute is silent or ambiguous as to congressional intent, a prospective plaintiff cannot rely on the general remedial character of the statute to establish a cause of action.

The divergent Redington and Cannon opinions placed the court in Curran in a difficult position. An examination of congressional intent by the court produced a finding favorable to an implied right of action; however, the court based this finding in part upon evidence that the purpose of the 1974 amendments was essentially remedial. In addition, other sections of the CEA statutory scheme provided private remedies through the use of an administrative reparations procedure. Conceivably, different results would obtain, depending on whether a court focused on Cannon or Redington as a mode of analysis. Using the four prong Cort test, the court buttressed a favorable, yet less than definitive finding of congressional intent with evidence of consistency with underlying purposes and of noninterference with state regula-

136. If Congress intends to imply a private cause of action, and it has that power, whether states have legislated in the area is of no moment. Congress may preempt the area.
139. Id. at 694.
140. 442 U.S. at 578.
141. See notes 126-27 & accompanying text supra.
142. See notes 45-46 & accompanying text supra.
perhaps believing that this aggregate result would offset the negative findings, under Redington, of remedial purpose and existence of other remedies.

CONCLUSION

A federal court potentially can select from one of three methods of analysis in order to determine whether a silent statute supports an implied right of action. The Redington-Lewis method centers on a finding of favorable legislative intent, both from the face of the statute and from the legislative history. Under this approach, the problem of reconciliation with Cannon still remains.\(^\text{146}\)

The second method, the one chosen by the court in Curran, augments the Redington focus on intent with the Cort analysis.\(^\text{146}\) When a court reaches the conclusion that it can garner an implied cause of action explicitly or implicitly from the legislative history, then it weighs the Cort test against any negative findings produced from the Redington inquiry.\(^\text{147}\)

Finally, a court may select the analytical framework discussed by Justice White in his dissent in Lewis.\(^\text{148}\) Justice White asserted that the Cort test as an entirety determines the presence of legislative intent.\(^\text{149}\) Although the second prong of Cort speaks directly to the question of intent, the other three prongs also constitute "criteria through which . . . intent can be discerned."\(^\text{150}\) Adoption of this mode of analysis by the federal courts would do much to clarify the doctrine of implied rights of action.\(^\text{151}\) First, this analysis would provide a methodical approach to the problem of ascertaining congressional intent. Second, the inquiry into whether the pro-

\(^{144}\) 622 F.2d 216, 234-35 (6th Cir. 1980).
\(^{145}\) See notes 137-40 & accompanying text supra.
\(^{146}\) See notes 141-44 & accompanying text supra.
\(^{147}\) Of course, the possibility exists of no negative findings under Redington, making the balancing process unnecessary. Even the "atypical" statute referred to in Cannon, see notes 75-81 & accompanying text supra, however, may come into conflict with some of the principles enunciated in Redington. See notes 137-44 & accompanying text supra.
\(^{149}\) Id. at 27.
\(^{150}\) Id. (quoting Davis v. Passman, 442 U.S. 228, 241 (1979)).
\(^{151}\) Although Justice White's method of analysis seems new in light of the Lewis and Redington decisions, the analysis constitutes only an updated version of the Cort four factor test.
posed cause of action is consistent with the congressional purpose behind the statute would answer the questions of whether a statute is remedial in character or whether a statutory scheme provides express remedies. Most importantly, however, the analysis would provide a uniform test that all federal courts could apply.

The court in Curran arrived at the proper result when it concluded that an implied right of action remains available under the CEA. The legislative history of the 1974 amendments provided clear evidence that Congress intended to preserve the implied private remedy. This evidence is certainly sufficient to satisfy the method of analysis established by the Supreme Court in the cases of Touche Ross & Co. v. Redington and Transamerica Mortgage Advisors, Inc. v. Lewis.

J. R. H.

152. 444 U.S. at 25 (White, J., dissenting).