University of Richmond Law Review

Volume 14 | Issue 3 Article 6

1980

Private Causes of Action from Federal Statutes: A Strict Standard for Implication by Sole Reliance on Legislative Intent

William Francis Drewry Gallalee
University of Richmond

PRIVATE CAUSES OF ACTION FROM FEDERAL STATUTES: A STRICT STANDARD FOR IMPLICATION BY SOLE RELIANCE ON LEGISLATIVE INTENT

I. INTRODUCTION

The implication doctrine allows a federal court to create a private cause of action from a federal statute that does not expressly provide for a private remedy. In *Cort v. Ash*,[1] the Supreme Court articulated a four factor test to determine when this doctrine should be utilized. This comment will provide a brief history of the implication doctrine and of the major Supreme Court decisions that culminated in the *Cort* test.[2] Relevant Supreme Court decisions after *Cort*, will then be examined to reveal a new, more restrictive approach to implication. Finally, reasons will be advanced that justify this stricter approach.

II. HISTORY OF THE IMPLICATION DOCTRINE THROUGH *Cort v. Ash*

"The origin of implied private causes of actions in the federal courts is said to date back to *Texas & Pacific R. Co. v. Rigsby*."[3] In holding that a private action may lie for a violation of the Federal Safety Appliance Act,[4] the Supreme Court reasoned that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ."[5] Since virtually every federal regulatory statute is enacted to protect special classes of persons, the *Rigsby* approach could justify implied private actions for nearly every penal statute.[6] A more complex and scrutinizing approach was needed.

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1. 422 U.S. 66 (1975).

2. For a detailed discussion of the implication doctrine prior to the Supreme Court's decision in *Cort*, *see* Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

3. Cannon v. University of Chicago, 99 S. Ct. 1946, 1975 (1979). The principle of judicially implied causes of action can be traced to the common law. In Couch v. Steel, 118 Eng. Rep. 1193 (K.B. 1854), a violation of a criminal statute requiring a shipowner to maintain a supply of medicines on board a vessel was found to give rise to a cause of action to a sailor who suffered personal injury from the breach of that statute.

4. Act of April 14, 1910, ch. 160, §§ 1-6, 36 Stat. 298, *as amended*, 45 U.S.C. §§ 11-16 (1976). Specifically, plaintiff's suit alleged violation of § 2 of the Act, requiring secure handholds on all railroad cars equipped with ladders. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 37 (1916).

5. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).

6. *See, e.g.*, Comment, *Implied Private Rights of Action—The Cort v. Ash Test—Interaction of "Especial Beneficiary" and Legislative Intent*, 24 WAYNE L. REV. 1173, 1174 (1978). *But see* Cannon v. University of Chicago, 99 S. Ct. 1946, 1976 (1979) (Powell, J., dissenting). Justice Powell argued that "[t]he practice of judicial reference to legisla-

The necessity of narrowing the test for implication frequently caused the Supreme Court to refuse to imply private causes of action from federal statutes.[7] Even when the statute was arguably for the benefit of a special class comprising the plaintiff, the Court refused to imply a private action if Congress specified other means of enforcing such duties.[8] However, a break in this pattern of restrictiveness occurred in the Court's decision of *J.I. Case Co. v. Borak*.[9] Finding an implied cause of action under section 14(a) of the Securities Exchange Act of 1934,[10] the Court held that private actions could be implied as a "necessary supplement" to a Congress-created mechanism for enforcing the statute.[11] This is because "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[12] The language suggests that implication provides those actions which Congress could not anticipate as necessary for its purposes, rather than those which Congress intended, but for which it did not specifically provide.[13] *Borak* came to represent a liberal application of the implication doctrine, one in which the judiciary's role was active and unrestrained by legislative authority, though justified by basic legislative policy.[14]

The Court's 1974 decision of *National Railroad Passenger Corp. v. Na-*

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tively determined standards of care was a common expedient to establish negligence . . . . *Rigsby* did nothing more than follow this practice and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress." *Id.*

7. *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647 (1963); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943). In all these cases, the Court focused primarily on the availability of means other than a private action to enforce the statutory duty at issue.

8. *See* Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300-01 (1943).

9. 377 U.S. 426 (1964).

10. 15 U.S.C. § 78 n(a) (1976). Specifically, the Court granted a private cause of action to a stockholder alleging corporate use of false statements in proxy solicitation materials which violated § 14(a) of the Act.

11. 377 U.S. at 432.

12. *Id.* at 433.

13. *See* 25 CATH. U.L. REV. 447, 451 (1976).

14. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (allowing a private action for enforcement of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1976)); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (allowing a private action under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 (1970)). *But see* Cannon v. University of Chicago, 99 S. Ct. 1946, 1977-79 (1979) (Powell, J., dissenting). Justice Powell argued that *Borak* did not signal the start of a trend in the Court, but represented a singular and aberrant interpretation of a federal statute. Further, Justice Powell went on to state that since *Borak*, the Court has upheld private causes of actions under very limited circumstances. For example, the decision in *Allen v. State Bd. of Elections* can be explained only "in terms of this Court's special and traditional concern for safeguarding the electoral process." *Id.* at 1978-79.

tional Association of Railroad Passengers[15] *(Amtrak)* has been interpreted as a warning to lower federal courts to decelerate their reliance on *Borak* in implying private actions.[16] In *Amtrak,* the Court denied a private action to challenge violations of the Rail Passenger Service Act of 1970,[17] in light of the Attorney General's express enforcement authority.[18] The issue of implication ceased to be merely whether a private action would further a congressional purpose. Instead, the Court addressed the issue as "whether such a private cause of action can be maintained in light of [an enforcement provision in the Act]."[19] By applying the maxim, *expressio unius est exclusio alterius,*[20] the Court indicated that where an adequate remedy is provided in the statute, there is a presumption against implication.[21] Such a presumption can only be rebutted by showing "clear contrary evidence of legislative intent."[22]

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15. 414 U.S. 453 (1974).

16. *See, e.g.,* De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1336-37 (Emer. Ct. App. 1974); Ash v. Cort, 496 F.2d 416, 426-27 (3d Cir. 1974) (Aldisert, J., dissenting); Fawvor v. Texaco, Inc., 387 F. Supp. 626, 629 (E.D. Tex. 1975); Ferland v. Orange Groves, Inc., 377 F. Supp. 690, 706-07 (M.D. Fla. 1974); *see* Note, *Remedies—Private Right of Action Not To Be Implied from Federal Corrupt Practices Act,* 50 TUL. L. REV. 713, 716 (1976); 12 HOUS. L. REV. 211, 216-17 (1974).

17. 45 U.S.C. §§ 501-645 (1976).

18. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453, 457 (1974).

19. *Id.* at 455.

20. *Id.* at 458. The expression of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 591 (5th ed. 1979).

21. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). *See* Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash,* 1 J. CORP. L. 371, 381 (1976) [hereinafter cited as *Implication of Private Actions*]. This presumption against implication expressed the general reluctance of the federal judiciary to invade the regulatory domain of another branch of government. Thus, where adequate remedial powers were vested in a federal officer or agency, private remedies were often denied. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (private suit under Amtrak Act vested in the Attorney General); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973) (remedial power for violation of Federal Trade Commission Act vested in F.T.C.); Intracoastal Transp., Inc. v. Decatur County, Ga., 482 F.2d 361 (5th Cir. 1973)(enforcement of Bridge Act vested in the Attorney General). *See generally* Note, *Implying Civil Remedies from Federal Regulatory Statutes,* 77 HARV. L. REV. 285, 294-96 (1963) [hereinafter cited as *Implied Civil Remedies*]. Similarly, where comprehensive enforcement schemes were provided, private remedies were often denied. *See, e.g.,* Jeter v. St. Regis Paper Co., 507 F.2d 973, 977 (5th Cir. 1975) (enforcement provisions of Occupational Safety and Health Act sufficiently comprehensive to negate the need for a private cause of action); *accord* Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974). *See also* note 8 *supra* and accompanying text.

22. National R.R. Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). Since the legislative history showed a congressional committee had considered private remedies and failed to adopt them, the Court concluded that the remedies provided were exclusive. In addition, since one of the purposes of the Act was to eliminate uneconomical routes without

That *Amtrak* signalled a more restrictive approach to implication was confirmed in *Securities Investor Protection Corp. v. Barbour.*[23] Again, the Court applied the familiar considerations of legislative intent,[24] congressional purpose,[25] and the adequacy of statutory remedies[26] to deny a private action under the Securities Investor Protection Act of 1970.[27] In *Barbour*, the Court found "[a]s in *Amtrak*, a private right of action under the [Act] would be consistent neither with the legislative intent, nor with the effectuation of the purposes it [was] intended to serve."[28] This seemingly ad hoc approach by the Supreme Court failed to provide a clear standard and resulted in diverse treatment of the implied remedy question.[29]

It was in this atmosphere of invariable refusal to imply private remedies, absent legislative intent, that the Court decided *Cort v. Ash.*[30] The issue was whether a corporate stockholder had been accorded a private cause of action for derivative relief against corporate directors for a violation of the Federal Corrupt Practices Act as amended by the Federal Election Campaign Act of 1971.[31] In denying such a cause of action, the Court announced a four factor test to determine when a private cause of action may be implied in a federal statute not explicitly authorizing one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[32]

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the expense and delay of litigation, a private action was not necessary to achieve this goal. *Id.* at 463-64.

23. 421 U.S. 412 (1975).

24. *Id.* at 418-20.

25. *Id.* at 421.

26. *Id.* at 425.

27. 15 U.S.C. § 78fff (1976). Specifically, customers of failing brokers are not entitled to an implied cause of action under this Act.

28. Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 424 (1975).

29. *See* 47 MISS. L. J. 156, 162, n. 60 (1976).

30. 422 U.S. 66 (1975).

31. 18 U.S.C. § 610, *as amended,* 18 U.S.C. § 610 (Supp. II 1972) (repealed 1976). The Act is a criminal statute which prohibits corporations from making campaign contributions in elections where the offices of President and Vice President are concerned.

32. Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis in original), *quoting* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (citations omitted). For a more detailed discussion of *Cort* and how each factor was applied, see *Implication of Private Actions, supra* note 21, at 382-88; Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for*

The *Cort* test contained many familiar principles. Yet, because the Court applied each criterion very rigidly and maintained a presumption against implication,[33] commentators have agreed that the *Cort* test indicated a severely restrictive approach designed to further reduce the implication of private remedies.[34] While each *Cort* factor is "relevant,"[35] the difficult question as to how these factors are to be applied remains. An examination of subsequent decisions in which the Court had an opportunity to apply the *Cort* test demonstrates the importance of clear congressional intent as a demanding and vital factor for the implication of a private remedy.[36] These decisions will be discussed in the following section.

III. Analysis of "Implication" Cases After *Cort v. Ash*

The first decision after *Cort* in which the Supreme Court dealt with an implied private cause of action was *Ernst & Ernst v. Hochfelder*.[37] Ernst and Ernst, an accounting firm, periodically audited a brokerage firm that had sold its customers on a fraudulent investment scheme.[38] The customers of the brokerage firm sought to sue Ernst & Ernst under section 10(b) of the Securities and Exchange Act of 1934[39] and the Exchange Commission Rule 10b-5[40] for its failure to conduct proper audits.

The Court recognized that "the existence of a private cause of action for violations of the statute and the Rule . . . [was] well established."[41] Here, however, the Court ruled that no private action would lie under section

Implication, 123 U. Pa. L. Rev. 1392, 1412-26 (1975) [hereinafter cited as *Private Rights of Action Under Amtrak*].

33. Cort v. Ash, 422 U.S. 66, 80-85 (1975).

34. *Implication of Private Actions, supra* note 21, at 383; 25 Cath. U.L. Rev. 447, 457 (1976); 47 Miss. L.J. 156, 163 (1976).

35. Cort v. Ash, 422 U.S. 66, 78 (1975).

36. For an argument that the *Cort* decision meant to "de-emphasize the importance of legislative intent," see Comment, *Implied Private Rights of Action—The Cort v. Ash Test—Interaction of "Especial Beneficiary" and Legislative Intent*, 24 Wayne L. Rev. 1173, 1179, 1181-82 (1978).

37. 425 U.S. 185 (1976).

38. *Id.* at 189-90.

39. 15 U.S.C. § 78j(b) (1976). This section makes it unlawful to use or employ any manipulative or deceptive device or contrivance when in contravention of Securities and Exchange Commission Rules.

40. 17 C.F.R. § 240.10b-5 (1979). This section prohibits any artifice to defraud or any act which operates or would operate as a fraud or deceit upon any person in connection with buying or selling securities.

41. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976). *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975); Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). *But see* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) which is discussed at note 46, *infra*.

10(b) or rule 10b-5 in the absence of intent to deceive, manipulate or defraud.[42] The significance of this case lies not so much in its holding, as in its rationale. Justice Powell, delivering the majority opinion, stated that ascertainment of congressional intent with respect to a judicially implied liability must rely primarily on the language of a statutory section or Act.[43] Such language, in fact, must be the starting point.[44] The next step is to examine the legislative history of the statute or Act to find further evidence of congressional intent.[45] This reasoning suggests that in the absence of any specific statutory language or legislative history that demonstrates congressional intent to provide a private remedy, the Court will be reluctant to imply such a remedy.[46]

Failing to mention the *Cort* analysis in *Ernst & Ernst,*[47] the Court first applied *Cort* in *Piper v. Chris-Craft Industries.*[48] The respondent in this case, Chris-Craft, was the unsuccessful tender offeror in a contest for the takeover of another corporation.[49] Chris-Craft sued for damages and injunctive relief against the target corporation, its investment advisor and the successful competitor, alleging violations of section 14(e) of the Securities Exchange Act of 1934.[50] This section makes unlawful "any fraudulent, deceptive or manipulative acts or practices in connection with any tender offer . . . or any solicitation of security holders in opposition to or in favor

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42. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). The case was not remanded for further proceedings to require proof of fraud, deception or manipulation since, throughout the history of the case, respondent customers proceeded on a theory of liability premised on negligence. In fact, respondents specifically disclaimed that Ernst & Ernst had engaged in fraud or any intentional misconduct. *Id.* at 215.

43. *Id.* at 200.

44. *Id.* at 197. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) ("[t]he starting point in every case involving construction of a statute is the language itself"); F.T.C. v. Bunte Bros., Inc., 312 U.S. 349, 351 (1941).

45. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201-06 (1976).

46. *Id.* at 214 ("[w]hen a statute speaks so specifically . . . and when its history reflects no more expansive intent, [the Court is] quite unwilling to extend the scope of the statute . . . ."). *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977), where the Court denied a private cause of action under section 10(b) and Rule 10b-5 to respondent stockholders who alleged fraud in a merger action with a Delaware corporation. Citing *Ernst & Ernst,* the Court said that "[a]bsent a clear indication of congressional intent, [the Court would be] reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities." *Id.* at 479.

47. 425 U.S. 185 (1976). Apparently, the Court in *Ernst & Ernst* felt that since "the language of §10(b) so clearly connotes intentional misconduct" the *Cort* analysis would not be necessary to divine congressional intent. "[Because] the language of a statute controls when sufficiently clear in its context, further inquiry may be unnecessary." *Id.* at 201 (citations omitted).

48. 430 U.S. 1 (1977).

49. *Id.* at 4-10.

50. 15 U.S.C. § 78n(e)(1976).

of such offer, request, or invitation."[51] The Court held that a defeated tender-offeror had no implied cause of action under section 14(e).[52] Chief Justice Burger, writing the majority opinion, stated that "[the] analysis begins, of course, with the statute itself."[53] Since the statute neither denied nor implied a private cause of action, the analysis shifted to legislative history to help determine the intent of Congress.[54] Warning that any reliance on legislative history must be dealt with "cautiously,"[55] the Court found no evidence that Congress intended to create a private remedy for a defeated tender offeror under section 14(e).[56]

Only after the first analysis in *Piper* did the Court apply the four factors of the *Cort* test to confirm its conclusion as to legislative history.[57] The Court's reliance on the initial analysis indicates that while the *Cort* factors are still "relevant,"[58] each factor is not necessarily essential, nor deserving of equal consideration. This is because each *Cort* factor actually addresses the question of whether Congress intended to create a private cause of action.[59] Thus, when legislative intent is determinable by statutory language or legislative history, it becomes unnecessary to apply any other *Cort* factor.[60]

The Court reiterated its reliance on legislative intent in *Santa Clara Pueblo v. Martinez.*[61] Respondent, a female member of the Santa Clara

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51. *Id.*

52. 430 U.S. at 47.

53. *Id.* at 24.

54. *Id.* at 26. In connection with legislative history, the Court mentioned congressional purpose and effectuation of congressional goals, but these factors were considered only for determining legislative intent. *Id.* at 25-26. *See* note 59 *infra,* and accompanying text.

55. 430 U.S. at 26. Specifically, the Chief Justice warned that "[w]e must be wary against interpolating our notions of policy in the interstices of legislative provisions." *Id., quoting* Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942). *See* text accompanying notes 124-44, *infra.*

56. 430 U.S. at 35.

57. *Id.* at 37-41.

58. 422 U.S. at 78.

59. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1980 (1979) (Powell, J., dissenting) ("[T]hese *[Cort]* factors were meant only as guideposts for answering a single question, namely whether Congress intended to provide a private cause of action."); *see also* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash,* 23 VILL. L. REV. 657, 674-75 (1978).

The fourth *Cort* factor also seems related to the question of whether the Court should, as a matter of policy, imply a private cause of action. An answer to this question is implicit in the facts that the courts are already overburdened with litigation and that their jurisdiction is limited to that created by statute. *See* text accompanying notes 124-44, *infra.*

60. *See* note 104 *infra,* and accompanying text. For a discussion of the problems of interpreting legislative history, see *Private Rights of Action under Amtrak, supra* note 32, at 1412.

61. 436 U.S. 49 (1978).

Pueblo Indian tribe, brought suit against the tribe, seeking declaratory and injunctive relief against enforcement of a tribal ordinance that denied tribal membership to children of female members who marry outside the tribe, but not to similarly situated men of the tribe.[62] The respondent claimed that such an ordinance is violative of Title I of the Indian Civil Rights Act of 1968.[63] The relevant part of the statute provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws. . . ."[64]

In *Martinez,* the Court's majority, speaking through Justice Marshall, held that the Act could not be interpreted as implying a private cause of action against a tribe or its officers in the federal courts.[65] Finding no private remedy expressly authorized by the statute,[66] the Court examined the legislative history and concluded that "it is highly unlikely that Congress would have intended a private cause of action . . . ."[67] Even though there was no doubt that the respondent was among the class to be especially benefited from this legislation,[68] the strength of legislative intent determined by legislative history and statutory construction proved to be of overriding consideration. *Martinez* is especially noteworthy because it represented a deviation from the Court's pattern of implying a cause of action where a statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.[69]

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62. *Id.* at 51.
63. 25 U.S.C. §§ 1301-03 (1977).
64. *Id.* at § 1302(8).
65. 436 U.S. at 69 (1978).
66. *Id.* at 59.
67. *Id.* at 69.
68. *Id.* at 61. *See* 422 U.S. at 78.
69. *See, e.g.,* Sullivan v. Little Hunting Park, 396 U.S. 229, 239 (1969) (42 U.S.C. § 1982 (1977): "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof . . . ."); Allen v. State Bd. of Elections, 393 U.S. 544, 554-55, (1969) (42 U.S.C. § 1973c (1977): "[N]o person shall be denied the right to vote . . . ."); Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 414-15 (1968) (same as in *Sullivan, supra*); Turnstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210, 213 (1944) Fourth Railway Labor Act § 2, 45 U.S.C. § 152 (1977). "Employees shall have the right to organize and bargain collectively through representatives . . . ."); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916), (Act of June 17, 1910, Pub. L. No. 214, 36 Stat. 298: "any employee of any common carrier . . . ."). That *Martinez* deviated from this pattern is obvious. However, *Martinez* can be distinguished since it involved an attempt to imply a private cause of action in a virtually unique situation, i.e., against an Indian tribe. Traditionally, Indian tribes have been protected by a strong presumption of autonomy and self-government and by a legislative history indicative of an intent to limit severely judicial interference in tribal affairs. See *Martinez,* 436 U.S. at 55, 58-59, 63-64, 67-70, 72. Even *Martinez,* however, "recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms." *Id.* at 61. Thus, *Martinez* alone can not

In *Chrysler Corporation v. Brown*,[70] the Court continued its trend of denying implied remedies. This decision primarily involved a criminal statute entitled the Trade Secrets Act.[71] This Act imposes criminal sanctions on government employees who disclose to any extent not authorized by law, certain classified information submitted to a government agency.[72] Chrysler, a government contractor, sued under this Act to prevent disclosure of information supplied to the Defense Logistics Agency concerning Chrysler's employment of women and minorities.[73] The Court rejected Chrysler's contention that the Act afforded a private cause of action to enjoin disclosure in violation of the statute.[74] Citing *Cort* in the opinion, Justice Rehnquist stated that a review of legislative history revealed no legislative intent to create a private cause of action.[75] Justice Rehnquist further stated, "a private right of action is not 'necessary to make effective the congressional purpose.' "[76] The Court's reliance on the second and third factors of the *Cort* test helps confirm the idea that it is not necessary to consider all four *Cort* factors.[77] Rather, a determination of congressional

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be construed to mean that the Court will no longer create a private remedy when Congress expressly grants a right to a person of a specified class. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1967-69 (1979) (allowing a private remedy under Title IX of the Education Amendments of 1972).

While the Court has granted private actions in statutes that confer a federal right on a plaintiff, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See 430 U.S. 1 ("unlawful conduct"); 422 U.S. 66 ("unlawful conduct"); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) (duty of SIPC to "discharge obligations"); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (forbidding "action, practice or policy inconsistent" with the Act); Wheedlin v. Wheeler, 373 U.S. 647 (1963) (setting procedure for procuring congressional subpoena); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) ("duty of every common carrier . . . to establish . . . just and reasonable rates . . . ."); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (similar duty of gas pipeline companies). *But see* 377 U.S. 426 (implying a cause of action under a securities provision describing "unlawful conduct").

70. 441 U.S. 281 (1979).

71. 18 U.S.C. § 1905 (1977).

72. 441 U.S. at 294-95.

73. *Id.* at 286. Chrysler also tried to base its suit for injunctive relief on the Freedom of Information Act, 5 U.S.C. § 552 (1977) [hereinafter cited as FOIA], which stated that the FOIA would not apply to trade secrets or confidential commercial information obtained from a person. The Court held that the FOIA was exclusively a disclosure statute and afforded petitioner no private right of action to enjoin agency disclosure. The language, logic and history of the FOIA showed that its exemption provisions were meant only to permit the agency to withhold certain information, and were not mandatory bars to disclosure. *Id.* at 292.

74. *Id.* at 316.

75. *Id.*

76. *Id.* at 317 (*quoting* 377 U.S. at 433).

77. *See* note 59 *supra*, and accompanying text.

intent at the time Congress considered the statute is not only necessary, but controlling.

Chrysler also supports the general notion that the Court will rarely imply a private cause of action under a criminal statute[78] and where it does so "there [is] at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone."[79]

A break in the Court's pattern of consistently refusing to create private actions[80] occurred in *Cannon v. University of Chicago.*[81] The Court's majority, speaking through Justice Stevens, held that a female, who was denied admission to medical school at two private universities, had an implied right under Title IX[82] of the Education Amendments of 1972 to pursue a private remedy.[83] The relevant section, 1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[84] Citing *Cort,* the opinion recognized that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."[85] Yet, the Court did say that before deciding whether Congress intended to afford a remedy to a special class of litigants, a court "*must* carefully analyze the four [Cort] factors. . . ."[86] The Court then proceeded systematically to apply each *Cort* factor and found that each factor was satisfied.[87] Nonetheless, this mandate of strictly applying each factor of the *Cort* test seems inconsistent with the Court's recent application of the test.[88] Such an extreme position may best be read in light of the fact that during the period of enactment of several titles of the Civil Rights Act, the Supreme Court had consistently found implied remedies.[89] Concerned,

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89. In the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them a cause of action was found. *See* Superintendent of Insur. v. Bankers Life and Cas. Co., 404 U.S. 6 (1971); Sullivan v. Little Hunting Park, Inc., 396

78. *See* 422 U.S. 66; Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

79. 441 U.S. at 316, *quoting* Cort v. Ash, 422 U.S. 66, 79 (1975); *see* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

80. *See* 441 U.S. 281; Santa Clara Pueblo v. Martinez, 436 U.S. 46 (1978); 430 U.S. 1; Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

81. 99 S. Ct. 1946 (1979).

82. 20 U.S.C. § 1681 (1977).

83. 99 S. Ct. at 1968.

84. *Id.* at 1949-50.

85. *Id.* at 1953. *See* 422 U.S. 66.

86. 99 S. Ct. at 1953 (emphasis added).

87. *Id.* at 1953-64.

88. *See* 441 U.S. 281; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

perhaps, that Congress had come to rely on the courts to decide issues of private remedies, a finding that each *Cort* factor was satisfied may have been the Court's way to justify creation of this private cause of action in *Cannon.*

Cannon, despite its reliance on *Cort,* signalled a more restrictive approach to implication. While Justice Stevens stated only that it was preferable for legislative intent to be manifested in the specific language of a statute,[90] a concurring opinion by Justice Rehnquist warned that the Court in the future would be "extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch."[91] In a dissenting opinion, Justice Powell even called for a rejection of the *Cort* analysis[92] and argued that no private action should be implied absent the most compelling evidence of legislative intent.[93]

The stricter approach to implication suggested by Justice Rehnquist in *Cannon* was embraced by the Court in *Touche Ross & Co. v. Redington.*[94] Touche Ross, an accounting firm, was hired by a securities brokerage firm (Weis) to audit Weis' books and file financial reports with the Securities and Exchange Commission as required by section 17(a) of the Securities Exchange Act of 1934.[95] Due to a poor financial condition, Weis underwent

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U.S. 229 (1969); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *But cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (separate opinion of White, J.). In *Bakke,* Justice White argued that the legislative history, like the terms of the Act itself, clearly showed that Congress did not intend for Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to provide a private cause of action. However, the other Justices refused to resolve this difficult issue in *Bakke* and it was assumed for purposes of the case. 438 U.S. at 283.

90. 99 S. Ct. at 1967.

91. *Id.* at 1968 (Rehnquist, J., concurring).

92. *Id.* at 1975 (Powell, J., dissenting). Justice Powell argued that the *Cort* analysis leads to judicial legislation. *See* note 138 *infra,* and accompanying text.

93. Justice Powell stated:

> Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternate mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes.

99 S.Ct. at 1985.

94. 99 S. Ct. 2479 (1979).

95. 15 U.S.C. § 78q(a) (1976). The relevant section reads as follows:

> Every national securities exchange, every member thereof . . . and every broker or dealer registered pursuant to . . . this title, shall make, keep and preserve for such periods, such accounts, correspondence . . . and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.

liquidation, but was unable to reimburse the customers who had left assets or deposits with the firm.[96] These customers sought to impose liability against Touche Ross for its allegedly improper auditing of Weis' financial statement.[97] Thus, the issue became whether customers of a securities brokerage firm, required to file financial statements under section 17(a), had an implied cause of action against accountants who failed to audit properly a now bankrupt broker.

In holding that section 17(a) did not create a private cause of action in anyone,[98] the Court, speaking through Justice Rehnquist, expressly refused to apply each of the four *Cort* factors.[99] The Court's task was "limited solely to determining whether Congress intended to create [a] private right of action . . . ."[100] To ascertain this intent, the Court's analysis began with the language of the statute itself.[101] Finding nothing in the language implying a cause of action in anyone,[102] the Court then examined legislative history and also found it silent on the issue of private remedies.[103] When it was determined on the basis of statutory language and legislative history that Congress did not intend to create, either expressly or implicitly, a private cause of action, the Court stated that further inquiries were of "little relevance".[104] In such circumstances, the Court held that if there is to be a federal remedy, Congress has to provide it.[105]

The Court's next implication case was *Transamerica Mortgage Advisors, Inc. v. Lewis.*[106] Respondent, a shareholder of Mortgage Trust of America

96. 99 S. Ct. at 2483.

97. *Id.* at 2484.

98. *Id.* at 2491.

99. *Id.* at 2489. The Court in *Touche Ross* acknowledged that the *Cort* decision did not determine what weight to give to the four factors. *Id.* Justice Brennan, concurring in *Touche Ross,* added that if the first two factors of *Cort* are not satisfied, the remaining two factors by themselves cannot be the basis for implying a cause of action. *Id.* at 2491 (Brennan, J., concurring).

100. *Id.* at 2485.

101. *Id. See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

102. 99 S. Ct. at 2485. The Court strongly indicated that if a statute neither prohibited certain conduct nor created federal rights in favor of private parties, the Court would rarely imply a private cause of action. *Id.* at 2485-86.

103. *Id.* at 2486. The Court stated here that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Id. See* text beginning at note 124, *infra.*

104. *Id.* at 2489. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1968 (1979) (White, J., dissenting) ("[If] the legislative history and statutory scheme show that Congress intended not to provide a new private cause of action, . . . such intent is controlling . . . .").

105. 99 S. Ct. at 2490. "[I]t is not for us to fill any *hiatus* Congress has left in this area." *Id.* at 2490-91, *quoting* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). *See* note 103, *supra.*

106. 48 U.S.L.W. 4001 (1979).

(Trust), alleged that Transamerica Mortgage Advisors, Inc.,[107] the Trust's investment adviser, had been guilty of various frauds in violation of the Investment Advisers Act of 1940 (Act).[108] The complaint sought injunctive relief to restrain further performance of the advisory contract, rescission of the contract and restitution under section 215.[109] In addition, the complaint sought an award for damages under section 206.[110] Since "the Act nowhere expressly provides a private action,"[111] the issue before the Court was whether a private cause of action could be implied from either of these two sections of the Act.

The Court, speaking through Justice Stewart, prefaced the decision by stating that the *Touche Ross* standard would apply.[112] Thus, in order to determine congressional intent, the Court examined the legislative history of the Act and found it silent on the question of private remedies.[113] The Court also looked to the language of the two sections of the Act. Concerning section 215,[114] the Court concluded that the statutory language itself implied a private cause of action for certain limited relief in the federal courts.[115] The Court reasoned that since section 215 declares that certain

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107. Also named as defendants in the case were Mortgage Trust of America, several individual trustees and two corporations affiliated with TAMA, Land Capital, Inc. and Transamerica Corporation, all of which were petitioners in the case. *Id.*

108. 15 U.S.C. §§ 80b-1 to -21 (1976).

109. 15 U.S.C. § 80b-15(1976). The relevant part of § 215 provides that any contract whose formation or performance would violate the Act "shall be void . . . as regards the rights of the violator and knowing successors in interest."

110. 15 U.S.C. § 80b-6 (1976). The relevant part of § 206 broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud . . . [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," or to engage in specified transactions with clients without making required disclosures.

111. 48 U.S.L.W. at 4002.

112. While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J. I. Case v. Borak* . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross v. Redington* . . . . We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us.

Id. See note 100 *infra,* and accompanying text.

113. 48 U.S.L.W. at 4003. While a silent legislative history may not be helpful to a person seeking a private remedy, it does not necessarily preclude courts from implying one. As Justice Stewart stated, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available . . . . Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.*

114. *See* note 109 *supra.*

115. 48 U.S.L.W. at 4003.

contracts are void, Congress necessarily intended that "the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution."[116] As for respondent's claim for monetary relief, the Court held that section 206 does not create a private cause of action. In noting that section 215, unlike section 206,[117] only "proscribes certain conduct, and does not in terms create or alter any civil liabilities,"[118] the Court acknowledged the basic rule of statutory construction that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[119] Thus, in view of Congress providing both judicial and administrative means for enforcing section 206,[120] the Court concluded that it was not possible to imply the existence of a private cause of action for damages.[121]

Touche Ross cannot be viewed as a total rejection of the *Cort* test. Indeed, the *Cort* factors are still "relevant."[122] However, these factors are

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116. *Id.* It can be argued that Congress only intended § 215 to be raised as a defense in private litigation merely to prevent the enforcement of an investment adviser's contract. However, the Court broadened this approach since it felt the legal consequences of voidness were not meant to be so limited. *Id. See* Deckert v. Independence Shares Corp., 311 U.S. 282, 289 (1940); 12 WILLISTON, CONTRACTS § 1525 (Jaeger 3d ed. 1970 & Supp. 1973).

117. *See* note 110 *supra.*

118. 48 U.S.L.W. at 4003.

119. *Id. See* notes 20-21 *supra*, and accompanying text.

120. First, under § 217 willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206.

48 U.S.L.W. at 4003.

121. *Id.* There also existed circumstantial evidence to support the Court's decision not to imply a private action under § 206. The Court found that under each of the securities laws that preceded the Investment Advisers Act of 1940 and under the Investment Company Act, Congress expressly allowed for private actions for damages in certain circumstances. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor." *Id.* at 4004.

The Court went on to reject the respondent's contention that the Court's inquiry could not stop with congressional intent, but must consider the utility of a private action and that such an action may not be traditionally relegated to state law. *Id.* The Court also stated that even though § 206 was designed to protect adviser's clients, such as the respondent, from the fraudulent practices it prohibited, this was not sufficient to require implication of a private action. Following *Touche Ross,* the Court stated that "[t]he dispositive question remains whether Congress intended to create any such [private] remedy. Having answered that question in the negative, our inquiry is at an end." *Id. But see id.* at 4005-08 (White, J., dissenting), where each of the four *Cort* factors was found to point toward implication of a private action under sections 215 and 206.

122. 99 S. Ct. at 2489, *quoting* Cort v. Ash, 422 U.S. 66, 78 (1975).

relevant only to the extent they serve as aids in ascertaining clear legislative intent.[123] *Touche Ross* demonstrates that such intent should be determined primarily by examination of the statutory language and legislative history. Such an emphasis on clear legislative intent is a stricter approach to implication than used in *Cort.* However, this next section will show that it is the correct approach.

IV. Strict Reliance on Legislative Intent: For Better or Worse?

It has been argued that a strict standard for implication defeats the legitimate purpose for which the implication doctrine was created.[124] This purpose, basically, is to prevent the frustration of congressional goals.[125] If a statutory enforcement scheme proves inadequate in achieving such goals, the federal courts have a duty to supplement the express remedy with an implied remedy.[126] This view of the courts' role is apparently based on an assumption that when Congress enacts a regulatory statute designed to protect a certain class, it intends to create an enforcement scheme to fully protect that class.[127] Thus, by creating implied remedies, the courts are merely helping to effectuate congressional policy.[128] If implication is utilized only when legislative intent is clear, the criticism is that congressional policy will be frustrated.

Yet, despite such criticism, the Supreme Court's strict approach of sole reliance on clear legislative intent as applied in *Touche Ross* is proper. One argument supporting this approach is grounded upon the constitutional doctrine of separation of powers. When Congress decides not to provide a private remedy, federal courts should not assume a legislative role, thereby expanding their jurisdiction.[129] Implication under a less rigid standard than

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123. *See* note 59, *supra.*

124. *Implication of Private Actions, supra* note 21, at 376; *Private Rights of Actions Under Amtrak, supra* note 32, at 1413; 25 Cath. U. L. Rev. 447, 457 (1976).

125. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964); *Implying Civil Remedies, supra* note 21, at 291; *Private Rights of Actions Under Amtrak, supra* note 32, at 1393.

126. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Bell v. Hood, 327 U.S. 678, 684 (1945) ("[w]here federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief"); *see,* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decisions,* 105 U. Pa. L. Rev. 797, 800 n.30 (1957).

127. *See, e.g.,* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967); J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964).

128. *See, e.g.,* Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

129. *See* 99 S. Ct. at 2490; 99 S. Ct. at 1975 (Powell, J., dissenting); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411-12 (1971) (Burger, C.J., dissenting); Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963). *See also* United States v. Standard Oil Co., 332 U.S. 301, 313-16 (1947). In *Bivens,* the majority held that a private cause of action

applied in *Touche Ross* also means delegating legislative functions to a branch of government ill-equipped to decide legislative issues properly.[130] As Chief Justice Burger stated, "Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."[131]

It has been suggested that Congress tends to rely on the courts to imply remedies, rather than determining the question for itself.[132] However, it does not follow that the Supreme Court should continue to indulge Congress in its refusal to address this issue of implied remedies. If federal courts were to rely on a standard other than clear legislative intent, it would encourage Congress to avoid its constitutional obligation by leaving hard political choices for the courts to decide.[133] Courts should not be free to reach decisions concerning implied remedies without regard to what the normal play of political factors would have produced because: (1) intended beneficiaries of the legislation are not ensured of obtaining remedies adequate to meet their needs;[134] (2) those subject to legislative restraints are denied the chance to "forestall through the political process potentially unnecessary and disruptive litigation;"[135] and (3) the public is generally denied the benefits derived from resolving important social issues "through the open debate of the democratic process."[136]

In the years since *Cort,* there have been numerous decisions in which courts of appeals have implied private actions from federal statutes.[137] It

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could be implied directly from the Constitution to remedy fourth amendment violations. The basic distinction between *Bivens* and other implication cases may be found in the Court's traditional concern for the preservation of an individual's constitutional rights. For a discussion of *Bivens* and the implication of other constitutional rights, see Comment, *Bivens Actions for Equal Protection Violations: Davis v. Passman,* 92 HARV. L. REV. 745 (1979).

130. 99 S. Ct. at 1975 (Powell, J., dissenting) ("[An implied remedy] is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process."); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 411-12 (1971) (Burger, C.J., dissenting).

131. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting).

132. 99 S. Ct. at 1968 (Rehnquist, J., concurring).

133. *Id.* at 1981 (Powell, J., dissenting). The dangers posed by the judiciary resolving social and political conflicts have been evident to the Court throughout its history. *See* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (1974); United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring); Eccles v. Peoples Bank, 333 U.S. 426, 432 (1948); Muskrat v. United States, 219 U.S. 346 (1911); Sinking Fund Cases, 99 U.S. 700, 718 (1878) ("One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.").

134. 99 S. Ct. at 1982 (Powell, J., dissenting).

135. *Id.*

136. *Id.*

137. *See, e.g.,* Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978) (§ 17(a) of

is unreasonable to assume that Congress simply forgot to mention an intended private action in each of these statutes. These decisions indicate that *Cort* not only invites judicial legislation,[138] but also leads the courts to apply diverse standards for implication.[139] The new standard of examining statutory language and legislative history to ascertain legislative intent will halt this accelerating trend and provide a uniform standard leading to decisions more consistent with constitutional principles.

Another argument supporting the strict standard articulated in *Touche Ross* involves the scarcity of judicial resources. The federal courts are already overburdened and the liberal use of each *Cort* factor for implication will aggravate this situation further.[140] As Justice Blackmun stated, an implied cause of action "opens the door for another avalanche of new federal cases."[141] Reliance on legislative intent as determined in *Touche Ross* will promote judicial restraint and alleviate some of the courts' burden. Further, this policy of judicial restraint and deference to Congress will not result in abandonment of injured plaintiffs because Congress is at liberty to make changes in an inadequate federal statute.[142] It has been

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Securities Exchange Act of 1934); Local 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978) (§ 13(c) of Urban Mass Transportation Act of 1964); Bratton v. Shiffrin, 585 F.2d 223 (7th Cir. 1978) (§ 1007(a) of the Federal Aviation Act of 1958); Riggle v. California, 577 F.2d 579 (9th Cir. 1978) (Rivers and Harbors Appropriation Act of 1906); Ass'n of Data Processing Serv. Organizations v. Fed. Home Loan Bank Bd., 568 F.2d 478 (6th Cir. 1977) (§ 11(e) of the Federal Home Loan Bank Act); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (§ 504 of Rehabilitation Act of 1973); McDaniel v. Univ. of Chicago, 548 F.2d 689 (7th Cir. 1977) (§ 1 of Davis-Bacon Act); Hughes v. Dempsey-Tegeler & Co., 534 F.2d 156 (9th Cir. 1976) (§ 6 of Securities Exchange Act of 1934). For exhaustive citations, *see* 99 S. Ct. at 1980-81 (Powell, J., dissenting).

138. In *Cannon*, Justice Powell eloquently stated reasons why the *Cort* factors, other than the one referring expressly to legislative intent, encourage judicial lawmaking:

> Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right. Determining whether a private action would be consistent with the "underlying purposes" of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced. Finally, looking to state law for parallels to the federal right simply focuses inquiry on a particular policy consideration that Congress already may have weighted in deciding not to create a private action.

99 S. Ct. at 1980 (Powell, J., dissenting) (footnotes and citations omitted).

139. *Compare* Local 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978) *with* Network Project v. Corp. for Pub. Broadcasting, 561 F.2d 963 (D.C. Cir. 1977).

140. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 428 (1971) (Black, J., dissenting). *See also* Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A.J. 938, 938-41 (1974).

141. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting).

142. Justice Rehnquist recognized in *Touche Ross* that Congress is obviously capable of

argued that congressional corrections do nothing to protect plaintiffs who are injured before Congress can amend the deficient statute.[143] However, the reverse is true in that congressional corrections will not protect a wary defendant already convicted under an implied cause of action. Therefore, as a matter of fairness, the intent of Congress should always control.

Since it is the duty of Congress to legislate,[144] it is incumbent upon them to make its intentions clear. Congress can best achieve this by including a specific provision in the statute stating who is entitled to a private remedy. Absent a specific provision or a strong legislative history showing congressional intent to create a private remedy, the courts should not imply one.

V. Conclusion

The implication doctrine is firmly entrenched in our federal judicial system. However, the Supreme Court and other federal courts have constantly wrestled with the question of the doctrine's application. *Cort* was an attempt by the Supreme Court to provide an acceptable standard by which to imply private causes of action. The Court's failure to decide the proper weight attributable to each factor resulted in the *Cort* test being applied so diversely that it encouraged unconstitutional judicial legislation. In an effort to keep all federal courts faithful to constitutional principles, the Court established a new standard in *Touche Ross* by limiting their inquiry strictly to what Congress intended. *Touche Ross* indicates that this inquiry can be answered only by clear statutory language or strong legislative history. It seems likely that *Touche Ross* will be the standard in future implication cases involving a federal statute, even where the plaintiff is expressly granted a federal right. The reason for this approach is that the Court's present majority seems to realize that the *Touche Ross* standard will help prevent judicial legislation, discourage unnecessary litigation, and promote consistency in lower federal courts. The Court has reminded Congress that it is the task of the legislative branch not only to make the law, but to make their intentions clearly known as to who is able to bring a private action under the law. It is hoped that Congress is prepared to meet this task.

William Francis Drewry Gallalee

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overruling the courts and finding an implied remedy:

> [N]othing we have said prevents Congress from creating a private right of action on behalf of brokerage firm customers for losses arising from misstatements contained in § 17(a) reports. But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent.

99 S. Ct. at 2491.

143. *Implication of Private Actions, supra* note 21, at 375.

144. "[I]t is . . . the exclusive province of Congress . . . to formulate legislative policies . . . ." TVA v. Hill, 437 U.S. 153, 194 (1978).