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Implying Private Rights and Remedies under the Federal Securities Act

William F. Schneider

IMPLYING PRIVATE RIGHTS AND REMEDIES UNDER THE FEDERAL SECURITIES ACTS

WILLIAM F. SCHNEIDER†

Between 1964 and 1975, the Supreme Court tended to favor recognizing implied causes of action based on the federal securities laws. In so doing, the Court focused on whether implication would further the goals Congress sought to accomplish by enacting the statutory provisions. Since 1975 the Court has been much less willing to imply new causes of action, and has focused instead on whether Congress manifested an intention to allow a private party to sue. Professor Schneider begins by noting that the Court often has confused the issues of implying a cause of action and implying a remedy, and notes that courts historically have had much more freedom to imply a remedy. After a detailed analysis of the evolution of Supreme Court jurisprudence in this area, Professor Schneider concludes that the Court needs to recognize more clearly the nature of its inquiry and needs to read congressional intent more broadly than it has in recent cases.

In 1916 the United States Supreme Court first recognized a private party's right to obtain a remedy in federal court for injuries caused by a violation of a federal statute not expressly providing for a private cause of action.[1] In *Texas & Pacific Railway v. Rigsby*,[2] decided that year, the Court held that disregarding 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 the damages from the party in default is implied . . . ."[3] Although prior to 1975 causes of action were not implied from every statute asserted as a basis for implication,[4] until that date the Supreme Court did not

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† Assistant Professor of Law, University of Houston Law Center. B.A. 1972, J.D. 1976, Florida.

1. This definition of an implied cause of action is a paraphrase of the definition formulated by Justice Powell in his dissent to Cannon v. University of Chicago, 441 U.S. 677 (1979). Justice Powell stated:

> [T]he phrase "private cause of action" may not have a completely clear meaning. As the term is used herein, I refer to the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty.

Id. at 730 n.1 (Powell, J., dissenting).

2. 241 U.S. 33 (1916).

3. *Id.* at 39. *Rigsby* is cited as having recognized implication of a private cause of action for damages under the Federal Safety Appliance Act. Not all commentators or current members of the United States Supreme Court agree that a private cause of action was implied in *Rigsby*. It has been argued that the *Rigsby* Court, exercising its pre-Erie v. Tompkins, 304 U.S. 64 (1938), common-law powers, merely applied a statutory standard in a common-law negligence case. *See, e.g.*, Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 293 n.4 (1972); Comment, *Implying Private Causes of Action From Federal Statutes:* Amtrak *and* Cort *Apply the Brakes*, 17 B.C. INDUS. & COM. L. REV. 53, 54 (1975). *See also* Cannon v. University of Chicago, 441 U.S. 677, 732 (1979) (Powell, J., dissenting).

4. *See, e.g.*, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S.

question the holding of *Rigsby* or indicate that judicial implication was not an appropriate function of the federal courts. In a series of opinions rendered since 1975, however, the Court has, with few exceptions, refused to recognize the implication of new causes of action.[5]

The negative outcomes of the recent implication cases represent an implicit and sometimes acknowledged shift in the Court's policy.[6] The Court has made clear that for policy reasons it should not exercise such power often, if at all. In its recent decisions, the Court has also raised serious questions about its power even to recognize implied causes of action. It has stated unequivocally that the intent of Congress should determine whether a cause of action can be implied from a statute not expressly providing for one.[7] Absent congressional intent to authorize a private cause of action, such an action cannot be judicially recognized, even if the Court finds that recognition would further important policies.[8] Unfortunately, the Court has not adequately explained what it

453 (1974) (*Amtrak*) (no private right of action to enforce compliance with the Rail Passenger Service Act of 1970 (Amtrak Act)); Calhoun v. Harvey, 379 U.S. 134 (1964) (no private right of action to enforce Title IV of the Labor-Management Reporting and Disclosure Act of 1959); Wheeldin v. Wheeler, 373 U.S. 647 (1963) (no private right of action for damages implied from a United States House of Representatives rule authorizing the issuance of subpoenas upon the signature of any committee chairman or any member of a committee designated by the chairman); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (no private right of action implied from the Motor Carrier Act of 1935).

5. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 do not provide implied causes of action); Texas Indus. v. Radcliff Materials, 451 U.S. 630 (1981) (implied cause of action for contribution not available to defendant in federal antitrust case); California v. Sierra Club, 451 U.S. 287 (1981) (Rivers and Harbors Appropriation Act does not provide an implied right of action); Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981) (Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 do not provide an implied right of action for contribution); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (Davis-Bacon Act does not provide employee with a private cause of action for back wages under a contract that has been administratively determined not to call for work subject to the Act and thus does not contain prevailing wage stipulations); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (§ 206 of the Investment Advisors Act of 1940 provides no implied cause of action); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied cause of action for damages under § 17(a) of the Securities Exchange Act of 1934); Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (Freedom of Information Act and Trade Secrets Act do not provide private causes of action to enjoin disclosure); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (Indian Civil Rights Act does not impliedly authorize private action for declaratory or injunctive relief). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (recognizing an implied cause of action under the Commodities Exchange Act); Cannon v. University of Chicago, 441 U.S. 677 (1979) (private cause of action exists under Title IX of the Education Amendments of 1972).

6. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). Justice Stevens stated, "The increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. Our cases subsequent to *Cort v. Ash* have plainly stated that our focus must be on 'the intent of Congress.'" *Id.* at 377.

7. This limited view of the judicial role clearly reflects a shift in the Court's view. The *Rigsby* Court, for example, did not purport to determine whether Congress intended to create or authorize a private cause of action. Instead, the Court was concerned with whether the legislation under review was intended to impose any duties on the defendant and whether the duties imposed were intended to protect the plaintiff. After resolving both issues affirmatively, the Court allowed the plaintiff to sue. *Rigsby*, 241 U.S. at 39-40.

8. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve

means by congressional intent to create a private cause of action.

When a court says a cause of action (or right of action) exists, it usually means that a plaintiff may bring suit in that court to obtain a particular remedy for another party's violation of a duty. In determining whether a cause of action exists, therefore, a court necessarily decides questions about its jurisdiction, the rights and duties created by the statute, the availability of remedies, and the standing of the parties.[9] Under our constitutional system, the federal courts are courts of limited jurisdiction and have no power to legislate; a federal court must have constitutional and usually legislative authority to exercise jurisdiction and Congress must be the source of statutorily created rights and duties. Once constitutionally or statutorily created rights are violated, however, federal courts traditionally have been viewed as having the power to fashion remedies and to decide questions of standing.[10] Thus, it is crucial whether implication involves creating jurisdiction or rights and duties, or merely provides a remedy for persons injured when rights created by the Constitution or Congress are violated. Because a federal court has no power to create jurisdiction or rights and duties, it would seem necessary to show congressional intent to create both. Since the federal courts arguably have the power to fashion remedies once jurisdiction and rights are discerned, it may not be necessary to show congressional intent to allow the court to provide a remedy.

A review of the Supreme Court's implication cases reveals a repeated failure to distinguish between implying (creating) rights and duties and implying remedies, and consequently a failure to indicate whether congressional intent to do either or both must be shown before a court can recognize implication. For this reason, the analytical tool the Court has adopted for resolving implication cases—discerning legislative intent—does not satisfactorily reconcile its prior holdings, does not serve as a useful predictor of when, if ever, implication will be allowed, and raises without resolving constitutional questions regarding the power of the federal courts. The existing decisions can be better harmonized, however, and important policy considerations can be effectuated without unnecessarily restricting the power of the federal courts, if the implication cases are analyzed in terms of whether congressional intent to confer

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upon the statutory scheme that Congress enacted into law."); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979):

> 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 purpose of a given statute . . ., what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.

9. Courts frequently use the terms "cause of action," "right of action," and "private remedy" interchangeably. In this Article, the term "cause of action" will be used when referring generally to an inquiry or the result of an inquiry that involved all four questions listed in the text. The term "right of action" will be used when referring to the question whether the plaintiff is entitled to file suit to obtain a remedy of some sort. The term "remedy" will be used when referring to the answer to the question whether a particular form of relief (*i.e.*, damages, rescission, or injunction) will be made available to a litigant. *See infra* note 19.

10. *See* Cannon v. University of Chicago, 441 U.S. 677, 736 n.6 (1979) (Powell, J., dissenting); L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1064 (1983). *See also infra* note 27.

jurisdiction, create a right of action, provide a remedy, or to confer standing can be shown.

Because many of the important implication cases have arisen under the federal securities acts, the focus of this Article is on implication from the securities laws.[11] Part I sets forth a structure for analyzing the Supreme Court cases, primarily by articulating the differences between what the Court does when it finds there is jurisdiction and what it does when it either implies a cause of action or implies a remedy. Part I also provides an overview of the federal securities laws and briefly explains why they have been a source for judicial implication. Part II analyzes Supreme Court cases and traces the shifts in the Court's approach to implication questions over the last twenty years. Part III contains a critical analysis of the current status of implication jurisprudence and concludes that the Court's inconsistent approach has made it difficult to use the decisional law as a basis for predicting the outcome of future controversies. Hidden in the cases, however, is a workable test, which if consistently applied creates a coherent analytical framework that courts can use to resolve correctly differing implication cases. This standard is explained and applied to the Court's prior cases to demonstrate the utility of a proper analytical approach. The Article will not examine cases implying a cause of action from a constitutional provision.[12]

I. AN ANALYTICAL FRAMEWORK

A. Jurisdiction

The federal trial courts, unlike state courts of general jurisdiction, must be constitutionally authorized to entertain the cases that come before them. Even when constitutional power is present, in most instances[13] jurisdiction must also be found in general or special statutes enacted by Congress.[14] This power to

11. Securities laws implication cases were decided both before and after the United States Supreme Court adopted its current emphasis on legislative intent. The Court has recognized and refused to recognize causes of action implied from provisions of the securities laws. In addition, the securities laws contain provisions that have been deemed by the Court to be both representative and anomalous of other statutes that have been the basis for implication.

12. Implication of a cause of action from a constitutional provision, as opposed to a statute enacted by Congress, involves different considerations. The federal courts are precluded from legislating by article III, § 1 of the Constitution. They cannot create substantive rights and duties. In our federal system it is Congress that has the power to create such rights and duties, unless the right sought to be enforced is one protected by the Constitution. The Supreme Court, in its role as the guardian of constitutionally guaranteed rights, arguably does not need congressional action in order for it to allow judicial enforcement of such rights. *See* Davis v. Passman, 442 U.S. 228, 241 (1979) ("The question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution."). *See also* Annot., 64 L. Ed. 2d 872 (1981).

13. The Supreme Court's original jurisdiction, maritime and admiralty jurisdiction, and the so called federal common-law jurisdiction (derived from Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)), are the principal exceptions. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 786 (2d ed. 1973).

14. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-31, at 115 (1978).

hear cases may be viewed conceptually as divisible into four types of authority.

First, the subject of the claim before the court generally must be one that Congress has indicated should be adjudicated in a federal forum. A general jurisdictional statute is sufficient to confer jurisdiction on a federal court. For example, 28 U.S.C. section 1331 confers on the federal courts jurisdiction to hear questions arising "under the Constitution or laws of the United States."[15] Jurisdiction may also be conferred on a federal court by a more specific grant, such as section 27 of the Securities Exhange Act of 1934, which provides that the federal district courts, concurrently with the state courts, shall have jurisdiction of "all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act]."[16] Without such subject matter jurisdiction the court would be compelled to dismiss the action.[17]

Second, the federal court, even though it has subject matter jurisdiction, must find that the claim is one that Congress has either specifically or impliedly authorized the courts to recognize and, assuming adequate proof of injury, to redress.[18] Third, the court must have the authority to award the specific type of relief requested (*e.g.*, damages or an injunction).[19] If either of

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15. 28 U.S.C. § 1331 (1982).

16. 15 U.S.C. § 78aa (1982).

17. *See* FED. R. CIV. P. 12(b)(1).

18. Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979); Bell v. Hood, 327 U.S. 678, 682 (1946). Distinguishing between this type of power and that labelled "subject matter jurisdiction" above has been a source of confusion in several of the implication cases. *See, e.g.*, *infra* text accompanying notes 53-57.

19. In Davis v. Passman, 442 U.S. 228 (1979), a case in which the Supreme Court recognized an implied cause of action based upon a violation of a constitutional provision, Justice Brennan distinguished the question of what relief, if any, a litigant may be entitled to receive from the "analytically distinct and prior" question whether a litigant has a cause of action. He defined the term, or concept of, a "cause of action" as one "employed specifically to determine who may judicially enforce the statutory rights or obligations." *Id.* at 239. In a footnote, Justice Brennan went on to state the following:

> [*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, ... Whether petitioner has asserted a cause of action, however, depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts.

Id. at 239 n.18 (citations omitted).

Arguably, Justice Brennan's definition of the term "cause of action" poses a question that is often considered to be part of the standing question. *See,* e.g., G. GUNTHER, CONSTITUTIONAL LAW 1616 n.3 (10th ed. 1980), in which Professor Gunther notes that while the most common article III problem has been the extent to which Congress can grant court access to plaintiffs not showing traditional injuries, recent Supreme Court decisions have brought to the fore a quite different aspect of Court-Congress relations. This aspect focuses on the delineation of remedies: the situation that exists when Congress fails to grant explicit remedies for violation of constitutional rights or fails to establish clear private remedies for the enforcement of new statutory rights. *Id.* There is a danger in confusing or combining the standing question with what constitutes a

these latter two categories of power are lacking, the court, even though it has subject matter jurisdiction, will dismiss the action for failure to state a claim upon which relief can be granted.[20] Finally, a plaintiff must have standing—he must be sufficiently adverse to a defendant to create an article III case or controversy[21]—before a federal court will exercise its jurisdictional power.

The lower court cases discussing these issues have at times confusingly referred to the absence of any one of the four types of authority simply as a lack of jurisdiction.[22] For example, if a court did not find an implied right of action or an implied remedy, it dismissed the case for lack of subject matter jurisdiction instead of for failure to state a claim upon which relief could be granted. Such a disposition raises questions about the subject matter jurisdiction of the federal courts to entertain cases involving claims based on implied rights. While the Supreme Court consistently has held that the federal courts have subject matter jurisdiction to hear cases based on implied rights,[23] it has not articulated clearly how the questions whether a right of action existed and whether a particular remedy could be granted are affected by the recognition that a federal court had subject matter jurisdiction.[24]

The Supreme Court frequently does not make clear in deciding implied cause of action cases whether its holding is based on a finding that a private right of action cannot be implied from the statute in question or whether its holding is simply that the relief sought by the plaintiff is not within the power of the Court to grant. The Court frequently uses the term "implied right of action" (or "cause of action") interchangeably with the term "implied remedy."[25] Furthermore, in at least one case, the Court resolved a securities statute implication case in terms of standing when arguably the question was whether a right of action existed.[26]

The confusion between right of action and remedy presents the most serious problems. The federal courts have long exercised flexibility and discretion when fashioning remedies.[27] The federal courts' ability to imply rights of ac-

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cause of action, because a cause of action can exist although the particular plaintiff asserting the right may be deemed not to have standing.

See *supra* note 9 for an explanation of how the term "cause of action" is used in this Article.

20. *See* FED. R. CIV. P. 12(b)(6).

21. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

22. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 679-80 (1946).

23. *See* Davis v. Passman, 442 U.S. 228 (1979); J.I. Case v. Borak, 377 U.S. 426 (1964); Bell v. Hood, 327 U.S. 678 (1946). None of the securities laws implication cases has been decided by the Supreme Court on the ground that the federal courts lack jurisdiction.

24. *See infra* text accompanying notes 53-59.

25. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975). "There are other questions, but the principal issue presented for decision is whether a private cause of action for damages against corporate directors can be implied . . . ." *id.* at 68; "and sought a private claim for relief . . . ." *id.* at 71; "In determining whether a private remedy is implicit . . . ." *id.* at 78; "is the cause of action one . . . ." *id.*

26. *See* Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), *discussed infra* text accompanying notes 125-148.

27. In J.I. Case v. Borak, 377 U.S. 426 (1964), the Court cited the following cases to support this proposition: Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) (federal court has power to devise equitable remedy for expressly created equitable right of action); Porter v. Warner Holding Co., 328 U.S. 395 (1946) (federal court has power to devise equitable remedy for

tion, however, is neither historically based nor widely accepted.[28] Consequently, the need to show legislative authorization or intent is much greater when a federal court wishes to hold that a right of action exists than when it wishes to grant a particular remedy.

B. Securities Legislation Background

Federal securities legislation[29] regulates most domestic securities transactions.[30] The Securities and Exchange Commission (SEC) is the principal federal agency responsible for enforcing and administering the federal securities laws.[31] Although the SEC has various statutory powers enabling it to enforce the securities laws and its own regulations, it has no power to require a securities law violator to compensate persons who suffer damages from prohibited conduct.[32] A person injured as a result of a securities law violation must sue

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expressly created equitable right of action); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (federal court has power to devise equitable remedies to supplement expressly created damage remedy for expressly created private right of action). In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982), Justice Stevens cited to Justice Frankfurter's dissenting opinion in Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), for the same proposition. In his dissent in *Montana-Dakota*, Justice Frankfurter cites Board of Comm'rs v. United States, 308 U.S. 343 (1939), Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937), Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930), as cases in which the Court exercised its "well-defined powers" to fashion familiar remedies to enforce statutory obligations even though there was no explicit statutory authorization to do so. *Montana-Dakota*, 341 U.S. at 261 (Frankfurter, J., dissenting).

There has not been an attempt to refute the power of the federal courts to fashion or imply remedies similar to that made against implying rights of action, even in Justice Powell's strong dissents in Cannon v. University of Chicago, 441 U.S. 677 (1979), and *Curran*, 456 U.S. 353, decisions in which a majority of the Court was willing to imply a cause of action.

28. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J. dissenting); L. Loss, *supra* note 10, at 1056-58; 2 L. Loss, SECURITIES REGULATION 934-36 (2d ed. 1961) [hereinafter cited as __ L. Loss].

29. In chronological order of enactment by Congress, the federal laws affecting securities are: Securities Act of 1933, §§ 1-26, 15 U.S.C. §§ 77a-77aa (1982); Securities Exchange Act of 1934, §§ 1-35, 15 U.S.C. §§ 78a-78kk (1982); Public Utility Holding Company Act of 1935 §§ 1-33, 15 U.S.C. §§ 79a to 79z-6 (1982); Trust Indenture Act of 1939, §§ 301-328, 15 U.S.C. §§ 77aaa-77bbbb; Investment Company Act of 1940, §§ 1-65, 15 U.S.C. §§ 80a-1 to -64; Investment Advisors Act of 1940, §§ 201-222, 15 U.S.C. §§ 80b-1 to -21 (1982); Securities Investor Protection Act of 1970, §§ 1-16, 15 U.S.C. §§ 78aaa-78*lll* (1982).

30. Certain transactions, securities, and persons engaging in securities transactions are exempted from one or more of the acts or parts thereof. For example, the Securities Act of 1933 exempts the issuance of securities by local, state, and federal governments from the registration provisions of the Act, 15 U.S.C. § 77c(a)(2) (1982), and the Investment Company Act of 1940 exempts from the definition of investment company any bank or insurance company, 15 U.S.C. § 80a-3(c)(3) (1982).

31. 15 U.S.C. § 78d (1982). Certain matters are specifically designated to be administered by other federal agencies. For example, the Board of Governors of the Federal Reserve System is authorized to prescribe rules and regulations regulating the amount of credit that can be extended and maintained on any security. *Id.* § 78g(a).

32. For example, the SEC may refuse to declare the registration of securities effective, 15 U.S.C. § 77h(b); may conduct hearings to determine if violations of the law have occurred, 15 U.S.C. § 78o(b)(4); and where appropriate may deny, suspend, or revoke the registrations of broker-dealers, *id.*; and may censure individuals for misconduct or bar them from employment with a registered broker-dealer, *id.* § 78o(b)(6). The SEC may refer facts indicating the commission of a fraud or other willful violation to the Department of Justice with a recommendation for criminal prosecution of the offending persons. The Justice Department, through its local United States attorneys, may present evidence to a federal grand jury and seek an indictment for a willful violation of a securities statute, 15 U.S.C. § 77t(b). The SEC may apply to an appropriate United

in state or federal court to recover damages or obtain other forms of personal relief.[33]

Three different types of provisions in the federal securities laws provide or may provide the basis for private suit: provisions explicitly creating private causes of action for rescission or money damages;[34] provisions purporting to affect the legal relationships between private parties but not expressly creating private causes of action;[35] and provisions requiring or prohibiting certain con-

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States district court for an order enjoining those acts or practices alleged to violate the law or commission rules, *id.* In connection with some injunction actions, the SEC has requested, and the court has granted, "ancillary relief," an order directing the violator to pay over his profits to a depository for distribution to persons entitled to recovery. *See, e.g.*, SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978); SEC v. Shapiro, 494 F.2d 1301 (2d Cir. 1974); SEC v. E & H Oil Co., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,652 (W.D. La. 1980); SEC v. Golconda Mining Co., 327 F. Supp. 257 (S.D.N.Y. 1971); SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y 1970), *aff'd*, 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971). *See also* SEC v. Wills, 472 F. Supp. 1250 (D.D.C. 1978) (ancillary relief appropriate remedy in some circumstances, but not applicable to the facts). Such relief is considered ancillary to the court's equity jurisdiction and is based on a theory of deterrence rather than compensation. L. Loss, *supra* note 10, at 1176-78.

33. Five of the seven federal securities acts provide for concurrent federal and state jurisdiction over private civil actions, while granting exclusive federal jurisdiction over criminal proceedings and enforcement actions by the SEC. Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (1982); Public Utility Holding Company Act of 1935, § 25, 15 U.S.C. § 79y (1982); Trust Indenture Act of 1939 § 322(b), 15 U.S.C. § 77vvv (1982); Investment Company Act of 1940, § 44, 15 U.S.C. § 80a-44 (1982); Investment Advisors Act of 1940, §214, 15 U.S.C. § 80b-14 (1982). Section 27 of the Securities Exchange Act of 1934 grants exclusive jurisdiction to the federal courts over all suits. 15 U.S.C. § 78aa (1982). The Securities Investor Protection Act of 1970, § 5, 15 U.S.C. § 78eee(b) (1982), provides that the securities investor corporation may apply to any court of competent jurisdiction specified in 15 U.S.C. § 78aa or § 78u(e) (1982) to seek enforcement of the Act's provisions. Section 78aa is the jurisdictional provision of the Securities Exchange Act of 1934 and § 78u(e) is a provision granting the SEC the power to seek injunctions under the Exchange Act.

34. The Securities Act of 1933 contains three provisions that expressly provide for private causes of action. Section 11 provides a private cause of action for the purchaser of a registered security when a false or misleading statement is included in the registration statement, 15 U..S.C. § 77k(a) (1982); § 12(1) makes a person who offers or sells a security in violation of the registration and prospectus delivery requirements liable to the purchaser, *id.* § 77*l*(1); and § 12(2) provides civil liability for false or misleading statements in connection with the sale (although not the purchase) of a security, *id.* § 77*l*(2).

The Securities Exchange Act of 1934 also contains three sections expressly providing for civil liability. Section 9(e) provides that any person who "wilfully participates" in any act or transaction in violation of § 9's provisions regarding price manipulation of securities listed on national securities exchanges, "shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction," 15 U.S.C. § 78i(e) (1982); § 18 imposes civil liability on any person who makes or causes to be made a false or misleading statement contained in any application, report, or other document filed with the SEC pursuant to the Exchange Act or any rule or regulation thereunder, *id.* § 78r(a); and § 16(b) provides for recovery by the issuer of any profit made by an insider on a sale of the issuer's securities within a period of less than six months, *id.* § 78p(b).

The Public Utility Holding Company Act of 1935 contains two provisions expressly providing for private causes of action. Section 16(a) incorporates § 18 of the Exchange Act by reference, 15 U.S.C § 79p(a) (1982). Section 17(b), *id.* § 79p(b), is similar to § 16(b) of the Exchange Act.

The Trust Indenture Act of 1939 includes one civil liability provision, § 323(a), 15 U.S.C. §§ 77aaw(a) (1982), which is modeled on § 18 of the Exchange Act. The Investment Company Act of 1940 includes one civil liability provision, § 30(f), 15 U.S.C. §§ 80a-30(f) (1982), which is comparable to § 16(b) of the Exchange Act. There are no provisions in the Investment Advisers Act of 1940 or the Securities Investor Protection Act of 1970 expressly providing for a private cause of action.

35. *See, e.g.*, § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1982). Section 29(b) provides generally that every contract formed or performed in violation of the Ex-

duct or declaring acts to be unlawful without expressly authorizing private causes of action.[36]

Section 12(1) of the Securities Act of 1933, an example of the first type of provision, makes a person who offers or sells a security in violation of the registration and prospectus delivery requirements of the Act liable to the purchaser of the security.[37] Section 29(b) of the Securities Exchange Act of 1934 illustrates the second type; it provides generally that every contract formed or performed in violation of the Exchange Act or any rule or regulation promulgated thereunder "shall be void" with respect to the rights of the violating party or his successor who takes with knowledge.[38] Section 29(b) does not specify how the provision is to be enforced, however. Section 10(b) of the Exchange Act is an example of the third type of provision; it makes unlawful manipulation or deception in contravention of SEC rules in connection with the purchase or sale of any security.[39]

The provisions expressly providing private causes of action have not been the most useful to persons seeking remedies for conduct violating the federal securities laws. The statutes creating such causes of action contain restrictions and defenses that make them less useful to plaintiffs.[40] Furthermore, not all conduct that violates the acts is made the basis of liability, and the express provisions generally provide only for the recovery of money damages or for rescission. Therefore, courts find a need to imply causes of action based on provisions of the second and third types.

The earliest lower court decisions implying private causes of action from

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change Act or any rule or regulation promulgated thereunder "shall be void" as regards the rights of the violating party or his successor who takes with knowledge. Similar but not identical provisions are § 26(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z(b) (1982), § 47(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-47(b) (1982), and § 215(b) of the Investment Advisers Act of 1940, 15 U.S.C § 15(b) (1982). The Securities Act of 1933, Trust Indenture Act of 1939, and Securities Investor Protection Act of 1970 do not contain voidability provisions.

36. The United States Supreme Court has recognized implied private causes of action to enforce § 10(b) and § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and § 78n(a) (1982). *See* Superintendent of Ins. v. Banker's Life & Casualty Co., 404 U.S. 6 (1971) (§ 10(b)); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (§ 14(a)). Both of these sections declare certain conduct to be unlawful. Many state and lower federal court decisions have recognized implied private causes of action based on other provisions of the federal securities laws or the rules and regulations promulgated thereunder. *See, e.g.*, cases cited in ALI FED. SEC. CODE § 1722 (1980).

37. 15 U.S.C. § 77*l*(2) (1982).

38. 15 U.S.C. § 78cc(b).

39. *Id.* § 78j(b).

40. For example, § 13 of the Securities Act of 1933 establishes a federal statute of limitations for all civil actions under § 11 and § 12. 15 U.S.C. § 77(m) (1982). In general, the limitations period is one year after the discovery of the violation but no more than three years after the sale of the security to the public. Sections 9(e) and 18 of the Securities Exchange Act of 1934 also contain similar, relatively short, one-year and three-year statutes of limitations. 15 U.S.C. § 78i(e), (r) (1982). In addition, § 9(e) and § 18 give the courts discretion to require an undertaking for costs, including attorney's fees, against either party litigant. Section 9(e) is limited to transactions involving securities listed on the national securities exchanges. Section 18 provides for liability only to a person who "purchased or sold a security at a price which was affected by such statement" and only if this plaintiff acted "in reliance upon such statement" and the defendant is not liable if he "acted in good faith and had no knowledge that such statement was false or misleading." *Id.*

provisions of the federal securities laws reasoned that a party injured by a violation of a statute that did not provide a private cause of action, but that had been enacted in whole or in part to protect an interest of the injured party, is entitled to recover damages caused by a violation of the statutorily imposed duty.[41] This approach is generally referred to as the tort theory, since it had its origins in the law of negligence.[42]

An alternative ground for implying private causes of action from the securities laws was based on the existence of voidability provisions in several of the acts.[43] Some of the early cases assumed not only that a private cause of action for rescission could be implied from the voidability provisions but also that damages could be recovered in such an action.[44] The voidability sections were cited by the courts as both an independent basis for implied civil liability and as a supporting basis for the tort theory.[45]

Although the vast majority of lower courts considering the issue prior to the late 1970s implied causes of action from various provisions of the federal securities laws, some courts did not. The reasons given for not doing so varied, but generally fell into one of three categories: the court before which the action was pending had no jurisdiction to hear the claim,[46] the court was without power to grant the particular remedy sought,[47] or the plaintiff was not within the category of individuals intended to be protected by the provision.[48]

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41. *See, e.g.*, Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) (implying private cause of action from § 6(b) of the Exchange Act, 15 U.S.C. § 78f(b) (1982)). *See also* Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) (implying cause of action to enforce § 4(a)(2) of the Public Utility Holding Company Act, 15 U.S.C. §79d(a)(2) (1982)); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (implying a private cause of action under § 10(b) of the Exchange Act, 15 U.S.C. §78j(b) (1982)).

42. *See* RESTATEMENT (SECOND) OF TORTS § 874A (1977). *See also* W. PROSSER, LAW OF TORTS § 36 (4th ed. 1971).

43. *See supra* note 35.

44. *See, e.g.*, Warshow v. Hentz & Co., 199 F. Supp. 581 (S.D.N.Y. 1961); Geismar v. Bond & Goodwin, 40 F. Supp. 876 (S.D.N.Y. 1941). *See also* cases cited in 3 L. Loss, *supra* note 28, at 1760 n.253; 6 L. Loss, *supra* note 28, at 3867 (2d ed. Supp. 1969); Gruenbaum & Steinberg, *Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened*, 48 GEO. WASH. L. REV. 1, 25 nn.117-19 (1979).

45. *See, e.g.*, Osborne v. Mallory, 86 F. Supp. 869, 879 (S.D.N.Y. 1949); Geismar v. Bond & Goodwin, 40 F. Supp. 876, 878 (S.D.N.Y. 1941). Section 26(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z(b) (1982), provided a basis for implied liability in addition to the common-law tort doctrine in Goldwin v. Groesbeck, 142 F.2d 422, 426-27 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). *See also* Kardon v. National Gypsum Co., 69 F. Supp. 512, 512-14 (E.D. Pa. 1946) (tort theory as well as § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1982) provide bases for imposing liability in private civil action for violating § 10(b) of the Exchange Act, *id.* § 78j(b)).

46. *See, e.g.*, Downing v. Howard, 162 F.2d 654, 659 (3d Cir.), *cert. denied*, 332 U.S. 818 (1947) (action dismissed for lack of subject matter jurisdiction although the basis of the decision seemed to be a failure to prove a legal connection between the violation of the statute and the loss).

47. *See, e.g.*, Goldsmith v. Western & S. Life Ins. Co., 5 SEC JUD. DEC. 795, 799-800 (N.D. Ohio 1948) (oral opinion, written findings and conclusions) (no private right to sue for an injunction against further violations of rule 10b-5, since the statute vests this remedy exclusively in the SEC).

48. *See, e.g.*, Howard v. Furst, 238 F.2d 790, 793 (2d Cir. 1956) (proxy provisions of the Exchange Act are designed to protect shareholders and will not sustain an implied action brought derivatively on behalf of a corporation).

The cases denying implication were always a distinct minority, however, and after the Supreme Court ruled favorably in a securities law implication case in 1964, they were believed to be generally discredited.

II. THE SUPREME COURT CASES

A. Borak *to* Barbour—*A Remedy for Every Right*

Although the lower courts began implying actions under the securities acts in the mid-1940s, the Supreme Court did not uphold implication in a securities case until 1964. In *J.I. Case Co. v. Borak*,[49] an opinion as notable for its unclear reasoning as for its groundbreaking holding,[50] the Court unanimously held that a corporate shareholder could sue for damages resulting from the circulation of a false and misleading proxy statement in violation of section 14(a) of the Exchange Act. Section 14(a) contains no language expressly authorizing a private cause of action. The section does, however, declare certain conduct unlawful.[51] By recognizing the shareholder's right to bring the action, the Supreme Court for the first time explicitly recognized that it was proper to imply a private cause of action from a provision of a federal securities act, at least when the provision made particular conduct illegal.

The Court stated the issue as whether section 27 of the Exchange Act "authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of Section 14(a) of the Act."[52] Section 27 of the Exchange Act gives federal courts exclusive jurisdiction over any suit or action brought to enforce any liability or duty created by the Act.[53] The section plainly was intended to be a general jurisdictional grant providing criminal as well as civil subject matter jurisdiction and is not relevant to deciding whether a private cause of action can be implied from section 14(a).[54] By framing the issue in

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49. 377 U.S. 426 (1964).

50. *See* Cannon v. University of Chicago, 441 U.S. 677, 735-36 (1979) (Powell, J., dissenting); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402-03 n.4 (1971) (Harlan, J., concurring). *See also* L. Loss, *supra* note 10, at 1063-64.

51. *See* Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a) (1982). Section 14(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Id.

52. *Borak*, 377 U.S. at 428.

53. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1982).

54. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979):

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision.

the manner in which it did, the Court confused the question of subject matter jurisdiction with the question of whether a right of action can be implied, two analytically distinct issues.[55] Furthermore, it raised the possibility that by recognizing subject matter jurisdiction based on a general jurisdictional statute, the Court was also holding that a substantive private right of action was contained in, or could be implied from, the jurisdictional statute, thus creating a fourth type of statute that could be the source of an implied cause of action. If the Court in fact meant for section 27 to be interpreted in such a manner, *Borak* was a radical decision, for such an interpretation in effect would give the Court the power to legislate—to be the source of substantive rights and duties.[56] It was not until 1979 that the Supreme Court made clear that it did not intend such a result in *Borak*, or, if it had so intended, it overruled that part of the decision which gave the Court this broad power.[57]

The *Borak* Court's analysis relating to the jurisdiction versus cause of action issue did not decrease the confusion. The Court stated:

> It appears clear that private parties have a right under Section 27 to bring suit for violation of Section 14(a) of the Act. Indeed, this section specifically grants the appropriate district courts jurisdiction over all suits in equity and actions at law brought to enforce any liability or duty created under the Act.[58]

Again, the Court's language caused, or perhaps just permitted, confusion between recognizing the existence of subject matter jurisdiction and implying private rights of action.[59]

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55. The question of the federal courts' subject matter jurisdiction to hear a claim based on an alleged violation of § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) (1982), was not raised, addressed, or answered in the opinion of the court of appeals below. The court of appeals, relying on precedent in another circuit, assumed that a cause of action implied from § 14(a) stated a claim upon which some relief could be granted. Borak v. J.I. Case Co., 317 F.2d 838, 848-49 (7th Cir. 1963), *aff'd*, 377 U.S. 426 (1964). The question actually addressed in the lower court opinion concerned the power of the federal court to provide the particular remedy sought by the plaintiff—rescission and damages as opposed to a declaratory judgment.

56. There is an alternative, however, to reading substantive content into § 27. It is arguable that all the Court wanted to do when it stated that "private parties have a right under section 27 to bring suit for violation of section 14(a) . . . ," *Borak*, 377 U.S. at 430-31, was to establish firmly that the federal courts had subject matter jurisdiction to hear suits alleging violations of the Exchange Act, as opposed to holding that § 27 was in part the source of the judicial power to imply a cause of action. The Court may have wanted to establish subject matter jurisdiction because of the confusion in the lower courts between dismissals for lack of subject matter jurisdiction and dismissals for failure to state a claim upon which relief could be granted. If that is all the Court wanted to do, however, it is unclear why no authority in support of the summary statement was cited. There were cases establishing that point, such as Bell v. Hood, 327 U.S. 678 (1946).

57. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). In *Touche Ross* Justice Rehnquist stated:

> The Court in *Borak* found a private cause of action implicit in Sec. 14(a). . . . We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action.

Id. at 577 (citations omitted).

58. *Borak*, 377 U.S. at 430-31.

59. In the concluding paragraphs of the opinion, the Court introduced an additional factor that further confuses understanding what the Court believed the impact to be of § 27 on the sources of the federal courts' power to imply causes of action and remedies. In holding that § 14(a) would control the remedy question despite the existence of relevant state corporation law,

Even assuming, however, that the Court merely wanted to establish the presence of subject matter jurisdiction, the Court went on to determine that it had the power to imply a right of action and to fashion an appropriate remedy. Furthermore, the Court recognized that the two issues were severable, pointing out that the petitioner was questioning not only the power of the Court to grant the relief sought by plaintiff but also the power of the Court to recognize the right of a private party to bring an action based on a violation.

To answer the question whether a private right of action could be implied from section 14(a), Justice Clark examined the legislative intent behind section 14(a), and determined that a purpose of section 14(a) "is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."[60] He then emphasized the language in the statute that anticipates the prescription by the SEC of rules and regulations necessary or appropriate in the public interest or *for the protection of investors*. This language "implies the availability of judicial relief where necessary to achieve that result."[61] Justice Clark also stated that private enforcement of the proxy rules provided a necessary supplement to SEC action, and called attention to the SEC's inability to examine the factual accuracy of the proxy statements required to be filed and the unlikelihood that the SEC could detect violations of the law prior to effectuation of the merger. He concluded that these three factors showed that Congress intended to create a private right of action and some remedy when it enacted section 14(a). It is also reasonably clear from the opinion that the Court viewed these factors as supporting the implication of a right of action as opposed to the implication of a particular remedy.

Justice Clark did not apply the reasoning then being used by the lower federal courts to support implication of a private right of action from the securities acts—the tort theory and the existence of a voidability provision in the Exchange Act. The only bases the Court gave for recognizing a right of action were found in its recognition of the remedial purposes underlying enactment of section 14(a) and the important role that private enforcement could play in exacting compliance with the statute.

Specifically addressing the question of relief, the Court found that courts had broad latitude to devise remedies, and cited cases holding that when the federal courts have subject matter jurisdiction and a cognizable right of action exists, there is judicial power to fashion a remedy that effectuates the right

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the Court cited Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *Borak*, 377 U.S. at 434. In *Lincoln Mills* the Court had construed § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1976), which provides generally for jurisdiction in the federal courts, to authorize the courts to create a federal common law of labor relations by defining the duties and the rights of the persons subject to the legislation. *See* Bickel and Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 35-38 (1957). Section 14(a) is not analogous to § 301. If any section of the Exchange Act is analogous to § 301, it is § 27, the jurisdictional provision. The effect of the *Borak* Court's citation to *Lincoln Mills* has thus been to engender confusion about whether the Court believed that § 27 could itself be the source of substantive rights.

60. *Borak*, 377 U.S. at 431.

61. *Id.* at 432.

being enforced.[62] The opinion does not indicate that evidence of congressional intent to create a *particular* remedy must be present. While the availability of any particular remedy would depend on a determination that a statute or the Constitution did not preclude its use, the opinion finds no such congressional intent limiting the available remedies under a right of action implied from section 14(a). To the contrary, the Court found that the reference in section 27, the jurisdictional section, to suits in equity as well as actions at law supported its proposition that Congress intended to give the courts wide latitude in devising remedies in cases in which section 14(a) violations are established.[63] The Court's discussion of the three factors supporting the theory that a private right of action existed, as well as its separate discussion of the availability of a remedy, supports interpreting *Borak* as recognizing that implying a right of action and implying a remedy are analytically severable issues.

The Court's failure to articulate the distinctions between what a court does when it implies a right of action and what it does when it fashions a remedy is curious and unfortunate. It may be that the Court felt that the power of the federal courts to imply rights of action was so well established that there was no need to mention specifically the sources of the courts' power to so do.[64] This seems to have been the assumption in most of the commentary generated immediately after the opinion. Writers focused on the Court's handling of the remedies and federalism questions, virtually ignoring the Court's justification for judicial power to imply a right of action, regardless of

62. *See supra* note 27 and cases cited therein. The *Borak* opinion does not make clear that the Court was aware that the cases it cited for this proposition were concerned only with the judicial power to fashion remedies as opposed to the power to imply rights of action. Nevertheless, an argument can be made that the Court was aware of the distinction. The cases are cited in the section of the opinion that begins as follows: "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Borak*, 377 U.S. at 433. *But see* Cannon v. University of Chicago, 441 U.S. 677, 735 n.6 (1979) (Powell, J., dissenting) ("None of the authorities cited in [*Borak*] supports the result.").

63. Although it is tempting to do so, all of the Court's references to § 27 cannot be explained by its desire to show that Congress intended the federal courts to have subject matter jurisdiction over suits seeking equitable as well as legal relief. The reference in the jurisdictional provision to both could not mean that Congress intended in all cases for all forms of relief to be available. As the Court later pointed out in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), a jurisdictional provision creates no cause of action of its own force and effect. Nevertheless, in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Court held that the absence of reference to actions at law in the jurisdictional provision of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 to -21 (1982), precluded the federal courts from fashioning any form of nonequitable relief to remedy violations of that Act.

64. Indeed, Professor Louis Loss argues that while individual members of Congress may or may not have enacted the Exchange Act with the implicit understanding that the courts would allow private parties to sue to recover damages resulting from injuries sustained as a result of violations of the statute, the drafters of the legislation would certainly have been aware of the courts' powers in this area. 2 L. Loss, *supra* note 28, at 942.

The failure of the Supreme Court to discuss either the tort or the voidability theories in *Borak* has led to some of the confusion regarding the references in the opinion to § 27. The tort and voidability theories had been offered by the lower federal courts as explanations for the sources of the power to imply causes of action. If the Supreme Court had expressly acknowledged or rejected either or both of the theories, the ensuing discussion would undoubtedly have revealed whether § 27 was viewed as the source of power to imply a right of action or merely the source of the court's subject matter jurisdiction to entertain cases based on a right of action implied from the Exchange Act.

remedy.[65]

On the other hand, the Court may have felt that the power to imply a right of action and the power to provide a remedy once a right of action was recognized were analogous. To a certain extent, judicial procedures used when implying rights of action and remedies are analogous; the analogy, however, is not perfect. Both are inferred to be the necessary consequence of express statutory language. When implying a right of action the court determines that a statute specifies certain duties and obligations that are judicially enforceable by the person asserting them. Only if it recognizes a right of action is it necessary to reach the question of available remedies. The right to invoke the power of the court to enforce a duty or obligation can exist, however, even though the particular remedy sought is unavailable, either because it is precluded by the express terms of the statute or because the plaintiff fails to establish facts that would entitle him to that remedy.[66]

The *Borak* decision has been described as reaching "the right result not for the wrong reason but for no reason at all."[67] Indeed the result was predictable. Supreme Court precedent existed for implying rights of action, albeit in non-securities cases,[68] and the lower courts had established the practice of implying rights of action in securities cases.[69] The unanimity of the opinion can

65. *See, e.g.*, Note, *Violations of Proxy Rules: Private Right of Action: Retrospective Relief:* J.I. Case v. Borak, 50 CORNELL L. REV. 370 (1965); *Recent Developments—SEC Proxy Regulations: Private Enforcement and Federal Remedies*, 64 COLUM. L. REV. 1336 (1964); *The Supreme Court, 1963 Term—Governmental Regulations—Securities Regulations*, 78 HARV. L. REV. 292 (1964); *Recent Decisions—Corporations-Stockholders May Obtain Retrospective as Well as Declaratory Relief Under Section 14(a) of the Securities Exchange Act*, 1964 U. ILL. L.F. 838. *But see* Note, J.I. Case v. Borak, *Civil Liability and Appropriate Remedies Under Section 14(a) of the Securities Exchange Act of 1934*, 59 NW. U.L. REV. 809 (1965) (examining the theories supporting judicial power to imply a cause of action). Most of the opinions were concerned with the implications of the interplay of federal remedies for proxy violations with state law that traditionally had governed corporate proxy procedures.

66. *See* Davis v. Passman, 442 U.S. 228, 240 n.18 (1979) ("A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies.") (citing Trainor v. Hernandez, 431 U.S. 434, 440-43 (1977)).

67. L. Loss, *supra* note 10, at 1064.

68. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (in personam relief implied despite Act's specific remedies for negligently sinking a vessel); United States v. Republic Steel Corp., 362 U.S. 482 (1960) (injunctive relief for removal of "structures" impliedly provided for removal of "obstructions" in rivers); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (Railway Labor Act impliedly allows for judicial remedies when administrative remedies are unavailable).

69. In 1961 Professor Loss stated that:

> The existence of a private remedy under Rule 10b-5 has now been recognized by four Courts of Appeals, with a favorable dictum in another, [Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953); Speed v. Transamerica Corp., 235 F.2d 369 (3d Cir. 1956); Errion v. Connell, 236 F.2d 447 (9th Cir. 1956); Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960); Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960); Slavin v. Germantown Fire Ins. Co., 174 F.2d 799 (3d Cir. 1949) (dictum); Beury v. Beury, 222 F.2d 464 (4th Cir. 1955) (dictum); and Reed v. Riddle Airlines, 266 F.2d 314 (5th Cir. 1959)] and also by several District Courts in other circuits. [Fifth-Third Union Trust Co. v. Block, S.D. Ohio, Civ. No. 1507, Dec. 11, 1946; Hawkins v. Merrill Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark. 1949); Grand Lodge of International Ass'n of Machinists v. Highfield, D.D.C., Civ. No. 3661-48, Jan. 24, 1949; Northern Trust Co. v. Essaness Theatres Corp.,

only be taken as evidence of the Court's view that implication was an appropriate function for the federal courts. Indeed, the source of the power to imply a right of action is clearly present in *Borak* (*i.e.*, the remedial purposes Congress sought to accomplish by enacting the legislation and the rights and duties created by section 14(a)). The right result does not, however, obviate the need for analysis. The Court did not adopt either the tort or voidability theories to support its result and offered no analytical substitute. It did not explain the source of a court's power to imply a right of action, citing Supreme Court precedent that permitted courts to imply remedies without making clear that the power was not dispositive of the power to imply rights of action.[70]

The next case in which the Supreme Court was presented with an issue involving a private cause of action implied from a federal securities statute was *Mills v. Electric Auto-Lite Co.*[71] *Mills* provided an opportunity for the Court to address the effect, if any, of section 29(b) of the Exchange Act on the propriety of implying rights of action and remedies. Section 29(b),[72] which declares that contracts made in violation of the Exchange Act or a rule thereunder are "void" as regards the rights of the violator, had not before been held by the Court to create implicitly a private right of action. Without directly addressing the question, the Court impliedly recognized such a right by holding, in accordance with a number of lower courts, that section 29(b) renders a contract merely voidable at the option of the innocent party, rather than as mandating that the agreement, entered into in violation of the act, be considered void.[73] Viewing the statutory language as merely making such an agreement voidable instead of void requires that an implied private cause of action based on section 29(b) be recognized, because in order to void the contract, the

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103 F. Supp. 954 (N.D. Ill. 1952); Taylor v. Janigan, D. Mass., Civ. No. 58-1056-M, Apr. 16, 1959; Texas Continental Life Ins. Co. v. Bankers Bond Co., 187 F. Supp. 14 (W.D. Ky. 1960).]

3 L. Loss, *supra* note 28, at 1763.

Similarly, numerous lower federal courts had by 1961 held that private actions could be maintained under the Exchange Act proxy rules. 1 L. Loss, *supra* note 28, at 932-46.

70. The cases cited in *Borak*, which hold that the federal courts have broad latitude to fashion (imply) remedies, all involved remedies for expressly created rights of action. *See, e.g.*, Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). Seemingly there would be no reason to restrict judicial flexibility to fashion relief because the cause of action is implied rather than expressly created. No distinction is made in *Borak*.

71. 396 U.S. 375 (1970).

72. Section 29(b) provides in part:

> Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation . . . .

15 U.S.C. 78cc(b) (1982).

73. *Mills*, 396 U.S. at 387.

innocent party would have to bring an action against the securities law violator. The primary reasons given by courts for recognizing a private right to enforce section 29(b) are that regarding the contract as void rather than merely voidable would create the possibility of hardship for the innocent party, and would fail to advance the statutory policy of disclosure that underlies the Exchange Act.[74]

Section 14(a) of the Exchange Act was also at issue in *Mills*, but instead of reexamining whether an action could be implied from that section, the Court addressed the necessity of showing causation to recover in such an action. The Court assumed the ability to imply a cause of action from section 14(a), presumably because of its holding in *Borak*.[75] In *Mills* it was merely defining the contents of the cause of action by looking at the substantive rights granted in section 14(a).[76]

Superintendent of Insurance v. Banker's Life and Casualty Co.,[77] which

74. *See id.* at 388.

75. In *Mills* the Court again stressed what it believed to be the congressional intent underlying the enactment of § 14(a): "to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with an 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.' " *Mills*, 396 U.S. at 381 (quoting H.R. REP. No. 1383, 73d Cong., 2d Sess. 14 (1934)). Similarly, the Court reaffirmed its adherence to the views first announced in *Borak* that private enforcement of the proxy rules provides a necessary supplement to SEC action and that failure to recognize an implied cause of action would result in the frustration of congressional intent. *Id.* at 382. In *Mills*, however, the Court went on to state that "[i]n devising retrospective relief for violation of the proxy rules, the federal courts should consider the same factors that would govern the relief granted for any similar illegality or fraud." *Id.* at 386. In making this statement, the Court did not distinguish between the types of relief available under an implied as opposed to an express cause of action. The Court reaffirmed the inherent power of the federal courts to provide adequate relief when a statutory duty is violated, bound only by the "sound discretion which guides the determinations of courts of equity." *Id.*

The Court did not refer to § 27 as the source of or a limitation on the courts' power to devise remedies. *Mills* thus provides support for the view that § 27 was not considered the source of the federal courts' power to do so; rather, such power is inherent in the courts. The issue before the *Borak* Court was restated in *Mills*, omitting any reference to § 27, thus lending further support to this view. As stated by the *Mills* Court, the inquiry in *Borak* was limited "to whether a violation of § 14(a) gives rise to 'a federal cause of action for rescission or damages.' " *Id.* at 383 (quoting *Borak*, 377 U.S. at 428).

76. In the concluding section of the opinion, the Court dealt with the question whether attorneys' fees could be awarded in a suit brought under § 14(a). Although the issue is outside the scope of this Article, several ideas discussed by the Court while resolving the issue have direct bearing on the implication question. First, the Court held that "[t]he absence of express statutory authorization for an award of attorneys' fees in a suit under § 14(a) [did] not preclude such an award." *Mills*, 396 U.S. at 390. As support for its position, the Court cited the longstanding practice of the lower federal courts to award attorneys' fees in suits brought by shareholders to recover short-swing profits for their corporation under § 16(b) of the Exchange Act, 15 U.S.C. § 78p(b) (1982), despite the lack of any provision for them in § 16(b). *See, e.g.*, Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). The lower courts did not find Congress' inclusion of express provisions for recovery of attorneys' fees in suits brought under other sections of the Act to in any way impinge upon the result reached under § 16(b) in the absence of statutory authorization, and the Supreme Court agreed that the existence of specific provisions should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act. The Court also found no reason to infer a purpose from the Exchange Act to circumscribe the courts' power to grant appropriate remedies. *Mills*, 396 U.S. at 390. The Court's rejection of the *expressio unius est exclusio alterius* maxim of statutory construction was not to be its last word on the subject, however. *See infra* note 187 and accompanying text.

77. 404 U.S. 6 (1971).

was decided a year and one-half later, is in the same analytical mode as *Mills*. Writing for a unanimous Court in *Banker's Life*, Justice Douglas somewhat cryptically provided Supreme Court recognition for an implied cause of action based on section 10(b) of the Exchange Act. Plaintiff brought a private action based on a violation of section 10(b).[78] The Court's entire discussion of the implication issue is contained in a footnote, in which the Court stated in full: "It is now established that a private right of action is implied under Section 10(b)."[79] The remainder of the opinion deals with the elements of the implied cause of action.

Banker's Life, although bereft of analysis, nevertheless has been cited authority for implying private actions in almost every one of the subsequent decisions addressing the issue. The Court made no attempt to compare or contrast the purposes underlying enactment of section 10(b) with those of section 14(a), the statute involved in *Borak*; nor did it address the scope of the courts' authority to devise remedies when a violation of section 10(b) is proved. Although the *Banker's Life* opinion cited *Borak*, it did not expressly reaffirm the bases for implication that were arguably set out in *Borak*—it can only be assumed they were reaffirmed.

After *Banker's Life*, the Supreme Court did not decide another implication case involving any of the securities acts until 1975, when it decided *Securities Investor Protection Corp. v. Barbour*.[80] Because the Court did not imply a cause of action in *Barbour*, the case is frequently viewed as a retrenchment or contraction from the Court's previous implication decisions, although in fact it is not.[81] The Court merely distinguished *Borak* on a sound basis.

Unlike *Borak*, *Mills*, and *Banker's Life*, *Barbour* did not arise under the Exchange Act but involved a dispute regarding the Securities Investor Protection Act of 1970 (SIPA).[82] SIPA is a narrowly focused act that provides for the establishment of the Securities Investor Protection Corporation (SIPC) as a nonprofit involuntary membership corporation for the purpose of providing financial relief to customers of failing broker-dealers with whom cash or secur-

78. Plaintiff also alleged violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1982). *Banker's Life*, 404 U.S. at 7. The Supreme Court did not discuss the § 17(a) claim.

79. *Banker's Life*, 404 U.S. at 13 n.9. As authority for this statement the Court cited its opinions in Techerepnin v. Knight, 389 U.S. 332 (1967), and *Borak*, as well as the discussion of § 10(b) liability in Professor Loss' treatise on securities regulation, 3 L. Loss, *supra* note 28, at 1763-97. *Techerepnin* required the Court to construe the definition of the term "security" set forth in the Exchange Act, and thus the Court did not have any opportunity to directly address the question whether § 10(b) provided a private right of action. The *Borak* opinion also did not discuss § 10(b). Although the section of Professor Loss' treatise the Court cited points out that the majority of lower court decisions had upheld implication of a private cause of action based upon § 10(b), the text generally deals with the elements of a private action under § 10(b) instead of the basis for implication.

The Court's footnote appears in a quotation from Shell v. Hensley, 430 F.2d 819, 827 (5th Cir. 1970), a case in which the Fifth Circuit recognized an implied cause of action based on § 10(b).

80. 421 U.S. 412 (1975).

81. The term "contraction era" is used by Professor Bromberg to describe the Supreme Court's securities implication decisions that post-date Cort v. Ash, 422 U.S. 66 (1975). *See* 1 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 2.4, at 310 (1982).

82. 15 U.S.C. §§ 78aaa-78*lll* (1982).

ities had been left on deposit. Pursuant to the Act, when the SIPC determines that a member organization has failed or is in danger of failing to meet its obligations to customers, it may file an application with a United States district court for a decree adjudicating that customers of the member firm are in need of the protection provided by SIPA.[83] If the court finds any of the four conditions on which an SIPC application may be based,[84] it must grant the application, issue the decree, and appoint a trustee for the liquidation of the business.[85] The SEC has a number of responsibilities and powers under SIPA, including the right to seek a judicial decree requiring the SIPC to discharge its statutory obligations.[86]

Barbour arose after the SEC had filed a complaint in district court against a registered broker-dealer. The complaint sought to enjoin continued violation of the SEC's rules, and requested that a receiver be appointed by the court to wind up the broker-dealer's affairs. The court granted the injunction and appointed the receiver. The respondent, the receiver appointed by the court, subsequently obtained an order directing the SEC and SIPC to show cause why the remedies afforded by SIPA should not be made available in the proceedings. The SIPC challenged the receiver's standing to compel its intervention. The district court upheld the receiver's right of action, but denied relief.[87] The Court of Appeals for the Sixth Circuit reversed the denial of relief and affirmed the recognition of the receiver's right to bring suit.[88] The appellate court specifically rejected the SIPC's argument that the provision in SIPA for SEC enforcement actions to compel the SIPC to perform its functions was meant to exclude such actions by protected customers or their representatives.[89]

The Supreme Court reversed, holding that the customers of an SIPC-member broker-dealer have no implied right to sue to compel the SIPC to perform its statutory functions.[90] The Court stated that implication of a private cause of action must be consistent with the legislative intent of the statute and that private enforcement must further the statutory purposes. The Court determined that Congress had created the SIPC to perform a public service, had provided for substantial supervision of its operations by an agency charged with protection of the public interest, and had authorized that agency to seek judicial action to enforce the obligations of the corporation. While the Court recognized that Congress' primary purpose for enacting SIPA and creating the SIPC was to protect investors, it found that allowing a private cause of

83. *Id.* § 78eee(a)(3).

84. *Id.* § 78eee(a)(1)(A)-(D).

85. *Id.* § 78eee(b)(1)-(3).

86. *Id.* § 78ggg(b).

87. SEC v. Guaranty Bond & Sec. Corp., 496 F.2d 145, 146-47 (6th Cir. 1974) (citing the district court opinion), *rev'd sub nom.* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

88. *Id.* at 150.

89. *Id.*

90. *Barbour*, 421 U.S. at 425. The Court, therefore, did not reach the issue of the receiver's standing to assert such a right.

action by the investors was not necessary or even capable of furthering that purpose.[91] The Court concluded that the overall structure and purpose of SIPA reflected a basic incompatibility with implication of a cause of action. The lack of any indication in the legislative history of congressional intent to create such a right bolstered this conclusion.

The *Barbour* Court distinguished *Borak* on the ground that implication of a cause of action under section 14(a) of the Exchange Act was premised on a belief that private enforcement was necessary to effectuate the broad remedial purposes of the proxy rules. It gave no indication that either the *Borak* result or its reasoning were faulty or superceded.[92] The Court simply thought that the two statutes were different.[93]

The *Barbour* opinion does not make clear what the Court meant when it stated that implication must be consistent with the legislative intent in enacting the statute. By a process of elimination, however, the Court's reasoning apparently is based on the theory that intent is the same as substantive legislative purpose.[94] Clearly, if the statute had included language expressly precluding or allowing private causes of action there would have been nothing for the Court to decide. It also seems apparent that if the legislative history had indicated that Congress had assumed there would or would not be private enforcement, the Court would have held accordingly. Assuming the federal courts have the power to imply private causes of action and that Congress

91. *Id.* at 421. The Court based its conclusion, in part, on the need to maintain public confidence in the capital markets as well as to protect the customers of the failing firm. Saving the firm by an infusion of capital or by merging it with another firm might be a better means of doing both. A customer was thought not to have enough public information to adequately consider the public interest, if indeed such interest would be considered, when making a decision to apply to the court. *Id.* at 422.

92. *Id.* at 423-24. The Court also distinguished its 1969 decision in Allen v. Virginia State Bd. of Elections, 393 U.S. 544 (1969). *Barbour*, 421 U.S. at 424. The question decided in the *Allen* case, which arose under the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p (1976), was whether a private citizen could sue to set aside a state or local election law on the ground that it was repugnant to the Act. The Act provided that the attorney general could bring such suits but was silent about the rights of others to do so. In *Barbour* the Supreme Court stated that it was clear to the *Allen* Court that the Voting Rights Act would be practically unenforceable against the many local governments subject to its provisions if the attorney general were the only one authorized to sue, and therefore it was consistent with the broad purposes of the Act to allow an individual citizen standing to ensure that his city or county government complies with the requirements of the Act. *Barbour*, 421 U.S. at 424-25 (citing *Allen*, 393 U.S. at 557). No similar incapacity on the part of the governmental agency and self-regulatory organizations charged with enforcement of SIPA was found.

93. *See Barbour*, 421 U.S. at 425. The Court held that the issue before it in *Barbour* was very similar to that before it in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (*Amtrak*). *Barbour*, 421 U.S. at 420. In *Amtrak* the Supreme Court held that private injunctive relief could not be obtained under the provision of the Rail Passenger Service Act of 1970, because the legislative history of the Act was entirely consonant with a holding that no private cause of action was intended; the structure and purpose of the Act further supported that conclusion; the Act's purposes would be hindered by recognition of a private cause of action; Congress had provided sufficient means for enforcing the Act without resort to private suit; and the absence of a private cause of action would not leave Amtrak free to disregard the public interest in its decisionmaking. *Barbour*, 414 U.S. at 462.

94. *Barbour*, 421 U.S. at 418. Professor Loss equates legislative intent with statutory purpose. *See* L. Loss, *supra* note 10, at 1103. It is not at all clear, however, that the Supreme Court is ready to adopt the equation.

knows of this power, "intent" as used by the *Barbour* Court must mean Congress' purpose in enacting the statute, not Congress' intent to allow private parties to sue.

Barbour did not address separately the questions of implying a right of action and implying a remedy.[95] Although the Court framed the question in terms of whether an implied private right of action for a particular remedy existed,[96] the Court's analysis did not focus on the remedy. The Court in effect held that SIPA did not create substantive rights or duties, or impose standards of conduct, that were capable of private enforcement. Thus, there was no procedural need to imply a private right of action. Absent a finding that a private right of action existed, there was no opportunity or need for the Court to examine the question of remedy.[97]

Between 1964 and 1975, there was no analysis of sources of power. It was generally assumed that the federal courts possessed the power to imply causes of action. The Supreme Court's decisions were supported in part by the lower courts' widespread use of the tort and voidability theories to support implication. In turn, *Borak* and its progeny prompted the lower federal courts to expansively imply causes of action, not only from the securities laws, but also from many other federal statutes.[98] It was therefore inevitable that the pendulum would swing too far. In fact it did, and *Cort v. Ash*[99] was the Supreme Court's response to this expansion.

B. Cort v. Ash*: Defining Intent*

Cases dealing with the implied causes of action issue must be classified as either pre- or post-*Cort v. Ash*, the 1975 decision in which Justice Brennan, writing for a unanimous Court, set forth a four part test for determining whether a private cause of action could be implied from a statute not expressly providing one. *Cort*, decided the same term as *Barbour*, was an obvious attempt to reconcile earlier implication decisions. Although written to be, and heralded as, a definitive guide for answering the question, the *Cort* test did not long survive.

Cort did not involve a securities statute. Instead, section 610 of the 1948 Election Act,[100] a criminal statute prohibiting corporations from making contributions or expenditures in connection with presidential elections was the

95. Subject matter jurisdiction apparently was not challenged.

96. As stated by the Court, the question presented was whether customers of a failing broker-dealer "have an implied private right of action under the Securities Investor Protection Act of 1970 . . . , to compel the SIPC to exercise its statutory authority for their benefit." *Barbour*, 421 U.S. at 413-14.

97. The fact that the subject matter jurisdictional provisions of SIPA were limiting and that there were no provisions in the statute creating a private right of action for any purpose supported the Court's determination that the particular action asserted and remedy sought could not be maintained or granted. *See id.* at 424-25.

98. *See, e.g.*, the United States courts of appeals' decisions cited in Cannon v. University of Chicago, 441 U.S. 675, 741-42 (1979) (Powell, J., dissenting).

99. 422 U.S. 66 (1975).

100. Act of June 25, 1948, ch. 645, § 610, 62 Stat. 718, 723 (repealed 1976).

proposed statutory basis for the implied cause of action. The issue was raised in a derivative suit brought by a shareholder of a corporation whose officers and directors allegedly had caused the corporation to violate the statute.[101]

In holding that a private cause of action to secure derivative damage relief could not be implied from section 610, the Court cited four relevant factors, phrased as questions, that were to be used in resolving implication cases:[102]

> First, . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purpose 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?[103]

The Court did not find that any of the factors supported implying a private cause of action from section 610. It did not find any intention to create a federal right in the plaintiff shareholders; rather, it found that the protection of ordinary stockholders was only a secondary concern of Congress when it enacted the statute.[104] The Court contrasted this secondary concern with other situations in which an implied cause of action was recognized—statutes or constitutional provisions that clearly articulate a federal right in the plaintiff[105] or "pervasive legislative scheme[s] governing the relationship between the plaintiff class and the defendant class in a particular regard."[106]

When discussing the importance of legislative intent, the Court noted that it is not necessary to show affirmative congressional intent to create a private cause of action in order to uphold implication, although an explicit purpose to

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101. The shareholder sought an injunction against further corporate expenditures in connection with election campaigns as well as compensatory and punitive damages in favor of the corporation. The Supreme Court held that injunctive relief was inappropriate because the Federal Election Campaign Act had been amended in 1974 to provide a statutory remedy for injunctive relief and, since it was the duty of the Court to decide the case in accordance with the law existing at the time of decision, the respondent was bound to pursue the new procedure with respect to alleged violations that had not yet occurred. *Cort*, 422 U.S. at 77.

102. *Id.* at 78. The four factors are identified in the opinion as being relevant to determining whether a private "remedy" is implicit in a statute not expressly providing one. Arguably, the term "remedy" as used by the Court combines the concepts of implied private right of action and implied relief. For purposes of consistency, this case will continue to be discussed in terms of the propriety of implying a private cause of action rather than implying a remedy.

103. *Id.* (citations omitted). The Court uses the term "right" in the first factor, "remedy" in the second two, and "cause of action" in the fourth. *Id.* While it would be tempting to argue that the second and third factors (legislative intent and consistency with the underlying purpose of the legislative scheme) should be limited to determining what relief should be granted, it seems clear that the Court did not intend such a result and it has not applied such an analysis in the later implication decisions.

104. *Id.* at 80.

105. *Id.* at 82 (citing, *e.g.*, Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics Agents, 403 U.S. 388 (1971) and Texas Pacific R. Co. v. Rigsby, 241 U.S. 33 (1916)). The Court's citation to *Bivens* is the first time the Court had cited a constitutional implication case or a case clearly based on the tort theory of implication in a securities act implied cause of action case.

106. *Id.* (citing, *e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964)).

deny a cause of action would be controlling. Nevertheless, stated the Court, when there is no suggestion that Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the absence in the legislative history of any suggestion of an intention to provide a private cause of action reinforces the view that no such action can be implied.[107]

The Court dispensed with the third factor by holding that the recovery of derivative damages by the corporation would not aid the primary congressional goal, to decrease or cure the impact of such funds on federal elections. The Court also held that in the situation before it, it was entirely appropriate to limit the respondent to a state law remedy. Unlike the situation in *Borak*, committing the respondent to state remedies would not have the effect of frustrating the congressional purposes in enacting section 610.[108]

Throughout its discussion of the second, third, and fourth factors, the Court clearly was addressing the propriety of implying a right of action to obtain a specific remedy—money damages.[109] Indeed, in its summation paragraph, the Court emphasized that the question of injunctive relief was not before it.[110] The Court reasoned in effect that money damages were an inappropriate remedy, and therefore a right of action to obtain such damages could not be implied.

Although it is arguable that the right of action question should have been answered first, the Court's failure to do so is supportable on the grounds that judicial economy requires that the narrower question be decided first. Even if the institutional preference for the more narrow decisional basis were the reason for the Court's focus on remedy, the opinion does not make clear whether the four factors were intended to be used to answer the right of action question or the remedy question. If one or more of the factors really should be used only to determine whether a right of action exists, its use when answering the remedy question may have the effect of restricting the power of the federal

107. *Id.* The Court was later to make clear that, similarly, even if express private causes of action are included in a statute, such inclusion does not necessarily evidence an intent to preclude implication of other causes of action.

108. *See id.* at 84. *Cf. id.* at 82-84 (when dubious congressional intent to vest rights broader than state regulations, absence of civil cause of action indicates expectation that area will continue to be controlled by states). In both *Borak* and *Banker's Life* the Supreme Court found occasion to discuss the impact of state law on the implication question. In *Borak* the Court was faced with the argument that questions of state law would have to be interpreted and applied in order to grant the relief sought by the plaintiffs in that action, and that the Court should not, therefore, imply a private cause of action. The *Borak* Court held, however, that the entire purpose of the proxy regulation provisions of the Exchange Act might be frustrated if the federal courts refused to grant remedial relief for violations of the federal statute. *Borak*, 377 U.S. at 434-35. In *Banker's Life*, the Court held that once a violation of section 10(b) of the Exchange Act was established, the plaintiff was entitled to redress "whatever might be available as a remedy under state law." *Banker's Life*, 404 U.S. at 12. In neither of these cases nor in *Cort* did the Court enter into a discussion of the constitutional distribution of judicial power between the states and the federal government, nor did it discuss the nonconstitutional aspects of the federalism concept. Only in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), a case not cited in *Cort*, was the federalism question addressed directly.

109. *See supra* note 103.

110. *Cort*, 422 U.S. at 85.

courts to fashion remedies, a power previously considered to be quite flexible and expansive.

The reverse situation may also be true. Because the federal courts arguably have greater power to fashion remedies than to imply rights, the Court may have formulated one or more of the factors in an attempt to identify an intent on the part of Congress to restrict judicial power to fashion remedies. Absent a finding of congressional intent to restrict the courts' power, the courts may provide a remedy. While the absence of a negative restriction on a particular remedy may give the courts a free hand to imply such a remedy, the failure of Congress to preclude implying rights of action does not similarly empower the courts to imply such rights.

In listing the four factors, Justice Brennan used the word "remedy" when describing the second and third criteria (discerning legislative intent and consistency with the underlying purposes of the legislative scheme), while the opinion speaks generally of inferring a cause of action. In later cases intent was to become the key factor—the only factor for some members of the Court—for resolving the right of action component in the cause of action equation.[111] If Justice Brennan's use of the term "remedy" was intentional, then discerning legislative intent may have been meant to be relevant to determining the appropriate remedy, and not relevant, or at least not relevant in the same way, when determining whether a private right of action exists.

Although it did not recognize a private cause of action in *Cort*, and used a novel analytical method, the Court did not disavow the bases previously recognized for implying private causes of action. The Court at least inferentially reaffirmed the inherent power of courts to provide a remedy for a wrong and the propriety of providing private enforcement mechanisms to further the accomplishment of discerned statutory goals. *Cort*, then, like *Borak*, really gave no basis for predicting the likelihood of the implication of additional causes of action under the federal securities acts. Although *Cort* purported to provide a refined analytical framework for determining when private causes of action would be inferred, the case law remained as muddled after the decision as it was before. While many commentators viewed the case as restricting the ability of the federal courts to imply causes of action,[112] the lower federal courts continued to do so.[113]

Two securities cases decided by the Supreme Court soon after *Cort* did not provide a better or more workable analysis for implying a cause of ac-

111. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979). These cases are discussed *infra* text accompanying notes 149-165 and 166-192 respectively.

112. *See, e.g.*, Comment, *supra* note 3; Note, *Implication of Private Actions From Federal Statutes: From* Borak *to* Ash, 1 J. CORP. L. 371 (1976); Note, *Private Right of Action Not To Be Implied from Federal Corrupt Practices Act*, 50 TUL. L. REV. 713 (1976); Note, *Implied Private Federal Action Not Available Under 18 U.S.C. § 610 When It Would Intrude on Area Traditionally Committed to State Law Without Asking the Main Purpose of the Act*, 25 CATH. U.L. REV. 447 (1976); Recent Decision, *Implied Cause of Action—No Remedy Available Under Federal Election Campaign Act*, 47 MISS. L.J. 156 (1976).

113. *See supra* note 98.

tion.[114] It was unnecessary for the Court to deal directly with the issue, however, because these cases clearly raised different, albeit subsidiary, issues—the availability of a particular remedy and standing.

C. *Post*-Cort v. Ash: *The Court Waffles*

In *Rondeau v. Mosinee Paper Corp.*[115] a corporation brought an action against a shareholder to enjoin him from voting or pledging his shares and from acquiring additional shares, and to require him to divest himself of the shares that he already owned. Plaintiff asserted section 13(d) of the Exchange Act[116] as the basis for the action. Section 13(d) was added to the Exchange Act in 1968 as part of the Williams Act. The Williams Act consisted of a number of provisions designed generally to regulate tender offers, which had not been directly regulated at the federal level. Section 13(d) requires the purchaser of more than five percent of the shares of a corporation whose shares are required to be registered with the SEC to file a statement describing the purchase. The statement must be filed with the SEC within ten days after the acquisition.

Plaintiff Mosinee Paper Corporation claimed that defendant's failure to comply with the disclosure requirements of section 13(d) was a scheme to defraud the corporation and its shareholders. Defendant, who had filed the disclosure schedule about three months late, contended that his admitted violation of section 13(d) resulted from his ignorance of the securities laws, and that neither the corporation nor its other shareholders had been harmed. After three months of pretrial proceedings defendant moved for summary judgment. The district court granted the motion, ruling defendant did not engage in intentional covert and conspiratorial conduct in failing to file the statement on time and that plaintiff had not shown the irreparable harm necessary to support an injunction.[117] The Court of Appeals for the Seventh Circuit reversed, holding that a showing of irreparable harm is not a prerequisite to obtaining permanent injunctive relief. The court based its holding on its belief that an issuer of securities, the corporation, is in the best position to ensure timely and complete compliance with the filing requirements of the Exchange Act by pursuing injunctive actions even if permanent harm had not been suffered, and to obtain speedy and forceful remedial action when necessary.[118]

The Supreme Court reversed. Chief Justice Burger wrote the majority opinion, from which Justices Brennan, Douglas, and Marshall dissented. As framed by the Court, the issue before it was whether the record supported the grant of an injunction, a remedy whose basis "in the federal courts has always

114. *See* Piper v. Chris-Craft Indus., 430 U.S. 1 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

115. 422 U.S. 49 (1975).

116. 15 U.S.C. § 78m(d) (1982).

117. Mosinee Paper Corp. v. Rondeau, 354 F. Supp. 686 (1973), *rev'd*, 500 F.2d 1011 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975).

118. Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975).

been irreparable harm and inadequacy of legal remedies."[119] The Court concluded that the corporate plaintiff and its shareholders had not been harmed by defendant's violation and that none of the evils addressed by section 13(d) had occurred or was threatened.

The Court did not decide whether a private cause of action ever could be implied from section 13(d), focusing instead on the narrower remedy question.[120] It noted that neither the availability of a private suit nor the corporation's standing to bring such a suit was before it, thereby suggesting that those questions do not control the remedy question. Although acknowledging that it had not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so was consistent with the legislative scheme and necessary to supplement SEC enforcement, the Court stated that this power was not deemed to relieve a plaintiff of the burden of establishing the traditional prerequisites to relief. A conclusion that a private litigant could maintain an action for violation of the securities laws meant no more than that traditional remedies would be available to redress any harm suffered. The questions of liability and relief are separate. The relief awarded must be determined according to traditional principles. Thus, unlike *Borak*, *Rondeau* made clear that differences exist between implying rights of action and fashioning remedies.[121]

The Court's reference to this dichotomy is both elucidating and confusing. Although *Rondeau* was an implication of remedy case, the Court recognized a difference between implying a right of action and implying a remedy. The Court did not, however, clearly identify the sources of the Court's power to imply either a right of action or a remedy. Nevertheless, from the Court's discussion it seems fair to infer that implying a right of action from a securities

119. *Rondeau*, 422 U.S. at 57 (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959)).

120. *Id.* A fair assumption, however, is that an implied cause of action exists. The Court concluded that an injuction was not necessary to protect the interests of either the shareholders who sold their stock to defendant at predisclosure prices or those who would not have invested had they known that a takeover bid might occur. *Id.* at 59-60. The Court stated that the shareholders who sold would have an adequate remedy by way of an action for damages, "thus negating the basis for equitable relief." *Id.* at 60. The Court did not say whether such an action could be based on the alleged § 13(d) violation. Arguably the reference to a damage action indicates approval of implying a private action from that section. The Supreme Court's silence on this issue, however, may only indicate its belief that an action for damages was available based on § 10(b) of the Exchange Act, which had previously been found to support an implied right of action in *Banker's Life*.

Furthermore, in regard to both groups of shareholders, the Court stated that it was not at all clear that the type of harm identified by plaintiff would be addressable under the provisions of § 13(d), *id.*, thus indicating that the Court was concerned more with the form of requested relief than with whether a private cause of action for any type of relief could be implied. The Court's silence has therefore led most commentators and some courts to conclude that if the appropriate harm was shown, then an implied cause of action under section 13(d) could be maintained. *See, e.g.*, General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977), in which the Court of Appeals for the First Circuit quoted *Rondeau* in connection with the issuance of a preliminary injunction for a violation of § 13(d). *Id.* at 96.

121. *Compare* General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977) (affirming grant of temporary injunction based on violation of section 13(d)) *with* Myers v. American Leisure Time Enters., 402 F. Supp. 213 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976) (no cause of action for damages).

statute will be permitted only when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to SEC enforcement. The Court's discussion strongly suggests, however, that once a right of action is recognized, the Court has a freer hand in fashioning an appropriate remedy, unless Congress intended to limit the judicial power to fashion particular remedies by prescribing the type of relief that will be available.[122] Thus, unlike *Borak*, the *Rondeau* opinion expressly purports to defer to Congress in determining when a right of action, as opposed to when a remedy, will be inferred. In fact, *Rondeau* can be read as a strong reaffirmation of the federal courts' power to fashion remedies absent express congressional prohibition.

In dissent, Justice Brennan argued that by enacting section 13(d), Congress intended to preclude inquiry into the results of a violation when granting relief.[123] In support of this result and his argument, Justice Brennan noted that the congressional objective could be gleaned from the purposes underlying enactment of the Williams Act, of which section 13(d) is a part. In Justice Brennan's view, Congress intended that investors and management be notified at the earliest possible moment of the potential for a shift in corporate control. Violation of section 13(d) by itself established the actionable harm. Harm of the type required by the majority would seldom, if ever, result from a violation of a section 13(d), thus thwarting the congressional objective of requiring reporting within certain time periods. Unless a violator refused to comply after the fact, there never could be harm that could not be remedied by damages. Thus, injunctive relief was necessary for its *in terrorem* value and the majority was in effect prohibiting its use in that context without any congressional directive to do so.

Some commentators viewed *Rondeau* as a retreat from the broad holdings of *Borak*, *Mills*, and *Banker's Life*, which had supported the implication of private causes of action.[124] *Rondeau*, however, can be distinguished in at least two ways. First, the remedy sought differed from that sought in the earlier cases: plaintiff was seeking an injunction. Courts traditionally have great discretion in administering equitable relief. Since *Rondeau* was the first Supreme Court securities law implication case in which the question of injunctive relief was the main issue, the analysis was accordingly directed to that question. Second, the statute upon which the plaintiff would ultimately have based his implied right of action for injunctive relief was different from those involved in the earlier securities implication cases. Section 13(d) has a narrower focus and purpose. It sets up a reporting mechanism designed to provide the SEC and corporations with information. By its own terms the section does not impose standards for conducting the actions that are required to be reported. In

122. The Court did not make clear that an express congressional prohibition of a particular remedy would preclude its use by the federal courts but such a result cannot be seriously questioned.

123. *Rondeau*, 422 U.S. at 65 (Brennan, J., dissenting).

124. *See, e.g.*, Porter & Hyland, Rondeau v. Mosinee Paper Company *and the Williams Act Injunction*, 59 MARQ. L. REV. 743 (1976).

the absence of fraud or detrimental reliance on the failure to report, the criminal sanctions available for a willful failure to report arguably would be a sufficient incentive to ensure compliance.

It seems clear that when *Rondeau* was decided, the Court had not yet reached a consensus in favor of restricting the implication of private causes of action. It was instead attempting to define when particular remedies would be fashioned absent express congressional direction, in the context of a narrowly focused statute which contained criminal sanctions that permitted achievement of the results Congress wanted without the use of an injunction.

Two terms after the Court disposed of *Barbour*, *Cort*, and *Rondeau*, it decided another case involving implication under a securities statute. Like *Rondeau*, *Piper v. Chris-Craft Industries*[125] concerned a provision of the Williams Act. Chris-Craft Industries was the unsuccessful tender offeror in a contest for the control of Piper Aircraft Corporation. During the course of the takeover contest, Chris-Craft brought suit for damages and injunctive relief against the management of Piper, Piper's investment advisor, and Bangor Punta Corporation, the successful tender offeror, alleging violations of section 14(e) of the Exchange Act.[126] Section 14(e) makes unlawful fraud, deception, or manipulation in connection with tender offers or solicitations of securities holders in opposition to or in favor of such offers.

Chief Justice Burger, writing for the majority, first noted that section 14(e) makes no express provision for a private cause of action. Recognizing that it previously had held that a private cause of action could be implied from sections 14(a)[127] and 10(b)[128] of the Exchange Act even though those sections contained no express civil liability provisions,[129] the Court stated that it found an implied cause of action in those cases because the congressional purposes in enacting them were likely to be undermined absent private enforcement. The *Chris-Craft* Court, therefore, found it necessary to examine the legislative history of section 14(e) to discern "the congressional purpose underlying the specific statutory prohibition."[130] The Court did not understand the *Cort* test to require determining whether Congress intended to allow private suits, but rather whether Congress intended a purpose which could be effectuated only if the Court allowed such suits. If the goal or purpose behind the statute could not be accomplished effectively without allowing private suits, then the Court

125. 430 U.S. 1 (1977).

126. 15 U.S.C. § 78n(e) (1982). Chris-Craft also alleged violation of SEC rule 10b-6, 17 C.F.R. § 240.10b-6 (1983). Rule 10b-6 prohibits issuers whose stock is in the process of distribution from tampering with the market by purchasing stock or stock rights until the distribution has been completed.

127. *Borak*, 377 U.S. 426 (1964).

128. *Banker's Life*, 404 U.S. 6 (1971).

129. *Chris-Craft*, 430 U.S. at 25. The actual language used by the Court was as follows: "This Court has nonetheless held that in some circumstances a private cause of action can be implied with respect to the 1934 Act's antifraud provisions, even though the relevant provisions are silent as to remedies." *Id.*

130. *Id.* at 26.

would infer a private cause of action from the statute.[131]

The Court found that the sole purpose of the Williams Act was to protect the shareholders of the target companies.[132] The Court also concluded that there existed no purpose in section 14(e) that required recognition of a private cause of action for damages on behalf of competing tender offerors.[133] While agreeing that Congress also intended to maintain the competitive balance between the target corporation and competing tender offerors, the Court refused to categorize the desire on the part of Congress to maintain neutrality[134] as either a purpose of the legislation or a basis for implying a cause of action from section 14(e).

Chris-Craft, of course, held a dual position in the controversy being litigated. It was a tender offeror, and therefore a member of one of the groups whose activities were intended to be regulated by the Williams Act. But Chris-Craft was also a shareholder of Piper, having become one as a result of its tender.[135] The Court was thus faced with a dilemma—was Chris-Craft to be treated as a shareholder or a tender offeror.

Chief Justice Burger ultimately concluded that even if a private cause of action were available to shareholders of the target companies, Chris-Craft could not be considered a shareholder for such purpose because it lacked standing to assert such a claim.[136] The majority purported to use the *Cort* test to support its conclusion. It did not, however, use the test to determine whether a private cause of action was implicit in section 14(e); the Court expressly declined to rule on that question.[137] Instead, it used the *Cort* analysis to determine whether Chris-Craft had standing to assert such an action, as-

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131. [W]e must consider whether § 14(e), which is entirely silent as to private remedies, permits this Court to read into the statute a damages remedy for unsuccessful tender offerors. To resolve that question we turn to the legislative history to discern the congressional purpose underlying the specific statutory prohibition in § 14(e). Once we identify the legislative purpose, we must then determine whether the creation by judicial interpretation of the implied cause of action asserted by Chris-Craft is necessary to effectuate Congress' goals.

Id. at 25-26.

132. "The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Id.* at 35.

133. "We find no hint in the legislative history, on which respondent so heavily relies, that Congress contemplated a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation." *Id.*

134. Chris-Craft and the SEC asserted that, in enacting the Williams Act, Congress intended to protect tender offerors as part of a pervasive scheme of federal regulation of tender offers. In support of this position, they argued that in enacting the legislation, Congress intended to establish a policy of evenhandedness in takeover regulation. In response, the Court stated:

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.

Id. at 29.

135. Chris-Craft had also purchased shares prior to making the tender offer. *Id.* at 5.

136. *Id.* at 42.

137. "Our holding is a limited one. Whether shareholder-offerees, the class protected by § 14(e), have an implied cause of action under § 14(e) is not before us, and we intimate no view on that matter. Nor is the target corporation's standing to sue an issue in this case." *Id.* at 42 n.28.

suming the action existed. Applying the test, the Court determined that Chris-Craft was not one for whose especial benefit the statute was enacted, that the legislative history, although ambiguous, did not support a cause of action in favor of Chris-Craft, and that the legislative purposes underlying section 14(e) would not be furthered by giving Chris-Craft the right to sue.[138]

Although disagreeing with the result, Justice Stevens in dissent seemingly accepted using the *Cort* test to resolve the question of Chris-Craft's standing. Justice Stevens believed, however, that the majority misconstrued and misapplied the *Cort* test by attaching undue importance to its finding that tender offerors do not belong to the special class Congress intended to benefit in enacting the Williams Act. He argued that the first *Cort* factor, whether the plaintiffs are members of the class for whose special benefit the statute was enacted, is not really an independent test.[139] Further, he found that the majority had substituted the necessity of finding a "pervasive legislative scheme" for the concept of an "articulated federal right in the plaintiff" that was described in the *Cort* opinion.[140]

In *Chris-Craft* the Court for the first time used the *Cort* test to resolve a standing question, doing so without noting that it had not so used the test before. In one sense, implying a cause of action always raises a question of standing because the court is deciding whether anyone can sue, (*i.e.*, has standing to assert the claim).[141] But it is possible for an express or implied cause of action to exist, even though the particular plaintiff asserting it lacks standing. There is nothing in *Cort* indicating that the four-part test was formulated to resolve the latter, more narrow question. Nothing in *Chris-Craft* indicates that the Court recognized a difference.[142] The disagreement between Chief Justice Burger and Justice Stevens would have little importance to an analysis of when causes of action can be implied if, as Justice Stevens wrote, "No one seriously questions the premise that Congress implicitly created a private right

138. *Id.* at 37-41.

139. Justice Stevens argued that it is not essential to the *Cort* test that the plaintiff belong to the 'especial class.' All that is necessary is that the protection Congress sought to provide for that class be furthered by recognition of the implied cause of action. *Id.* at 66-67 (Stevens, J., dissenting).

140. *Id.* at 67 (Stevens, J., dissenting).

141. *See* G. GUNTHER, *supra* note 19, at 1616 n.3.

142. Neither Chief Justice Burger nor Justice Stevens made clear what he meant by the term "standing." Certainly neither intended to raise the question whether Chris-Craft "alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness which sharpens the presentation of issues." Baker v. Carr, 369 U.S. 186, 204 (1962). Similarly, neither Justice raised an injury-in-fact issue. Chief Justice Burger was concerned instead with whether the injuries admittedly suffered by Chris-Craft were suffered as a shareholder of Piper or as a defeated tender offeror. This kind of question arguably forms the second part of Justice Douglas' test for standing employed in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). In *Camp* the Court held that sellers of the the data processing services had standing to challenge a ruling by the Comptroller of the Currency giving national banks the right to provide similar services. The Court set forth a two-part test to determine standing. First, is there injury in fact, economic or otherwise? Second, is the interest sought to be protected by the complainant arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question? *Id.* at 152-53. Nevertheless, nowhere in the review of the legislative history or the discussion of Chris-Craft's status does either the majority or dissent cite any standing decisions.

of action when it enacted § 14(e) in 1968."[143] The majority opinion, however, raises doubts about the accuracy of Justice Stevens' statement.

Although Chief Justice Burger expressly reserved ruling on the question whether any "investor" can state a claim under section 14(e),[144] many of the reasons he gave for not allowing Chris-Craft as a defeated tender offeror to sue are equally applicable to target shareholders. For example, when the Court argued that shareholders may be prejudiced because some tender offers may never be made if massive damage claims are possible,[145] such an argument could apply to suits brought by holders or sellers of the target's shares as well as to those brought by shareholding defeated tender offerors. The logical conclusion of this reasoning is that no class would have an implied cause of action. The majority, therefore, arguably was disagreeing with Justice Stevens' conclusion.

Although Justice Stevens argued that a private cause of action had been created, the majority did not rule on that issue. Of course, the Court was not required to make such a ruling because it decided the case on the narrower ground of standing. Nevertheless, the majority opinion furthers confusion. By failing to decide the case on whether a right of action existed and instead deciding that there was no standing (or, as in earlier cases, no remedy), the majority permitted speculation about whether the Court believed that a private cause of action exists under section 14(e). For example, at times the majority discussed the issues before it in terms of whether Chris-Craft had a "cause of action for damages."[146] At other times the majority discussed whether "private remedies"[147] are available under section 14(e), and therefore raised the question whether Chris-Craft could have obtained private injunctive relief rather than damages. By at least raising the possibility that it could have granted such relief, the Court permitted an inference that the *Cort* factors could be used to resolve both the right of action and the remedy questions, although it seems unlikely that the factors are either necessary or useful in resolving the remedy question. The Court clearly has the power to award both equitable and legal relief when an appropriate private claimant alleging violations of the Exchange Act is before it. The question really should not be whether injunctive relief or damages are available but whether the claimant has an implied right. Only then is the question of relief reached. Nevertheless, the Court only decided standing. Although the narrow ruling on standing can be viewed as another way of undercutting or restricting the implication of private causes of action, analytically *Chris-Craft* is not a retrenchment in that regard because it does not purport to resolve the implication question. Moreover, this foray into the standing arena can be seen as aberrational, inasmuch as the Court has not returned to it.[148] Instead the Court next met the implica-

143. *Chris-Craft*, 430 U.S. at 55 (Stevens, J., dissenting).
144. *Id.* at 42 n.28. *See supra* note 137.
145. *Chris-Craft*, 430 U.S. at 40.
146. *Id.* at 4, 24, 42.
147. *Id.* at 25.
148. The Court did discuss the standing issue in Merrill Lynch, Pierce, Fenner & Smith, Inc. v.

tion issue head on and attempted to define it out of existence.

D. 1979: Slamming the Door?

In *Touche Ross & Co. v. Redington*[149] Justice Rehnquist, writing an opinion from which only Justice Marshall dissented, held that customers of securities brokerage firms that were required by section 17(a) of the Exchange Act[150] to file certain financial reports with the SEC did not have an implied cause of action for damages against accountants who audit such reports, based on misstatements contained in the reports. Justice Rehnquist's opinion was based on three essential factors: (1) section 17(a), unlike other statutes from which private causes of action had been implied, did not proscribe certain conduct as unlawful or create federal rights in favor of private parties; (2) the legislative history of the Exchange Act is silent on the question whether a private cause of action for damages should be available under section 17(a); and (3) the Exchange Act contains provisions that explicitly grant private causes of action, including a section that creates a private cause of action against persons, such as accountants, who "make or cause to be made" materially misleading statements in any reports or other documents filed with the SEC.[151] The Court cited these three factors as indicating conclusively that Congress had not *intended* to create a private cause of action. Justice Rehnquist wrote that absent such a finding there can be no implication of a private cause of action for damages.[152]

The majority made no direct attempt to apply the four-factor *Cort* test, but it did not expressly disavow the test. Instead, it reinterpreted *Cort*. Justice Rehnquist stated that the first three factors discussed in *Cort*—"the language and focus of the statute, its legislative history, and its purpose"—are ones that

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Curran, 456 U.S. 353 (1982). In that case, however, the Court turned to the standing issue only after it had determined that a private cause of action was available under the Commodity Exchange Act in favor of some plaintiffs. *Id.* at 388-90.

149. 442 U.S. 560 (1979).

150. 15 U.S.C. § 78q(a)(1) (1982). Section 17 of the Exchange Act was amended by the Securities Acts Amendments of 1975. Section 17(a)(1) contains essentially the same language as the first sentence of the 1972 version of § 17(a).

151. Securities Exchange Act of 1934, § 18(a), 15 U.S.C. § 78r(a) (1982). The right of action created by § 18(a) is limited, however, to persons who, in reliance on the statements, purchased or sold a security whose price was affected by the statement. Since plaintiffs in the case did not allege that the customers of the broker-dealer purchased or sold securities in reliance on § 17(a) reports, they could not sue Touche Ross under § 18(a).

In his dissent, Justice Marshall disputes the contention espoused by the majority that § 18(a) was intended to provide the only remedy for misstatements in reports filed with the SEC. In his view, § 18 pertains to investors who are injured in the course of securities transactions, while § 17 is concerned exclusively with brokerage firm customers who may be injured by a broker's insolvency. Because Justice Marshall viewed § 17 as imposing duties for the benefit of private parties, he was unwilling to assume that Congress simultaneously sought to protect a class and deprive it of a means of protection. *Touche Ross*, 442 U.S. at 582 (Marshall, J., dissenting).

152. Justice Rehnquist stated that the issue was whether the plaintiffs "have an implied cause of action for damages under Section 17(a) against accountants. . . ." *Touche Ross*, 442 U.S. at 562. Throughout the opinion, however, the terms "implied cause of action," "private right of action," and "implied remedies" are used interchangeably. *Compare id.* at 569 ("in those cases finding such implied private remedies . . . .") *with id.* at 571 ("whether a private right of action for damages . . . .").

courts traditionally have relied on to determine legislative intent.[153] He then pointed out that *Cort* did not declare that each of the four factors was entitled to equal weight.[154] In a situation such as that in *Touche Ross*, in which congressional intent against implication could be discerned, Justice Rehnquist stated that there could be no resort to the fourth factor (whether the cause of action is one traditionally relegated to state law) or even an independent investigation of the third (whether an implied private right is necessary to effectuate the purpose of the section).[155] Justice Rehnquist in effect redefined congressional intent to encompass only whether Congress intended to create a private right to sue and excluded whether giving the right to sue would accomplish the congressional objectives and purposes in enacting the legislation.

In *Touche Ross* the Court once again distinguished, without overruling, *Borak*. In response to an argument that the jurisdictional grant set forth in section 27 of the Exchange Act required or suggested implication, the Court made clear that the provision creates no right of action of its own force and effect, stating that "[t]he Court in *Borak* found a private cause of action implicit in § 14(a)."[156] Justice Rehnquist had a more difficult time dismissing the *Borak* Court's recognition of and reliance on the remedial purposes underlying enactment of the Exchange Act to justify implying a private cause of action. The opinion candidly admitted that the Court had adhered to a stricter standard for the implication of private causes of action since *Borak* was decided.[157] Similarly, lest there be any attempt to find an analogy between the previously recognized private causes of action under section 10(b) and the asserted right under section 17(a), the Court stated that when it recognized a right implicit in section 10(b), it was acquiescing to a twenty-five year history of the lower federal courts implying such an action. There was no corresponding history of implication under section 17(a).[158]

The majority concluded by noting that the Court "is not at liberty to legislate," and that if Congress intended brokerage firms' customers to have a federal right of action under section 17(a), "it is well aware of how it may effectuate that intent."[159] Other than this passing reference to a separation of powers problem, the Court did not discuss the possible constitutional problems inherent in the implication process. Nonetheless, this was the first securities implication case in which the Court made *any* allusion to constitutional difficulties in the implication area. The Court's concern was fostered perhaps by the split decision that same term in *Cannon v. University of Chicago*,[160] which upheld implying a private cause of action under section 901(a)

153. *Id.* at 575-76.
154. *Id.* at 575.
155. *Id.* at 576.
156. *Id.* at 577.
157. *Id.* at 578.
158. *Id.* at 577 n.19.
159. *Id.* at 579.
160. 441 U.S. 677 (1979). In *Cannon* Justice Powell strongly dissented from the majority's holding that a private cause of action could be implied from Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982). Justice Powell stated that the four-part *Cort* test "is an

of Title IX of the Education Amendments of 1972.[161] Unfortunately, the Court did not respond to the argument that implication by definition is legislation. The *Touche Ross* Court's discussion of *Borak* and *Banker's Life* indicated, however, that a majority of the Court did not believe that implication poses constitutional problems. If it did, the Court would not be at liberty to acquiesce to twenty-five years of unconstitutional holdings by the lower federal courts.[162] Nor could the Court simply adopt a stricter standard for the implication of private rights of action and let stand an unconstitutional interpretation of section 14(a).

It is clear that the Court wanted to curtail the rapid growth, and recognition by the lower courts, of implied causes of action. Since these actions were recognized judicially there would seem to be no impediment to some judicial retrenchment in this area. What was lacking in *Touche Ross* was any basis for determining when, if ever, the Court would be receptive to implying a cause of action from a statute not expressly providing for one. Ascertainment of congressional intent, as that term is used by Justice Rehnquist, cannot provide a workable test, except in the unlikely event that the legislature expressly gives the courts the discretion to recognize implied causes of action if certain conditions are present,[163] or unless somewhat precise and relatively unambiguous standards are set forth as the means by which to determine congressional intent. The latter is what the Court seemed to be trying to do in *Cort*. To the extent that *Touche Ross* discounted reliance on the four-factor *Cort* test, it defeated this purpose.

Touche Ross was relatively uncontroversial because almost every member of the Court believed implication from section 17(a) was inappropriate, an undoubtedly correct result even under the older cases.[164] The Court's analysis was, however, a change in its jurisprudence, notwithstanding Justice Brennan's assertion in his concurrence that he viewed the opinion as consistent

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open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." *Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

161. 20 U.S.C. § 1681(a) (1982).

162. *Touche Ross*, 442 U.S. at 577 n.19.

163. *See, e.g.*, ALI FED. SEC. CODE § 1722(a) (1980). The proposed Code would do exactly that. Section 1722(a) provides:

> IMPLIED ACTIONS. —A court, considering the nature of the defendant's conduct, the degree of his culpability, the injury suffered by the plaintiff, and the deterrent effect of recognizing a private action based on this Code, may recognize such an action even though it is not expressly created by part XVII [the civil liability section of the code], but only if (1) the action is not inconsistent with the conditions or restrictions in any of the actions expressly created or with the scheme of this Code, (2) the provision, rule, or order that is the basis of the action is designed for the special benefit of a class of persons to which the plaintiff belongs against the kind of harm alleged, (3) the plaintiff satisfies the court that under the cirumstances the type of remedy sought is not disproportionate to the alleged violation, and (4) in cases comparable to those dealt with in section 1702(e)(2) or 1708(c)(2) or a similar provision that specifies a maximum measure of damages, a comparable maximum is imposed.

164. *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) *discussed supra* text accompanying notes 95-97.

with *Cort*.[165] The view that the Court was using a new test in *Touche Ross* is supported by the decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*,[166] in which the Court reached an incorrect result that was also inconsistent with prior case law. Unlike *Touche Ross*, *Transamerica* was not a near unanimous decision. Four members of the Court dissented sharply.

Transamerica was brought as a derivative action on behalf of a real estate investment trust and as a class action on behalf of the trust's shareholders, alleging that several trustees of the trust, its investment advisors, and two corporations affiliated with the advisors, were guilty of fraud and breaches of fiduciary duty in violation of the Investment Advisers Act of 1940.[167] The complaint sought an injunction restraining further performance of an advisory contract, rescission of the contract, restitution of fees and other consideration paid by the trustee, an accounting of illegal profits, and damages.

Plaintiffs argued that a private cause of action should be implied from two sections of the Investment Advisers Act: section 206,[168] which prohibits

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165. *Touche Ross*, 442 U.S. at 579 (Brennan, J., concurring).

166. 444 U.S. 11 (1979). Certiorari was granted in *Transamerica* on November 6, 1978, 47 U.S.L.W. 3317 (1978). The case was argued on March 20, 1979, *id.* at 3634, and restored to the calendar for reargument on April 23, 1979, *id.* at 3714. Reargument was heard on October 2, 1979, *id.* at. 3238, and decided on November 13, 1979. Certiorari was granted in *Touche Ross* on November 27, 1978, *id.* at 3368, argument was heard on March 26, 1979, *id.* at 3651, and the case was decided on June 18, 1979.

167. Investment Advisers Act of 1940, §§ 201-21, 15 U.S.C. §§ 80b-1 to -21 (1982). The Investment Advisers Act was enacted to deal with abuses that Congress had found to exist in the investment advisers industry. *Transamerica*, 444 U.S. at 12-13. *See* 2 L. Loss, *supra* note 28, at 1392-94. Professor Loss states that for the first twenty years the Investment Advisers Act was little more than a continuing census of investment advisers. In 1960, however, the statute was substantially bolstered by a series of amendments that had been sought by the SEC since 1945. The 1960 amendments affected one of the two provisions reviewed by the Court in *Transamerica*. The scope of § 206, the general fraud provision, was extended to cover "all investment advisers who use the mails or interstate facilities rather than merely those who are registered," thus making its coverage similar to the anti-fraud provisions of the Securities and Exchange Acts, which "apply irrespective of the availability of an exemption from registration of securities or of broker-dealers." *Id.* at 1414.

168. Investment Advisers Act of 1940, § 206, 15 U.S.C. § 80b-6 (1982). Section 206 provides as follows:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; (3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Section 206(4) was added to the statute in 1960. Act of Sept. 13, 1960, Pub. L. No. 86-750, 74 Stat. 885, 887 (1960). At that time Congress also expanded the category of investment advisers subject to the provisions of § 206.

fraudulent practices by investment advisers, and section 215,[169] which makes contracts whose formation or performance would violate the Act void as to the rights of the violator and his knowing successors in interest. Both sections have analogies in the Exchange Act. Section 206 uses language similar to that found in section 10(b)[170] and rule 10b-5,[171] and section 215 tracks the language of section 29(b).[172]

The majority held that a limited implied cause of action existed under section 215, but refused to recognize one implied from section 206. Characterizing the question before it as basically one of statutory construction, the Court stated that what ultimately had to be determined was whether Congress intended to create a private remedy.[173] This necessitated beginning with the language of the statute itself. While acknowledging that sections 215 and 206 were intended to benefit the clients of investment advisers and to establish federal fiduciary standards to govern the advisers' conduct, the majority found that the legislative history was completely silent about private enforcement. In the Court's view this was not surprising because the Investment Advisers Act does not expressly provide for any private causes of action at all.[174] In effect, the majority adopted Justice Rehnquist's definition of congressional intent as used in *Touche Ross*—Congress' intent to create a private right to sue—rather than equating intent with the purposes and objectives Congress sought to accomplish by enacting the legislation.

Nevertheless, the Court found that the language of section 215 itself implied a private cause of action for specific and limited relief in federal court.[175]

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169. Investment Advisers Act of 1940, § 215, 15 U.S.C. § 80b-15 (1982). Section 215 provides in part as follows:

> (b) Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards to rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

170. 15 U.S.C. § 78j(b) (1982).

171. 17 C.F.R. § 240.10b-5 (1982).

172. 15 U.S.C. § 78cc(b) (1982).

173. *Transamerica*, 444 U.S. at 15-16. Again the Court uses the terms "cause of action," "right of action," and "private remedy" interchangeably. "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Id.* at 15. "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ." *Id.* at 15-16. "It is asserted that the creation of a private right of action can fairly be inferred from the language of two sections of the Act." *Id.* at 16.

174. The Investment Advisers Act, unlike the Securities Act and the Exchange Act, does not include provisions expressly providing for a private cause of action. The only provision that authorizes suits to enforce the duties or obligations set out in the Act is § 209, 15 U.S.C. § 80b-9 (1982), which permits the SEC to bring suit in a federal court to enjoin violations of the provisions of the Act or the rules and regulations promulgated under it.

175. *Transamerica*, 444 U.S. at 18. The Court's use of the term "federal court" can be questioned. The Investment Advisers Act, like all but one of the six original securities acts, provides for concurrent jurisdiction in state and federal courts. Investment Advisers Act of 1940, § 214, 15 U.S.C. § 80b-14 (1982). A state court deciding federal law is bound to follow federal precedent.

In construing section 215 in this manner the Court used the same analysis that it had used in *Mills* when it construed section 29(b) of the Exchange Act as providing for a private cause of action. By declaring certain contracts void the statute necessitates that the issue of voidness be litigated somewhere, or at the very least presumes that the issue could be raised defensively in private litigation to preclude the enforcement of an investment adviser's contract. Choosing not to limit the statute to purely defensive uses, the Court, as it did in *Mills*, held that section 215 also conferred the rights to rescind the contract, to obtain restitution of consideration paid, and to seek an injunction against continued operation of a contract.[176]

The Court was unwilling, however, to find an implied right of action for damages and other monetary relief under section 206. First, the Court distinguished the language of section 206 from that of section 215. "Section 206," stated the Court, "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the [Investment Advisers] Act."[177] Because Congress expressly provided judicial and administrative means for forcing compliance with section 206, the Court found it improbable that "Congress absentmindedly forgot to mention an intended private action."[178] The express authorization of private suits for damages in prescribed circumstances in each of the five federal securities acts that preceded or were enacted contemporaneously with the Investment Advisers Act strongly suggested to the Court that Congress did not intend to impose monetary liability on violators of Investment Advisers Act provisions because "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[179]

As support for the preceeding conclusions, the Court cited section 214 of the Investment Advisers Act,[180] which provides the federal courts with jurisdiction over suits in equity to enjoin violations of the Act and the rules, regulations, and orders promulgated pursuant thereto. It contrasted this grant of jurisdiction in section 214 with the broader jurisdictional provisions of the Se-

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See Hazen, *Allocation of Jurisdiction between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C.L. REV. 710 (1982). The Court's use of the term federal court could be read as limiting its holding to federal courts and thereby creating an inference that state courts could give broader effect to the same statutory language.

176. *Transamerica*, 444 U.S. at 19. The Court footnotes its holding with the following: "One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Id.* at 19 n.8. The intent of this note is ambiguous at best. The Court does not give any reasons why a state court might be able to construe a federal statute more broadly than a federal court.

177. *Id.* at 19.

178. *Id.* at 20 (citing Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979)). Section 17 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-17 (1982), makes willful violations of the Act criminal offenses. Section 9, *id.* § 80b-9, authorizes the SEC to bring civil actions in federal courts to enjoin compliance with the Act, and § 3, *id.* § 80b-3, authorizes the SEC to impose administrative sanctions on persons who violate the Act.

179. *Transamerica*, 444 U.S. at 21 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979)).

180. 15 U.S.C. § 80b-14 (1982).

curities Act,[181] Exchange Act,[182] Public Utility Holding Company Act,[183] Trust Indenture Act,[184] and Investment Company Act,[185] all of which provide for jurisdiction of actions at law as well as suits in equity. While the majority did not base its decision against implication of an action for damages on the jurisdictional section, it nevertheless cited the failure to include jurisdiction over actions at law in section 214 as additional support for its conclusion.[186]

Finally, the majority rejected the contention that all four of the *Cort* factors must be considered, citing its disposition of the same argument in *Touche Ross* without distinguishing the two cases. In *Touche Ross*, the first two *Cort* factors, the legislative history and the language and focus of the statute, were not found to support implication. The *Touche Ross* Court also held that the first three factors were simply the traditional means used to determine legislative intent. Therefore, there was no need to examine all of the factors, or to give them equal weight, once a conclusion regarding intent was formed. In *Transamerica*, however, the Court determined that the first *Cort* factor could support implication because the Investment Advisers Act was designed to protect adviser's clients. Going to the second *Cort* factor, the Court was persuaded by a silent legislative history and a reading of the Act in its entirety that Congress did not intend to create a private cause of action. It did not then examine the third and fourth *Cort* factors. The Court, therefore, seemed to indicate that the absence of any discussion in the legislative history of an intent to provide a private damage remedy makes unnecessary further investigation of congressional intent. The Court also used the *expressio unius est exclusio alterius* principle of statutory construction to bolster its conclusion.[187] In other words, the failure to find an express intent to provide a private cause of action is sufficient to preclude implication. In all but name, *Cort* was overruled. Furthermore, the result reached by the majority regarding section 206 was inconsistent with the Court's prior implication decisions. In *Borak* and *Banker's Life*, statutes almost identical to section 206 were found to support implication.

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181. 15 U.S.C. § 77v(a) (1982).

182. 15 U.S.C. § 78aa (1982).

183. 15 U.S.C. § 79y (1982).

184. 15 U.S.C. § 77vvv (1982).

185. 15 U.S.C. § 80a-43 (1982).

186. *Transamerica*, 444 U.S. at 21-22. The majority does this even though in *Touche Ross* (decided the previous term) the Court had held that a jurisdictional grant can create no right of action of its own force and effect. *Touche Ross*, 442 U.S. at 577.

187. "[T]he expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979). This maxim of statutory construction had also been used by the Court in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) and Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975), to support decisions not to imply causes of action from statutes that contained express means of enforcement. While the Court was always careful to note that even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent, there are at least two ways of interpreting what was meant by "contrary evidence of legislative intent." The plaintiff might be required to prove that Congress intended to create a private cause of action in his favor. It is also possible that the requisite contrary intent could be shown by proving that Congress did not intend that the remedies provided in a statute should be exclusive. *See* Comment, *supra* note 3, at 63. The Court in *Transamerica* seems to have adopted the former meaning.

Justice White wrote a strong dissent in which Justices Brennan, Marshall, and Stevens joined. The dissenters argued forcefully that the *Cort* analysis should have been followed because, if it had been used, the Court would have recognized implication of a private cause of action from section 206.[188] Acknowledging that decisions after *Cort* indicated that implication questions should be resolved primarily by determining whether Congress intended to create a private cause of action, Justice White nevertheless argued that the four *Cort* factors were the criteria by which such intention could be discerned. Justice White indicated that the third and fourth factors should not have been discarded because they allow for growth and change in the law and embody a recognition that statutory interpretation involves more than discerning what Congress may have intended when it debated and enacted the legislation. These factors give the Court room to discern what Congress would intend now.

In the *Transamerica* dissent, there appeared for the first time in a statutory implication case a more candid discussion of the differences between the questions whether an implied right of action exists and whether a particular remedy ought to be implied.[189] The dissenters were in favor not only of implying a right of action from section 206 but also of implying a damage remedy. Justice White therefore argued that once an implied right of action was recognized,[190] the Court was not constrained in determining what type of relief to make available, because "in the absence of any contrary indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose."[191] This argument was not new of course, having been set out in *Borak*. And the majority opinion is rightly criticized for using arguments against implying a damage remedy to justify a refusal to imply a right of action.

Unfortunately, Justice White did not carry the discussion far enough. He failed, for example, to deal with the fact that recognizing an implied right of action does not necessarily prohibit recognizing that Congress did not intend all remedies to be available to redress a particular violation. Congressional intent, therefore, could have a role to play, albeit a negative role, when courts imply remedies. An affirmative indication of congressional intent derived from substantive provisions is necessary to imply a right of action. In the absence of such provisions, implication should not be undertaken. Any form of

188. *Transamerica*, 444 U.S. at 27 (White, J., dissenting).

189. Justice Brennan explored the issue in Davis v. Passman, 442 U.S. 228 (1979), in the context of implying a private cause of action from a provision of the Constitution. *See supra* note 19.

190. Justice White found substantive support for implication of a private cause of action from the language of § 206, as well as from the relationship between that section and other substantive provisions of the Investment Adviser's Act, including § 215, 15 U.S.C. § 80b-15 (1982). Since § 215 creates no right of action of its own force and effect and imposes no liabilities, in Justice White's view that section merely specifies one consequence of a violation of the substantive provisions of § 206. The need for a private action to enforce § 215, which itself is violated because of the violation of § 206, supported the view that Congress contemplated the use of private actions to redress violations of § 206. This analysis was conducted under the framework set forth in *Cort*. *Transamerica*, 444 U.S. at 28-30 (White, J., dissenting).

191. *Transamerica*, 444 U.S. at 30 (White, J., dissenting) (citing *Borak*, *Barbour*, and *Rigsby*).

relief can be made available, however, when express or implied actions are recognized, as long as there is no indication of congressional intent to prohibit use of the particular remedy.[192]

Transamerica was an analytical retrenchment with respect to implying causes of action. It was generally assumed after *Transamerica* and a number of other implication cases, which were decided in the 1980-81 Term,[193] that no new causes of action would be implied; nevertheless, the Supreme Court in its 1982 opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*[194] held that an implied cause of action existed under the Commodity Exchange Act (CEA).[195] In doing so, a majority of the Court at least inferentially concluded that judicial recognition of an implied private cause of action does not violate the separation of powers doctrine.[196] The opinion also provided a new test, or superimposed an additional test, for implying a private cause of action.

The CEA governs the trading of commodity futures. A much amended statute, the forebearer of the CEA was enacted in 1921. Amendments were enacted in 1936, 1968, 1974, and 1978. Although the 1974 legislation added provisions requiring arbitration procedures for the settlement of certain claims[197] and creating reparations procedures for persons damaged as a result of violations of the CEA or its implementing regulation,[198] the CEA does not expressly provide for private causes of action.

Two decisions were before the Court for review. The Court of Appeals

192. *See supra* notes 10 & 27 and accompanying text.

193. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (two Justices concurred in part and dissented in part) (Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 do not provide any implied causes of action); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (unanimous) (implied cause of action for contribution not available to defendant in federal antitrust case); City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (6-3 decision) (Federal Water Pollution Act Amendments of 1972 displaced federal common law, at least with respect to the claims brought by the state, and federal common law could not be used to impose more stringent effluent standards than those set forth under the Act and the attendant regulation); California v. Sierra Club, 451 U.S. 287 (1981) (four justices concurring) (Rivers and Harbors Appropriation Act does not provide an implied right of action); Northwest Airlines v. Transportation Workers Union, 451 U.S. 77 (1981) (unanimous; Blackmun, J., not participating) (no implied right of action under Equal Pay Act and Title VII of the Civil Rights Act of 1964 for contribution); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (unanimous) (Davis-Bacon Act does not provide employees with a private cause of action for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and which thus does not contain a prevailing wage stipulation).

194. 456 U.S. 353 (1982).

195. 7 U.S.C. §§ 1-26 (1982).

196. *See Curran*, 456 U.S. at 376. Justice Stevens described the issue not in terms of whether a cause of action can be implied but rather as whether "an implied private *remedy* violates the separation-of-powers doctrine." *Id.* (emphasis added). In his dissent, Justice Powell discussed the issue in terms of whether "federal courts are free to hold, as a general rule of statutory interpretation, that private rights of action are to be implied unless Congress 'evidences a contrary intention.' " *Id.* at 402 (Powell, J., dissenting).

197. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 209, 88 Stat. 1401 (adding § 5a(11) of the CEA, codified as amended at 7 U.S.C § 7a(11) (1982)).

198. Commodity Futures Exchange Act of 1974, Pub. L. No. 93-463, § 106, 88 Stat. 1393-95 (adding § 14 of the CEA, codified as amended at 7 U.S.C. § 18 (1982)). This section authorized the Commission to investigate complaints and, "if in its opinion the facts warrant such action," to afford a hearing before an administrative law judge. Reparations orders entered by the Commission are subject to judicial review.

for the Sixth Circuit had held that an implied cause of action existed in favor of a customer against a registered commodity futures merchant.[199] The Court of Appeals for the Second Circuit had held that speculators (customers) who invested in futures contracts had causes of action implied from the CEA against a commodities exhange, its officials, and several firms of futures commission merchants.[200] In both of the cases a majority of the respective appeals courts noted that an implied cause of action was generally thought to exist prior to the 1974 amendments to the CEA, and inferred from this that the 1974 Congress was aware of and desired to preserve such action when it enacted the amending legislation.[201] Judge Friendly, writing the Second Circuit opinion, also commented upon the similarity between implying private remedies under the CEA and implying remedies under other federal statutes, particularly those regulating trading in securities.[202]

Justice Stevens, writing for a 5-4 majority, began by recognizing that in certain limited circumstances it is appropriate to recognize a private cause of action even when Congress has not expressly provided such an action, if doing so would be consistent with an intent on Congress' part to make such an action available to the persons benefited by the legislation. Initially, "[w]hen federal statutes were less comprehensive," stated the Court, it "applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class."[203] Justice Stevens viewed *Cort*, however, as changing the manner in which the Court went about the task of implying private causes of action. He characterized the change as requiring a more careful scrutiny of legislative intent than the 1916 *Rigsby* case and the cases following it had required. The change in emphasis was necessitated by the increased volume and complexity of federal legislation.

The majority did not deal with the question of congressional intent in a straightforward manner. It did not discuss and investigate Congress' intent when it enacted the substantive provisions of the CEA that were alleged to be the basis for implied actions—in other words, the majority did not use the *Cort* test to determine whether such provisions could be the basis for implied causes of action.[204] Instead, the majority discussed whether Congress intended to prohibit continued judicial recognition of implied causes of action under the CEA when it amended the statute in 1974. The 1974 amendments

199. Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 622 F.2d 216 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982).

200. Leist v. Simploy, 638 F.2d 283 (2d Cir. 1980), *aff'd*, 456 U.S. 353 (1982).

201. The dissenting judges (Judge Mansfield in the Second Circuit and Judge Phillips in the Sixth Circuit) reasoned that the pre-1974 cases recognizing a private cause of action under the CEA were decided incorrectly and that a fair application of the criteria identified in *Cort* required that plaintiffs' damages claims be rejected. *Id.* at 323-56 (Mansfield, J., dissenting); *Curran*, 622 F.2d at 237 (Phillips, J., dissenting).

202. *Curran*, 638 F.2d at 299. Judge Friendly used the term "implied remedies" to mean implied causes of action.

203. *Curran*, 456 U.S. at 374 (citing Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916)).

204. Justice Stevens indicated, however, that if the *Cort* test were applied to the substantive provisions at issue in the case, some would and others would not support implication. *Id.* at 391.

were deemed the crucial ones because the *Cort* decision in 1975 presumably put Congress on notice that the Supreme Court would thereafter be applying a different test to determine whether a statute created a private cause of action.[205] Thus, one of the major issues dividing the majority from the dissent was which Congress' intent needed to be discerned.

The majority's focus on this aspect of intent, however, arguably reaffirms or is consistent with the meaning given by Justice Rehnquist in *Touche Ross* to the term "congressional intent"—that is, did Congress intend to give private parties the right to sue. This definition, which was adopted by the majority in *Transamerica*, sharply conflicts with the meaning of the term "congressional intent" as set out in *Cort*. The *Cort* four-factor test clearly used the term to encompass an investigation of what Congress intended to accomplish by enacting the particular statutory provision being construed. While the *Cort* test was not insensitive to, nor did it preclude, an examination of whether the legislative history gave any express or implied indicia of an intent to allow private suits, it also required the Court to determine whether the substantive goals of the legislation could be accomplished absent private civil litigation.

Disturbing is the apparent assumption of both the majority and minority in *Curran* that the Court can, in effect, order Congress to include language in statutes expressly acknowledging the right of a private party to sue by refusing to recognize such a right absent express congressional acknowledgement, even if the Court is able to discern that Congress' objectives could only be effected if private suits were allowed and even if the statutory language or the legislative history does not indicate any intent on the part of Congress to deny or prohibit such a right. *Curran* in effect holds that legislation enacted after publication of the *Cort* opinion in 1975 will be construed in denigration of a discernable intent of Congress. While such a result would be necessary if the Court were willing to hold that judicial implication of a cause of action was an unconstitutional exercise of power by the federal courts, neither the majority nor the dissenters seem prepared to so rule.

Perhaps the more important issue in *Curran* was the veiled debate between Justices Stevens and Powell over the constitutionality of implication. Justice Stevens noted that because the *Rigsby* approach prevailed throughout most of the Court's history there was no merit to the argument that the judicial recognition of an implied remedy violates the separation of powers doctrine.[206] The dissent did not directly confront the issue. For example, Justice Powell wrote, "As the court's citation of the Restatement of Torts made apparent, [inquiring whether Congress had created a regulatory system for the benefit of the plaintiffs' class] has been thought appropriate for common-law courts of general jurisdiction. But our cases establish that it is *not* appropriate for

205. *Id.* at 378-82.

206. *Id.* at 378. Justice Stevens directed his refutation of the argument that implication violates the separation of powers doctrine at the petitioners, rather than at Justice Powell's exposition of the same idea in his dissent to *Curran*. Perhaps this is because Justice Powell did not base his dissent expressly on the argument.

federal courts possessed only of limited jurisdiction."[207] Later he noted that the pre-1974 lower court cases that had held that private causes of action could be implied from the CEA were fundamentally erroneous, having implied a cause of action under a federal statute on common-law principles. Because the majority opinion presumed congressional knowledge of these cases in 1974 and 1978, when the CEA was amended, and from this knowledge inferred congressional intent to continue or preserve the implied cause of action, Justice Powell felt compelled to call this line of reasoning "inconsistent with fundamental premises of our structure of government."[208] Justice Powell concluded his dissent by once again alluding to the separation of powers concept when he called the majority opinion "disquieting because of its implicit view of the judicial role in the creation of federal law"[209] and described the majority's concept of the lawmaking powers of courts at common law as being "inconsistent with the theory and structure of our constitutional government."[210]

In his discussion, Justice Powell seemed to ignore that the Court had changed direction, a proposition candidly admitted by Justice Stevens,[211] and that the Court changed direction for policy reasons, not because of constitutional principles or pursuant to congressional directive.[212] Justice Powell later explained some of these policy considerations when he stated that modern federal regulatory statutes tend to be exceedingly complex, and that in this context, courts should recognize that intricate policy calculations are necessary to decide when new enforcement measures are desirable additions to a particular regulatory structure.[213] What is missing from Justice Powell's discussion of policy, however, is recognition that if creating causes of action, as opposed to devising remedies, is constitutionally mandated to be a legislative function, the Court is not free to recognize such actions based on its own view of whether doing so is advisable for governmental policy reasons.

Curran cannot be viewed as relaxing the restrictive, and arguably incorrect, analysis used in *Transamerica*. A majority of the Court still apparently found no constitutional prohibition to implying private causes of action, while at the same time effectively refused to imply such actions unless it could determine that Congress in effect forgot to include express authorization in the statute as enacted. The further device of construing differently statutes enacted before or after *Cort* is analytically unsound. The distinction does not even promote predictability because the statute construed in *Transamerica* was a pre-*Cort* statute. Furthermore, both the majority and dissent in *Transamerica*

207. *Id.* at 399 (Powell, J., dissenting) (emphasis in original).

208. *Id.* at 402 (Powell, J., dissenting).

209. *Id.* at 408 (Powell, J., dissenting).

210. *Id.*

211. *Id.*

212. Justice Stevens wrote, "The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required." *Id.* at 377 (footnote omitted).

213. *Id.* at 408 (Powell, J., dissenting).

agreed that section 209 of the Investment Advisers Act was at least intended to create rights and duties for the benefit of the party seeking to assert the private cause of action. The majority in *Curran* admitted that all but one of the CEA provisions which the Court held in that case to give rise to a private cause of action would not even meet the original, unreformed *Cort* test, because they were framed in general terms not purporting to confer special rights on any identifiable class of persons.[214] The Court reached this result even though it had refused to imply causes of action from similar statutes in *Barbour* and *Touche Ross*. Perhaps the best thing that can be said for the *Curran* decision is that a majority of the Court was unwilling to renounce judicial implication of private causes of action.

III. ANALYSIS

The Supreme Court's continued willingness to recognize the propriety of judicially implying causes of action, at least in certain limited situations, necessarily means that the lower federal courts should continue to imply such actions in appropriate circumstances. Unfortunately, the Court has not yet developed an analytical framework that lower federal courts and litigants can use to identify such appropriate circumstances with any degree of predictability. Absent such a formulation, the Court hinders one of the more important functions that a highest appellate court can perform: supplying, to the extent possible, certainty and finality, thereby reducing the need for litigation or at least curtailing its length and expense.

In large part the Supreme Court's failure reflects its inability to reach a consensus regarding the sources, or absence thereof, of the federal judiciary's power to imply causes of action. Unwilling to hold that the courts lack the constitutional power to imply causes of action, but at the same time cognizant of and sensitive to our governmental system of separate and limited powers, the Court has ruled that causes of action may only be implied when consistent with a discernable congressional intent to authorize such actions. Regrettably, the Court has not yet articulated what suffices to show, or is encompassed within, congressional intent.

The Court has made clear in cases such as *Barbour*, *Cort*, and *Touche Ross* that a cause of action will not be implied when the plaintiff can support implication only with the enactment of a statute, framed in general terms, that does not purport to confer special rights on any identifiable class of persons. The Court has not succeeded in uniformly defining additional limits, however. At its most restrictive extreme, the Court in *Touche Ross* and *Transamerica* seems to have equated the congressional intent necessary to supply the requisite power to imply a cause of action with an affirmative showing in the record that Congress forgot, overlooked, or otherwise neglected to include words in the statute that expressly give a person the right to sue. *Transamerica*'s alternative method of showing congressional intent to permit implication is almost as

214. *Id.* at 390-91.

restrictive as the above "forgot equals intent" rule—the statute in question must be one in which the failure to imply a cause of action would preclude enforcement of rights specifically created by the statute.[215] The voidability provisions that are included in several of the securities acts are examples of such statutes.[216]

Arguably, the Court has found a middle ground in its most recent implication case. In *Curran* the Court did not renounce or abandon the "forgot equals intent" formulation. Instead it superimposed additional tests upon, or created exceptions to, that rule. Pointing to the Court's admitted change in approach articulated in *Cort*, *Curran* held that a different, less restrictive test would be used when implying causes of action from statutes enacted prior to 1975. In such cases the requisite congressional intent could be shown by discerning that Congress was aware at the time it enacted or amended the statute in question that the lower federal courts had either already or were likely to imply causes of action.

At the other end of the spectrum, the Court in *Borak* and *Banker's Life*, cases that have not been overruled or even in some instances distinguished, held that the requisite intent can be shown by identifying the purposes Congress sought to accomplish in enacting a statute and then asking whether such purposes would be enhanced or furthered by allowing a private right to sue, even if the statute expressly includes alternative methods of enforcement. Statutes such as sections 10(b) and 14(a) of the Exchange Act, which declare certain conduct unlawful and were enacted for the benefit of an identifiable group, are examples of statutes from which the Court has implied causes of action. This approach arguably has also been used in cases that post-date *Cort*, such as *Cannon*[217] and *Curran*,[218] showing that the Court has not abandoned this more liberal strand of the implication of rights doctrine.

The lack of a coherent doctrinal approach to determining congressional intent to permit implication of a cause of action has undoubtedly led the Supreme Court to attempt to avoid the analytical difficulties by deciding cases on alternative grounds such as standing or the lack of remedy. In these cases, such as *Chris-Craft* and *Rondeau*, the Court invariably ruled negatively, thereby making it unnecessary to deal with the harder question of congres-

215. *See supra* text accompanying notes 175-76.

216. *See supra* note 35.

217. In *Cannon*, 441 U.S. 677, the Court held that § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1982), explicitly confers a benefit on persons discriminated against on the basis of sex. The Court, applying the *Cort* factors, recognized an implied cause of action even though § 902 of Title IX, *id.* § 1682, established a procedure for the termination of federal financial support for institutions violating § 901. Section 901 provides, in part, 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."

218. In *Curran* the Court found § 4b of the Commodity Exchange Act, 7 U.S.C. § 6b (1982), to support an implied cause of action, due to its similarity to the language of § 10(b) of the Exchange Act. The Court also held in *Curran* that implied causes of action could be based on other provisions of the Commodity Exchange Act that "are framed in general terms and do not purport to confer special rights on any identifiable class of persons." *Curran*, 456 U.S. at 391.

sional intent to allow judicial implication of a private cause of action. Of course, standing and remedy can be viewed as the narrower bases for decision, particularly in view of the possible underlying difficulties in implication cases. In addition, however, the Court may prefer to use the lack of standing or remedy as a basis for decision, because they are areas in which the Court has traditionally been thought to possess greater discretion and authority.

Compounding the confusion, underlying concern about the Court's power to imply causes of action has been reflected in yet another way. Although the Court apparently is sensitive to the differences between implying a right of action and implying a remedy or resolving jurisdictional issues, it has in many of its implied cause of action cases neglected to make clear which question it was answering. As a result, the Court arguably has both restricted its ability to devise remedies and has in some cases assumed that it has greater power or flexibility to imply rights of action that it actually may have.

The underlying legal premise of the "forgot equals intent" rule, as articulated in *Transamerica*, must reflect a belief that absent express or quasi-express congressional authorization, the Court has no power to recognize implied causes of action. A majority of the Court has not, however, held that the federal judiciary lacks such constitutional power. Indeed, Justice Stevens in his majority opinion in *Curran* indicated that the Court actually possessed this authority. The Court, then, is operating under what may be a false and unduly restrictive premise. Unless the Court confronts the underlying constitutional issue directly, it will continue to decide implication cases more narrowly than necessary because of its unresolved doubts. The extremely restrictive position adopted in *Transamerica* should only be used if a majority of the Court determines that judicial power to imply causes of action does not exist. Failing to make such a ruling, the Court must at least either develop a new rationale or reaffirm its previous holdings that upheld implication.[219]

Because a majority of the Court has thus far not overruled any of its old implication cases, such as *Borak* and *Banker's Life*, the new rationale, if any, should to the extent possible reconcile the Court's prior implication decisions. At the same time, any new formulation should not restrict unnecessarily the federal courts' freedom to perform functions that they not only have the power to perform but the duty to perform as part of the judicial function. A review of the Court's decisions reveals that such an analytical framework already exists.

The four-prong test of *Cort* supplies the basic structure for such a rationale. For this test to be applied appropriately, however, its use must be limited

219. In Herman & MacLean v. Huddleston, 103 S. Ct. 683 (1983), a case concerned with the overlap between the express cause of action created in § 11 of the Securities Act, 15 U.S.C. § 77k (1982), and the implied cause of action based on § 10(b) of the Exchange Act, the Court stated: "Most significantly for present purposes, a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." 103 U.S. at 686-87 (footnote omitted). The Court offered no explanation or analysis, other than calling attention to the judicial precedent of recognition, for its reaffirmation of the implied cause of action.

to determining whether a right of action can be implied and must not be used to answer questions regarding availability of remedies, standing, or subject matter jurisdiction. In addition, the *Cort* Court's use of congressional intent as the second part of the test must be defined more broadly than the Court has construed it in its more recent cases, such as *Touche Ross* and *Transamerica*. Rather than "forgot equals intent," intent must be defined or equated with congressional purpose; congressional purpose in turn must be defined as what substantive goals Congress sought to accomplish, rather than whether Congress meant to make available the procedural device of filing suit.

It is necessary, however, to analyze why the issues of jurisdiction, right of action, relief, and standing are analytically severable. Judicial implication or recognition of a cause of action means that a person will be allowed to pursue relief in federal court from injuries caused by another's violation of a statute. To imply a cause of action, therefore, a federal court must have subject matter jurisdiction, must be able to identify statutorily created rights and duties giving rise to a right to sue, must determine that it can grant the relief sought, and must determine that the plaintiff is the appropriate party to assert the claim.

Generally a federal court cannot exercise subject matter jurisdiction unless Congress has provided it. A statute conferring jurisdiction is therefore a prerequisite to implication.[220] The existence of a jurisdiction granting statute does not, however, authorize the federal courts to legislate. Therefore, before a federal court can imply a cause of action, Congress must have enacted a statute conferring rights on the plaintiff and concurrently imposing duties on the defendant.[221] When such rights-creating statutes also expressly authorize private civil suits no implication problem exists.[222] It is only when the statute does not expressly authorize private lawsuits that the courts will need to imply private causes of action.

Two types of substantive, or rights- and duties-creating, statutes have been found by the Supreme Court to support implication. Statutes that purport to affect the legal relationships between private parties but which do not expressly authorize resort to the courts to vindicate or enforce compliance are one group. Section 29(b) of the Exchange Act as construed in *Mills*, and section 209 of the Investment Advisers Act as construed in *Transamerica*, are examples of such statutes. This type of statute has not given the Court serious difficulty because without implication the statute cannot be enforced. The other type consists of statutes that prohibit certain conduct or declare acts to be unlawful. Sections 10(b) and 14(a) of the Exchange Act and section 206 of the Investment Advisors Act are examples of this type. In all cases but *Transamerica*, in which the Court declined to imply a right of action from section 206, the Court has upheld implication when it has been able to determine that such a statute was intended to benefit an identifiable group and that private

220. *See, e.g.*, L. TRIBE, *supra* note 14, §§ 3-31, at 115-16. *See also supra* notes 13-17 and accompanying text.

221. *See supra* note 18.

222. *See* statutes cited *supra* note 34.

suits are necessary to fully effectuate the congressional purposes that led to the enactment of the statute.

Admittedly, this determination of statutory intent is the hardest part of the process and an area in which the Court might be tempted to supply its own judgment for that of Congress. Nevertheless, unless and until the Court determines that discerning congressional intent is tantamount to legislating and therefore unconstitutional, it has the duty to undertake the task. Equating intent with forgot, however, has the practical effect of relieving the Court of this responsibility. The four-factor *Cort* test appears to be a workable, and perhaps the best, means of discerning congressional intent, at least when intent is defined more broadly than the "forgot equals intent" test of *Transamerica*. Apparently, at least a majority of the Court agrees, because *Cort* has not been overruled.

The *Cort* test should not, however, be used to resolve the relief and standing questions. The *Rondeau* and *Chris-Craft* decisions are examples of attempts by the Court to use the test this way. Whether the *Cort* Court itself viewed the four-factor test as limited to answering only the right of action question is debatable. The test should, however, be so limited, because its application in other contexts unjustifiably invades or restricts the Court's powers to decide questions involving relief and standing and, in addition, fosters confusion concerning the differences between jurisdiction, implying rights of action and remedies, and recognizing standing.

Courts, including federal courts, traditionally have exercised a great deal of flexibility and discretion when fashioning remedies to vindicate rights created by Congress.[223] Even when Congress has created a right, expressly authorized private suit, and set out particular forms of relief that can be granted, the Supreme Court has not felt constrained to deny other types of relief, unless, of course, Congress has expressly prohibited such relief.[224] There should be no reason for the federal courts to limit their ability to provide relief simply because the right to sue is implied instead of expressly created. Applying the four-factor *Cort* test to resolve the remedy question could have this constricting effect. Because the Court does not always make clear which question it thinks it is resolving when it uses the *Cort* test, the different effect that legislative intent has on implying remedies may be thought applicable when attempting to answer the more difficult right of action question.

Similarly, the courts have long thought themselves competent and arguably freer to resolve standing questions,[225] engaging in a more traditional kind of statutory interpretation to do so. Attempting to resolve standing questions by resort to the *Cort* test, as was done in part in *Chris-Craft*, and to a lesser

223. *See supra* notes 10 & 27.

224. *See* cases cited *supra* note 27.

225. While the federal courts are not completely free to determine standing, the Supreme Court has nevertheless exercised a great deal of discretionary judgment in the area. In 1980 Professor Gunther noted that while the Warren Court was quite lenient in recognizing standing, the Burger Court has signified that it is unwilling to abandon standing barriers entirely. G. GUNTHER, *supra* note 19, at 1617.

extent in *Curran*, is not only unnecessary but also leads to confusion regarding the federal courts' power to imply causes of action and could, given the stricter limitations on the courts' power in the implication area, unduly restrict the ability of the courts to resolve standing questions.

The attempt in *Curran* to grandfather in causes of action either recognized by the lower courts prior to 1975 or recognized by the courts after 1975 but implied from statutes enacted prior to that date is simply not defensible. In *Curran* the Court held that even though the Court today, using the "forgot equals intent" test, might not imply a cause of action from a particular statute, it would do so if the statute were enacted prior to 1975 because Congress had not been put on notice that the Court was adopting a new test for implication. The Court held that even if a statute would never have supported implication under any test used by the Court, including that used in *Borak*, if the lower federal courts nevertheless had erroneously implied a cause of action from such a statute, and if the Court could discern that Congress was aware that such actions had been implied, then the Court today would uphold implication.

From one perspective *Curran* can be viewed as more liberal than the decisions immediately preceding it because it permits implication even though the "forgot equals intent" test has not been met. On the other hand, *Curran* can be viewed as having only created an exception to the strict "forgot equals intent" test, rather than as having adopted a less restrictive test. It is clear, however, that the Court is not abandoning "forgot equals intent" on a broad basis. Although Justice Stevens claims that there are no constitutional bars to judicial implication, the retention of the "forgot equals intent" test belies that assertion.

If the federal courts have the power to imply causes of action, they must do so when they discern that Congress intended (in the *Cort* sense) such a result, regardless of whether the statute under review was enacted prior to the time that the Court changed its direction. If the federal courts have no such power, the Supreme Court cannot continue to allow previously recognized, but unconstitutional causes of action to be litigated and new unconstitutional causes of action to be recognized by the lower federal courts.

Last, the inability of the current Court to agree on the implication issue will increase the volume of litigation in the area, a result the Court expressly sought to preclude.[226] This is so because the Supreme Court, while not flatly prohibiting the lower courts from recognizing new implied causes of action, has not given the lower courts a reliable and consistent test for identifying when such causes of action are to be implied. Thus, defendants will undoubtedly continue to challenge the propriety of any implied causes of action not yet approved by the Supreme Court. The problem is further exacerbated by the Court's failure to separate clearly its serious concerns regarding the need for

226. *See, e.g.*, Justice Stevens' comment in *Curran* that the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. *Curran*, 456 U.S. at 377.

congressionally supplied power in the right of action arena from the different needs in the remedies and standing areas. Confusion about which test applies will lead to unnecessary litigation over the courts' powers to proceed in these other areas. Therefore, to the extent that the Court adopted the strict "forgot equals intent" test to contain litigation, its purpose has been defeated.

The *Cort* test, subject to limitations, is workable because it is possible to reconcile most of the previous decisions without overruling any of them except *Transamerica*. It provides an appropriate balance between congressional and judicial powers because it takes into account the necessity of having Congress supply the substantive rights and duties sought to be enforced while at the same time permitting the courts to exercise some flexibility in determining whether to allow a private lawsuit to obtain vindication of the congressionally created rights. The use of the *Cort* test will thus reconcile the cases, ensure adherence to precedent, and keep judicial and legislative powers in balance.

IV. CONCLUSION

The eleven year period between *Borak* and *Cort* has been referred to as the "expansion era"[227] or the "ebullient stage"[228] in the history of the Supreme Court's implication of causes of action from federal securities law statutes. The subsequent decisions have been viewed and described as restrictive and the period post-dating *Cort* has been labeled the "contraction era."[229] In hindsight, this shift in the tenor of the Court's decisions, if not inevitable, was predictable. Whether a cause of action is created expressly by Congress or recognized by the courts for the first time, the scope or content of the action must be delimited. In numerous decisions both pre- and post-dating *Cort*, the Supreme Court and the lower federal courts have done so. The courts also must decide which statutes will support implied causes of action and develop a rationale for so deciding.

Touche Ross, *Transamerica*, and *Curran* are more than limit-setting decisions, however. The Court arguably has tried to renounce its prior practice of recognizing implied causes of action without, however, overruling its prior affirmative decisions or articulating a consistent constitutionally or policy based rationale for doing so. In the process it has rendered decisions that add to the confusion regarding what it is that a federal court does when it implies causes of action and the sources of the courts' power to do so.

Cort was an attempt to set forth a rationale or test that could be used for determining when causes of action would be implied. The test, or a modified version of it, is still workable. What *Cort* did not do, and what has yet to be

227. 1 A. BROMBERG & L. LOWENFELS, *supra* note 81, § 2.2, at 461. ("Like most histories, this one has some conspicuous major movements. The clearest is the birth and expansion of implied private rights of action until the mid 1970s, and their contraction since then, primarily in the Supreme Court's retrenchment cases.")

228. L. LOSS, *supra* note 10, at 1058. ("The Supreme Court's decisions in the past twenty years have gone through several stages, not marked by clear boundaries. The first . . . might be called the 'ebullient stage' . . . .").

229. 1 A. BROMBERG & L. LOWENFELS, *supra* note 81, § 2.2, at 461.

done, is to set forth or explain the sources or limits of the federal courts' power to imply causes of action under any circumstances. It is apparent that not all members of the existing Court agree that such a power exists. Unless and until the Court deals directly with this question confusion in the area will continue.

The Supreme Court's emphasis in its more recent implication decisions on the intent aspect of the *Cort* test is undoubtedly an expression of its view that Congress must ultimately be the source of that power. What remains is to define what is meant by the term "congressional intent." If intent is defined in too limited a manner, the Court runs the risk of unnecessarily limiting powers that it has traditionally exercised in the remedies and standing areas and that arguably are necessary if our federal judicial system is to continue to operate efficiently and flexibly. If the Court separately addresses the several questions that must be answered to determine whether a cause of action should be implied, with particular emphasis on the role that determining congressional intent should play, a reasonable but not unnecessarily restrictive approach will result.