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NOTES

A NEW DIRECTION FOR IMPLIED CAUSES OF ACTION

INTRODUCTION

Since the Supreme Court first inferred a private right of action[1] from a federal statute more than sixty years ago,[2] the lower federal courts have refined and expanded upon the practice with increasing frequency.[3] Despite attempts by the Court to develop appropriate guidelines[4] for resolving implication questions, however, implied actions continue to present analytical problems for the federal judiciary.[5] The current confusion regarding the proper analysis for inference of a

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1. The phrase "private cause of action" was recently defined as "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." Cannon v. University of Chicago, 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting). Such private rights of action, judicially inferred from either regulatory or criminal statutes which do not explicitly provide therefor, are also commonly referred to as "implied causes of action," *see* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 285 (1963) [hereinafter cited as *Implying Civil Remedies*], and the concept of such judicial inference is commonly known as the "implication doctrine." *See* Cannon v. University of Chicago, 559 F.2d 1063, 1072 n.11 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. Cin. L. Rev. 1, 1 (1978); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 Wm. & Mary L. Rev. 429, 429-30 (1976) [hereinafter cited as *Emergence of a Conservative Doctrine*]. This Note's discussion of implied actions is limited to statutory private causes of action, with a particular emphasis placed on implied actions in the area of securities law. Private causes of action arising under the Constitution or its amendments are omitted because the criteria used in the analysis of such actions are separate and distinct from those that should be used when examining statutory private rights of action. *See* Davis v. Passman, 99 S. Ct. 2264, 2274 (1979).

2. *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40 (1916). *But see* Cannon v. University of Chicago, 441 U.S. 677, 732 (1979) (Powell, J., dissenting) (the *Rigsby* Court used the term "private right of action" to convey a different connotation from the one commonly used today). In *Rigsby*, the Court found that "[a] disregard of the command of [a] statute is a wrongful act, and where it results in damage to one of the class for whose *especial benefit* the statute was enacted, the right to recover the damages from the party in default is implied." 241 U.S. at 39 (emphasis added); *accord*, Restatement of Torts § 286 (1934). This analytical approach to implication is often referred to as the "statutory tort approach." *See* Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, 1 J. Corp. L. 371, 376 (1976) [hereinafter cited as *From* Borak *to* Ash]. As courts began to resort to the implication doctrine with increasing frequency, the deficiencies of the statutory tort approach became apparent; its overly broad nature failed to establish any comprehensive standards for judicial inference and it could easily be construed to apply to most statutes. Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. Pa. L. Rev. 1392, 1394 (1975) [hereinafter cited as *Private Rights*]. Although the statutory tort approach was not abandoned completely, courts began to supplement the *Rigsby* tort doctrine with other analytical criteria to justify the inference of a private right of action. *See* notes 81-89 *infra* and accompanying text.

3. *See Implying Civil Remedies*, *supra* note 1, at 285; *From* Borak *to* Ash, *supra* note 2, at 371; *Private Rights*, *supra* note 2, at 1396.

4. *See* notes 17-23 *infra* and accompanying text.

5. *See* Young, *Supreme Court Report*, 66 A.B.A.J. 88, 88 (1980); notes 23-27 *infra* and accompanying text.

cause of action[6] arises in part from the haphazard development of the Supreme Court's implied action cases[7] and in part from the Court's most recent trend toward discouraging their use.[8]

Although the Court refused to acknowledge implied actions in some decisions in the late 1950's,[9] its recognition in 1964 of a private cause of action under section 14(a) of the Securities Exchange Act of 1934 (the Exchange Act)[10] in *J.I. Case Co. v. Borak*[11] seemed to signal a renewed leniency toward implied actions.[12] This liberal attitude was short-lived, however, and between 1974 and 1977 the Court made its first major effort to curtail the expansion of the implication doctrine.[13] In a series of decisions departing from the *Borak* approach, the

6. *See* notes 28-31 *infra* and accompanying text.

7. *See* Cannon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting); Olsen v. Shell Oil Co., 561 F.2d 1178, 1184 (5th Cir. 1977); *cf.* Note, *Emerging Standards for Implied Actions Under Federal Statutes,* 9 U. Mich. J.L. Ref. 295, 298-99 (1976) [hereinafter cited as *Emerging Standards*] (discussion of the lack of comprehensive standards in the federal courts for inferring private causes of action prior to Cort v. Ash, 422 U.S. 66 (1975)).

8. *See* pt. I *infra.*

9. T.I.M.E. Inc. v. United States, 359 U.S. 464, 471-72 (1959) (Motor Carrier Act of 1935, 49 U.S.C. §§ 301-327 (1976), did not provide a private cause of action to shipper who sought to challenge reasonableness of motor carrier's past charges); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76, 382 (1958) (no private cause of action under § 4 or § 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1976), for sales made at unreasonably low prices for the purposes of destroying competition). *But see* Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 87-88 (1962) (implied cause of action for damages allowed under Motor Carrier Act of 1935, 49 U.S.C. §§ 301-327 (1976), because issue was reasonableness of routes, not rates; T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959), distinguished).

10. 15 U.S.C. § 78n(a) (1976).

11. 377 U.S. 426, 430-31 (1964). The *Borak* Court relied on several rationales to justify its inference of a private right of action in favor of the plaintiff shareholder. The action was based on the defendant corporation's issuance of an allegedly false and misleading proxy statement in connection with a merger. The Court ruled that § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), which 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," gives private parties a right to bring suit for violations of § 14(a), which does not expressly provide for any private actions. 377 U.S. at 431. In so doing, the Court stressed the generally "broad remedial purposes" of § 14(a), the section's chief purpose of investor protection, and the need for private enforcement of the proxy rules to supplement actions taken by the Securities and Exchange Commission (SEC). *Id.* at 431-32. *Borak* evidenced a shift away from a purely statutory tort approach to implication. *See* note 2 *supra.* The Court emphasized the need for courts to approach implication problems mindful of their duty to provide "such remedies as are necessary to make effective the congressional purpose" in enacting the statute in question. 377 U.S. at 433; *see From* Borak *to* Ash, *supra* note 2, at 379-80.

12. The Court apparently continued to favor a broad approach to implication through the late 1960's. *See, e.g.,* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (violation of the fourth amendment by federal agents gives rise to a private cause of action for damages); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967) (remedies and procedures specified in Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-467e (1976), were not intended to be exclusive; United States can, therefore, bring suit to recover costs incurred in removing a negligently sunk barge, although act does not provide for this remedy); *cf.* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (Court recognized that an implied action under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), is now well established).

13. *See* Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings,* 65 Geo. L.J., 891, 923 (1977); Pillai, *supra* note 1, at 2-3.

Court sought not only to limit future use of the implication doctrine,[14] but to reduce the scope and effectiveness of previously recognized implied actions as well.[15]

The Court's unanimous decision in *Cort v. Ash*[16] most clearly enunciated this new implied action conservatism. The adoption in *Cort* of a structured approach to implication analysis, more than the precise holding of the case, attested to a new caution in the area of implied actions. Drawing on the rationales and approaches of prior implication cases,[17] the Court formulated four relevant factors to be considered by a court addressing an implied action question:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth], 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?[18]

Although the *Cort* implication criteria were formulated in the context of the Supreme Court's analysis of a criminal statute,[19] they have since been applied to

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14. Redington v. Touche Ross & Co., 592 F.2d 617, 628 (2d Cir. 1978) (Mulligan, J., dissenting), *rev'd*, 99 S. Ct. 2479 (1979); *see, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 42 (1977) (finding no private cause of action under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1976), in favor of defeated tender offeror); Cort v. Ash, 422 U.S. 66, 68-69 (1975) (no private cause of action allowed against corporate directors for violation of criminal statute prohibiting election contributions); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 420-22, 425 (1975) (customers of failing broker-dealer did not have private cause of action under Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-78*lll* (1976), to force Securities Investor Protection Corp. to perform its duties); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 464-65 (1974) (statute provided exclusive remedy; no private cause of action allowed).

15. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473-74 (1977) (plaintiff asserting private action under rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), must allege manipulative or deceptive conduct); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976) (standard of materiality adopted for rule 14a-9, 17 C.F.R. § 240.14a-9 (1979), promulgated under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976)); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (plaintiff asserting private action under rule 10b-5 must allege scienter); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975) (person who is neither buyer nor seller of securities cannot bring action under § 10(b), 15 U.S.C. § 78j(b) (1976), or rule 10b-5).

16. 422 U.S. 66 (1975). The issue in *Cort* was whether a corporate shareholder could bring a derivative private cause of action under 18 U.S.C. § 610 against corporate directors who allegedly made contributions and expenditures in connection with the 1972 presidential election. Section 610, a criminal statute prohibiting the expenditure of corporate funds in connection with certain federal elections, specifically provided that violators of the section were subject to fines and/or imprisonment, but did not expressly provide for any civil rights of action. The Court held that a private right of action could not be judicially inferred under the section. 422 U.S. at 69.

17. *E.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Calhoon v. Harvey, 379 U.S. 134 (1964); J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Wheeldin v. Wheeler, 373 U.S. 647 (1963); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); *see* Cort v. Ash, 422 U.S. 66, 78 (1975).

18. Cort v. Ash, 422 U.S. at 78 (citations omitted).

19. *See* note 16 *supra*.

a variety of statutes that differ in nature, scope and purpose.[20] Developed as merely a suggested approach[21] to a complex problem of statutory construction and the discernment of legislative intent,[22] the test has become the analytical focal point for most courts deciding an implication issue.[23] Frequent applications of the loosely-structured and overlapping criteria,[24] however, have disclosed their weakness as an analytical model and their susceptibility to judicial manipulation.[25] Moreover, the method of reconciling the often conflicting results produced by the factors[26] was not discussed in the *Cort* opinion. Consequently, the

20. *See* 3A H. Bloomenthal, Securities and Federal Law § 9.05A (rev. 1979).

21. The four factors presented in *Cort* are merely dicta and, although deemed relevant by the Supreme Court, are not compulsory tests to be used in analyzing every implied action problem. *See* Sacks v. Reynolds Sec., Inc., 593 F.2d 1234, 1243 (D.C. Cir. 1978); Abrahamson v. Fleschner, 568 F.2d 862, 873 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Emerging Standards, supra* note 7, at 295. *Compare* Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2489 (1979) (limited *Cort* analysis applied) *with* Cannon v. University of Chicago, 441 U.S. 677, 688 (1979) (all four *Cort* factors analyzed).

22. The Court has often characterized the question of the existence of an implied action as one of statutory construction. *See, e.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 245 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2485 (1979); *cf.* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (Court employed statutory construction theory in its implication analysis). Although a distinction has sometimes been drawn between "statutory construction" and "statutory interpretation" on the ground that "interpretation" refers to the meaning of words and "construction" to the application of words to the facts at issue, in judicial practice the terms are used interchangeably. 2A J. Sutherland, Statutes and Statutory Construction § 45.04 (4th ed. C. Sands 1973). Legislative intent is the traditional standard used in the interpretation of statutes. *Id.* While the concept of using legislative intent to decide questions of statutory interpretation has provoked debate, *id.* § 45.06; MacCallum, *Legislative Intent,* 75 Yale L.J. 754, 754 (1966), it continues to be favored by the courts over the meaning given to the statute by "members of the public to whom it is addressed." 2A J. Sutherland, *supra,* § 45.08; *see* note 147 *infra* and accompanying text.

23. *Cf.* Pillai, *supra* note 1, at 19 (*Cort* and criterion set forth in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), constitute definitive rules for implication); *Emergence of a Conservative Doctrine, supra* note 1, at 449 (*Cort* factors are to control implication decision).

24. *See* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of* Cort v. Ash, 23 Vill. L. Rev. 657, 657 (1978). The interrelated nature of the factors and the absence of any explanation in *Cort* as to the weight each one was to be given caused new problems for the federal courts with respect to implied actions cases. *See* 4 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 2.4, at 384.3 (1979); McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment,* 80 Dick. L. Rev. 167, 187 (1975); *Emerging Standards, supra* note 7, at 316-18.

25. Cannon v. University of Chicago, 441 U.S. 667, 740-41 (1979) (Powell, J., dissenting); *see* Bratton v. Shiffrin, 585 F.2d 223, 232 (7th Cir. 1978) (Bauer, J., dissenting) (court "adjusted" *Cort* factors), *vacated,* 99 S. Ct. 3094 (1979); Redington v. Touche Ross & Co., 592 F.2d 617, 628 (2d Cir. 1978) (Mulligan, J., dissenting) (majority "misapplied" *Cort*), *rev'd,* 99 S. Ct. 2479 (1979); Crawford & Schneider, *supra* note 24, at 658-59.

26. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (referring to situation when all four *Cort* factors point to implication as "atypical"); Clark v. Gulf Oil Corp., 570 F.2d 1138, 1145-50 (3d Cir. 1977) (finding plaintiffs within especial class was insufficient to outweigh inconsistencies of implied action with legislative scheme; remaining factors provided little guidance on issue), *cert. denied,* 435 U.S. 970 (1978); Rauch v. United Instruments, Inc., 548 F.2d 452, 460 (3d Cir. 1976) (concluding that plaintiff was not a member of an especial class and that the action was a matter of state concern, court found it unnecessary to consider second and third factors; implied action denied); National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp.

federal courts have felt free to select the factors to be applied to a particular statute and have continued to infer private causes of action frequently,[27] despite the Supreme Court's original goal of limiting such practices through the *Cort* test.

Nowhere is the uncertainty as to the proper analysis for inferring private causes of action as evident as in the Supreme Court decisions that have confronted the issue in the past year.[28] Although they evidence a certain consistency of result, usually refusing to infer a cause of action,[29] they lack consistent analysis.[30] This Note explores these recent decisions and in particular examines their impact on the future of the implication doctrine in the context of federal securities law, an area which has been the subject of a significant portion of implied action litigation.[31] Using the securities laws as a conceptual model, the Note also proposes a specialized approach for determining the existence of private rights of action within a federal regulatory scheme.

I. RECENT SUPREME COURT DECISIONS

Although the Supreme Court has recently further limited the use of implied actions, it has not altogether foreclosed the possibility of judicial inference.[32] Three of the Court's recent decisions, however, illustrate the substantial diver-

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1256, 1259-61 (S.D.N.Y. 1979) (concluding that the findings of an especial beneficiary and no state law tradition were insufficient to outweigh the negative implication results produced by the second and third factors; implied action denied).

27. *See, e.g.*, Redington v. Touche Ross & Co., 592 F.2d 617, 621-23 (2d Cir. 1978) (implied cause of action recognized under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (a) (1976)), *rev'd*, 99 S. Ct. 2479 (1979); Local Div. No. 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1, 12-16 (1st Cir. 1978) (implied cause of action recognized under § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) (1976)); Bratton v. Shiffrin, 585 F.2d 223, 228-32 (7th Cir. 1978) (implied cause of action for travelers exists under § 1371(n)(2) of the Federal Aviation Act of 1958, 49 U.S.C. § 1371(n)(2) (1976)), *vacated*, 99 S. Ct. 3094 (1979) (remanded for further consideration in light of Touche Ross & Co. v. Redington, 99 S. Ct. 2479 (1979)); Abrahamson v. Fleschner, 568 F.2d 862, 872-76 (2d Cir. 1977) (implied cause of action recognized under § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1976)), *cert. denied*, 436 U.S. 913 (1978); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1244-45 (7th Cir. 1977) (section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976), held to provide private parties with an implied cause of action), *rev'd on other grounds*, 439 U.S. 551 (1979).

28. Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); *see* Young, *supra* note 5, at 88 (recent decisions cast doubt on *Cort* as precedent); *cf.* Southeastern Community College v. Davis, 99 S. Ct. 2361, 2366 n.5 (1979) (Court disposed of case on the merits; implied action issue not addressed); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979) (Court assumed, without deciding, that implied actions existed under the statutes in question); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 557 n.9 (1979) (same).

29. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2489 (1979); Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979). *Contra*, Cannon v. University of Chicago, 441 U.S. 677, 709 (1979).

30. *See* pt. I *infra*.

31. *See* McMahon & Rodos, *supra* note 24, at 167 n.13; *Implying Civil Remedies*, *supra* note 1, at 286.

32. *Cf.* Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 Notre Dame Law. 33, 44 (1979) (discussing implication doctrine after Court's decision in Touche Ross & Co. v. Redington, 99 S. Ct. 2479 (1979)). *But see* N.Y. Times, Nov. 14, 1979, § D, at 1, col. 4, at 17, col. 3.

sity of opinion among the Supreme Court Justices on the subject of implied actions[33] and the need for refinement of the guidelines used to determine whether inference of an action is justified.[34]

A. Cannon v. University of Chicago

Using a full *Cort* analysis, the Supreme Court held in *Cannon v. University of Chicago*[35] that section 901(a) of Title IX of the Educational Amendments Act of 1972[36] confers an implied right of action on victims of sex discrimination in federally financed educational programs.[37] Although another section of Title IX establishes an administrative procedure for termination of federal support to institutions that discriminate on the basis of sex,[38] the Supreme Court rejected the argument that Congress intended this express procedure to be the exclusive means of enforcement.[39] The Court's reluctance to accept such an argument is consistent with its pre-*Cort* decisions in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*[40] and *Securities Investor Protection Corp. v. Barbour (SIPC).*[41] In *Amtrak* and *SIPC*, the Court found

33. *See* Young, *supra* note 5, at 88. *But see* Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The *Chrysler* Court faced implied action questions under both the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), and the Trade Secrets Act. 18 U.S.C. § 1905 (1976). Chrysler sought to establish private rights of action under these acts to prevent disclosure of employment information it had supplied to the Defense Logistics Agency. 441 U.S. at 286-87. A unanimous Court found the FOIA to be exclusively a disclosure statute that did not afford those submitting information any right to enjoin agency disclosure to third parties. *Id.* at 292, 294. The Supreme Court relied on *Cort* to establish that the Trade Secrets Act, a criminal statute, did not warrant the inference of a private right of action. *Id.* at 316. The Court's unanimity of opinion in *Chrysler* is attributable to the FOIA's relatively clear legislative history, which seemed to preclude the need to resort to a detailed *Cort* analysis, and to the criminal nature of the Trade Secrets Act. *Id.* at 316. In comparison, the regulatory statutes and legislative histories at issue in the other 1979 implied action cases differ in nature and organization.

34. *See* notes 135-37 *infra* and accompanying text.

35. 441 U.S. 677 (1979).

36. 20 U.S.C. § 1681(a) (1976). Section 901(a) provides that no person "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." *Id.*

37. 441 U.S. at 717. Cannon alleged that her applications for admission to medical school were denied on the basis of sex. *Id.* at 680.

38. Section 902 provides for termination of federal financial assistance to recipient institutions that have failed to comply with the provisions of § 901. 20 U.S.C. § 1682 (1976).

39. 441 U.S. at 711. This argument is based on the maxim *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). For a discussion of traditional applications of this maxim of statutory construction, see 2A J. Sutherland, *supra* note 22, §§ 47.23-.25. The use of this theory in the context of implied action analysis has met with strong criticism from commentators. *See, e.g., Emergence of a Conservative Doctrine, supra* note 1, at 452-53 (maxim limits a court's inquiry to merely an examination of statutory language); *Implying Civil Remedies, supra* note 1, at 290 (although maxim may present one possible reading of a provision, other interpretations are often plausible); *cf.* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 n.8 (1943) (maxim should be merely another aid to statutory construction).

40. 414 U.S. 453 (1974). *Amtrak* used the exclusivity argument of statutory construction to hold that the remedies specifically provided in § 307(a) of the Rail Passenger Service Act of 1970, 45 U.S.C. § 547 (1976), were the exclusive means of enforcing that act. 414 U.S. at 464-65; *see From* Borak *to* Ash, *supra* note 2, at 381.

41. 421 U.S. 412 (1975). The *SIPC* Court held that customers of a failing broker-dealer did not

that an "express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature."[42] This conclusion will yield, however, when there is "clear contrary evidence of legislative intent"[43] to imply a right of action. Evidently, the strict adherence to the *Cort* criteria in the *Cannon* analysis of Title IX[44] produced sufficiently convincing evidence of a congressional private right of action intent to warrant inference despite the existence of express enforcement procedures.[45]

Cannon's impact on implied action analysis was twofold. First, the especial benefit factor of *Cort*, labelled the "threshold question" by the *Cannon* majority,[46] seemed to emerge as the factor to be accorded primary importance in any implied action analysis. The *Cannon* Court also suggested that consideration of the especial benefit criterion should be based on the language of the statute itself, language which "expressly identifies the class Congress intended to benefit."[47] Unfortunately, because of its conclusion that each of the four factors supported recognition of an implied action, the Court circumvented the need to balance the conflicting results so often produced by the *Cort* criteria.[48]

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have a private right of action under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78*lll* (1976), to compel the Securities Investor Protection Corp. (SIPC) to perform its statutory functions. 421 U.S. at 425. The Court found that the SEC's authority under § 7(b) of the act to compel the corporation to perform its duties, *see* 15 U.S.C. § 78ggg(b) (1976), was the exclusive means by which SIPC could be forced to act. *See* 421 U.S. at 417-18, 421.

42. Securities Investor Protection Corp. v. Barbour, 421 U.S. at 419; *see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. at 461.

43. Securities Investor Protection Corp. v. Barbour, 421 U.S. at 419 (quoting National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. at 458).

44. With respect to the four factors, the Court found that: (1) § 901 was enacted for the benefit of persons discriminated against because of sex and that the plaintiff was a member of that class, 441 U.S. at 693-94; (2) the legislative history of Title IX plainly evidenced a congressional intent to create a private remedy, *id.* at 694; (3) the inference of a private action would not frustrate the underlying purpose of the legislative scheme, *id.* at 704-06; and (4) the subject matter of the suit, discrimination, was not an area basically of concern to the states, but was in fact an area in which the federal government and courts had been a primary force. *Id.* at 708-09.

45. The *Cort* criteria themselves do not contain any specific reference to the theory of statutory construction followed in *Amtrak* and *SIPC*, although the maxim used in those cases, *see* notes 39-43 *supra* and accompanying text, has been incorporated by some courts into their discussion of the *Cort* factors. *See, e.g.*, Caceres Agency, Inc. v. Trans World Airways, Inc., 594 F.2d 932, 933 (2d Cir. 1979); Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1223 (9th Cir.), *cert. denied*, 100 S. Ct. 49 (1979); Bratton v. Shiffrin, 585 F.2d 223, 233 (7th Cir. 1978) (Bauer, J., dissenting), *vacated*, 99 S. Ct. 3094 (1979). The *Cort* and *Cannon* opinions both reiterate the need for additional, convincing evidence beyond the mere existence of an express remedy for this maxim to be applied validly. *See* 441 U.S. at 711; Cort v. Ash, 422 U.S. 66, 82 n.14 (1975). It has been argued that *Cort*'s brief discussion of this maxim was directed at limiting its use to the particular facts of *Amtrak* and *SIPC*. *See Emergence of a Conservative Doctrine*, *supra* note 1, at 451-52; *cf.* Bratton v. Shiffrin, 585 F.2d at 229-30 (*Amtrak* maxim does not detract from duty to consider effectuation of congressional purpose). The Supreme Court's increasingly strict approach to implication, however, is likely to result in the more frequent use of this statutory construction principle. *See* pt. I(c) *infra*.

46. 441 U.S. at 689.

47. *Id.* at 690; *see id.* n.13.

48. *Id.* at 709. The consistent results of the factors as applied in *Cannon* were atypical. *Id.* at 717; *see* note 26 *supra* and accompanying text.

Second, although the four factor *Cort* method received the general approval of the *Cannon* majority,[49] the Justices questioned the basic premise of inferring private causes of action.[50] The majority noted that only in certain limited circumstances, which it failed to delineate, will congressional failure to provide an express civil remedy be consistent with a congressional intent "to have such a remedy available to the persons benefited by its legislation."[51] Both concurring[52] and dissenting[53] opinions echoed this readiness to substantially curtail future inferences of private actions.

Justice Rehnquist's concurring opinion in *Cannon* focused directly on the changes in the Court's approach to implied action analysis since *J.I. Case Co. v. Borak.*[54] In Justice Rehnquist's view, *Borak* and its progeny[55] apparently gave Congress the impression that the federal judiciary was willing to assume the task of deciding whether a particular statute should support a private right of action.[56] Although Justice Rehnquist would not have the federal courts shoulder this burden,[57] his opinion failed to explain whether Congress' duty to accept it applies solely to prospective legislation or also to existing statutes. The former interpretation seems preferable in light of the judiciary's established role in the interpretation of legislative enactments.[58] The resolution of an implied action

49. *See* 441 U.S. at 688.

50. The Justices split into several factions in *Cannon*, each stressing different approaches or areas of emphasis with regard to the interpretation of § 901. Justice Stevens, writing for the Court, was joined by Justices Brennan, Stewart, Marshall and Rehnquist in holding that a private action should be inferred. *Id.* at 680-717. Chief Justice Burger concurred in the judgment. *Id.* Justice Rehnquist, joined by Justice Stewart, filed a concurring opinion discussing the implication doctrine generally. *Id.; see* notes 54-57 *infra* and accompanying text. Justice White's dissent, in which Justice Blackmun joined, attacked the majority's reading of both Title IX and the legislative history of that act, but did not challenge the Court's overall approach to implied actions. *See* 441 U.S. at 718-30. In contrast, Justice Powell's separate dissent offered an entirely different approach to implication issues. *Id.* at 730-49; *see* notes 60-64 *infra* and accompanying text.

51. 441 U.S. at 717. Discussing the second *Cort* factor, however, the Court noted that "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Id.* at 694 (quoting Cort v. Ash, 422 U.S. 66, 82 (1975)).

52. 441 U.S. at 717-18 (Rehnquist, J., concurring); *see* notes 54-57 *infra* and accompanying text.

53. 441 U.S. at 730 (Powell, J., dissenting); *see* notes 60-64 *infra* and accompanying text.

54. 377 U.S. 426 (1964). *See also* notes 11-12 *supra* and accompanying text.

55. *See, e.g.,* Redington v. Touche Ross & Co., 592 F.2d 617, 623 (2d Cir. 1978) (applying *Borak* "necessity" rationale to justify implication), *rev'd,* 99 S. Ct. 2479 (1979); Abrahamson v. Fleschner, 568 F.2d 862, 872 (2d Cir. 1977) (same), *cert. denied,* 436 U.S. 913 (1978). *Compare* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25, 32-33, 41 (1977) (distinguishing *Borak* as to both the type of plaintiff and the need to ensure fulfillment of the act's purposes) *with id.* at 59-61, 66 (Stevens, J., dissenting) (applying *Borak* rationales; *Cort* distinguished).

56. 441 U.S. at 718.

57. *Id.* While many of the Justices comprising the *Cannon* majority might agree with Justice Rehnquist that there has been a conservative shift in the Court's attitude towards implied actions, it is doubtful that all would go along with Justice Rehnquist in favoring a continuation of this narrowing process. *See id.;* Young, *supra* note 5, at 88.

58. *See* 2A J. Sutherland, *supra* note 22, § 45.04; *accord,* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 253 n.8 (1979) (White, J., dissenting); Steinberg, *supra* note 32, at 51; *cf.*

question under existing statutes should require congressional action only when judicial inference would exceed the bounds of interpretation and border on judicial legislation.[59] Thus, the development and refinement of sound guidelines to aid in the interpretation of existing statutes should be stressed rather than the elimination of judicial action altogether.

To restrain courts that too readily create private rights of action and to encourage legislative resolution of policy considerations inherent in implied actions,[60] Justice Powell, in a dissenting opinion, recommended replacing the *Cort* criteria with a stricter test that would require "the most compelling evidence" of congressional intent.[61] Although a compelling evidence test might be easier to administer, it provides too narrow and inflexible an alternative to the *Cort* approach.[62] A compelling evidence requirement would eliminate a court's ability to consider the subtler influences of factors such as congressional awareness of judicial precedent[63] and might reduce any inherent flexibility that Congress sought to provide in the statute.[64]

From Borak *to* Ash, *supra* note 2, at 373-74 (implication is a product of the "inherent limitations" of the legislative process).

59. The development and expansion of judicial inference of private actions, often criticized as judicial legislation and a violation of the separation of powers doctrine, *see* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting); *From* Borak *to* Ash, *supra* note 2, at 374, is attributable to "the inherent limitations of Congress and the law-making process." *Id.* at 373 (footnote omitted). For a general discussion of the separation of powers doctrine in the context of statutory construction questions, see 1 J. Sutherland, *supra* note 22, §§ 3.01-.07, 3.26.

60. 441 U.S. at 749; *accord,* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 545 (1947). According to Justice Frankfurter, courts are not equipped to devise policy and, therefore, "[t]he pressure on legislatures to discharge their responsibilities with care . . . should be stiffened, not relaxed." *Id.*

61. 441 U.S. at 749. Justice Powell further advocated strict adherence to the *Amtrak* maxim so that alternative enforcement mechanisms expressly provided in the statute would almost always exclude the inference of private actions. *Id; see* notes 40-43 *supra* and accompanying text.

62. Convinced that the *Cort* approach allows the judiciary to assume the "policymaking authority" which the Constitution vested in Congress, *id.* at 743, Justice Powell developed a test more in accord with a traditional and narrow view of the separation of powers principle. *See generally* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 126-27 (1978); 1 J. Sutherland, *supra* note 22, §§ 3.03-.07. Implication questions may require a court to draw a fine line between "merely carrying out a [legislative] formulated policy" and "initiating policy." *Cf.* Frankfurter, *supra* note 60, at 534 (discussing statutory interpretation generally). Justice Powell's test, in flatly rejecting flexible guidelines, also eliminates the need for any in depth judicial investigation of the implied action issue. Although his response to the deficiencies of the *Cort* criteria is an extreme one, his recognition of the need for a fresh approach to implication is valid. *See* 441 U.S. at 749; notes 135-38 *infra* and accompanying text.

63. The persuasiveness of this factor is evident in the majority opinion in *Cannon.* The *Cannon* Court recognized that at the time of enactment of Title IX, Congress was aware of judicial precedent allowing a private cause of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976), the statute upon which Title IX was patterned. 441 U.S. at 694-703. The Court concluded that Congress had understood Title VI as permitting implied actions and had intended that similar relief be available under Title IX. *Id.* at 703. *See also* 2A J. Sutherland, *supra* note 22, § 49.02.

64. *Cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) ("efficient regulation of securities trading could not be accomplished under a rigid statutory program"). *See also* Steinberg, *supra* note 32, at 40 (Justice Powell's test "premised on unduly strict notions of judicial restraint").

Aside from its new focus on the especial benefit criterion as a primary factor, the *Cannon* decision provides little additional guidance to aid a court in the integration and evaluation of the *Cort* criteria. In fact, the opinions indicate that the use of the *Cort* factors for analysis of implied actions is no longer unanimously supported by the members of the Court.

B. Touche Ross & Co. v. Redington

One month after *Cannon*, in *Touche Ross & Co. v. Redington*,[65] the Supreme Court considered its most important implication case arising under the securities laws[66] since its 1977 decision in *Piper v. Chris-Craft Industries, Inc.*[67] In *Piper*, the Court held that section 14(e) of the Exchange Act[68] did not provide a private cause of action to a defeated tender offeror.[69] Although the *Piper* Court applied the *Cort* test to section 14(e),[70] it did not discuss the implication issue strictly in *Cort* terms.[71] The Court also focused on the absence of a need for an implied

65. 99 S. Ct. 2479 (1979). Touche Ross, an accounting firm, was retained by Weis Securities, Inc. to serve as that brokerage firm's independent auditor. In addition to conducting audits, Touche Ross prepared annual reports of Weis' financial position for filing with the SEC. Weis' subsequent insolvency resulted in the appointment of Redington to act as trustee in Weis' liquidation under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78*lll* (1976). The trustee and the Securities Investor Protection Corp. sued Touche Ross for losses suffered by Weis' customers as a result of the accounting firm's alleged improper audits and financial statement certifications. *Id.* at 2482-84.

66. The *Redington* action was brought under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1976). The district court dismissed the complaint on the ground that no private right of action was implicit in § 17(a). Redington v. Touche Ross & Co., 428 F. Supp. 483, 489-91 (S.D.N.Y. 1977), *rev'd*, 592 F.2d 617 (2d Cir. 1978), *rev'd*, 99 S. Ct. 2479 (1979). The Second Circuit reversed, finding that § 17(a) imposes a duty on accountants and that a breach of such duty gives rise to an implied damage action in favor of a broker-dealer's customers. Redington v. Touche Ross & Co., 592 F.2d 617, 621 (2d Cir. 1978), *rev'd*, 99 S. Ct. 2479 (1979).

67. 430 U.S. 1 (1977).

68. 15 U.S.C. § 78n(e) (1976). Section 14(e), an antifraud provision, provides that "[i]t shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact" with respect to tender offers.

69. 430 U.S. at 42.

70. The *Cort* method led the Court to conclude that (1) the plaintiff was not one of the class for whose especial benefit the statute was enacted, *id.* at 37; (2) although there was no express intent to deny a private damage remedy apparent in the legislative history, the history evidenced a generally narrow purpose behind the enactment—the regulation of tender offerors, *id.* at 38; (3) an implied action seeking damages was not consistent with the legislative scheme, *id.* at 39; and (4) it was appropriate to relegate tender offerors to state law remedies. *Id.* at 41.

71. The Court at times seemed to treat the issue in *Piper* as one of standing, although the predominant language in the opinion relates to the existence of an implied action. *See* 4 A. Bromberg & L. Lowenfels, *supra* note 24, § 2.4, at 384.5. The Court began its analysis with an examination of the statute itself and the legislative history of the Williams Act, which added § 14(e) to the Exchange Act in 1968. Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. § 78n(e) (1976)). The Williams Act was adopted "in response to the growing use of cash tender offers as a means for achieving corporate takeovers." 430 U.S. at 22 (footnote omitted). From this limited analysis, the Court concluded "that the sole purpose of the Williams Act was the *protection of investors* who are confronted with a tender offer" and that Congress did not contemplate a private cause of action for damages by a contending offeror against either the target corporation or competing offerors. *Id.* at 35 (emphasis added). The Court then used the *Cort* factors to confirm its conclusions as to § 14(e)'s legislative history. Finally, the Court

action to effectuate congressional purposes.[72] *Redington*'s significance as an implication case lies not in its interpretation of section 17(a) of the Exchange Act,[73] but in its express recognition of a threshold requirement which must be met to justify a full *Cort* analysis.[74] Moreover, *Redington* conclusively rejected prior, more expansive rationales which had been used to justify the inference of private causes of action.[75]

The *Redington* Court's approach to the implied action claim under section 17(a) represented a compromise between a full *Cort* analysis and the compelling evidence test suggested by Justice Powell in *Cannon*. *Redington* advocated a "limited" *Cort* analysis in certain prescribed instances. When a "statute by its terms grants no private rights to [an] identifiable class [nor] proscribes [any] conduct as unlawful" and when the "legislative history of the [statute] simply does not speak to the issue of private remedies,"[76] inquiry should end; no other factors need be considered and the private right of action should be denied.[77] Apparently, no other factors can produce the degree of sufficiently compelling evidence necessary to override these negative findings. According to the *Redington* Court, section 17(a) neither expressly confers any rights on private parties nor does it proscribe unlawful conduct.[78] In addition, the section's legislative history is silent on the issue of private actions.[79] The Court, therefore, refused to recognize any private right of action under section 17(a).[80]

In analyzing section 17(a), the *Redington* Court considered and rejected several implication theories used extensively in the past to interpret securities statutes. The oldest of these, the "tort doctrine," which held that an action was to be inferred *whenever* disregard of a statute was a wrongful act and resulted in damage to a party benefited by the statute,[81] was dismissed by the Court as

employed a policy argument reminiscent of reasoning used in *Borak*, but in this instance found that a private cause of action was not necessary to effectuate Congress' purposes in enacting § 14(e). *Id.* at 41; *cf.* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (private enforcement necessary to supplement SEC action under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976)). *See generally* notes 88-90 *infra* and accompanying text. For a further discussion of the *Piper* litigation, see 91 Harv. L. Rev. 274 (1977); 3 J. Corp. L. 364 (1978).

72. 430 U.S. at 25, 41.

73. 15 U.S.C. § 78q(a) (1976). Section 17(a) was described by the Court as a "forward-looking" statute, designed simply to aid the SEC in its monitoring of the financial condition of brokerage firms and to prevent broker-dealer insolvency. The Court also classified § 17(a) as a reporting statute, similar to countless other recordkeeping requirements found in regulatory statutes. 99 S. Ct. at 2486. The Supreme Court found it unnecessary to decide whether § 18(a), which provides a private cause of action to purchasers and sellers acting in reliance on a misleading statement, *see* 15 U.S.C. § 78r(a) (1976), provides the exclusive remedy for misstatements in § 17(a) reports. Because the plaintiffs did not meet § 18(a)'s purchaser-seller requirement, the Court was "extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the [express] remedy that Congress chose to provide" in § 18(a). *Id.* at 2488.

74. *See* 99 S. Ct. at 2489.

75. *See* notes 81-89 *infra* and accompanying text.

76. 99 S. Ct. at 2489.

77. *Id.*

78. *Id.* at 2486.

79. *Id.*

80. *Id.* at 2487.

81. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40 (1916); *see* note 2 *supra* and accompanying text.

"entirely misplaced."[82] The Court also rejected the argument that the jurisdictional section of the Exchange Act,[83] relied on to justify implication in *Borak,* could by "its own force and effect" create a right of action,[84] despite its reference to "*all* suits in equity and actions at law" arising under the act.[85] Finally, the *Redington* Court disapproved of the theory that a statute can support an implied action because of its remedial nature.[86] According to the Court, reliance on an often vague remedial purpose does not provide any substantial basis for judicial inference of a private action. Rather, it is the specific statutory language, history and scheme that must dictate a court's decision.[87]

Although not specifically rejecting the theory, the *Redington* Court found irrelevant to its "central inquiry" into congressional intent the argument that a private action should be inferred if such action is "necessary to 'effectuate the purpose'" of a statute.[88] The Court, however, failed to explain when this "necessity" argument may be appropriate. The Court might have done so by distinguishing *Piper,* in which it used the finding of a lack of such a need to justify its denial of an implied action.[89] To the extent, therefore, that *Piper* considered the necessity of an action to be equally as important as the *Cort* criteria,[90] *Piper's* analytical approach would seem to be overshadowed by *Redington.*

82. 99 S. Ct. at 2485.

83. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976).

84. 99 S. Ct. at 2490. Instead, the Court ruled that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce." *Id.*

85. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (emphasis added). Rejection of this jurisdictional section argument reduces even further the courts' implied action flexibility. Such sections, however, may still be useful in the context of a court's overall analysis of the legislative scheme of an act and the type of relief available if an implied action is established. *See* notes 119-22 *infra* and accompanying text.

86. 99 S. Ct. at 2490; *see, e.g.,* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964); Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1242 (5th Cir. 1978), *vacated,* 100 S. Ct. 442 (1979). The danger in such reasoning is that it can result in an overly broad reading of a provision and lead to judicial legislation, rather than judicial inference, of a private right of action. *See* 99 S. Ct. at 2490; *cf.* Pitt, *An SEC Insider's View of the Utility of Private Litigation Under the Federal Securities Laws,* 5 Sec. Reg. L.J. 3, 4 (1977) (remedial "rhetoric" of some Supreme Court cases eventually became a cliché).

87. *See* 99 S. Ct. at 2489.

88. *Id.*

89. 430 U.S. at 25-61, 41. Since the Supreme Court's broad use of this concept in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), courts have frequently included it within a discussion of the third *Cort* factor—legislative scheme. *See, e.g.,* Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979); Olsen v. Shell Oil Co., 561 F.2d 1178, 1189 (5th Cir. 1977); Abrahamson v. Fleschner, 568 F.2d 862, 875-76 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978). The "necessity" concept is not technically part of the third *Cort* factor and when used as such can be misleading. Only if the necessity for private action was evident and recognized at the time of enactment or amendment will this line of inquiry be helpful. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 199-200 (1963); notes 155, 165-67, 174 *infra* and accompanying text. Inferring a cause of action based on a recently developed or increased need for supplementary enforcement can lead to judicial legislation and frustration of congressional intent. *See* Redington v. Touche Ross & Co., 592 F.2d 617, 631, 634 (2d Cir. 1978) (Mulligan, J., dissenting), *rev'd,* 99 S. Ct. 2479 (1979).

90. *Cf.* Pillai, *supra* note 1, at 35-36 (*Cort* factors subordinated in *Piper* to an overriding and dispositive test of necessity). Professor Pillai distinguished the necessity test used in *Piper* from that

The relevance of the *Borak* opinion to future implication decisions is also questionable in light of *Cannon* and *Redington*. Although the Court endeavored to distinguish *Borak* in these cases,[91] it simultaneously undermined most of the implication theories that formed the basis of the *Borak* decision.[92] After *Redington,* only the "necessity" argument of *Borak* retains any validity, yet it remains the subject of confusion.[93] While acquiescing in the existence of the particular cause of action recognized in *Borak,*[94] the Court has virtually eliminated the case's precedential value.

The *Redington* Court's implied action approach should eliminate the inference of private actions from reporting provisions similar to section 17(a).[95] Many other statutes, however, will probably be able to meet the new especial benefit or prohibitory conduct requirement advocated in *Redington.*[96] Unfortunately, the facts in *Redington* did not provide the Court with an opportunity to elaborate on the further analysis that is needed when this requirement is met.[97]

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applied in *Borak.* "[T]he new necessity test tacitly presumes that no remedy is implied [; therefore,] [t]he burden [is] now . . . on the proponent of the remedy to show not merely that enforcement without the remedy would be less effective, but that the denial of the remedy would cause the collapse of the entire legislative scheme." *Id.* at 36 (footnote omitted). *See also* Pitt, *supra* note 86, at 11 (private litigation no longer seems to be a necessary supplement to SEC action and "may not even seem desirable to the Court in the long run").

91. *See* 99 S. Ct. at 2489-90 (Court declined to read *Borak* broadly); Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (*Borak* is a deviation from the Court's pattern of implied action cases).

92. *See* note 11 *supra* and accompanying text.

93. *See* 99 S. Ct. at 2489-90; notes 88-90 *supra* and accompanying text.

94. *Cf.* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (the private action for damages recognized under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) was a result of the Court's acquiesence in 25 years of acceptance by the lower courts of such an action).

95. *See* Abbey v. Control Data Corp., 603 F.2d 724, 730 (8th Cir. 1979) (questioning whether § 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(a) (1976), requiring certain reports to be filed with the SEC by issuers of registered securities, can give rise to an implied cause of action in light of *Redington*).

96. *See generally* 3 H. Bloomenthal, *supra* note 20, § 1.16 (summary of disclosure and reporting requirements under securities laws).

97. *See also* Steinberg, *supra* note 32, at 41-44. Professor Steinberg's article, written prior to the decision in Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979), adopts the *Redington* implication approach and takes it one step further by outlining the additional factors to be considered in the event the *Redington* "minimum requirement" is met. Steinberg, *supra* note 32, at 47. Designed to be applied in cases in which a federal statute's legislative history is silent or ambiguous on the implication issue, Prof. Steinberg's "modified *Cort* test" requires not only that a statute either grant certain rights to the plaintiff or proscribe unlawful conduct, Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2489 (1979), but that the third and fourth *Cort* factors also be found to favor implication. Steinberg, *supra* note 32, at 50. In effect, Prof. Steinberg has converted the *Cort* guidelines into mandatory tests, all of which must be met for implication to be justified. *See id.* Although this new approach may appear to be consistent with the Court's restrictive analysis of the *Redington* implication issue, *see* notes 76-80 *supra* and accompanying text, it is not supported by the Court's decision in *Lewis.* While the statute in *Lewis* met the *Redington* minimum requirement, *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979), the Court refused to consider the "utility of a private remedy" and state law traditions in its analysis of the issue. *Id.* at 249.

C. Transamerica Mortgage Advisors, Inc. v. Lewis

In *Transamerica Mortgage Advisors, Inc. v. Lewis,*[98] the most recent implication case, a divided Court[99] acknowledged the existence of a "limited private remedy"[100] under section 215 of the Investment Advisers Act of 1940 (the Advisers Act).[101] The section 215 action allows an injured investor to void an investment advisory contract, but precludes him from obtaining an award of damages from violators of the Advisers Act.[102] In its analysis of the Advisers Act, however, the Court mixed and manipulated prior implication concepts to achieve an outcome consistent with the conservative implied action trend. Consequently, the majority opinion did little to illuminate the modified method of analysis used in *Redington* and further undermined the validity of a full *Cort* analysis.

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98. 100 S. Ct. 242 (1979). Lewis, a shareholder in a real estate investment trust, brought this suit as a derivative action on behalf of the trust and as a class action on behalf of the trust's shareholders, alleging various frauds and breaches of fiduciary duty by the trust's investment adviser, the trust itself, individual trustees and two affiliated corporations, in violation of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -18a (1976). 100 S. Ct. at 243-44.

99. The split among the Justices on this particular implication issue is attributable to the existence of persuasive precedents allowing private causes of action for damages under antifraud provisions similar to the provision under consideration in *Lewis. See* note 104 *infra* and accompanying text. The Court, therefore, faced the difficult task of reconciling these precedents with its present conservative stand on implied actions. Unfortunately, no attempt at reconciliation was actually made in the majority opinion. *See* 100 S. Ct. at 250 (White, J., dissenting).

100. 100 S. Ct. at 249. The dissent in *Lewis* objected to the concept of a "limited private remedy," arguing that the majority had confused the existence of a right of action with the question of available relief. *Id.* at 252. Although the Court recently acknowledged that an implied action inquiry is analytically distinct from and should precede an inquiry into the availability of relief, Davis v. Passman, 99 S. Ct. 2264, 2274 (1979), the *Lewis* majority apparently considered both questions simultaneously in the context of its general inquiry into legislative intent. *See* 100 S. Ct. at 245-46. Such a combined inquiry is not uncommon. *See, e.g.,* Abrahamson v. Fleschner, 568 F.2d 862, 879 (2d Cir. 1977) (Gurfein, J., dissenting), *cert. denied,* 436 U.S. 913 (1978). Nor is this the first time a "limited" implied action has been recognized. *See* Kipperman v. Academy Life Ins. Co., 554 F.2d 377, 380 (9th Cir. 1977), in which the court held that an implied right of action under a statute making mailing of unsolicited merchandise a per se unfair trade practice encompassed suits to secure restitutionary relief, but did not include injunctive relief, as that would interfere with the Federal Trade Commission's express statutory powers of enforcement.

101. 15 U.S.C. § 80b-15 (1976). The Advisers Act "was the last in a series of [regulatory statutes] designed to eliminate various abuses in the securities industry." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963). Congressional recognition of the importance of the investment adviser's role in the securities industry prompted the development of legislation designed to combat some of the problems and abuses prevalent among investment advisers. *See* 15 U.S.C. § 80b-1 (1976); S. Rep. No. 1775, 76th Cong., 3d Sess. 21-22 (1940). The theme of investor protection is found throughout the Advisers Act's legislative history. *See, e.g.,* S. Rep. No. 910, 94th Cong., 2d Sess. 2-3 (1976); S. Rep. No. 1760, 86th Cong., 2d Sess. 1, *reprinted in* [1960] U.S. Code Cong. & Ad. News 3502; S. Rep. No. 1775, 76th Cong., 3d Sess. 21-22 (1940). Until 1960, when the SEC obtained more substantial regulatory and administrative power over investment advisers, *see* note 167 *infra,* the Advisers Act operated merely as a census of investment advisers. *See* Abrahamson v. Fleschner, 568 F.2d 862, 879 (2d Cir. 1977) (Gurfein, J., dissenting), *cert. denied,* 436 U.S. 913 (1978); 2 L. Loss, Securities Regulation 1393, 1404-06 (2d ed. 1961 & Supp. 1969).

102. 100 S. Ct. at 249.

Prior to *Lewis*, the circuit courts which considered the question of private actions for damages under the Advisers Act[103] examined the issue in the context of section 206 of the act, a broad antifraud provision that expressly forbids any fraudulent or deceptive conduct by investment advisers.[104] Utilizing the *Cort* method of analysis, each of these courts, including the Ninth Circuit in *Lewis*, concluded that a private action for damages should be inferred under section 206.[105] The Supreme Court, however, refused to make this inference.[106] It premised its denial on the selective use of the restrictive implication concepts found in *Amtrak*,[107] *Cannon*,[108] and *Redington*.[109] This approach seems to be an inadequate substitute for the detailed, comprehensive analysis that the section 206 implication question required.[110]

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103. *See* Lewis v. Transamerica Corp., 575 F.2d 237 (9th Cir. 1978), *aff'd in part, rev'd in part sub nom.* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978), *vacated*, 100 S. Ct. 442 (1979) (remanded for further consideration in light of *Lewis*); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

104. 15 U.S.C. § 80b-6 (1976). Section 206 prohibits investment advisers from (1) employing "any device, scheme, or artifice to defraud any client or prospective client;" (2) engaging in transactions or practices designed to operate as a fraud upon such persons; and (3) engaging "in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." *Id.* Implied actions for damages have been recognized under other antifraud provisions similar in language to § 206, making recourse to that section of the Advisers Act logical for injured clients of investment advisers. Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act*, 74 Mich. L. Rev. 308, 311 (1975) [hereinafter cited as *Private Actions*]. Both § 206 and rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), were patterned after § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976). *See* 100 S. Ct. at 250 n.1 (White, J., dissenting); 1 A. Bromberg & L. Lowenfels, *supra* note 24, § 2.2 (410-20); 3 L. Loss, *supra* note 101, at 1515. Several federal courts have found § 17(a) of the Securities Act to encompass a private right of action for damages. *See, e.g.*, Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1244-45 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 551 (1979); Newman v. Prior, 518 F.2d 97, 99 (4th Cir. 1975). *See generally* Hazen, *A Look Beyond the Pruning of Rule 10b-5: Implied Remedies and Section 17(a) of the Securities Act of 1933*, 64 Va. L. Rev. 641 (1978). The Supreme Court has acknowledged a private right of action for damages under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and under rule 10b-5. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-51 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). It has yet to consider whether a private action is implied in § 17(a) of the Securities Act of 1933.

105. Lewis v. Transamerica Corp., 575 F.2d 237, 239 (9th Cir. 1978) (adopting rationale of Fifth and Second Circuits and allowing private right of action for both injunctive relief and damages), *aff'd in part, rev'd in part sub nom.* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979); Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1240, 1243 (5th Cir. 1978) (applying *Cort* factors with "gloss of *Piper*"), *vacated*, 100 S. Ct. 442 (1979); Abrahamson v. Fleschner, 568 F.2d 862, 878 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

106. 100 S. Ct. at 249.

107. *Id.* at 245, 247; *see* notes 39-43 *supra* and accompanying text.

108. 100 S. Ct. at 245-47; *see* notes 49-51 *supra* and accompanying text.

109. 100 S. Ct. at 245, 248-49; *see* notes 76-90 *supra* and accompanying text.

110. *See* 100 S. Ct. at 250-51 (White, J., dissenting). *See generally Private Actions*, *supra* note 104, at 314-24 (*Cort* factors found to support a private action under § 206); 30 Vand. L. Rev. 905, 917-21 (1977) (criticizing Second Circuit's use of the *Cort* factors as applied to § 206; full *Cort* analysis indicates that such an action should be denied).

Ignoring the *Cort* factors,[111] the *Lewis* majority began its inquiry into section 206 with a reiteration of the *Amtrak* rationale that express statutory enforcement provisions ordinarily preclude the inference of additional remedies.[112] The Court found this theory relevant in light of the enforcement authority expressly granted to the Securities and Exchange Commission (SEC) in the Advisers Act[113] and the Court's finding of "circumstantial" evidence of legislative intent to provide no private remedy other than the one that flowed from section 215 of the act.[114] The Court found persuasive two pieces of circumstantial evidence arising out of a comparison of the statutory scheme of the Advisers Act with that of other securities statutes. The first significant difference is the absence of express authorization for private damage suits in the Advisers Act;[115] certain sections of the other major securities acts allow private damage suits in prescribed circumstances.[116] The Court found the absence of express provisions in the Advisers Act indicative of Congress' unwillingness to extend a damage remedy to a private litigant.[117]

The Supreme Court also used the omission of the phrase "actions at law" from the jurisdictional section of the Advisers Act to support its conclusion.[118] This omission was said to stand in sharp contrast to the jurisdictional language found in the other securities acts,[119] which provide for federal court jurisdiction over "all suits in equity *and actions at law*."[120] Although this discrepancy was not determinative,[121] it was sufficient, taken with the absence of any express civil

111. Although the *Lewis* majority indirectly covered the second and third factors of *Cort, see* 100 S. Ct. at 245-48; note 18 *supra* and accompanying text, its less structured inquiry merely glossed over the first factor and did not consider the final factor at all. The Court discussed the purpose of the Advisers Act and of § 206, but failed to consider whether a private action was necessary to effectuate that purpose. 100 S. Ct. at 249. The *Lewis* dissent, however, adhered to a "full" *Cort* analysis. *Id.* at 250-51 (White, J., dissenting) (*Cort* is the "preferred approach").

112. *See* notes 39-40 *supra* and accompanying text.

113. The Investment Advisers Act of 1940, § 209, 15 U.S.C. § 80b-9 (1976), authorizes the SEC to bring suit to enjoin acts and practices in violation of the Advisers Act and to enforce its provisions or that of any rule or regulation promulgated thereunder.

114. 100 S. Ct. at 247.

115. *Id.* at 247-48.

116. *See, e.g.*, Securities Act of 1933, §§ 11(a), 12, 15 U.S.C. §§ 77k(a), 77*l* (1976); Trust Indenture Act of 1939, § 323(a), 15 U.S.C. § 77www(a) (1976); Securities Exchange Act of 1934, §§ 9(e), 16(b), 18(a), 15 U.S.C. §§ 78i(e), 78p(b), 78r(a) (1976); Public Utility Holding Company Act of 1935, §§ 16(a), 17(b), 15 U.S.C. §§ 79p(a), 79q(b) (1976); Investment Company Act of 1940, §§ 30(f), 36(b), 15 U.S.C. §§ 80a-29(f), 80a-35(b) (1976).

117. 100 S. Ct. at 248; *accord,* Abrahamson v. Fleschner, 568 F.2d 862, 881-82 (2d Cir. 1977) (Gurfein, J., dissenting), *cert. denied,* 436 U.S. 913 (1978).

118. 100 S. Ct. at 248. Section 214 of the Advisers Act, 15 U.S.C. § 80b-14 (1976), provides for concurrent state and federal jurisdiction of "all suits *in equity* to enjoin any violation" of the Advisers Act or rules promulgated thereunder. *Id.* (emphasis added).

119. *See* 100 S. Ct. at 248.

120. *E.g.*, Securities Act of 1933, § 22, 15 U.S.C. § 77v (1976) (emphasis added); Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (emphasis added); Public Utility Holding Company Act of 1935, § 25, 15 U.S.C. § 79y (1976) (emphasis added); Investment Company Act of 1940, § 44, 15 U.S.C. § 80a-43 (1976) (emphasis added).

121. 100 S. Ct. at 248. Although the Court established in *Redington* that the jurisdictional section of an act creates no private right of action by its own effect, *see* 99 S. Ct. at 2490, the *Lewis*

remedies, to persuade the Court that "Congress did not intend to authorize a cause of action for anything beyond limited equitable relief."[122]

Finding no implied damage action in section 206, the court turned its attention to section 215 of the Advisers Act. Section 215, similar to "void contract" provisions found in other securities laws,[123] provides that a contract made in violation of the act is voidable at the option of the deceived party.[124] The *Lewis* majority held that section 215 evidenced a congressional intent to allow private parties recourse to "the customary legal incidents of voidness . . . including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution."[125] Because of its refusal to infer a private damage action under section 206, the Court strictly limited the remedy available under section 215 to restitution of consideration.[126] Efforts to recover any diminution of plaintiff's investment as a result of his adviser's misconduct on a restitutionary theory were precluded on the principle that such a recovery would be the equivalent of a damage award.[127]

Relying on *Redington*, the *Lewis* Court did not examine the need for a private damage remedy under section 206 to effectuate the purposes of the Advisers Act.[128] The use of the *Redington* precedent is puzzling, however, because section 206 expressly prohibits specified conduct.[129] Furthermore, as the Court conceded, section 206 was intended to protect the victims of the fraudulent practices of investment advisers.[130] Had the *Redington* opinion been applied accu-

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Court validly used § 214 of the Advisers Act to highlight the differences between it and other securities statutes. *But see* 100 S. Ct. at 253-54 (White, J., dissenting).

122. 100 S. Ct. at 248 (footnote omitted).

123. *E.g.*, Securities Exchange Act of 1934, § 29, 15 U.S.C. § 78cc (1976); Public Utility Holding Company Act of 1935, § 26, 15 U.S.C. § 79z (1976); Investment Company Act of 1940, § 47, 15 U.S.C. § 80a-46 (1976). *See generally* 1 A. Bromberg & L. Lowenfels, *supra* note 24, § 2.4(1)(b).

124. *See* 15 U.S.C. § 80b-15 (1976); *cf.* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-88 (1970) (under § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1976), a "void contract" is not a nullity, merely voidable at the option of innocent party).

125. 100 S. Ct. at 247 (footnote omitted). The "void contract" provision of the Exchange Act has frequently been cited as support for the inference of a private right of action under § 10(b) of that act, 15 U.S.C. § 78j(b) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), promulgated thereunder. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735 (1975); Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). *See generally* 1 A. Bromberg & L. Lowenfels, *supra* note 24, § 2.4(1)(b); 3 L. Loss, *supra* note 101, at 1757-59. The void contract provision of the Advisers Act was applied in a similar manner in Abrahamson v. Fleschner, 568 F.2d 862, 874 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), to support an implied action under § 206. *Lewis*, however, utilized the void contract provision of the Advisers Act in a different manner. Section 215 was seen not as supporting a private right of action under another section of the Advisers Act, but as giving rise itself to a private action. *See* 100 S. Ct. at 246-47.

126. 100 S. Ct. at 249 n.14.

127. *Id.*

128. *Id.* at 249.

129. *See* note 104 *supra* and accompanying text.

130. 100 S. Ct. at 249; *see* 15 U.S.C. § 80b-6 (1976). The benefited class would seem to include clients and prospective clients of investment advisers. *See id.*; *Private Actions*, *supra* note 104, at 314-16. To avoid an expansion of liability inconsistent with legislative objectives, however, the term "prospective clients" should be read to encompass only those prospective clients who actually enter into an investment advisory contract. *Id.* at 355-56.

rately, the minimum requirement established therein should have mandated a more detailed examination of section 206[131] that might have strengthened the Court's conclusions[132] and brought some consistency to implication analysis.

D. *Summary*

The dissenting Justices in *Lewis* strongly criticized the majority opinion's analytical approach to the implication issue and its resulting inconsistencies.[133] The confusion in *Lewis,* however, stemmed from the insufficient direction provided by *Redington* and *Cannon.*[134] A new method of analysis, one more finely attuned to the intricacies of securities law and its development, could have been used to clarify rather than to obscure the *Lewis* implication issue. In any event, the amorphous nature of the *Cort* factors and the Court's inconsistent application of them has clearly diminished their utility in implication analysis.

II. A PROPOSED APPROACH FOR IMPLIED CAUSES OF ACTION

In the five years since *Cort v. Ash,* federal courts have grappled with its four factor method, making the virtues and drawbacks of those criteria increasingly apparent.[135] Although it is evident that *Cort* was intended to be a starting point

131. Further examination of that section might have included an investigation into the purposes of the Advisers Act, its legislative history and a review of implied actions under other securities antifraud provisions. 100 S. Ct. at 250 (White, J., dissenting); *see* note 104 *supra* and accompanying text.

132. *Cf.* Abrahamson v. Fleschner, 568 F.2d 862, 879-85 (2d Cir. 1977) (Gurfein, J., dissenting) (detailed examination of § 206 and the Advisers Act indicates that implied action should be denied), *cert. denied,* 436 U.S. 913 (1978); 30 Vand. L. Rev. 905, 918 (1977) (correct application of *Cort* factors warrants denial of private cause of action under § 206). *But see Private Actions, supra* note 104, at 314 (*Cort* factors strongly suggest that private action should be allowed).

133. *See* 100 S. Ct. at 250 (White, J., dissenting).

134. Much of the analytical confusion emanating from *Lewis* seems to surround the third *Cort* factor, "consistency of legislative scheme." Professor Steinberg views the factor as being capable of two interpretations. First, that the implied action must be consistent with legislative purpose, or second, that such action be *necessary* to effectuate congressional purposes, the latter being the more restrictive interpretation. Steinberg, *supra* note 32, at 49. The necessity argument as applied in *Borak* and *Piper,* however, should be viewed as separate and distinct from the third *Cort* factor. *See* note 89 *supra* and accompanying text. Both *Lewis* and *Redington* analyze the statutes at issue in terms of consistency with their legislative scheme. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247-49 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2487-90 (1979); notes 78-80, 114-26 *supra* and accompanying text. The majority in *Lewis* based its argument on two pieces of evidence drawn from an examination of the scheme of the Advisers Act. *See* notes 114-21 *supra* and accompanying text. *Lewis* illustrates that a stricter implication test of the type advocated by Prof. Steinberg, *see* note 97 *supra,* is not the solution to the confusion surrounding implied action analysis. Although the test proposed by Prof. Steinberg eliminates the balancing problems of the *Cort* guidelines, as does Justice Powell's test in *Cannon v. University of Chicago,* 441 U.S. 677, 749 (1979) (Powell, J., dissenting); *see* notes 60-64 *supra* and accompanying text, it is also unduly restrictive. While a minimum requirement may be needed to bring some structure to the implication doctrine, the development of hard and fast rules to fit a variable and often complex issue only exacerbates the current problem surrounding implied action analysis. *See* notes 137-38 *infra* and accompanying text.

135. *See* notes 24-27 *supra* and accompanying text.

for the development of an integrated approach to implied actions,[136] the Court's recent decisions are indicative of its continuing failure to develop such an approach from *Cort*, its predecessors or its progeny. Because of the natural differences among statutes, the development of universal implication criteria has proved impractical.[137] Thus, a new conceptual approach to implication analysis that synthesizes *Cort* and the more recent Supreme Court cases is warranted.

As an alternative to the universal criteria approach of *Cort*, specialized guidelines should be designed for implication questions arising in different areas of law or under different types of statutes.[138] For example, there are several advantages to a specialized approach for implied action questions that arise under the federal securities laws. The principal statutes that regulate securities transactions and related financial institutions[139] are linked by the common goals of disclosure and the protection of investors from fraud.[140] The acts are also similar in structure, language, and SEC administration.[141] A uniform approach to implied actions under securities statutes would not only clarify the analysis of securities provisions, but would lead to more consistent and predictable results.[142]

136. *See Emerging Standards*, *supra* note 7, at 321.

137. *See* Pillai, *supra* note 1, at 41; *cf.* Frankfurter, *supra* note 60, at 543-44 (informal, less structured approach to statutory construction advocated).

138. Professor Pillai suggests a legislative solution to the implication analysis problem, recommending that a general private right of action should be enacted to enable "individual[s] to claim damages for injur[ies] sustained from violations of federal statutes by anyone other than the federal government." Pillai, *supra* note 1, at 39.

139. The approach suggested in this Note might be applied to the following federal securities laws: Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78hh-1 (1976); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1976); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -52 (1976); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (1976). For a review of implied actions under stock exchange rules and rules promulgated by the National Association of Securities Dealers, see Lowenfels, *Private Enforcement in the Over-The-Counter Securities Markets: Implied Liabilities Based on NASD Rules*, 51 Cornell L.Q. 633 (1966); Note, *Governmental Action and the National Association of Securities Dealers*, 47 Fordham L. Rev. 585, 595-97 (1979); 46 Fordham L. Rev. 367 (1977) (implied rights of action for violations of stock exchange rules).

140. SEC v. National Sec., Inc., 393 U.S. 453, 466 (1969); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963); 3 H. Bloomenthal, *supra* note 20, § 1.16; *see* 1 L. Loss, *supra* note 101, at 21-22, 130.

141. *See* 1 L. Loss, *supra* note 101, at 129.

142. *Cf.* ALI Fed. Securities Code § 101 (Proposed Official Draft 1978) (need to integrate securities statutes). The proposed Federal Securities Code also presents a set of criteria for the determination of private rights of action under Code provisions which do not expressly provide therefore. *Id.* § 1722(a). Civil liability, considered in light of the nature of the defendant's conduct, the degree of his culpability, plaintiff's injury and the deterrent effect of such liability, should be judicially inferred if four criteria are met. *Id.* The Code requires that: (1) the implied action be consistent with the conditions or restrictions of the express Code provisions providing for civil liability; (2) the Code provision under which an implied action is sought is designed for the "special benefit" of a class of persons, to which plaintiff belongs, against the harm alleged; (3) the remedy sought is not disproportionate to the alleged violation; and (4) in cases comparable to those provisions of the Code which specify a maximum measure of damages, a comparable maximum is imposed on the implied remedy. *Id.* Although these rules bear some resemblance to the *Cort* factors, *id.* Note 3, they are designed to function solely within the context of the Code. Unlike the *Cort* criteria, the Code

The recent Supreme Court decisions in *Cannon, Redington* and *Lewis,* along with the *Cort* factors and other implication theories, suggest that a court faced with an implied action question should follow a two-step approach. First, a simple minimum requirement—membership in a class benefited by the statute—should be met before a court undertakes any detailed investigation of legislative intent. If this minimum test is not satisfied, the court's inquiry should end and a private right of action be denied. If, however, the statute under which the action is asserted meets the threshold requirement, the court should proceed to a second and more intricate analysis, designed to focus attention on four areas chosen to further the ascertainment of congressional intent.[143] These secondary factors—additional congressional purposes behind the statute, the legislative scheme of the statute, inter-act relationships with other securities provisions, and the role of administrative agencies—should be accorded more or less equal weight.[144] When, however, the balancing of factors produces equally conflicting indications of congressional intent, the Supreme Court's current conservative stand on implication would seem to favor the disallowance of a private remedy.

The threshold requirement of the proposed approach requires that a securities statute show, either expressly or through its legislative history, that it was enacted for the especial benefit of a certain class of which the plaintiff is a member.[145] Such a requirement would convert the especial benefit factor of *Cort* into a *prerequisite* to the finding of an implied action. Two factors justify such a conversion. First, although the proposed minimum requirement is narrower

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requirements must be met in order for a private action to be inferred. *Id.* § 1722 & Note 3. By consolidating and unscrambling the express and implied actions under the securities statutes, the Code eliminates the need for "guidelines" such as those in *Cort. Id.* §§ 1701-1728. The Code's provision for implication rules is an affirmation of the continued need for judicial inference in order to maintain a certain degree of flexibility in securities law. *See id.* at lv. The rules themselves, however, are designed, like the *Cort* criteria, to restrict the creation of implied actions. *See* 3A H. Bloomenthal, *supra* note 20, § 9.05A. Still the subject of examination and debate, the Code is years away from possible enactment by Congress. *See Disputes on Code Rewrite May Cause SEC Setback,* Nat'l L.J., Jan. 7, 1980, at 3, col. 2; *ALI Securities Proposal Hits 10th Year,* Nat'l L.J., Nov. 5, 1979, at 10, col. 1.

143. The availability of the particular form of relief sought by the plaintiff is pertinent to the question of congressional intent to allow a private action and can therefore be considered simultaneously with the implied action issue. *See, e.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 243 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 4 (1977); *accord, Implying Civil Remedies, supra* note 1, at 297. *Contra,* Davis v. Passman, 99 S. Ct. 2264, 2274 (1979).

144. In order to avoid the problems encountered by courts in evaluating the results of the *Cort* analytical method, *see* notes 21-27 *supra* and accompanying text, this proposal attempts to formulate guidelines of equal importance and consideration, based, in part, on the Court's latest implication cases. *E.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247-49 (1979) (stressing relationships among Advisers Act's provisions); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2489 (1979) (reducing importance of "necessity" argument).

145. The emphasis of this minimum requirement, as in *Cort,* is on the *especial* nature of the beneficiary. Although the phrase "for whose especial benefit the statute was enacted" as used in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916), was initially construed as applying to all "intended" beneficiaries of a statute, *see* note 2 *supra, Cort* interpreted the phrase such that only primary beneficiaries could be deemed "especial." Cort v. Ash, 422 U.S. 66, 78 (1975); *see* Pillai, *supra* note 1, at 20; *Emerging Standards, supra* note 7, at 308-09.

than the one suggested in *Redington*, which would also permit inference under statutes prohibiting specified conduct,[146] it is consistent with the tendency of the Supreme Court and the lower federal courts to emphasize the especial benefit criterion of *Cort* in their analyses.[147] Second, this criterion can be traced not only to the Supreme Court's earliest implication decision,[148] but to established common law principles.[149] Although the existence, without more, of an especial beneficiary is no longer accepted by the Supreme Court as a sufficient reason for granting an implied action,[150] it should be a threshold requirement for analysis of securities implication issues.[151] More rigorous than the test for standing,[152] this requirement should effectively reduce needless securities litigation and the possibility of judicial legislation of private actions that favor persons only tangentially benefited by the statute.[153]

After determining that the especial benefit requirement is met, the court should examine the first of the four secondary factors, the general congressional

146. *See* Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2485, 2489 (1979); *accord*, 3A H. Bloomenthal, *supra* note 20, § 9.05A, at 9-15.

147. *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26-35 (1977) (legislative history examined at length to determine if Congress intended to benefit tender offerors); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (statute adopted expressly for protection of investors, a class of which plaintiffs were members); Stern v. Merill Lynch, Pierce, Fenner & Smith, Inc., 603 F.2d 1073, 1087-88 (4th Cir. 1979) (primary beneficiary test is "threshold hurdle").

148. *See* note 2 *supra* and accompanying text.

149. *See In re* Anonymous, 87 Eng. Rep. 791, 791 (Q.B. 1703) (Holt, C.J.) ("[W]here-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity."); 3 W. Blackstone, Commentaries *123; Restatement of Torts § 286 (1934) (formulation of statutory tort theory); note 2 *supra* and accompanying text.

150. *See* Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2485 (1979); Clark v. Gulf Oil Corp., 570 F.2d 1138, 1146 (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978).

151. *See* Cannon v. University of Chicago, 441 U.S. 677, 689 (1979); *cf.* Pillai, *supra* note 1, at 20 ("The sole function of the 'especial beneficiary' factor should be to provide a *basis* for the inference that Congress intended for the statute to affect the rights of the plaintiff") (emphasis added) (footnote omitted); 3A H. Bloomenthal, *supra* note 20, § 9.05A (once plaintiff is established as an "especial beneficiary," a presumption of a private remedy is created).

152. *See Private Actions*, *supra* note 104, at 315. Standing "is a question of whether a plaintiff is sufficiently advers[e] to a defendant to create an Article III case or controversy or at least to overcome prudential limitations on federal court jurisdiction." Davis v. Passman, 99 S. Ct. 2264, 2274 n.18 (1979); *cf.* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-56 (1970) (three part test for standing). Because implied actions are reviewed by a court in terms of a particular plaintiff's ability to assert a private action, implied action issues are sometimes mistakenly framed as questions of standing. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 455-56 (1974). In *Amtrak*, the Court established that the issues of a plaintiff's standing to sue and a court's jurisdiction to entertain an implied action suit should be decided after the existence of such an action has been determined. *Id.* at 456. *But see id.* at 467 (Douglas, J., dissenting) (distinctions between "right of action," "jurisdiction" and "standing" in *Amtrak* merely a matter of semantics).

153. Courts do not seem to have had any difficulty distinguishing between secondary beneficiaries and especial beneficiaries of a statute. *See* note 147 *supra* and accompanying text. *But see Emerging Standards*, *supra* note 7, at 309 (especial benefit factor is not a viable measure of legislative intent; it does not aid in distinguishing especial beneficiaries from secondary beneficiaries).

purposes behind the statute in question.[154] Like the especial benefit requirement, congressional purpose may also be discerned from statutory language and legislative history. The court should concentrate on effectuating, in the words of Justice Frankfurter, not the purpose

which Congress should have enacted, or would have [enacted, but]... that which it did enact, however inaptly, because it may fairly be said to be embedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.[155]

Pursuant to this inquiry, a court should consider both state common law and statutory tradition.[156] Although the role of state law has been a minor consideration in recent implication cases,[157] it has been significant in the development of federal corporate law and the scope of recognized implied actions.[158]

Next, a court should review the scheme and structure of the particular securities act under analysis, examining the relationships of the various provisions of the act *inter se*. The court should consider whether an implied action will undermine the often delicately balanced purposes of the act or disrupt the legislative scheme, thereby frustrating legislative intent.[159] Many of the acts are directed at regulating a particular segment of the securities industry[160] and provide detailed systems of control. The court should carefully consider whether an implied action will unduly upset this established pattern of regulation.[161] Congressional limitations evident in the structure of the act are an important reflection of congressional intent regarding private actions and

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154. Although one of the purposes of the act may be to benefit an individual in plaintiff's category, it may not be the sole or primary purpose. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (one of the provision's chief purposes is the protection of investors) *with* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979) (implication should not be based on mere fact that statute is designed to protect adviser's clients).

155. Frankfurter, *supra* note 60, at 539.

156. *See generally Implying Civil Remedies, supra* note 1, at 292-93. *But see* Pillai, *supra* note 1, at 33-35 (deference to state remedies in implication analysis is usually ill-advised).

157. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2489 (1979). *But see* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 40-41 (1977) (plaintiff relegated to state law remedies for damage claim).

158. *Cf.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473-74, 479-80 (1977) (plaintiff relegated to state law remedy; only conduct involving manipulation or deception is reached by § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), or rule 10b-5, 17 C.F.R. § 240.10b-5 (1979)); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) ("overriding" federal law in *Borak* controlled despite provisions of state corporation law).

159. *See* Network Project v. Corporation for Public Broadcasting, 561 F.2d 963, 972 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978) (no private cause of action under Public Broadcasting Act of 1967, 47 U.S.C. § 396 (1976), for injunctive relief; legislative scheme, which was a result of delicate balance of federal, state, public and private interests, would be disrupted by such an action).

160. *See* 1 L. Loss, *supra* note 101, at 134-43 (approach of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1976), to regulation of utility holding companies); *id.* at 144-53 (detailed regulatory pattern found in Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -52 (1976)).

161. *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 422-23 (1975) (private action would undermine policy considerations which led to creation of regulatory organization).

the potential expansion of a legislative scheme that invariably accompanies their inference.[162]

The third proposed inquiry directs the court to examine the relationship between the section under which the plaintiff seeks to infer a cause of action and any parallel provisions in the other securities acts. Thus, the court should examine the relevant section in the context of a body of securities law.[163] The nature and scope of these related private actions, whether express or implied, can enlighten the court as to the type of private action, if any, that Congress might have intended to include in the statute at issue.[164] For example, in its interpretation of the Investment Advisers Act in *Lewis*, the Court briefly noted that through an amendment to the Investment Company Act in 1970,[165] Congress created a very narrowly defined private action for damages in favor of investment companies against their investment advisers.[166] Such a provision seems to support the *Lewis* Court's conclusion that Congress' silence at both the time of enactment and at the time of amendment of the Advisers Act in 1960[167] indicated an unwillingness to impose broad damage liability on investment advisers. This related provision in the Investment Company Act is

162. *See* Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2485 (1979).

163. *See* 1 L. Loss, *supra* note 101, at 139; *cf.* ALI Fed. Securities Code § 101 (Proposed Official Draft 1978) (necessity for a code); 3A H. Bloomenthal, *supra* note 20, § 9.05A (describing general federal securities antifraud provisions as "persuasive and overlapping.").

164. The function and operation of express private liabilities in the act and the detail with which Congress has defined those express provisions in terms of statutes of limitations, relief available, standing to sue, and the degree of culpability should be considered by the court. Although the existence of express private actions should not deter judicial inference of a private action under another section of the act, *see* Cannon v. University of Chicago, 441 U.S. 677, 711 (1979), the absence of parameters for a court to follow in defining the implied action can work against recognition of an implied action. *See* Hazen, *supra* note 104, at 658.

165. Investment Company Amendments Act of 1970, Pub. L. No. 91-547, § 20, 84 Stat. 1428 (amending 15 U.S.C. § 80a-35 (1976)).

166. A security holder of a registered investment company may bring an action on behalf of that company against its investment adviser based on breach of fiduciary duty for compensation or payments paid by the investment company or its security holders to the investment adviser. *Id.*

167. Act of Sept. 13, 1960, Pub. L. No. 86-750, § 9, 74 Stat. 887 (1960). Section 206 was amended to give the SEC the authority to define and prescribe means reasonably designed to prevent violations of the section. *Id.* In 1975, an SEC proposal for amending the Advisers Act to include, *inter alia*, the phrase "actions at law" in § 214 was submitted to Congress. *See Proposed Amendments to the Investment Advisers Act of 1940: Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 17 (1976). The § 214 change was proposed to ensure "the right of an individual who has been injured as a result of a violation of the Advisers Act to sue for civil damages in Federal courts." *Id.* at 2. *But see id.* at 233 (statement of Prof. Loss) (amendment to § 214 "will not assure civil liability; it will simply remove a possible impediment"). At the time of the proposed 1976 amendment, no circuit court had yet ruled on the § 206 implied action issue, although there was apparent confusion in the district courts on the subject. *Compare* Bolger v. Laventhol, Krekstein, Horwath & Horwath, 381 F. Supp. 260, 262-64 (S.D.N.Y. 1974) (allowing private cause of action for damages under § 206) *with* Greenspan v. Del Toro, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,488 (S.D. Fla. 1974) (private cause of action denied based on jurisdictional section). Although reported on favorably by the committee, the bill never reached the floor of the Senate or House of Representatives. *See* Ahart, *Suggested Amendments to the Investment Advisers Act*, 6 Sec. Reg. L.J. 226, 228 (1978).

more pertinent and should have received greater emphasis than the "circumstantial" evidence so heavily relied on by the *Lewis* majority.[168]

The fourth and final inquiry in this second stage of analysis centers on the role of the SEC[169] or any other established regulatory body[170] in the administration and enforcement of the act and provision under consideration. Whether a monitoring function is involved, as in *Redington,*[171] or an active enforcement duty, as in *Lewis,*[172] the court should consider the effect of an implied action on the established pattern of agency regulation. The advantages of having one enforcer as opposed to an army of private attorneys general[173] should also be examined. A subsequent need for additional and more effective enforcement mechanisms beyond those provided by Congress should not necessarily be filled by the judicial inference of a private action. Instead, the court should determine whether the act in question possesses such a high degree of flexibility that an increased need for regulatory control can be satisfied by allowing a private right of action.[174] Finally, although the SEC's view will not be controlling in determining whether an action should be inferred in favor of a particular class,[175] the agency will be influential when it has "rendered binding, consistent, official interpretations of [a] statute over a long period of time."[176] It should be noted, however, that SEC support for the implied actions in *Lewis* and *Redington*[177] did not persuade the Court that such actions were justified.

The implication analysis suggested by this Note is a reflection of the Court's present conservative view of the practice of judicial inference as well as an attempt at a more pragmatic approach to the analysis of implied actions. With *Cort's* precedential validity thrown into question by the Court's recent decisions, a new direction for implication analysis is needed. Both the structure of the suggested analytical method and the sharpened focus of its guidelines offer

168. *See* notes 115-22 *supra* and accompanying text.

169. *See generally* House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Report on Federal Regulation and Regulatory Reform 17-24 (Comm. Print 1976).

170. *See, e.g.,* Commodity Exchange Act, § 101(a)(3), 7 U.S.C. § 4a (1976) (creating the Commodity Futures Trading Comm'n); Securities Investor Protection Act of 1970, § 3(a), 15 U.S.C. § 78ccc(a) (1976) (creating the Securities Investor Protection Corp.).

171. *See* note 73 *supra* and accompanying text.

172. *See* note 167 *supra* and accompanying text.

173. *See* Stern v. Merill Lynch, Pierce, Fenner & Smith, Inc., 603 F.2d 1073, 1092 (4th Cir. 1979); National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp. 1256, 1260 (S.D.N.Y. 1979); *cf.* Caceres Agency, Inc. v. Trans World Airways, 594 F.2d 932, 934 (2d Cir. 1979) (statutory compliance may be more efficiently and inexpensively achieved without private litigation).

174. 2A J. Sutherland, *supra* note 22, §§ 49.01-.02. *See, e.g.,* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Clark v. Gulf Oil Corp., 570 F.2d 1138, 1148 (3d Cir. 1977), *cert. denied,* 435 U.S. 970 (1978).

175. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 n.27 (1977).

176. *Id.; cf.* Redington v. Touche Ross & Co., 592 F.2d 617, 626-27 (2d Cir. 1978) (SEC position should be known to the court), *rev'd,* 99 S. Ct. 2479 (1979). *See generally* 2A J. Sutherland, *supra* note 22, § 49.03.

177. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 243, 248 n.13 (1979); Redington v. Touche Ross & Co., 592 F.2d 617, 626 (2d Cir. 1978), *rev'd,* 99 S. Ct. 2479 (1979).

the courts a more substantial basis for their examination of an implied action issue.

CONCLUSION

The proposed approach will eliminate some of the confusion presently surrounding implied action analysis and, it is hoped, draw courts away from the overly broad *Cort* criteria. When possible, a more structured and specialized approach to implication should be taken. A return to *Cort* per se will not resolve the problems presented by the Supreme Court's latest implication cases. Although the Court's decisions interpreting a particular area of law, such as securities, may reflect its general conservatism in that area,[178] such conservatism need not and should not breed inconsistent analysis.

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178. *See* Steinberg, *Section 17(a) of the Securities Act of 1933 After* Naftalin *and* Redington, 68 Geo. L.J. 163, 163-64 (1979) (Supreme Court has generally restricted the scope and effect of securities laws); *accord,* Lowenfels, *supra* note 13, at 891.