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IMPLIED PRIVATE RIGHTS OF ACTION UNDER FEDERAL
STATUTES: CONGRESSIONAL INTENT, JUDICIAL
DEFERENCE, OR MUTUAL ABDICATION?

*Be thy intents wicked or charitable,
Thou com'st in such a questionable shape*
William Shakespeare, Hamlet Act I

*To ask him his intentions? What a violation of
Twentieth Century principles!*
George Bernard Shaw, You Never Can Tell Act III

INTRODUCTION

Implied private rights of action are judicially inferred rights to relief from injuries caused by another's violation of a federal statute.¹ Although implied rights afford private litigants needed access to federal courts,² the implication doctrine has been severely restricted in recent years and, as signified by Supreme Court decisions in the 1980 Term,³ may be in danger of evisceration. For years, inconsistent standards were invoked in the implication area.⁴ In the 1975 landmark decision *Cort v. Ash*,⁵ the Court attempted to provide guidelines⁶ to reconcile these standards. Three 1979 decisions,⁷ however, signalled a reconsideration of the implication doctrine and led to a renewal of the prior confusion. Chipping away at aspects of

1. *Cannon v. University of Chicago*, 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting); see *Cort v. Ash*, 422 U.S. 66, 78 (1975).

2. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 434-35 (1964); Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. Corp. L. 371, 371 (1976) [hereinafter cited as *From Borak to Ash*].

3. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981); *California v. Sierra Club*, 101 S. Ct. 1775 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); cf. *City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981) (denying a federal common-law right for the abatement of a public nuisance caused by interstate water pollution).

4. Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 Temp. L.Q. 469, 472-77 (1981); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 Vand. L. Rev. 1333, 1346-58 (1980); see *infra* notes 24-25 and accompanying text.

5. 422 U.S. 66 (1975).

6. See *California v. Sierra Club*, 101 S. Ct. 1775, 1783 (1981) (Stevens, J., concurring).

7. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

the *Cort* standard,⁸ the Court has introduced new emphases and concerns that create almost irrebuttable presumptions against implication.⁹ Although the Court has not expressly rejected *Cort*, the effect of recent Supreme Court decisions has been to emasculate *Cort* without replacing it with adequate guidelines. Consequently, an amorphous restrictive standard for implication has emerged.¹⁰

Most lower federal courts have properly respected the Supreme Court's restrictive policy toward implication.¹¹ Some lower courts have responded, however, with confused analyses¹² that reflect a tension among the Justices' varying approaches to the implication doctrine. Often agreeing in the restrictive judgments, the Justices frequently differ with respect to the appropriate standard to be applied and the weight to be afforded elements of the analysis.¹³

The articulated justifications for the recent restrictive rulings are deference to congressional intent,¹⁴ and the inappropriateness of judicial amendment of comprehensive federal schemes¹⁵ involving

8. See *California v. Sierra Club*, 101 S. Ct. 1775, 1783-84 (1981) (Rehnquist, J., concurring in the judgment).

9. See *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1088, 1108 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980); *Hill v. Der*, 521 F. Supp. 1370, 1374-76 (D. Del. 1981); *infra* pt. I(B).

10. See *Lieberman v. University of Chicago*, 660 F.2d 1185, 1193 (7th Cir. 1981) (Swygert, J., dissenting); *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 127 (2d Cir. 1981).

11. See, e.g., *Community Psychiatric Centers v. Grant*, 664 F.2d 1148 (9th Cir. 1981); *Miscellaneous Serv. Workers, Teamsters Local 427 v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981); *Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740 (9th Cir. 1981); *Gilman v. Federal Deposit Ins. Corp.*, 660 F.2d 688 (6th Cir. 1981); *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152 (5th Cir. 1981); *Hill v. Der*, 521 F. Supp. 1370 (D. Del. 1981); *Biltz v. Northwest Orient Airlines, Inc.*, No. 4-80-424 (D. Minn. Aug. 5, 1981); *Meyerson v. Arizona*, 507 F. Supp. 859 (D. Ariz. 1981).

12. See *infra* pt. II(B).

13. Compare *California v. Sierra Club*, 101 S. Ct. 1775, 1778-79 (1981) (White, J.) (the *Cort v. Ash* factors are a "preferred approach" and are "relevant inquiries"), *with id.* at 1783 (Stevens, J., concurring) ("[t]he *Cort v. Ash* analysis is . . . a part of our law"), *with id.* at 1783-84 (Rehnquist, J., concurring in the judgment) ("the Court's opinion places somewhat more emphasis on *Cort v. Ash* . . . than is warranted").

14. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2622 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 (1981); *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1580 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1981); *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

15. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 783 (1981);

complex subject matter,¹⁶ a function more properly committed to the unique institutional competence of Congress.¹⁷ The Court's underlying concern is the prevention of a flood of litigation in the federal judiciary.¹⁸ Consequently, the Court is increasingly reluctant to find an implied right in the absence of clear congressional mandate to afford this right to private litigants.¹⁹ Such mandate, however, is rarely present.²⁰

Part I of this Note describes the development of the Supreme Court's implication standard and the erosion in recent decisions of the *Cort v. Ash* analysis. Part II summarizes the current standard, examines recent lower federal court decisions to determine whether the Court has provided clear precedent, and explores the different approaches taken by the courts this year. Part III then analyzes the Court's current standard in light of its policy concerns and questions the extent to which these concerns should affect the Court's implication approach. Finally, this Note, while acknowledging the legitimacy of the reluctance of the Court to overburden its resources and overreach its competence, suggests that the Court consider certain factors that may favor implication, and encourages the Court to afford relief to deserving injured private parties. To the extent that the Court continues to deny such relief, this Note urges Congress to

cf. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2626 (1981) (effect of comprehensive statutes on § 1983 actions); City of Milwaukee v. Illinois, 101 S. Ct. 1784, 1792-93 (1981) (effect of comprehensive statutes on federal common-law actions).

16. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2070 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754, 784 (1981); *cf.* City of Milwaukee v. Illinois, 101 S. Ct. 1784, 1796 (1981) (effect of complex subject matter on statutory preemption of federal common law).

17. Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1582 (1981); Greene, *supra* note 4, at 483, 487, 493, 499; *see* Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2070 (1981); J. Freedman, Crisis and Legitimacy The Administrative Process and American Government 94 (1978).

18. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2628-29 (1981) (Stevens, J., concurring in part and dissenting in part); *see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2625 n.27 (1981); Cannon v. University of Chicago, 441 U.S. 677, 740-41, 747 (1979) (Powell, J., dissenting); *From Borak to Ash*, *supra* note 2, at 374-75; *cf.* Carlson v. Green, 446 U.S. 14, 35-36 (1980) (burden on judiciary if implication under constitutional provision); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting) (same); *id.* at 430 (Blackmun, J., dissenting) (same).

19. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2629 (1981) (Stevens, J., concurring in part and dissenting in part); *see id.* at 2623-25; Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2069 n.17 (1981); California v. Sierra Club, 101 S. Ct. 1775, 1780-81 (1981); Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1582 (1981).

20. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2629 (1981) (Stevens, J., concurring in part and dissenting in part).

respond to the Court's new posture with a clear and overdue expression of its will.

I. THE DEVELOPMENT OF THE IMPLICATION DOCTRINE

The Supreme Court established the doctrine of implication over sixty-five years ago in *Texas & Pacific Railway v. Rigsby*.²¹ Stating that this doctrine is "but an application of the maxim, *Ubi jus ibi remedium*"²²—where there is a right there is a remedy—the Court noted that fear of liability to private suit may be as potent a deterrent to statutory violations as is governmental prosecution.²³

In its decisions between 1916 and 1975, the Court invoked several different implication standards that yielded inconsistent results.²⁴ In

21. 241 U.S. 33 (1916). The Court held that a violation of a federal employee protection statute resulting in injury to a railroad employee who was one of the class for whose especial benefit the statute was enacted gave rise to an implied cause of action for damages in favor of the injured party. *Id.* at 39.

22. *Id.* at 39-40.

23. *Id.* at 42.

24. Greene, *supra* note 4, at 472-77; Hazen, *supra* note 4, at 1346-58; Note, *Implication Under Section 17(a) of the Securities Act of 1933—The Effect of Aaron v. SEC*, 49 Fordham L. Rev. 1161, 1167 n.33 (1981) [hereinafter cited as *Implication under Section 17(a) of the Securities Act of 1933*]; Note, *A New Direction for Implied Causes of Action*, 48 Fordham L. Rev. 505, 505-06 & n.2, 515-16 (1980); Note, *Confusing Signals from the Burger Court: Judicial Refinement of Private Causes of Action*, 16 Tulsa L.J. 91, 93-97 (1980) [hereinafter cited as *Confusing Signals from the Burger Court*]; Casenote, *Middlesex County Sewerage Authority v. National Sea Clammers Association: Implied Private Rights of Action for Damages Under the Federal Water Pollution Control Act Amendments of 1972*, 12 Envtl. L. 197, 200-03 (1981) [hereinafter cited as *Implied Private Rights of Action Under the FWPCA*]. The theory invoked by the Court in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916), implying a remedy where violation of a statutory duty results in injury "to one of the class for whose especial benefit the statute was enacted," has been labelled the tort theory, see *From Borak to Ash*, *supra* note 2, at 376, and was abandoned in favor of more restrictive and specific criteria for implication. Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. Pa. L. Rev. 1392, 1394 (1975) [hereinafter cited as *Some Implications for Implication*]. In at least two instances an implied remedy was found available based on the jurisdictional provision of a statute. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944). From the 1950's to the 1970's, the confusion with respect to appropriate theories for implication was represented by the emergence of two distinct theories in the implication area: (1) examining legislative intent to afford a judicially implied remedy; or (2) examining whether the statutory scheme suggested that an implied remedy would further the purpose of the act. Greene, *supra* note 4, at 474-78. Compare *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, 414 U.S. 453 (1974) (legislative intent; denying an implied private right), and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) (same), and *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Comm'n Co.*, 341 U.S. 246 (1951) (same), with *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (legislative purpose; implying a right), and *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (same). The more

the 1960's, when the Court more often applied an expansive implication analysis,²⁵ an implied right of action was frequently found.

A. *CORT v. ASH: The Court Provides Guidelines*

A unanimous Supreme Court attempted to synthesize its prior standards and decisions²⁶ into a more workable and consistent analysis in *Cort v. Ash*.²⁷ Four factors were deemed relevant to the implication inquiry:

- (1) whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted;
- (2) whether there is any explicit or implicit legislative intent to create or to deny the remedy;
- (3) whether implication is consistent with the underlying purposes of the legislative scheme; and
- (4) whether the cause of action is traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.²⁸

In *Cort*, the Justices seemed to attach equal weight to each of the four "relevant" factors and, finding that none of them had been satisfied, denied the implied remedy.²⁹ The *Cort* analysis represented

expansive legislative purpose approach has been criticized as encouraging judicial legislation, see Pitt, *An SEC Insider's View of the Utility of Private Litigation Under the Federal Securities Laws*, 5 Sec. Reg. L.J. 3, 10-11 (1977), and has been rejected by the Court. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). The Court today has embraced the legislative intent approach to the exclusion of all other theories. See *infra* pt. II(A).

25. Greene, *supra* note 4, at 476-77; Hazen, *supra* note 4, at 1352-55; see, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

26. See *supra* notes 24-25 and accompanying text.

27. 422 U.S. 66 (1975). A derivative suit was brought against corporate directors for contributions made with respect to the 1972 Presidential election. Stockholders sought an implied private right of action under § 610 of the Federal Election Laws, 18 U.S.C. § 610 (1970 & Supp. III 1973) (repealed 1976), which prohibited corporations from making contributions or expenditures with respect to certain federal elections. 422 U.S. at 68.

28. 422 U.S. at 78.

29. See *id.* at 78, 80-85. The availability and adequacy of the corporate respondents' state remedies were justification in part for the denial of the remedy under federal law. See *id.* at 84. In addressing this fourth factor, the Court stated that corporations are traditionally "creatures of state law," *id.*, and state law generally governs the internal affairs of a corporation. *Id.* at 84-85. The Court also noted the possibility of adequate state remedies: The respondents had initially brought an *ultra vires* claim under federal pendent jurisdiction, and the Court suggested that a claim for an alleged misuse of corporate funds may give rise to an action for breach of a fiduciary duty under state law. *Id.*

a restrictive approach to implication,³⁰ and the four factors implicitly embody various considerations: The first two factors dictate deference to congressional intent;³¹ the third factor implicates a policy determination and requires a broad assessment of legislative purpose;³² the fourth factor addresses federalism concerns.³³ Intended to assist judges in the difficult task of ascertaining legislative intent,³⁴ this "multifactor balancing" test³⁵ could easily be applied to support implication if a court emphasized the policy considerations implicit in the more flexible third and fourth factors of the analysis.³⁰

B. *The Erosion of Cort*

The Court's methodology in implied private right of action cases was restricted in three decisions in 1979 in which several members of the Court adhered to a stricter standard than was set forth in *Cort v. Ash*.³⁷ It became clear that the four factors were no longer afforded equal weight;³⁸ the fundamental inquiry was legislative intent³⁰ as

30. *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436 (5th Cir. 1981); *Greene*, *supra* note 4, at 478-79; *Pillai, Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. Cinn. L. Rev. 1, 35-36 (1978); *Implication Under Section 17(a) of the Securities Act of 1933*, *supra* note 24, at 1168; *A New Direction for Implied Causes of Action*, *supra* note 24, at 507; *see Hazen*, *supra* note 4, at 1358-59; *Implied Private Rights of Action for Damages Under the FWPCA*, *supra* note 24, at 204.

31. *Implied Private Rights of Action for Damages Under the FWPCA*, *supra* note 24, at 204 & n.47; *see Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).

32. *See Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 34-35 (1979) (*White, J.*, dissenting); 2A C. Sands, *Sutherland's Statutes and Statutory Construction* § 45.09 (4th ed. 1973) [hereinafter cited as *Sutherland*]; *Greene*, *supra* note 4, at 473, 474-75; *Note, The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 *Fordham L. Rev.* 441, 448 (1974) [hereinafter cited as *The Phenomenon of Implied Private Actions*]; *Note, Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, 79 *Mich. L. Rev.* 1093, 1095 & n.17 (1981).

33. *Hazen*, *supra* note 4, at 1359-61, 1383-84; *Confusing Signals From the Burger Court*, *supra* note 24, at 100.

34. *See California v. Sierra Club*, 101 S. Ct. 1775, 1783 (1981) (*Stevens, J.*, concurring).

35. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2629 (1981) (*Stevens, J.*, concurring in part and dissenting in part) (suggesting that "multifactor balancing tests" tend to produce negative results).

36. *See The Phenomenon of Implied Private Actions*, *supra* note 32, at 450.

37. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (*Burger, C.J.*, *Rehnquist, Brennan, Stewart, White, Blackmun, Stevens, JJ.*); *Cannon v. University of Chicago*, 441 U.S. 677, 698 (1979) (*Stevens, Brennan, Stewart, Marshall, Rehnquist, JJ.*); *see Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (*Burger, C.J.*, *Blackmun, Powell, Rehnquist, Stewart, JJ.*).

38. *See, e.g., Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979).

39. *See, e.g., Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 575 (1979); *id.* at 579-80

revealed by the first two inquiries of the *Cort* test.⁴⁰ Moreover, the first two *Cort* factors were infused with presumptions against implication.⁴¹ The Court placed less emphasis on those factors of the *Cort* test that implicated policy concerns and that were, therefore, more likely to support implication.

In the first of these decisions, *Cannon v. University of Chicago*,⁴² a majority of the Court found an implied private right of action for injunctive relief under section 901(a) of Title IX of the Education Amendments of 1972.⁴³ Adhering to the *Cort* analysis,⁴⁴ the Court stated that there was no need to weigh the relative importance of the *Cort* factors; each equally supported implication.⁴⁵ The majority opinion, however, refined the first inquiry of the *Cort* test—whether the statute was enacted for the *especial* benefit of the plaintiff—by stating that right- or duty-creating statutory language directed at a benefited class was to be distinguished from general prohibitory language directed solely at the conduct of defendants.⁴⁶ This distinction has been frequently cited by the Court to support a finding that the first *Cort* criterion has not been satisfied⁴⁷ and, thereby, to create a strong presumption against implication.⁴⁸

(Brennan, J., concurring); *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring); *id.* at 718-19 (White, J., dissenting).

40. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 34 n.10 (1979) (White, J., dissenting); *see id.* at 23; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-78 (1979); *id.* at 580 (Brennan, J., concurring). *But see* *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. at 27-36 & n.10 (White, J., dissenting) (arguing that the Court should apply all *Cort* factors equally); *Touche Ross & Co. v. Redington*, 442 U.S. at 580-83 (Marshall, J., dissenting) (same).

41. Pillai, *supra* note 30, at 3, 23.

42. 441 U.S. 677 (1979).

43. 20 U.S.C. § 1681(a) (1976), *construed in* 441 U.S. at 689-709.

44. *See* 441 U.S. at 689-709.

45. *Id.* at 709; *accord* *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436 (5th Cir. 1981).

46. 441 U.S. at 690-93. The Court stated: "The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public. There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct . . ." *Id.* at 690-92 (footnotes omitted). The statute provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681 (1976).

47. *See infra* note 135 and accompanying text.

48. *Id.* By contrast, in addressing the issue of general prohibitory language in a criminal statute, the Court in *Cort v. Ash* stated: "We need not, however, go so far as to say that in this circumstance a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group." *Cort v. Ash*, 422 U.S. 66, 80 (1975) (emphasis in original).

In a concurring opinion, Justice Rehnquist noted that earlier and more expansive implied right of action decisions encouraged Congress to rely on the federal judiciary to decide whether a private action should exist.⁴⁹ The Justice stressed that it is far better for Congress to specify when it intends private parties to have a cause of action, and warned that "this Court . . . should be extremely reluctant to imply a cause of action absent such specificity."⁵⁰

Justice Powell's dissent argued that the *Cort* analysis and judicial implication in general disregard the doctrine of separation of powers; they allow the Court to enlarge its jurisdiction unconstitutionally, and require the federal judiciary to engage in policy-making, thereby assuming the legislative function.⁵¹ In later decisions that created heavy presumptions against implication, the views of Justices Powell and Rehnquist were to carry a majority of the Court.⁵²

*Touche Ross & Co. v. Redington*⁵³ was the first direct assault on *Cort*'s four-factor analysis. Reversing the Second Circuit,⁵⁴ the Court denied an implied private action for damages under section 17(a) of the Securities Exchange Act of 1934.⁵⁵ The Court limited its role to ascertaining legislative intent.⁵⁶ Justice Rehnquist, speaking for the

49. 441 U.S. at 718 (Rehnquist, J., concurring).

50. *Id.*

51. *Id.* at 730-49 (Powell, J., dissenting). For criticisms of Justice Powell's theory, see Greene, *supra* note 4, at 487-88; Steinberg, *Implied Private Rights of Actions Under Federal Law*, 55 Notre Dame Law. 33, 40-41 (1979).

52. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2618 (1981) (Justice Powell delivered the opinion of the Court); *California v. Sierra Club*, 101 S. Ct. 1775, 1783 (1981) (Justice Rehnquist's concurring opinion, in which Chief Justice Burger and Justices Stewart and Powell joined, stressing that the majority opinion placed undue emphasis on the *Cort* analysis); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 561-62 (Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun and Stevens joined); Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 564 n.61 (1981).

53. 442 U.S. 560 (1979).

54. 442 U.S. at 566-67, *reversing* 592 F.2d 617 (1978). The Second Circuit found an implied remedy for damages even though it recognized that the legislative history is silent on the issue. 592 F.2d at 622.

55. 15 U.S.C. § 78q(a) (1976), *construed in* 442 U.S. at 562-64. The complaint alleged that the improper conduct of the accounting firm of Touche Ross had prevented a brokerage firm's true financial condition from becoming known until it was too late to attempt to minimize the adverse financial results of the corporation's liquidation. *Id.* at 566.

56. 442 U.S. at 568, 578. The Court expressly rejected various implication theories invoked prior to its decision in *Cort. Id.*; *A New Direction for Implied Causes of Action*, *supra* note 24, at 515-16; see *Implication Under Section 17(a) of the Securities Act of 1933*, *supra* note 24, at 1167 n.33. Furthermore, the Court concluded that it had adhered to a "stricter standard" than that applied in prior implication deci-

Court,⁵⁷ expressly narrowed the *Cort* analysis⁵⁸ and indicated that the *Cort* factors were no longer to be accorded equal weight.⁵⁹ The third and fourth factors were expressly subordinated:⁶⁰ A finding that the first two factors had not been satisfied was now sufficient to deny an implied private right of action.⁶¹ This approach imposed new burdens on a plaintiff. Whereas *Cort* interpreted congressional silence in light of the last two factors of its analysis, involving federalism concerns and consideration of the remedial purpose of the legislative scheme,⁶² *Touche Ross* interpreted such silence as weighing against implication when the statutory language does not suggest otherwise.⁶³

Contrary to its declarations in *Cort* and *Cannon*,⁶⁴ the Court in *Touche Ross*, implicitly applying the maxim *expressio unius est exclusio alterius*,⁶⁵ stated that the existence of a damage provision in a statutory scheme weighs against implication because it demonstrates that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."⁶⁶ Implicitly altering the

sions in the securities area. 442 U.S. at 578. The Court, without expressly overruling *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a cause of action for damages under another section of the 1934 Act), noted that the *Borak* Court's approach to implication—based to a great extent on the jurisdictional provision and the remedial purpose of the 1934 Act—was abandoned in a series of subsequent cases. 442 U.S. at 576-78.

57. 442 U.S. at 562.

58. *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436 (5th Cir. 1981); see *infra* notes 59-68 and accompanying text.

59. 442 U.S. at 575-76.

60. See *id.* at 579-80 (Brennan, J., concurring) ("the remaining two *Cort* factors cannot by themselves be a [sufficient] basis for implying a right of action").

61. See *id.* at 576-78, 579-80 (Brennan, J., concurring).

62. See *Cort v. Ash*, 422 U.S. 66, 83-85 (1975).

63. 442 U.S. at 571. The Court also stated that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Id.*

64. In *Cannon*, the Court stated that the existence of express enforcement provisions elsewhere in a "complex" legislative scheme is not a sufficient basis for denying an implied remedy unless there is convincing evidence that Congress intended to exclude the remedy. *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979); accord *Cort v. Ash*, 422 U.S. 66, 82-83 & n.14 (1975); see *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, 414 U.S. 453, 458-61 (1974); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 203 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964); *infra* note 201 and accompanying text.

65. See 442 U.S. at 572. See generally 2A Sutherland, *supra* note 32, § 47.23 (discussing *expressio unius* rule). This maxim appears to have three distinct applications: (1) the existence of an express enforcement provision within a statute precludes an implied remedy, see *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, 414 U.S. 453, 458 (1974), (2) the existence of an express remedy elsewhere in a legislative scheme precludes an implied remedy, see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979), and (3) the existence of remedies in other unrelated statutes or legislative schemes precludes implied remedies. See *Carlson v. Green*, 446 U.S. 14, 40-41 (1980) (Rehnquist, J., dissenting).

66. 442 U.S. at 572.

burden of proof that prevailed in *Cort* and *Cannon*,⁶⁷ the Court now required a plaintiff to establish affirmative legislative intent to create an implied remedy in order to rebut a strong presumption against implication.⁶⁸

The Court further restricted the availability of implied private remedies in *Transamerica Mortgage Advisors, Inc. v. Lewis*.⁶⁹ Respondent sought the implied remedies of injunctive relief, rescission of a contract, restitution, and an award of damages for fraud and breach of a fiduciary duty⁷⁰ under sections 206 and 215 of the Investment Advisors Act of 1940.⁷¹ In a five-four decision, the Court⁷² recognized only a "limited [implied] private remedy . . . to void an investment [adviser's] contract" and recover restitution therefrom under section 215,⁷³ and denied an implied remedy for damages under the anti-fraud provision of section 206.⁷⁴ Whereas in *Touche Ross* the Court denied the remedy on the basis of finding that each of the first two *Cort* factors was not satisfied,⁷⁵ here the Court denied the remedy even though the first requirement had been met.⁷⁶ Accordingly, a negative answer to the second factor, without more, was held sufficient to deny an implied private right of action.

67. In *Cort* it was stated that "in situations in which it is clear that federal law has granted a class of persons certain rights, 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." 422 U.S. at 82 (emphasis in original) (footnote omitted); *accord Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979).

68. See 442 U.S. at 571-72; *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436-37, 439 (5th Cir. 1981).

69. 444 U.S. 11 (1979).

70. *Id.* at 13-14.

71. 15 U.S.C. §§ 80b-6, -15 (1976).

72. 444 U.S. at 11-25 (Stewart, J., majority opinion, joined by Burger, C.J., Blackmun, Powell and Rehnquist, JJ.); *id.* at 25-36 (White, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.).

73. *Id.* at 24. The Court noted, however, that this provision "confers no other private causes of action, legal or equitable." *Id.* (footnote omitted). The party's restitutionary remedy included only consideration given under the contract; compensation for any diminution in value of the party's investment could not be afforded because that would be equivalent to an indirect private damage remedy. *Id.* at n.14.

74. *Id.* at 19-24. The Court again attached significance to congressional silence in light of the existence of provisions for enforcing compliance under § 206. The Act provided for criminal penalties, and authorized the commission to enjoin prohibited conduct and impose administrative sanctions. *Id.* at 20.

75. See *supra* note 61 and accompanying text.

76. 444 U.S. at 17, 24; *id.* at 34 n.10 (White, J., dissenting); *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 437 (5th Cir. 1981). An indication that Congress intended to benefit an especial class was once deemed significant by the Court even though there was no affirmative evidence that Congress intended to allow a private remedy. See *Cannon v. University of Chicago*, 441 U.S. 677, 694

It has also been suggested that *Transamerica* introduced a new factor to be considered in determining the existence of a private right of action.⁷⁷ It is argued that in recognizing only a "limited" remedy of rescission and restitution while refusing to afford a damage remedy, the majority considered the nature of the relief sought a significant factor in determining whether the right of action should exist.⁷⁸ Because the Court did not rely on this distinction, but instead based its holding on the dissimilar statutory language contained in sections 206 and 215,⁷⁹ this issue remains a source of controversy in the circuits⁸⁰ and requires the Court's resolution.

(1979); *Cort v. Ash*, 422 U.S. 66, 82 (1975). Interestingly, Justice Powell stated in *Transamerica* that the Court's opinion was "compatible" with his dissent in *Cannon*, 441 U.S. at 730 (Powell, J., dissenting). *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 25 (1979) (Powell, J., concurring). In that opinion, however, he expressly advocated abandoning the *Cort* analysis. 441 U.S. at 730-49. To the extent that the Court in *Transamerica* apparently placed the greatest weight on *Cort's* second factor inquiry, the Justice was suggesting that the *Cort* inquiry has, in effect, been abandoned. *Implied Private Rights Under the FWPCA*, *supra* note 24, at 211. See Greene, *supra* note 4, which argues that *Transamerica* was not an appropriate candidate for the application of the "hard-line stance" against implication adopted by Justices Rehnquist and Powell in *Cannon*, in light of the "antiquity" of the statute involved. *Id.* at 485 n.92.

77. 444 U.S. at 25-26, 30-31 (White, J., dissenting).

78. *Id.* Justice White stressed that the Court, in confusing the separate and distinct issue of the availability of a private right of action with the question of the nature of the relief, had erroneously suggested that an implied private right of action may be denied on the basis that monetary relief is sought. *Id.* He stated: "Once it is recognized that a statute creates an implied right of action, courts have wide discretion in fashioning available relief." *Id.* at 30 (citing *Davis v. Passman*, 442 U.S. 228, 239 (1979) (the question whether "a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief . . . a litigant may be entitled to receive"); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies."); and *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("where . . . a federal statute provides for a general right to sue . . . federal courts may use any available remedy to make good the wrong done")); see *infra* note 175 and accompanying text. In addition, Justice White, in addressing the third and fourth factors bypassed by the majority, emphasized that the plaintiffs lacked redress for their injuries. 444 U.S. at 34-35. Traditionally, the regulation of investment advisers has been a matter of federal law, *id.* at 35-36, and the SEC was not equipped to handle the growth of enforcement problems under the Act. *Id.* at 35 & n.12.

79. 444 U.S. at 15-16, 19-25.

80. A request for damages has been a factor militating against implication in some lower federal court decisions. See *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399, at 92,393, 92,396, 92,397-98 (6th Cir. Dec. 23, 1981), *cert. denied*, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982); *Lieberman v. University of Chicago*, 660 F.2d 1185, 1186-88 (7th Cir. 1981); *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 255-63 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982) (No. 81-431); *Haggiag v. Blum*, No. 80 Civ. 4872, slip op. at 8-11 (S.D.N.Y. June 25, 1981); *De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 78 (C.D. Ill. 1981); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 299-300, 301 (D. Del. 1981); *Berman v. Metzger*, [1981 Transfer Binder] Fed. Sec. L.

Having substantially departed in these decisions from the *Cort* analysis, the Court would have been expected to either reassert or abrogate the validity of *Cort* in its subsequent decisions. It did neither.

C. The 1980 Term: Further Erosion and New Concerns

The Supreme Court's decisions in the 1980 Term extended the Court's restrictive policy toward implication.⁸¹ These decisions, which may be viewed as implicitly questioning the viability of implication in our federal system,⁸² leave injured plaintiffs seeking access to the federal courts on precarious ground.

In *Universities Research Association v. Coutu*,⁸³ respondent sought damages under section 1(a) of the Davis-Bacon Act.⁸⁴ A unanimous

Rep. (CCH) ¶ 97,857, at 90,293-94 (D.D.C. Feb. 9, 1981). *But see* Lieberman v. University of Chicago, 660 F.2d 1185, 1189-95 (7th Cir. 1981) (Swygert, J., dissenting); National Treasury Employees' Union v. Campbell, 654 F.2d 784, 790 n.6 (D.C. Cir. 1981); Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 273-75 (2d Cir. 1980) (Coffrin, J., concurring), *cert. granted*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982) (No. 81-431).

81. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981); Texas Indus., Inc. v. Radeliff Materials, Inc., 101 S. Ct. 2061 (1981); California v. Sierra Club, 101 S. Ct. 1775 (1981); Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981).

82. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2628-29 (1981) (Stevens, J., concurring in part and dissenting in part). In the Supreme Court's 1980 Term alone, implied private rights were denied under eight federal statutes. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981) (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 12, 15, 31 & 33 U.S.C.) and Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified as amended in scattered sections of 16 & 33 U.S.C.)); Texas Indus., Inc. v. Radeliff Materials, Inc., 101 S. Ct. 2061 (1981) (denying an implied right to contribution) (Sherman Act, § 1, 15 U.S.C. § 1 (1976) and Clayton Act, § 4, 15 U.S.C. § 15 (1976) (amended 1980)); California v. Sierra Club, 101 S. Ct. 1775 (1981) (Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. § 403 (1976 & Supp. III 1979)); Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981) (denying an implied right to contribution) (Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)-(2) (1976) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976)); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (Davis-Bacon Act, § 1, 40 U.S.C. § 276a(a) (1976)).

83. 450 U.S. 754 (1981).

84. 40 U.S.C. § 276a(a) (1976). The complaint alleged that petitioner failed to pay prevailing wages for construction work performed by its employer under a contract with the Atomic Energy Commission. 450 U.S. at 764. Section 1(a) of the Davis-Bacon Act provides that every federal contract in excess of \$2000 "for construction, alteration, and/or repair . . . of public buildings or public works of the United States . . . shall contain a provision stating the minimum wages to be paid . . . laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" in the community. 40 U.S.C. § 276a(a) (1976).

Court held that, under the facts presented, section 1(a) did not confer an implied private right of action for back wages.⁸⁵ Although the Court examined the first three factors of the *Cort* test, it limited its inquiry to legislative intent⁸⁶ and found that the statute's language, legislative history and purpose precluded the availability of an implied right.⁸⁷

The Court, however, raised additional concerns as partial justification for its denial of the implied remedy. It was unwilling to interfere with and "undercut" the "elaborate" and "detailed" administrative scheme, or to "destroy" the Act's carefully achieved balance between contractor and employee interests.⁸⁸ In addition, the Court noted, for the first time, that the difficulty of the necessary determinations was a factor weighing against implication.⁸⁹ The comprehensive character and the complexity of the subject matter contained in a legislative scheme were to have recurring significance in the Court's implication decisions.⁹⁰

85. 450 U.S. at 767-68. The holding was limited to the situation in which a contract has been administratively determined not to call for Davis-Bacon work. Although the Court stated that they were not deciding whether the Davis-Bacon Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations, it intimated that its opinion may have some impact on this issue in the future. *Id.* at 769 n.19. The Court stated: "While we recognize that some of our reasoning arguably applies to the question whether the Act creates *any* implied right of action, we have no reason to reach that broader issue here. Further, we note that there is some question whether that issue is properly before us . . ." *Id.* at 769 n.19 (emphasis in original). The Court also noted the conflict in the circuit courts with respect to this issue. *Id.* Compare *McDaniel v. University of Chicago*, 512 F.2d 583 (7th Cir.) (the Davis-Bacon Act confers an implied private right of action in favor of an employee seeking to compel a contractor's compliance with required prevailing wage stipulations), *vacated and remanded*, 423 U.S. 810 (1975), *judgment re-entered on remand*, 548 F.2d 689 (1977), *cert. denied*, 434 U.S. 1033 (1978), with *United States ex rel. Glynn v. Capeletti Bros.*, 621 F.2d 1309 (5th Cir. 1980) (no implied private right of action exists under § 1(a) of the Davis-Bacon Act in favor of wage earners whose employers failed to pay locally prevailing wages).

86. 450 U.S. at 770. The Court stated that the statute is phrased solely as a directive to federal agencies and does not confer rights on mechanics and laborers. *Id.* at 772-73. The express enforcement provision in the Act and the corresponding right to bring a private suit for contracts requiring prevailing wage stipulations indicated that the absence of a comparable provision authorizing a suit for contracts not requiring prevailing wage stipulations was deliberate. *Id.* 758-59 & n.4, 773. Furthermore, the Court concluded that nothing in the legislative history indicated Congress intended to create these remedies. *Id.* at 773-81.

87. *Id.* at 770-81.

88. *Id.* at 782-83. The Court also stated that judicial implication, in this instance, was "inappropriate" because it would require the Court to substitute its judgment for that of the contracting agency. *Id.* at 784.

89. See *id.* at 784.

90. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82 (1981); *infra* pt. III(C).

The comprehensiveness of a statutory scheme weighed heavily against implication in *Northwest Airlines, Inc. v. Transport Workers Union*⁹¹ and *Texas Industries, Inc. v. Radcliff Materials, Inc.*,⁹² in which the Court denied private parties implied private rights to contribution.⁹³ Finding that the first three factors of the *Cort* test had not been satisfied,⁹⁴ the Court, in *Northwest Airlines*,⁹⁵ denied an employer an implied right to contribution from unions allegedly bearing partial responsibility for violations of the Equal Pay Act of 1963⁹⁶

91. 101 S. Ct. 1571 (1981).

92. 101 S. Ct. 2061 (1981).

93. *Id.* at 2066-67; *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82 (1981). Contribution is the distribution of loss among tortfeasors achieved by requiring each to pay his proportionate share. W. Prosser, *The Handbook of the Law of Torts* § 51, at 310 (4th ed. 1971). As of 1971, statutes had been enacted in at least twenty-three states to permit contribution among tortfeasors in varying circumstances. This represented a departure from the common-law rule that prohibited contribution among joint tortfeasors. *Id.* at 305-07. The Court in both *Northwest Airlines*, 101 S. Ct. at 1584, and *Texas Industries*, 101 S. Ct. at 2070, also denied the parties a right to contribution under federal common law. This issue is separate and distinct from the ability of federal courts in diversity cases to recognize a right to contribution under state law. *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1583 n.38 (1981) (citing *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967)). *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), greatly restricted application of federal common law under diversity jurisdiction. Federal common law under federal question jurisdiction, however, continued under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). *Hazen*, *supra* note 4, at 1375-82. The Court continued to fashion federal common law, in the absence of an applicable act of Congress, in cases implicating uniquely federal interests. *See Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1582 & n.33 (1981). Furthermore, prior to its recent decision in *City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981), the Court consistently held that state law is inappropriate for resolving interstate controversies, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2067 (1981), because in this area there is an overriding federal interest in the need for a uniform rule of decision. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972). Thus, in determining whether a question is to be governed by federal common law, the ultimate issue was whether promoting uniformity, as a means of avoiding disparity between the states, was required because of the nature of the subject matter of the suit. Interestingly, this analysis is similar to the requisite determination with respect to the fourth *Cort* factor—whether the action is traditionally relegated to the states. *Hazen*, *supra* note 4, at 1383-84. Accordingly, had the Court in its recent decisions inquired whether the subject matter of the cause of action is traditionally relegated to state law, it would have been, at the same time, examining those factors which, absent a federal statute, would be relevant to determining the scope of federal common law. *Id.* at 1378-84.

94. *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581 (1981). The Court noted that the statutes' language was directed at employers' conduct, *id.* at 1581, and indicated that the existence of express enforcement provisions was presumptive evidence that the omission of a private remedy provision was deliberate. *Id.* at 1581-82.

95. 101 S. Ct. 1571 (1981).

96. 29 U.S.C. § 206(d)(1)-(2) (1976), construed in 101 S. Ct. at 1582.

and Title VII of the Civil Rights Act of 1964.⁹⁷ In addition, a unanimous Court found that the "comprehensive" character of both acts presumptively evinced congressional intent not to authorize an implied remedy.⁹⁸ The Court reasoned that "amending" comprehensive schemes was not properly within the institutional competence of the federal judiciary.⁹⁹ This function resides within the congressional ambit.¹⁰⁰

97. 42 U.S.C. § 2000e-2 (1976), construed in 101 S. Ct. at 1582. Collectively bargained wage differentials between stewards and stewardesses, negotiated and executed in response to union demands, had been held to violate both Acts. 101 S. Ct. at 1575. The employer was held liable to its female employees for back pay: Petitioner's monetary liability was estimated at \$20,000,000. *Id.* at 1575 & n.7. Many lower federal courts had held that the right to contribution under the Equal Pay Act of 1963 was not implicit in the statute and not available under federal common law. *Id.* at 1576 n.9 (citing, *inter alia*, *Denicola v. G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977); *EEOC v. Ferris State College*, 493 F. Supp. 707 (W.D. Mich. 1980); and *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975)). *But see* *Love v. Temple Univ.*, 366 F. Supp. 835 (E.D. Pa. 1973). However, lower federal courts have held that a federal common-law right to contribution is available to employers found liable for back pay under Title VII. 101 S. Ct. at 1577 n.11 (citing, *inter alia*, *Glus v. G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980), *vacated and remanded for further consideration in light of Northwest Airlines*, 101 S. Ct. 2013 (1981); *Stevenson v. International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977); *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); and *Gilbert v. General Elec. Co.*, 59 F.R.D. 267 (E.D. Va. 1973)).

98. 101 S. Ct. at 1581-82. Furthermore, the Court cited other statutes that expressly provide for contribution among joint tortfeasors as support for the presumption that the absence of legislative intent to create those implied remedies was deliberate. *Id.* at 1580 n.24. In addition, the Court declined to address the merits of the reasoning—applied by some lower federal courts—that where express remedies are afforded in a legislative scheme under which an implied cause of action has been found to exist, an implied remedy of contribution should likewise be permitted. *Id.* (citing *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971)).

99. 101 S. Ct. at 1582. In denying the parties relief under federal common law, the Court's approach was similar to its implication analysis in that it emphasized the comprehensive character of the legislative schemes, which included integrated procedures for enforcement. *Id.* at 1584. Although federal courts have the responsibility to fashion limited federal common-law relief in the absence of an applicable act of Congress, *id.*, the Court stated that this responsibility is ultimately limited by the authority of Congress. *Id.* at 1582-83. "[O]nce Congress addresses a subject . . . the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 1583 n.34; see *infra* note 130. As in its implication analysis, the Court concluded its analysis of the availability of federal common law by stating that this determination implicated a policy question that is more properly addressed by Congress. *Id.* at 1584 & n.41. Quoting from *United States v. Gilman*, 347 U.S. 507, 511-13 (1954), the Court stated, "the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It

Despite a suggestion in *Northwest Airlines*¹⁰¹ that federal courts enjoy greater flexibility in the area of antitrust than in other areas governed by federal statutes,¹⁰² a unanimous Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*¹⁰³ denied petitioner an implied right to contribution under the antitrust laws from participants in a price-fixing conspiracy.¹⁰⁴ The Court again stressed the comprehensive nature of the enforcement scheme contained in the antitrust laws¹⁰⁵ and emphasized that the important policy questions raised were more appropriately suited to congressional resolution.¹⁰⁶ As in *Universities Research Association*, the Court also stated that judicial resolution of such a "complex" issue was inappropriate because the

presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.'" 101 S. Ct. at 1584 n.41.

100. See *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1808 (1981); cf. J. Freedman, *supra* note 17, at 94 (capacity of Congress to delegate to executive administrative agencies).

101. 101 S. Ct. 1571 (1981); see *supra* notes 94-100 and accompanying text.

102. 101 S. Ct. at 1584 n.42 (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978)).

103. 101 S. Ct. 2061 (1981).

104. *Id.* at 2066-67. Petitioner had been indicted for violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and damages had been assessed against him under the Clayton Act, 15 U.S.C. § 15 (1976) (amended 1980). 101 S. Ct. at 2062-63. There had been a conflict in the circuit courts with respect to these issues. Compare *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979) (no implied right to contribution among antitrust conspirators), *aff'd sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981), and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979) (same), *aff'd en banc per curiam*, No. 78-1773 (10th Cir. June 30, 1981), with *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (an antitrust defendant is entitled to contribution from joint tortfeasors in limited circumstances).

105. 101 S. Ct. at 2069 & nn.18-23. In addition, the Court construed the legislative silence on the issue as deliberate. The general purpose of treble damages is "an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 2066. Furthermore, the Court noted the ninety-year existence of the antitrust laws without an amendment authorizing contribution. *Id.* at 2069.

106. *Id.* at 2070. The Court quoted *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), which stated that "[t]he choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts." *Id.* at 317 (footnote omitted), *quoted in* 101 S. Ct. at 2070; *accord* *United States v. Topco Associates*, 405 U.S. 596, 611-12 (1972).

range of factors to be weighed required an inquiry into the "entire spectrum of antitrust law."¹⁰⁷

Although a unanimous Court in *California v. Sierra Club*¹⁰⁸ held that no private right of action could be inferred¹⁰⁹ from section 10 of the Rivers and Harbors Appropriation Act,¹¹⁰ the Justices disagreed with respect to the applicability and significance of the *Cort* analysis. Justice White, writing for the Court, noted that the four *Cort* factors remain the criteria through which congressional intent may be discerned.¹¹¹ Nevertheless, referring to the *Cort* analysis merely as a "preferred approach,"¹¹² he summarily addressed only the first two factors of the test, and concluded that "consideration of the first two factors [was] dispositive."¹¹³ Justice Stevens, concurring, advocated

107. 101 S. Ct. at 2070. The Court stated: "Ascertaining what is 'fair' in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases." *Id.*

108. 101 S. Ct. 1775 (1981).

109. *Id.* at 1781.

110. 33 U.S.C. § 403 (1976 & Supp. III 1979). Section 10 prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." *Id.* The *Sierra Club* and two private citizens sought to enjoin the state of California from constructing and operating water diversion facilities, part of the California Water Project, alleging that diversions of water from northern California to southern portions of the state had degraded the quality of the water. 101 S. Ct. at 1777-78. The Court had previously addressed this issue and found an implied private right of action under this Act in favor of the United States government as a plaintiff. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (declaratory relief and damages for reimbursement of costs incurred in removing an abandoned vessel in a waterway under § 15 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 15, 30 Stat. 1152 (current version at 33 U.S.C. § 409 (1976))); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (injunctive relief to compel removal of an obstruction in a waterway under § 10 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (current version at 33 U.S.C. § 403 (1976 & Supp. III 1979))). Interestingly, the Act encourages public participation in its enforcement. Section 16 of the Act authorizes the district courts to award one-half of any criminal fines imposed on violators of § 13 of the Act to "persons giving information which shall lead to conviction." 33 U.S.C. § 411 (1976); see *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). However, courts have consistently denied private plaintiffs the right to bring an action under the Rivers and Harbors Appropriation Act "to recover . . . the percentage of the fine which they might have been entitled to receive as informers [in a *qui tam* action] if an offense had been prosecuted to conviction." *Id.* at 1008, 1012 n.9 (quoting *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1279 (D. Conn. 1976), *aff'd sub nom.* *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977)).

111. 101 S. Ct. at 1779 (citing *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 27 (1979) (White, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 241 (1979)).

112. 101 S. Ct. at 1778 (quoting *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 26 (1979) (White, J., dissenting)); see *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

113. 101 S. Ct. at 1781. Justice White stated that the last two factors of the *Cort*

adherence to the "wisely developed rules" set forth in *Cort* and reminded the Court that the *Cort* analysis is "a part of our law."¹¹⁴ Justice Rehnquist, concurring in the judgment and joined by Chief Justice Burger and Justices Stewart and Powell, stressed that the *Cort* factors are "merely guides"¹¹⁵ and that the majority's emphasis on *Cort* was unwarranted in light of more recent cases that "limited" the four-prong test.¹¹⁶ Moreover, he admonished that mechanical application of all four *Cort* factors does not lend predictability to implied right of action jurisprudence.¹¹⁷

test are "only of relevance, if the first two factors give indication of congressional intent to create the remedy." *Id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574-76 (1979)). "[T]he remaining two *Cort* factors cannot by themselves be a basis for implying a [private] right of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 580 (Brennan, J., concurring); see *infra* note 141 and accompanying text. The Court, in *California v. Sierra Club*, rejecting the Ninth Circuit's reasoning that any person "especially harmed" by an unauthorized obstruction of the waterway was an especial beneficiary of the Act, stated that "[t]he question [was] not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." 101 S. Ct. at 1779; see *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 & n.13 (1979). The Court observed that the language of the Act merely states a general proscription of certain activities without focusing on any particular class of beneficiaries. 101 S. Ct. at 1779. The Court's analysis of the statute's legislative history indicated greater willingness to afford power to the United States government under a federal statute than remedies to private parties. The Act's legislative history indicates that the statute was passed in response to the Court's decision in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888) (holding that there was no federal common law prohibiting obstructions and nuisances in navigable waterways). 101 S. Ct. at 1780; see *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 663-64 (1973); *United States v. Republic Steel Corp.*, 362 U.S. 482, 485-86, 499-500 (1960) (Harlan, J., dissenting); 21 Cong. Rec. 8603, 8605, 8607 (1890). However, the Court rejected respondents' claim that this legislative history suggests that Congress intended to afford individuals private remedies; the Court stated that the Act merely intended to empower the federal government to respond to obstructions in navigable waterways. 101 S. Ct. at 1780-81 & n.7. Indeed, the legislative history of the Rivers and Harbors Appropriation Act has been regarded as inconclusive. See *United States v. Republic Steel Corp.*, 362 U.S. 482, 493 (1960) (Harlan, J., dissenting) ("the provisions of the [Act] are complex and their legislative history tortuous"). Interestingly, in prior, more expansive implication decisions, the Supreme Court afforded the United States government an implied right to injunctive relief to compel the removal of an obstruction in a waterway under § 10 of the Act, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 196-201 (1967), and noted that the United States government as a plaintiff has an implied private right of action for declaratory relief and damages for reimbursement of costs incurred in removing an abandoned vessel in a waterway under § 15 of the Act. 389 U.S. at 196-201.

114. 101 S. Ct. at 1783 (Stevens, J., concurring).

115. *Id.* at 1783 (Rehnquist, J., concurring in the judgment).

116. *Id.* Justice Stevens, in a pithy note to his concurring opinion, questioned Justice Rehnquist's interpretation of the Court's recent decisions and stated that only a majority of the Court can "give an authoritative explanation of the meaning of its judgments." *Id.* at 1783 n.5 (Stevens, J., concurring).

117. *Id.* at 1783-84 (Rehnquist, J., concurring in the judgment).

The Court's current restrictive approach to the question of private remedies in the federal courts and its de-emphasis of the *Cort* analysis is exemplified by *Middlesex County Sewerage Authority v. National Sea Clammers Association*.¹¹⁸ The Court held that no implied private right of action for damages or equitable relief was available under either the Federal Water Pollution Control Act (FWPCA) Amendments of 1972¹¹⁹ or the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).¹²⁰ In reaching its decision, the Court implicitly de-emphasized the *Cort* analysis. It did not cite *Cort* or reiterate its requirements until the last paragraph of the section addressing the question of an implied right,¹²¹ nor did it mention the first, third and fourth factors of the *Cort* analysis. The Court's justification for denying respondents' relief was its prior observation that the comprehensive nature of a legislative scheme indicates congressional intent that statutes' enforcement provisions provide the exclusive remedies for statutory violations.¹²² The Court emphasized that both the FWPCA and the MPRSA contain "citizen suit" provisions, authorizing statutory enforcement by private parties.¹²³

118. 101 S. Ct. 2615 (1981).

119. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified, as amended, in scattered sections of 12, 15, 31 & 33 U.S.C.). The amendments prohibited discharging pollutants into the nation's waters except under permits, which are subject to specific effluent limitations promulgated by regulations of the Environmental Protection Agency (EPA). *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1789 (1981). Permits were issued either by the EPA or by qualifying state agencies applying EPA standards. *Id.*

120. Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified, as amended, in scattered sections of 16 & 33 U.S.C.). The MPRSA regulates dumping of materials into the ocean waters near the United States coastline. The Act requires, *inter alia*, permits for dumping materials into the ocean water where the materials are transported from the United States, or where the dumping "may affect the territorial sea or the territory of the United States." 33 U.S.C. § 1411(b) (1976).

121. *See* 101 S. Ct. at 2625.

122. *Id.* at 2623-25; *see supra* notes 88, 98, 105 and accompanying text. Section 309 of the FWPCA authorizes the EPA Administrator to obtain compliance orders and initiate civil suits, 33 U.S.C. § 1319 (1976 & Supp. III 1979), and to seek civil penalties, *id.* § 1319(d), and criminal penalties. *Id.* § 1319(c). Any "interested person" may obtain judicial review, in the United States Court of Appeals, of the Administrator's actions as long as the person seeks review within ninety days. *Id.* § 1369(b). However, where review could have been obtained under this provision, any subsequent civil or criminal proceeding is barred. *Id.* § 1369(b)(2). Similarly, the MPRSA authorizes the Administrator to seek civil penalties, 33 U.S.C. § 1415(a) (1976), or criminal penalties, *id.* § 1415(b), and authorizes the Attorney General to initiate suits for injunctive relief, *id.* § 1415(d), and to suspend or revoke permits. *Id.* § 1415(f).

123. 101 S. Ct. at 2625 n.27. The citizen suit provision of the FWPCA, § 505, 33 U.S.C. § 1365(b)(1) (1976), authorizes suits by private citizens against violators of the Act, provided a citizen complies with the requirement that sixty-days notice of the

Middlesex County demonstrates the Court's position that when a statute contains "comprehensive" enforcement provisions, ambiguous legislative history does not reveal the affirmative legislative intent to create an implied remedy necessary to overcome the Court's presumptions against implication.¹²⁴ The legislative history,¹²⁵ which indicates that the statutes were not intended to supersede other existing remedies,¹²⁶ and the "savings clause" provisions contained in both statutes,¹²⁷ were construed as meaning that the provisions authorizing citizen suits did not revoke available remedies under state common law or other federal statutes.¹²⁸

Paradoxically, the Court then held that the savings clauses did not preserve a direct cause of action under section 1983.¹²⁹ Again, its

violation be given to the EPA, the state and the violator. *Id.* § 1365(b)(1)(A). The MPRSA's citizen suit provision contains the same notice requirements. 33 U.S.C. § 1415(g)(2)(A) (1976). Both provisions merely provide for injunctive relief. 33 U.S.C. § 1365(b)(1) (1976) (FWPCA); 33 U.S.C. § 1415(g)(1) (1976) (MPRSA). Since the parties failed to comply with the notice requirements contained in these provisions and, in addition, sought compensatory relief, these provisions were to no avail. 101 S. Ct. at 2619-20.

124. See 101 S. Ct. at 2625.

125. The Court summarily addressed the legislative history of both Acts. 101 S. Ct. at 2624-25 & nn. 26-27. For a comprehensive discussion of the legislative history of the FWPCA, see *Implied Private Rights of Action for Damages Under the FWPCA*, *supra* note 24, at 221-28.

126. 101 S. Ct. at 2624 n.26. The Senate Report on the FWPCA states: "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 414, 92d Cong., 1st Sess. 81, reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3746-47; see H.R. Rep. No. 911, 92d Cong., 2d Sess. 134 (1972). Similarly, as the Court noted, the Senate Report on the MPRSA states that the authorization of citizen suits shall not restrict or supersede "any other right to legal action which is afforded the potential litigant in any other statute or the common law." S. Rep. No. 451, 92d Cong., 1st Sess. 23-24, reprinted in 1972 U.S. Code Cong. & Ad. News 4234, 4250, quoted in 101 S. Ct. at 2624 n.26; see H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971).

127. Section 505(e) of the FWPCA amendments provides: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C. § 1365(e) (1976). Section 105(g) of the MPRSA provides: "The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency)." 33 U.S.C. § 1415(g)(5) (1976).

128. 101 S. Ct. at 2624-25.

129. 42 U.S.C. § 1983 (1976) (amended 1979), construed in 101 S. Ct. at 2626-27. The Court, *sua sponte*, addressed the question of whether respondents had a cause of action directly under this statute which affords a remedy to any person deprived of any rights, privileges, or immunities created by the Constitution and laws by any person acting under color of state law, 42 U.S.C. § 1983 (1976) (amended 1979), as

justification was the comprehensiveness of the legislative schemes.¹³⁰ This seeming inconsistency supports Justice Stevens' assessment of the reasons for the Court's restrictive holdings.¹³¹ In his dissent, Justice

construed by the Court's recent decision in *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (construing § 1983 as encompassing violations of federal statutes).

130. 101 S. Ct. at 2626-27. In denying the § 1983 remedy, the Court, for the first time, implicitly created a presumption against affording that remedy, *id.*; *The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 91, 298 & n.63 (1981) [hereinafter cited as *The 1980 Term*]; *but see* 101 S. Ct. at 2636 n.31, and expressly carved out two exceptions to its availability: (1) where the statute does not create "rights, privileges, or immunities" within the meaning of § 1983; or (2) where the statute provides an exclusive remedy for violations of its terms. 101 S. Ct. at 2626; *see Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1557 (1981) (White, J., concurring) (stating that *Maine v. Thiboutot* creates a rebuttable "presumption" that a federal statute creating federal rights may be enforced in a § 1983 action and citing to Justice Powell's dissent); *Maine v. Thiboutot*, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting) (stating that the § 1983 remedy would not be available "in cases where the governing statute provides an exclusive remedy for violations of its terms"). The Court, in *Middlesex County*, held for the first time that the comprehensive nature of the FWPCA and MPRSA constituted congressional intent that the statutes' enforcement provisions be the exclusive remedies for violations of the statutes' terms. 101 S. Ct. at 2626-27; *see The 1980 Term, supra*, at 294. The Court also summarily disposed of the claims based on the federal common law of nuisance by reiterating its recent holding in *City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981). A unanimous Court had held in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), that the state of Illinois was entitled to relief from the city of Milwaukee and from Wisconsin for abatement of a nuisance caused by interstate water pollution under federal common law. *Id.* at 103-07. In *City of Milwaukee*, the Court held that the previously recognized cause of action under federal common law had been subsequently preempted by the FWPCA Amendments of 1972, to the extent that a district court could not impose more stringent effluent limitations than those contained in the FWPCA. *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1793-94 (1981). The Court held that the comprehensive character of an applicable federal statute suggests that it was intended as the exclusive source of federal law. *Id.* at 1793 n.14. Another justification for the denial of the remedy was the peculiar "inappropriateness" of invoking federal common law in the area of water pollution today. The Court felt that it lacked expertise to deal adequately with the existing "complex," "difficult" and "technical problems." *Id.* at 1796 (noting the lower court's conceded failure to fully understand this "arcane" subject matter). The Court, in *Middlesex County*, broadly characterized its prior holding: It stated that "the federal common law of nuisance" in the area of ocean water pollution had been "entirely pre-empted" by the FWPCA. 101 S. Ct. at 2627; *accord* *United States v. Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). Moreover, the MPRSA preempts federal common law in waters that are not covered by the FWPCA. 101 S. Ct. at 2627.

131. 101 S. Ct. at 2628-29 (Stevens, J., concurring in part and dissenting in part) (attributing the Court's holding to its concern for excessive litigation). The Court also relied on reports and debates concerning the citizen suit provision of the Clean Air Act (CAA), 42 U.S.C. § 7604 (1976), that served as a model for the similar provision in the FWPCA. 101 S. Ct. at 2625 n.27; *see* S. Rep. No. 414, 80th Cong., 2d Sess. 79, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3745. The reports indicate that members of Congress, concerned with burdening the judiciary, had rejected the availability of a damage remedy under the citizen suit provision of the CAA. 101 S. Ct. at 2625 n.27; *see* 116 Cong. Rec. 33,104 (1970) (statement of Sen. Hart) ("It will be the rare, rather than the ordinary person, I suspect, who, with no hope of

Stevens made explicit what was implicit in the majority opinion. He stated:

In recent years . . . a Court that is properly concerned about the burdens imposed on the Federal Judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen. . . . [R]ecently some Members of the Court have been inclined to deny relief with little more than a perfunctory nod to the *Cort v. Ash* factors. . . . Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention, that touchstone will further restrict the availability of private remedies.¹³²

II. THE CURRENT IMPLICATION APPROACH

A. *The Supreme Court*

The Court's current implication approach adopts the contours of the *Cort* analysis, yet substantially alters its application. Content has been added to each of the first two *Cort* factors, and these factors, once "relevant" to the implication analysis,¹³³ are now explicit requirements embodying specific presumptions against implication: The plaintiff is now required to carry the heavy burden of proving affirmative congressional intent to create an implied right.¹³⁴ The Court's current inquiry may be better understood as: (1) whether the statutory language is couched in broad prohibitory terms and directed at defendants' conduct so that the plaintiff is not one of the class for whose especial benefit the statute was enacted;¹³⁵ (2) whether there

financial gain and the very real prospect of financial loss, will initiate court action under this bill."'). The Court's concern with the prevention of a flood of litigation in the federal judiciary, however, does not have as much force in the context of its denial of the § 1983 remedy, because this remedy is limited to violations by "state officials, rather than all violators of federal statutes." *The 1980 Term, supra* note 130, at 298 n.67.

132. 101 S. Ct. at 2628-29 (Stevens, J., concurring in part and dissenting in part) (citations and footnotes omitted).

133. *Cort v. Ash*, 422 U.S. 66, 78 (1975); see *A New Direction for Implied Causes of Action, supra* note 24, at 508 & n.21 (arguing that the four factors in *Cort* were merely dicta, the application of which was not required in all implication analyses).

134. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 (1981); *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 778-81 (1981).

135. *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1580-81 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-73 (1981). *But see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623-25 (1981) (in

exists an express statutory enforcement provision or a "comprehensive" legislative scheme so that the omission of the implied remedy is deemed deliberate;¹³⁶ and (3) whether the legislative history is silent or ambiguous so that there is no evidence of affirmative legislative intent to create an implied remedy sufficient to rebut the above two presumptions against implication.¹³⁷ If all three inquiries are answered in the affirmative, the implied remedy will be denied.¹³⁸ Moreover, an implied remedy will be denied even if the first inquiry is answered in the negative and the plaintiff is, therefore, found to be one of the class for whose especial benefit the statute was enacted.¹³⁹

examining the especial benefit criterion, addressing only the presumption that where a statutory enforcement provision is contained in the legislative scheme, an implied remedy is deemed deliberately omitted); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 (1981) (not attaching significance to whether the language is broad or right, duty-creating).

136. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623, 2626-27 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 n.11, 2069 (1981); *California v. Sierra Club*, 101 S. Ct. 1775, 1780 n.6 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82, 1584 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 (1981). It is not entirely clear within which *Cort* factor the express enforcement provision presumption falls. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623-25 (1981) (within the especial benefit and language inquiry); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 n.11 (1981) (contained within a footnote at the end of the analysis); *California v. Sierra Club*, 101 S. Ct. 1775, 1780 & n.6 (1981) (within the second *Cort* factor); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 & n.24 (1981) (between the first and second *Cort* factors).

137. *See California v. Sierra Club*, 101 S. Ct. 1775, 1780-81 (1981) (congressional silence on the issue of an implied remedy proving dispositive to its denial); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1582 (1981) (same). The remarks of a single legislator are not sufficient evidence of legislative intent to imply a right. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 n.17 (1981). Furthermore, inconclusive or ambiguous passing reference by members of Congress is insufficient evidence of legislative intent to imply a right. *See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623-25 (1981); *id.* at 2629-33 (Stevens, J., concurring in part and dissenting in part); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 n.17 (1981).

138. *See California v. Sierra Club*, 101 S. Ct. 1775, 1779-80 & n.6 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1580-82 & n.30 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-73 & n.24, 783-84 (1981). In two cases, the Court did not pose the first current inquiry as restrictively as it did in the above cases but did restrictively apply the last two inquiries. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623-25 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 & n.11 (1981).

139. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 34 n.10 (1979) (White, J., dissenting); *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 437 (5th Cir. 1981); *see Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17, 24 (1979).

In light of the Court's frequent denial of the implied right over the past two years,¹⁴⁰ it is not clear what evidence of legislative intent will be deemed sufficient to support implication. The Court's language indicates, however, that a bifurcated approach has emerged: Whereas only one of the first two *Cort* factors need be disproven to deny the remedy, satisfaction of all four *Cort* factors is still required in order to obtain the remedy.¹⁴¹

B. *The Lower Federal Courts*

Although it is too early to fully assess the impact of the Supreme Court's implication analysis, recent decisions of the lower federal courts indicate that most are embracing the restrictive rulings,¹⁴² often rejecting precedent among the circuits which embraced a more expan-

140. See *supra* pts. I(B)-(C).

141. See *California v. Sierra Club*, 101 S. Ct. 1775, 1781 (1981) (the last two factors of the *Cort* test are "only of relevance, if the first two factors give indication of congressional intent to create the remedy"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 580 (1979) (Brennan, J., concurring) ("the remaining two *Cort* factors cannot by themselves be a basis for implying a private right of action"); *accord Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770-71 n.21 (1981) (citing *Touche Ross*). Consequently, not only is it unlikely that a plaintiff will be able to uncover and prove affirmative congressional intent to create an implied remedy, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2629 (1981) (Stevens, J., concurring in part and dissenting in part), but the plaintiff's case is made more burdensome by the requisite showing that the implied remedy will effectuate the purpose of the congressional scheme and the subject matter has not been an area traditionally relegated to the states. *But see Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436 (5th Cir. 1981) ("factors three and four . . . are considerably easier for a plaintiff to establish than the factors requiring proof of affirmative legislative intent to provide the relief sought").

142. Some areas in which the issue has arisen and implication has been denied are: securities, *e.g.*, *Gilman v. Federal Deposit Ins. Corp.*, 660 F.2d 688 (6th Cir. 1981) (§ 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g (1976)); *Picard v. Wall St. Discount Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,364 (S.D.N.Y. Nov. 24, 1981) (§ 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f (1976)); *First Ala. Bancshares, Inc. v. Lowder*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,015 (N.D. Ala. May 1, 1981) (§ 7(f)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78g(f)(1) (1976), and Regulation U, 12 C.F.R. § 222.1(a) (1981)); *Hill v. Der*, 521 F. Supp. 1370 (D. Del. 1981) (§ 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976)); *Colman v. D.H. Blair & Co.*, 521 F. Supp. 646 (S.D.N.Y. 1981) (§§ 6(b)(5), (6), 15A(b)(6), (7) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f(b)(5), (6), 780-3(b)(6), (7) (1976)); *Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981) (supplemental opinion) (Commodity Exchange Act, 7 U.S.C. §§ 1-22 (1976 & Supp. IV 1980)); *Walsh v. International Precious Metals Corp.*, 510 F. Supp. 867 (D. Utah 1981) (Commodity Exchange Act, 7 U.S.C. § 6b (1976)); *Berman v. Metzger*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,857 (D.D.C. Feb. 9, 1981) (§ 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1976 & Supp. IV 1980)), civil rights, *e.g.*, *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981) (§ 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. III 1979)); *Lieberman v. University of Chicago*, 660

sive implication analysis.¹⁴³ Nevertheless, a number of decisions raise serious questions with respect to whether or not the Supreme Court has provided sufficient guidance in this area.

F.2d 1185 (7th Cir. 1981) (Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976)); *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2d Cir. 1981) (§ 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. III 1979)); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981) (same), *petition for cert. filed*, 50 U.S.L.W. 3404 (U.S. Nov. 6, 1981) (No. 81-850); *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980) (compensatory relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976)), *cert. granted*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982) (No. 81-431); *Brown v. American Home Prods. Corp.*, 520 F. Supp. 1120 (D. Kan. 1981) (§ 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a) (1976 & Supp. III 1979)); *Dopico v. Goldschmidt*, 518 F. Supp. 1161 (S.D.N.Y. 1981) (§ 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. III 1979), and § 16 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612 (1976 & Supp. III 1979)); *Meyerson v. Arizona*, 507 F. Supp. 859 (D. Ariz. 1981) (same); *Lyon v. Temple Univ.*, 507 F. Supp. 471 (E.D. Pa. 1981) (Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976)); *Jones v. Illinois Dept. of Rehabilitation Servs.*, 504 F. Supp. 1244 (N.D. Ill. 1981) (Title I of the Rehabilitation Act of 1973, §§ 120-131, 29 U.S.C. §§ 720-751 (1976 & Supp. III 1979)), labor, e.g., *Daniel v. Peick*, No. 74 C 2865 (N.D. Ill. Oct. 5, 1981) (§ 302(c)(5) of the National Labor Relations Act, 29 U.S.C. § 186(c)(5) (1976 & Supp. II 1978)); *Quiroga v. Lawrence & Ahlman, Inc.*, No. 78 C 208 (N.D. Ill. Sept. 1, 1981) (Davis-Bacon Act, 40 U.S.C. § 276a (1976)), aviation, e.g., *Griner v. Dugan*, 3 Av. L. Rep. (CCH) ¶ 741 (S.D.N.Y. Sept. 8, 1981) (federal aviation regulation 575 under the Federal Aviation Act, 14 C.F.R. 121.575 (1981)), housing, e.g., *Perry v. Housing Auth.*, 664 F.2d 1210 (4th Cir. 1981) (United States Housing Act of 1937, 42 U.S.C. §§ 1401, 1437(d), 1441, 1441(a) (1976) (amended 1979)), environmental protection, e.g., *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894 (2d Cir. 1981) (§§ 4 and 15 of the Federal Hazardous Substances Act, 15 U.S.C. §§ 1263, 1274 (1976) (amended 1979)); *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434 (5th Cir. 1981) (§ 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976)); *Gunnells v. United States*, 514 F. Supp. 754 (S.D.W. Va. 1981) (§ 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (1976), and the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1976 & Supp. II 1978)), and various other areas. E.g., *McCabe v. City of Eureka*, 664 F.2d 680 (8th Cir. 1981) (§ 1674(a) of the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976)); *Miscellaneous Serv. Workers, Teamsters Local 427 v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981) (§ 4(c) of the Service Contract Act of 1965, 41 U.S.C. § 351(c) (1976)); *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981) (§§ 18 and 18(b)(3) of the Shipping Act, 46 U.S.C. §§ 817, 817(b)(3) (1976 & Supp. III 1979)); *National Treasury Employees' Union v. Campbell*, 654 F.2d 784 (D.C. Cir. 1981) (Treasury, Postal Service, and General Appropriations Act, 18 U.S.C. § 1913 (1976)).

143. E.g., *McCabe v. City of Eureka*, 664 F.2d 680, 682 (8th Cir. 1981); *Perry v. Housing Auth.*, 664 F.2d 1210, 1215-16 (4th Cir. 1981); *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992, 994-95 (4th Cir. 1981); *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 121 & nn. 2-3 (2d Cir. 1981); *Simon v. St. Louis County*, 656 F.2d 316, 319 n.5 (8th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3404 (U.S. Nov. 17, 1981) (No. 81-850); *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 853 (2d Cir. 1981); *Picard v. Wall St. Discount Corp.*, [Current] Fed.

1. Adherence to the Court's Current Implication Analysis

Various courts, applying aspects of the current standard to a particular statute, often reach differing conclusions.¹⁴⁴ For example, controversy has centered around the Commodities Exchange Act as amended in 1974,¹⁴⁵ section 13(d) of the Securities Exchange Act of 1934,¹⁴⁶ section 17(a) of the Securities Act of 1933¹⁴⁷ and, in the civil

Sec. L. Rep. (CCH) ¶ 98,364, at 92,224 (S.D.N.Y. Nov. 24, 1981); Goodweather v. Thompson & McKinnon Auchincloss Kohlmeyer, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,352, at 92,187 (N.D. Ohio Nov. 16, 1981); Daniel v. Peick, No. 74 C 2865, slip op. at 14-15 (N.D. Ill. Oct. 5, 1981); Hill v. Der, 521 F. Supp. 1370, 1374 (D. Del. 1981); Griner v. Dugan, 3 Av. L. Rep. (CCH) ¶ 741, at 17,843-44 (S.D.N.Y. Sept. 8, 1981); Quiroga v. Lawrence & Ahlman, Inc., No. 78 C 208, slip op. at 6-7 (N.D. Ill. Sept. 1, 1981); Automatic Catering, Inc. v. First Multifund for Daily Income, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,254, at 91,662 (S.D.N.Y. Aug. 3, 1981); Colman v. D.H. Blair & Co., 521 F. Supp. 646, 650-53 (S.D.N.Y. 1981); Brown v. American Home Prods. Corp., 520 F. Supp. 1120, 1123 (D. Kan. 1981); Helton v. Bache, Halsey, Stuart and Shields, Inc., No. 80 C 6506, slip op. at 5-6 (N.D. Ill. July 31, 1981); First Alabama Bancshares, Inc. v. Lowder, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,015, at 91,257-58 (N.D. Ala. May 1, 1981); Paine, Webber, Jackson & Curtis, Inc. v. Conaway, 515 F. Supp. 202, 209 (N.D. Ala. 1981) (supplemental opinion); De La Fuente v. Stokely-Van Camp, Inc., 514 F. Supp. 68, 77 (C.D. Ill. 1981); Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 869-71 (D. Utah 1981); Meyerson v. Arizona, 507 F. Supp. 859, 861 (D. Ariz. 1981); Berman v. Metzger, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,857, at 90,293-95 (D.D.C. Feb. 9, 1981); Savino v. E.F. Hutton & Co., 507 F. Supp. 1225, 1233 n.6 (S.D.N.Y. 1981).

144. In construing § 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. III 1979), for instance, courts disagree with respect to the results of the especial benefit inquiry. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861, 863-67 (9th Cir. 1981) (denying an implied right; finding that the especial benefit criterion was met); Davis v. Modine Mfg. Co., 526 F. Supp. 943, 949, 954 (D. Kan. 1981) (finding an implied right; finding that the especial benefit criterion was met); Brown v. American Home Prods. Corp., 520 F. Supp. 1120, 1123, 1125 (D. Kan. 1981) (denying an implied right; finding that the especial benefit test was met); Biltz v. Northwest Orient Airlines, Inc., No. 4-80-424, slip op. at 5-7 (D. Minn. Aug. 5, 1981) (denying an implied right; finding that the especial benefit criterion was not met); Meyerson v. Arizona, 507 F. Supp. 859, 861 (D. Ariz. 1981) (same).

145. 7 U.S.C. § 6b (1976), construed in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980) (implied right exists), *cert. granted sub nom.* New York Mercantile Exch. v. *Leist*, 101 S. Ct. 1346 (1981); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980) (same), *cert. granted*, 101 S. Ct. 1971 (1981); Paine, Webber, Jackson & Curtis, Inc. v. Conaway, 515 F. Supp. 202 (N.D. Ala. 1981) (supplemental opinion) (no implied right); Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 869-71 (D. Utah 1981) (same); Christensen Hatch Farms, Inc. v. Peavey Co., 505 F. Supp. 903 (D. Minn. 1981) (implied right exists).

146. 15 U.S.C. § 73m(d) (1976 & Supp. IV 1980), construed in *Spencer Cos. v. Agency Rent-A-Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,301 (D. Mass. Sept. 21, 1981) (private right exists for injunctive relief); Berman v. Metzger, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,857 (D.D.C. Feb. 9, 1981) (no implied right to damages exists because recent Supreme Court decisions compel this result).

rights area, section 503 of the Rehabilitation Act of 1973.¹⁴⁶ The most apparent difficulty is manifested in the courts' inconsistent conclusions with respect to whether particular legislative history supports a finding of congressional intent.¹⁴⁹ The courts frequently divide with respect to their interpretation of, and the weight to be afforded, committee reports and remarks by members of Congress. In construing the legislative history of section 503 of the Rehabilitation Act of 1973,¹⁵⁰ for example, the courts' differing views are manifested in their widely varying characterizations of the legislative history as: "silent,"¹⁵¹ "insufficient,"¹⁵² "a slender reed [that] when combined with other evidence [evinces] intent,"¹⁵³ and "replete."¹⁵⁴ These deci-

147. 15 U.S.C. § 77q(a) (1976), *construed in* Goodweather v. Thompson & McKinnon Auchincloss Kohlmeyer, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,352 (N.D. Ohio Nov. 16, 1981) (no implied right); Hill v. Der, 521 F. Supp. 1370 (D. Del. 1981) (same); Automatic Catering, Inc. v. First Multifund for Daily Income, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,254 (S.D.N.Y. Aug. 3, 1981) (implied right exists); Savino v. E.F. Hutton & Co., 507 F. Supp. 1225 (S.D.N.Y. 1981) (same).

148. 29 U.S.C. § 793 (1976 & Supp. III 1979), *construed in* Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981) (no implied right); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981) (same); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981) (same), *petition for cert. filed*, 50 U.S.L.W. 3404 (U.S. Nov. 17, 1981) (No. 81-850); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir.) (same), *cert. denied*, 449 U.S. 889 (1980); Davis v. Modine Mfg. Co., 526 F. Supp. 943 (D. Kan. 1981) (implied right exists); Brown v. American Home Prods. Corp., 520 F. Supp. 1120 (D. Kan. 1981) (no implied right); Biltz v. Northwest Orient Airlines, Inc., No. 4-80-424 (D. Minn. Aug. 6, 1981) (same); Meyerson v. Arizona, 507 F. Supp. 859 (D. Ariz. 1981) (same); *cf.* Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981) (no implied right for damages under Title IX of the Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a) (1976)); Montgomery Improvement Ass'n v. United States Dep't of H.U.D., 645 F.2d 291 (5th Cir. 1981) (an implied right for injunctive relief exists under Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976)); Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980) (no implied right to compensatory relief under Title VI), *cert. denied*, 101 S. Ct. 3083 (1981); Strong v. Demopolis City Bd. of Educ., 515 F. Supp. 730 (S.D. Ala. 1981) (implied right to injunctive relief recognized by the Supreme Court in *Cannon* extends to faculty members); Yakin v. University of Ill., 508 F. Supp. 848 (N.D. Ill. 1981) (implied private right exists under Title VI).

149. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861, 862 (9th Cir. 1981); *id.* at 868 n.2 (Fletcher, J., concurring in part and dissenting in part); Davis v. Modine Mfg. Co., 526 F. Supp. 943, 949-53 (D. Kan. 1981); Brown v. American Home Prods. Corp., 520 F. Supp. 1120, 1123-25 (D. Kan. 1981); Biltz v. Northwest Airlines, Inc., No. 4-80-424, slip op. at 6-7 (D. Minn. Aug. 5, 1981); Meyerson v. Arizona, 507 F. Supp. 859, 860 (D. Ariz. 1981).

150. 29 U.S.C. § 793 (1976 & Supp. III 1979).

151. Brown v. American Home Prods. Corp., 520 F. Supp. 1120, 1125 (D. Kan. 1981); Meyerson v. Arizona, 507 F. Supp. 859, 861 (D. Ariz. 1981).

152. Fisher v. City of Tucson, 663 F.2d 861, 862 (9th Cir. 1981); *see* Biltz v. Northwest Orient Airlines, Inc., No. 4-80-424, slip op. at 6 (D. Minn. Aug. 5, 1981) ("no express indication in the legislative history").

153. Davis v. Modine Mfg. Co., 526 F. Supp. 943, 951 (D. Kan. 1981).

sions, therefore, reflect uncertainties in implication and reveal the diaphanous nature of the Court's exclusive requirement: legislative intent.¹⁵⁵

2. Resistance to the Court

Patterns of discord have emerged between the approaches of lower federal courts and that of the Supreme Court.¹⁵⁶ Many lower courts continue to apply the *Cort* and *Cannon* analyses. The failure of these courts to adhere to presumptions implicit in the Supreme Court's

154. *Fisher v. City of Tucson*, 663 F.2d 861, 868 n.2 (9th Cir. 1981) (Fletcher, J., concurring in part and dissenting in part).

155. *Miscellaneous Serv. Workers, Teamsters Local 427 v. Philco-Ford Corp.*, 661 F.2d 776, 781 (9th Cir. 1981) (stating that the "prevailing view is against implications . . . except where ineluctable inferences arise from the Act" (emphasis in original)); *Lieberman v. University of Chicago*, 660 F.2d 1185, 1193 (7th Cir. 1981) (stating that the "task of determining Congress' intent [is a] delphic task [and] can best be analogized to the medieval practice of counting angels on the head of a pin"); *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 127 (2d Cir. 1981) (stating "that the glass through which we see is by no means crystal clear but is so cloudy as to be barely translucent"). The inadequacy of this analysis has caused one commentator to note that it is unclear "[w]hether there is such a thing as a discoverable legislative intent . . . The controversy has centered principally over the relevance and competence of legislative history materials in ascertaining legislative intent as well as the weight which should be accorded them. The Supreme Court not infrequently divides as to what is shown by or may be implied from legislative history." *The Phenomenon of Implied Private Actions*, *supra* note 32, at 443-44 (quoting G. Folsom, *Legislative History* 7-8 (1972)).

156. A number of lower courts have recently found implied rights. *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399 (6th Cir. Dec. 23, 1981) (injunctive relief under § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1976)), *cert. denied*, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982); *Montgomery Improvement Ass'n v. United States Dep't of H.U.D.*, 645 F.2d 291 (5th Cir. 1981) (declaratory and injunctive relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and the Housing and Community Development Act of 1974, 88 Stat. 633 (codified in scattered sections of 5, 20, 40, 42 & 49 U.S.C.)); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981) (§ 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1981)), *petition for cert. filed*, 50 U.S.L.W. 3319 (U.S. Oct. 9, 1981) (No. 81-680); *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980) (Commodity Exchange Act, as amended in 1974, 7 U.S.C. § 6b(A), (C) (1976)), *cert. granted sub nom. New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980) (same), *cert. granted*, 101 S. Ct. 1971 (1981); *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943 (D. Kan. 1981) (§§ 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793 (a), (b), 794 (1976 & Supp. III 1979)); *Spencer Cos. v. Agency Rent-A-Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,301 (D. Mass. Sept. 21, 1981) (injunctive relief under § 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1976 & Supp. IV 1980)); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981) (§§ 111, 132, 133(a) and 135 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6010, 6062, 6063(a), 6065 (1976 & Supp. III 1979)); *Saunders v. Oppenheimer Gov't*

current standard stems from possible oversight or express rejection.¹⁵⁷ This dissonance is most apparent in frequent, continued application of all four *Cort* factors.¹⁵⁸

Certain aspects of the Court's current standard have caused especial difficulty and dissension. Some courts are oblivious to the currently required burden of proof that the plaintiff establish affirmative congressional intent to create an implied remedy. Instead, they apply a presumption, implicitly rejected by the Court, that favors implication and which is rebuttable only by congressional intent to exclude the remedy.¹⁵⁹

Sec., Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,318 (D. Or. Aug. 17, 1981) (§ 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and SEC rule 10b-16, 17 C.F.R. § 240.10b-16 (1981)); *Automatic Catering, Inc. v. First Multifund for Daily Income, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,254 (S.D.N.Y. Aug. 3, 1981) (§ 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q (1976)); *Strong v. Demopolis City Bd. of Educ.*, 515 F. Supp. 730 (S.D. Ala. 1981) (Title IX of the Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a) (1976), extended to faculty members); *United States v. FMC Corp.*, 514 F. Supp. 1166 (E.D. Pa. 1981) (Patent Act, 35 U.S.C. § 135(c) (1976)); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294 (D. Del. 1981) (injunctive relief under § 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(m)(e)(1) (1976), and SEC rule 13e-1, 17 C.F.R. § 240.13e-1 (1981)); *Yakin v. University of Ill.*, 508 F. Supp. 848 (N.D. Ill. 1981) (Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976)); *Haynes v. Anderson & Strudwick, Inc.*, 508 F. Supp. 1303 (E.D. Va. 1981) (rule 10b-16, 17 C.F.R. § 240.10b-16 (1981)); *Rich v. New York Stock Exchange, Inc.*, 509 F. Supp. 87 (S.D.N.Y. 1981) (§ 6(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(b) (1976)); *Savino v. E.F. Hutton & Co.*, 507 F. Supp. 1225 (S.D.N.Y. 1981) (§ 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976)); *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903 (D. Minn. 1981) (Commodities Exchange Act, 7 U.S.C. § 6b(A), (C) (1976)).

157. *See, e.g.*, *McCabe v. City of Eureka*, 664 F.2d 680, 684-85 (8th Cir. 1981) (Heaney, J., dissenting); *Leist v. Simplot*, 638 F.2d 283, 313 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Automatic Catering, Inc. v. First Multifund for Daily Income, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,254, at 91,662 (S.D.N.Y. Aug. 3, 1981); *United States v. FMC Corp.*, 514 F. Supp. 1166, 1169 n.7 (E.D. Pa. 1981).

158. *See, e.g.*, *McCabe v. City of Eureka*, 664 F.2d 680, 681-83 (8th Cir. 1981); *Perry v. Housing Auth. of Charleston*, 664 F.2d 1210, 1212-17 (4th Cir. 1981); *Fisher v. City of Tucson*, 663 F.2d 861, 863-67 (9th Cir. 1981); *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 437-39 (5th Cir. 1981); *Simpson v. Cleland*, 640 F.2d 1354, 1359-60 (D.C. Cir. 1981); *United States v. City of Philadelphia*, 644 F.2d 187, 194-99 (3d Cir. 1980); *Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1171-74 (S.D.N.Y. 1981); *City of Philadelphia v. Pennsylvania*, 508 F. Supp. 211, 214-16 (E.D. Pa. 1981).

159. *Brown v. American Home Prods. Corp.*, 520 F. Supp. 1120, 1125 (D. Kan. 1981); *Yakin v. University of Ill.*, 508 F. Supp. 848, 851 (N.D. Ill. 1981); *see Leist v. Simplot*, 638 F.2d 283, 303 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981).

Several courts reject or criticize the application of the *expressio unius* doctrine,¹⁶⁰ while others merely fail to apply it.¹⁶¹ Furthermore, a few courts, despite the existence of statutory language that is not right- or duty-creating, fail to adopt the Court's presumption against implication,¹⁶² or emphasize policy considerations¹⁶³ to support a finding that the especial benefit requirement has been met.

In contrast, the Ninth Circuit recently seized the initiative and imposed a heavier presumption against implication when an affirmative action law is at issue.¹⁶⁴ Despite the Supreme Court's finding of an implied right under Title IX of the Civil Rights Act,¹⁶⁵ the Ninth Circuit reasoned that an implied right under an affirmative action law would be too difficult to administer: The issue raised difficult questions with respect to who would be sued and whether a court order compelling compliance would be more appropriate than personal relief.¹⁶⁶

Two recent cases best demonstrate the confusion and frustration resulting from some lower courts' attempts to apply the Supreme Court's standard. The Fourth Circuit acknowledged a "difficult jurisprudential problem" in determining whether to follow "venerable" and "analogous" Supreme Court precedent, "when *Cort v. Ash* and its progeny compel a contrary result."¹⁶⁷ A district court in Kansas, apparently unable to reconcile the current restrictive standard with federal policy towards handicapped persons, proposed an alternative standard that is more expansive than the Supreme Court's approach.

160. *McCabe v. City of Eureka*, 664 F.2d 680, 684-85 (8th Cir. 1981) (Heaney, J., dissenting); see *Leist v. Simplot*, 638 F.2d 283, 313 (2d Cir. 1980), cert. granted sub nom. *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Automatic Catering, Inc. v. First Multifund for Daily Income, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,254, at 91,662 (S.D.N.Y. Aug. 3, 1981); *United States v. FMC Corp.*, 514 F. Supp. 1166, 1169 n.7 (E.D. Pa. 1981).

161. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 541-43 (5th Cir. 1981), petition for cert. filed, 50 U.S.L.W. 3319 (U.S. Oct. 9, 1981) (No. 81-680); *Saunders v. Oppenheimer Gov't Sec., Inc.*, [Current] Fed. Sec. L. Rep. ¶ 98,318, at 91,975 (D. Or. Aug. 17, 1981); *Haynes v. Anderson & Strudwick, Inc.*, 508 F. Supp. 1303, 1319-21 (E.D. Va. 1981).

162. *Leist v. Simplot*, 638 F.2d 283, 318 (2d Cir. 1980), cert. granted sub nom. *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 300-01 (D. Del. 1981); *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903, 909 (D. Minn. 1981).

163. *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399, at 92,395 (6th Cir. Dec. 23, 1981), cert. denied, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982); *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943, 949 (D. Kan. 1981).

164. *Fisher v. City of Tucson*, 663 F.2d 861, 865 (9th Cir. 1981).

165. *Cannon v. University of Chicago*, 441 U.S. 677 (1979); see *supra* notes 42-48 and accompanying text.

166. *Fisher v. City of Tucson*, 663 F.2d 861, 865 (9th Cir. 1981).

167. *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992, 994-95 (4th Cir. 1981).

It suggested instituting a presumption in favor of implication when the legislative purpose clearly is "to provide a course of conduct or duty by someone against another."¹⁶⁸

3. Unresolved Issues

Unresolved issues—which the Justices of the Supreme Court expressly left open, disagreed on, or only addressed in early implication decisions that involved more expansive analyses—have caused recurring difficulty in the lower federal courts. The first of these issues is the question of what findings are sufficient to support an implied private right of action.¹⁶⁹ Despite the Supreme Court's failure to expressly or implicitly address the necessary findings since *Cannon*,¹⁷⁰ some courts have mechanically required the satisfaction of all four *Cort* factors.¹⁷¹ The Fifth Circuit, however, has determined that in finding the existence of an implied private right, it is "unnecessary" to consider factors three and four.¹⁷² Given the tenor of the Supreme Court's current analysis, it is unlikely that it would embrace this lenient approach.

The monetary nature of the relief sought has been a factor militating against implication in some decisions.¹⁷³ These courts have denied an implied private right for damages despite Supreme Court precedent that implied a right for injunctive relief under the same

168. *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943, 956 (D. Kan. 1981).

169. See *supra* notes 140-41 and accompanying text.

170. *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (implying a private right of action based on a finding of the presence of all four *Cort* factors); see *supra* notes 44-45, 140-41 and accompanying text.

171. *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399, at 92,394-97 (6th Cir. Dec. 23, 1981), *cert. denied*, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982); *Leist v. Simplot*, 638 F.2d 283, 318-22 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943, 948-54 (D. Kan. 1981); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 300-01 (D. Del. 1981); *Yakin v. University of Ill.*, 508 F. Supp. 848, 851-53 (N.D. Ill. 1981); *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903, 909-10 (D. Minn. 1981).

172. *Montgomery Improvement Ass'n v. United States Dep't of H.U.D.*, 645 F.2d 291, 297 (5th Cir. 1981). The court did, however, briefly discuss these factors. *Id.*

173. *Lieberman v. University of Chicago*, 660 F.2d 1185, 1186-88 (7th Cir. 1981); *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 255-63 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982) (No. 81-431); *Haggiag v. Blum, No. Civ. 4872*, slip op. at 8-11 (S.D.N.Y. June 26, 1981); *De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 78 (C.D. Ill. 1981); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 299-300, 301 (D. Del. 1981); see *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399, at 92,393, 92,396, 92,397-98 (6th Cir. Dec. 23, 1981), *cert. denied*, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982); *Berman v. Metzger*, [1981 Transfer Binder] Fed. Sec. L. Rep. ¶ 97,857, at 90,293-94 (D.D.C. Feb. 9, 1981).

statutory provision.¹⁷⁴ This result, however, is not free from doubt: Some judges have rejected the necessity of this distinction,¹⁷⁵ while the Third Circuit curiously reached an opposite conclusion. Imposing common-law requirements on an implied statutory remedy, the circuit court adopted a more stringent test when the "extraordinary" remedy of injunctive relief is sought.¹⁷⁶

Also unsettled is the weight to be afforded dicta in *Cannon* and *Touche Ross* suggesting that long-standing federal court precedent uniformly recognizing an implied right should weigh in favor of

174. *E.g.*, *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (denying an implied right for damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976), despite the Supreme Court's implying a right to injunctive relief under that provision in *Cannon*). Interestingly, another court found an implied action for injunctive relief under § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1976), *Mobil Corp. v. Marathon Oil Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,399, at 92,399-400 (6th Cir. Dec. 23, 1981), *cert. denied*, 50 U.S.L.W. 3650 (U.S. Feb. 23, 1982), despite Supreme Court precedent denying the right to damage relief under the same statutory provision. *See Piper v. Chris-Craft, Inc.*, 430 U.S. 1 (1977). In *Lieberman*, a divided court denied a plaintiff a damage remedy under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976). 660 F.2d at 1187-88. The *Cannon* Court had not expressly limited its holding to situations where a plaintiff seeks only equitable relief. In fact, the Court had stated that a successful plaintiff may receive an award of attorney's fees. *Cannon v. University of Chicago*, 441 U.S. 677, 685-89 (1979). In denying the damage remedy in *Lieberman*, the court relied on the reasoning in the Supreme Court's recent decision in *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531 (1981), because it "provided guidelines for construing implied rights and remedies in the context of funding legislation." 660 F.2d at 1187. The Seventh Circuit apparently created a distinction between implication analyses under federal legislation enacted pursuant to the commerce power as opposed to analysis under legislation enacted pursuant to the spending power. The Court reasoned that an implied right to damage relief under Title IX of the Education Amendments would impose financial liability upon institutions that had not knowingly accepted such liability as a condition of federal aid. *Id.* at 1187-88. *Pennhurst*, however, expressly did not reach the issue of a private remedy but merely held that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1976), did not create any substantive rights in the mentally disabled. 101 S. Ct. at 1545 n.21. Therefore, the Seventh Circuit's reliance on *Pennhurst* as indicating the proper mode of implication analysis was criticized by the dissent as misplaced. 660 F.2d at 1190 (Swygert, J., dissenting); *cf. Miener v. Missouri*, No. 80-1791, slip op. at 8-9 n.4 (8th Cir. Feb. 4, 1982) ("the analysis in *Pennhurst* is simply irrelevant to determining a . . . cause of action [under § 504 of the Rehabilitation Act of 1973]").

175. *Lieberman v. University of Chicago*, 660 F.2d 1185, 1189-95 (7th Cir. 1981) (Swygert, J., dissenting); *National Treasury Employees' Union v. Campbell*, 654 F.2d 784, 790 n.6 (D.C. Cir. 1981); *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 273-75 (2d Cir. 1980) (Coffrin, J., concurring), *cert. granted*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982) (No. 81-431).

176. *United States v. City of Philadelphia*, 644 F.2d 187, 191 n.1 (3d Cir. 1980); *see United States v. FMC Corp.*, 514 F. Supp. 1166, 1172 (E.D. Pa. 1981).

implication.¹⁷⁷ Recognizing the import of such precedent in a particular circumstance, the Second Circuit in *Leist v. Simplot*¹⁷⁸ and the Sixth Circuit in *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*¹⁷⁹ found an implied right under the Commodity Exchange Act, which had been amended in 1974.¹⁸⁰ Each circuit relied heavily on precedent prior to the amendment which had uniformly found an implied right.¹⁸¹ They held that congressional silence when amending federal statutes indicates sub silentio approval of the implied right recognized by federal courts under the original legislation.¹⁸² This approach significantly alters the current burden of proof: The burden is placed on the defendant to establish that congressional silence indicates an intent to repeal the previously recognized right.¹⁸³ The federal courts that have addressed this issue, however, have disagreed as to whether this is a relevant factor to be considered and, in addition, what weight it should be accorded.¹⁸⁴ Although it is doubtful that the Supreme Court will rely on this factor to the same extent as the Second and Sixth Circuits, the Court should treat uniform judicial recognition of an implied right under a statute prior to its amendment as weighing in favor of implication. Consideration of this factor represents a practical and considered approach to construing congressional silence. Moreover, this approach encourages courts to adhere to judicial precedent and thus, at the very least, promotes consistency in the law.

177. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.19 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979).

178. 638 F.2d 283 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981).

179. 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

180. 7 U.S.C. § 6b(A), (C) (1976), *construed in Leist v. Simplot*, 638 F.2d 283, 302-22 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 236-37 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

181. *Leist v. Simplot*, 638 F.2d 283, 302-22 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230-36 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

182. *Leist v. Simplot*, 638 F.2d 283, 302-22 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230-36 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981); *see Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 209-10 (N.D. Ala. 1981) (supplemental opinion); *Walsh v. International Precious Metals Corp.*, 510 F. Supp. 867, 869-71 (D. Utah 1981); *Yakin v. University of Ill.*, 508 F. Supp. 848, 852-53 (N.D. Ill. 1981); *Rich v. New York Stock Exch., Inc.*, 509 F. Supp. 87, 87-89 (S.D.N.Y. 1981); *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903, 910 (D. Minn. 1981).

183. *Leist v. Simplot*, 638 F.2d 283, 303 (2d Cir. 1980), *cert. granted sub nom.* *New York Mercantile Exch. v. Leist*, 101 S. Ct. 1346 (1981).

184. *Id.* at 302-22 (great weight); *id.* at 323-56 (Mansfield, J., dissenting) (no

III. THE COURT'S CONCERNS

The dissonance evident in the lower courts results from their obligation to apply the Supreme Court's sometimes uncertain precedent.¹⁸⁵ The Supreme Court, on the other hand, may abandon its precedent for perceived changes in policy.¹⁸⁶ The Court's departure from *Cort*, therefore, can best be understood by examining the policies underlying the new restrictiveness.

A. Burdens on the Judiciary

Underlying the Court's frequent denial of implied private rights of action is its often expressed concern with preventing a potential surge of lawsuits in the already clogged federal judiciary.¹⁸⁷ This concern is

weight); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230-36 (6th Cir. 1980) (great weight), *cert. granted*, 101 S. Ct. 1971 (1981); *id.* at 237 (Phillips, J., concurring in part and dissenting in part) (no weight); *Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 209-10 (N.D. Ala. 1981) (supplemental opinion) (no weight); *Walsh v. International Precious Metals Corp.*, 510 F. Supp. 867, 869-71 (D. Utah 1981) (no weight); *Rich v. New York Stock Exch., Inc.*, 509 F. Supp. 87, 87-89 (S.D.N.Y. 1981) (great weight); *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903, 910 (D. Minn. 1981) (great weight); *see also Yakin v. University of Ill.*, 508 F. Supp. 348, 852-53 (N.D. Ill. 1981) (although a legislative amendment was not at issue, the court gave great weight to long-standing judicial recognition of an implied right).

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

186. *See, e.g., R. McCloskey, Principles, Powers, and Values*, in *The Modern Supreme Court* 290, 308 (1972); H. Spaeth, *Supreme Court Policy Making* (1979).

187. *McCabe v. City of Eureka*, 664 F.2d 680, 686 (8th Cir. 1981) (Heaney, J., dissenting); Hazen, *supra* note 4, at 1342-43, 1380, 1384; Pillai, *supra* note 30, at 38; *The Phenomenon of Implied Private Actions*, *supra* note 32, at 447. This concern has been expressed in prior implication cases. *Carlson v. Green*, 446 U.S. 14, 35-36 (1980) (Rehnquist, J., dissenting); *Cannon v. University of Chicago*, 441 U.S. 677, 741, 747 (1979) (Powell, J., dissenting); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting); *see Bartels, Recent Expansion in Federal Court Jurisdiction: A Call for Restraint*, 55 St. John's L. Rev. 219, 226, 231, 238-39 (1981); *cf. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2625 n.27 (1981) (citing concern in Congress); *Maine v. Thiboutot*, 448 U.S. 1, 23 (1980) (Powell, J., dissenting) (under 42 U.S.C. § 1983 (1976) (amended 1979)). *But see Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) (no evidence that Title VI litigation has been so voluminous as to unduly burden the courts); *cf. Davis v. Passman*, 442 U.S. 228, 248 (1979) (not only is a burden unlikely in constitutional implication cases, but a burden would not warrant closing the courthouse doors to these claims); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 391 & n.4 (1971) (burden is unlikely in constitutional implication cases); *id.* at 410-11 (Harlan, J., concurring) (burden is unlikely and does not warrant closing the courthouse door to constitutional implication claims). Some Justices have remarked on the frequency of having been presented the implication question in recent years. *E.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2622 &

particularly manifested in the presumption imposed in the "especial class" requirement.¹⁸⁸ If the law afforded a cause of action to any individual who was adversely affected by statutory violations and who met the minimal requirements of standing,¹⁸⁹ implication litigation would crowd the Court's docket.

The reluctance to find that the "especial benefit" criterion has been satisfied may be a response to the expansion of the concept of standing in the last decade.¹⁹⁰ *Sierra Club v. Morton*¹⁹¹ established that inju-

n.21 (1981) (Powell, J.); *id.* at 2627 & n.1 (Stevens, J., concurring in part and dissenting in part); *Kissinger v. Reporters Comm.*, 445 U.S. 136, 148 (1980) (Rehnquist, J.); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562 (1979) (Rehnquist, J.). Moreover, some Justices' greater willingness to afford an implied right to injunctive relief than an implied right to damages is based on their suggestion that a litigant may be less likely to bring suit if he has no expectation of monetary recovery, but is limited to injunctive relief. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2625 n.27 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 737-38 (1979) (Powell, J., dissenting). Other Justices suggest that assessing damages shades into policy-making to a greater extent than does affording injunctive relief. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-24 (1979); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting).

188. *See supra* note 135 and accompanying text. Statutes couched in terms of broadly-worded prohibitions weigh against implication. *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1580-81 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-73 (1981); *Kissinger v. Reporters Comm.*, 445 U.S. 136, 148-49 (1980); *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

189. *McCabe v. City of Eureka*, 664 F.2d 680, 686 (8th Cir. 1981) (Heaney, J., dissenting). In determining whether a party has standing, the basic inquiry is "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

190. *The Phenomenon of Implied Private Actions*, *supra* note 32, at 447. The Court's expansion of the concept of standing in recent years has been most apparent in the area of environmental protection. *See United States v. SCRAP*, 412 U.S. 669, 688-89 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 731-34 (1972); *cf. Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 73 (1978) (standing to challenge the constitutionality of an act limiting liability for nuclear accident when only some of the "immediate" adverse effects" were found to have harmed appellees). In *Middlesex County*, the Court, construing § 505(g) of the FWPCA, 33 U.S.C. § 1365(g) (1976), which defined "citizen" as "a person or persons having an interest which is or may be adversely affected," 101 S. Ct. at 2624, relied on a Senate report which indicated that Congress intended this phrase to allow all persons possessing standing under the Court's decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972), to bring suit under the citizen suit provision of the FWPCA, § 505(a), 33 U.S.C. § 1365(a) (1976). *See S. Conf. Rep. No. 1236*, 92d Cong., 2d Sess. 146, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3776, 3823. The Court noted that "[t]his broad category of potential plaintiffs necessarily includes both plaintiffs . . . whose injuries are 'non-economic' and probably noncompensable, and persons . . . who assert that they have suffered tangible economic injuries because of statutory violations." 101 S. Ct. at 2624. In fact, certain judges are carelessly employing the term standing

ries to noneconomic, aesthetic and purely environmental interests are sufficient to confer standing, even though the interests may not be unique to the litigant but are shared by the public.¹⁹² Furthermore, the Court has conferred standing even where pleadings revealed an "attenuated line of causation to the eventual injury."¹⁹³ The expansion of standing is offset by the restrictive application of the especial benefit criterion.¹⁹⁴ The Court's concern, however, is not justified;

when addressing the issue of implied private remedies. *See, e.g.*, *Miscellaneous Serv. Workers v. Philco-Ford Corp.*, 661 F.2d 776, 779-80 (9th Cir. 1981); *Spencer Cos. v. Agency Rent-A-Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,301, at 91,894-95 (D. Mass. Sept. 21, 1981).

191. 405 U.S. 727 (1972); *see* L. Tribe, *American Constitutional Law* § 3-19, at 85 (1978). The Sierra Club brought suit seeking a declaratory judgment that various aspects of a proposed "Disneyland" complex, to be constructed adjacent to the Sequoia National Forest in California, violated federal laws and regulations. The Sierra Club also sought injunctions restraining federal officials from granting approval or issuing permits for the project. *Id.* at 728-31. The Sierra Club relied on § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*, *quoted in* 405 U.S. at 732-33.

192. 405 U.S. at 734. The Court found that the kind of injury alleged could satisfy the injury in fact requirement under § 10 of the APA, 5 U.S.C. § 702 (1976), stating: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* Plaintiffs, however, are required to be "among the injured": They must allege individual injury by showing that their own use of the threatened area has been adversely affected. *Id.* at 735. Purely public and ideological interests in the environment are not sufficient to confer standing. L. Tribe, *supra* note 191, § 3-19, at 85. Accordingly, because the Sierra Club failed to allege that its members' use of the area would be adversely affected by the proposed construction, 405 U.S. at 735, they did not allege the requisite individualized interest for standing to challenge the federal action. *Id.* at 739. The Court added, however, that once standing is established, a party may assert the interests of the public in support of his claims for equitable relief. *Id.* at 740 n.15.

193. *United States v. SCRAP*, 412 U.S. 669, 688 (1973). In *United States v. SCRAP*, an environmental group composed of law students, Students Challenging Regulatory Agency Procedures (SCRAP), contended, *inter alia*, that a proposed railroad rate increase permitted by the ICC would cause its members "economic, recreational and aesthetic harm." *Id.* at 675-76. The Court stated that the alleged injury was "far less direct and perceptible" than the injury alleged in *Sierra Club v. Morton*, 405 U.S. 727 (1972), yet conferred standing on the appellees under § 10 of the APA, 5 U.S.C. § 702 (1976), despite its warning that "pleadings must be something more than an ingenious academic exercise in the conceivable." 412 U.S. at 688; L. Tribe, *supra* note 191, § 3-19, at 86.

194. *See The Phenomenon of Implied Private Actions, supra* note 32, at 447. The fact that the Court was willing to afford the United States government an implied right under the Rivers and Harbors Appropriation Act of 1899 for injunctive relief, *see United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (ch. 425, § 10, 30 Stat. 1151 (current version at 33 U.S.C. § 403 (1976 & Supp. III 1979))), and for damage relief, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204 (1967) (ch. 425, §

implication cases are neither "traceable" to, nor "responsible" for, the crowded federal dockets.¹⁹⁵ Moreover, if the Court indeed desires to restrict the availability of standing, to do so in this manner is inappropriate.

B. *Judicial Deference and Divining Legislative Intent*

The Supreme Court's evolving deference to congressional initiative is manifested most clearly in its insistent narrowing of the *Cort v. Ash* criteria: Its sole focus has become that of divining legislative intent.¹⁹⁶ The Court's current approach signifies its implicit acknowledgement that the issue of the availability of private remedies in the federal courts implicates a policy determination for which Congress is more appropriately suited.¹⁹⁷ Accordingly, under the Court's approach the federal judiciary assumes a dependent and subordinate position in formulating and fulfilling current national policy in our federal system.¹⁹⁸

15, 30 Stat. 1152 (current version at 33 U.S.C. § 409 (1976))), yet has denied private individuals a remedy, *California v. Sierra Club*, 101 S. Ct. 1775, 1781 (1981), may also indicate that part justification for the Court's denial of private remedies to individuals is its desire to avoid burdening the federal judiciary with implication cases. Congress shares the Court's concern for restricting litigation in the federal courts. See, e.g., The Equal Access to Justice Act, Pub. L. No. 96-481, 1980 U.S. Code Cong. & Ad. News (94 Stat.) 2325 (to be codified in scattered sections of 5, 26, 28 & 41 U.S.C.); Comment, *The NEPA and Energy Legislation: The Preemption of Judicial Review*, 14 U.S.F. L. Rev. 403, 420-30 (1980).

195. Pillai, *supra* note 30, at 38 & n.271; see *McCabe v. City of Eureka*, 664 F.2d 680, 686 (8th Cir. 1981) (Heaney, J., dissenting) ("recognizing an implied private cause of action [in this case] would not open the floodgates for substantially more litigation in the federal courts").

196. See *supra* pt. II(A).

197. Although the courts, aware of limitations on their appropriate functions, have various devices for avoiding encroachment on the domains of other branches of the federal government, their restrictions are based on two distinct theories: the constitutional limitation founded in the case or controversy requirement of article III of the Constitution, U.S. Const. art. III, or the policy of judicial restraint founded more generally on prudential considerations. Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 386 (1976); see G. Gunther, *Cases and Materials on Constitutional Law 1688-94* (10th ed. 1980).

198. Greene, *supra* note 4, at 485; see *Baker v. Carr*, 369 U.S. 186, 192, 217 (1962); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981); see also Taylor, *Attorney General Outlines Campaign to Rein in Courts*, N.Y. Times, Oct. 30, 1981, at A1, col. 1 (discussion of Atty. Gen. William French Smith's recommendations to prevent the federal courts' encroachment on the legislature by its engaging in "subjective judicial policy-making"); *Excerpts From Attorney General's Remarks on Plans of Justice Department*, *id.* at 22 (same); Kaufman, *Congress v. the Court*, N.Y. Times, Sept. 20, 1981, § 6 (magazine), at 44 (discussion of bills presently before Congress to withdraw the jurisdiction of the federal court in certain matters).

1. The Significance of Express Remedies

Repeatedly confronted with legislative history that is either silent or ambiguous on the issue of the propriety of judicial implication, the Court has resorted to another means of ascertaining legislative intent. Applying the maxim *expressio unius est exclusio alterius*,¹⁹⁹ the Court on several occasions has concluded that the existence of express enforcement mechanisms in federal statutes is tantamount to congressional intent to preclude all other remedies.²⁰⁰ Application of this rule of statutory construction had been rejected and criticized by the Court in prior implied private right of action decisions²⁰¹ and has consistently provoked criticism by commentators.²⁰² The propriety of applying the *expressio unius* rule in these cases is questionable²⁰³

199. The expression of one thing implies the exclusion of another thing. See 2A Sutherland, *supra* note 32, §§ 47.23-.25, 57.10 (4th ed. 1973 & Supp. 1981). The Court described this rule in *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979), which has been quoted in subsequent decisions: "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* (citation omitted); *accord* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Kissinger v. Reporters Comm.*, 445 U.S. 136, 149 (1980). This rule was first given weight in *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, 414 U.S. 453, 458 (1974), and has been noted by many commentators. See, e.g., *Hazen*, *supra* note 4, at 1337, 1348, 1384; *Implication Under Section 17(a) of the Securities Act of 1933*, *supra* note 24, at 1170 & n.48; *A New Direction for Implied Causes of Action*, *supra* note 24, at 510 & n.39; *Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, *supra* note 32, at 1099-1100 & nn.32-35; *The Phenomenon of Implied Private Rights of Action*, *supra* note 32, at 444-45.

200. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623, 2626-27 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 (1981); *California v. Sierra Club*, 101 S. Ct. 1775, 1780 n.6 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82, 1584 (1981); *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-22 (1979); see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-74 (1979); cf. *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1792-93 (1981) (applying variation of the *expressio unius* rule to congressional preemption of federal common law).

201. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 29 n.6 (1979) (White, J., dissenting): see *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979) ("[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy"); *Cort v. Ash*, 422 U.S. 66, 82-83 n.14 (1975) ("[w]e find this excursion into extrapolation of legislative intent entirely unilluminating").

202. *The Phenomenon of Implied Private Actions*, *supra* note 32, at 445; Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 290-91 (1963); *Some Implications for Implication*, *supra* note 24, at 1416-20; Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 Wm. & Mary L. Rev. 429, 451-53 (1976) [hereinafter cited as *The Emergence of a Conservative Doctrine*]; see 2A Sutherland, *supra* note 32, § 47.25.

203. The severity of this rule is revealed by the result produced when congressional authorization of explicit remedies in provisions of statutes unrelated to the one at

because it fails to direct the Court's attention to the differences between those enforcement remedies expressly afforded and the implied remedies sought. The enforcement provisions examined by the Court in *Middlesex County*, for example, are non-compensatory; they merely afford prospective, injunctive relief.²⁰⁴

Application of this rule inevitably results in the denial of remedies²⁰⁵ because it is unlikely that a plaintiff can uncover affirmative legislative intent to rebut the rule's presumption.²⁰⁶ For example, application of the rule in *Middlesex County* compelled the denial of an implied remedy,²⁰⁷ federal common-law relief²⁰⁸ and a direct cause of action under section 1983.²⁰⁹ Paradoxically, the Court denied that

issue is emphasized. In *Carlson v. Green*, 446 U.S. 14 (1980), Justice Rehnquist, dissenting, attempted to expand the application of this rule. He rejected the majority's holding that a damage remedy is available under the eighth amendment, even though a damage remedy is available under the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346(b), 1346(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2671-80 (1976 & Supp. III 1979), because "when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly," 446 U.S. at 40, as revealed by the damage remedies provided in other statutes, e.g., Fair Labor Standards Act, 29 U.S.C. § 216(b) (1976) (amended 1978); 42 U.S.C. § 1983 (1976) (amended 1979); Civil Rights Act of 1968, 42 U.S.C. § 3612(e) (1976); Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1976). 446 U.S. at 40-41.

204. 101 S. Ct. at 2019-20. The citizen suit provisions of the FWPCA and the MPRSA only provide for prospective injunctive relief and the assessment of civil penalties, payable to the government, against the violator. 33 U.S.C. § 1365(a) (1976) (FWPCA); 33 U.S.C. § 1415(g) (1976) (MPRSA); see S. Rep. No. 414, 92d Cong., 1st Sess. 79, reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3745 ("any [civil] penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant"); Pillai, *supra* note 30, at 39 (public enforcement not a substitute for private remedies). Similarly, the limited relief afforded in express remedies in the securities laws has also been noted. See Frankel, *supra* note 52, at 577; see also *Implying Civil Remedies From Federal Regulatory Statutes*, *supra* note 202, at 290 (noting that the express remedies in the securities laws prescribe certain procedural requirements).

205. *The Phenomenon of Implied Private Rights of Actions*, *supra* note 32, at 445; see *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623, 2626-27 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2066 n.11, 2069 (1981); *California v. Sierra Club*, 101 S. Ct. 1775, 1780 n.6 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82, 1584 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 (1981); *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-22 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-74 (1979); *The Emergence of a Conservative Doctrine*, *supra* note 202, at 451-53; *Some Implications for Implication*, *supra* note 24, at 1416-20; *Implying Civil Remedies from Federal Regulatory Statutes*, *supra* note 202, at 290-91.

206. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2629 (1981) (Stevens, J., concurring in part and dissenting in part).

207. *Id.* at 2623-25.

208. See *id.* at 2627.

209. 42 U.S.C. § 1983 (1976) (amended 1979), construed in 101 S. Ct. at 2626-27; see *supra* notes 129-30 and accompanying text. The Court stated the *expressio unius* rule as follows: "In the absence of strong indicia of a contrary congressional intent,

savings clauses contained in the FWPCA and the MPRSA evinced legislative intent to preserve the section 1983 remedy.²¹⁰ The Court's overzealous application of the *expressio unius* rule caused it to reject the application of the basic rule of statutory construction:²¹¹ the "plain meaning rule."²¹²

2. The Significance of Congressional Silence

The Court has repeatedly recognized that "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question."²¹³ Nevertheless, the Court unrelentingly requires a plaintiff to establish clear evidence of affirmative legislative intent to create an implied remedy.²¹⁴ Consequently, congressional silence, which is deemed deliberate, or ambiguous legislative history has proven dispositive to the denial of private remedies.²¹⁵

The Court too readily infers that silence is the product of Congress's "considered abstention."²¹⁶ Thus, the current analysis does not evince judicial deference to legislative intent as much as it reveals the Court's inordinate deference to congressional initiative and its concomitant abdication of an active and significant role in implication.²¹⁷

C. Institutional Competence

In previous decisions, Justices Rehnquist and Powell frequently argued that the doctrine of judicial implication violated the constitu-

we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." 101 S. Ct. at 2623.

210. 101 S. Ct. at 2626-27 n.31; *id.* at 2631-32 (Stevens, J., concurring in part and dissenting in part).

211. *Id.* at 2631-32 & n.12 (Stevens, J., concurring in part and dissenting in part).

212. See 2A Sutherland, *supra* note 32, § 46.01.

213. Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1582 (1981) (quoting Cannon v. University of Chicago, 441 U.S. 677, 694 (1979)).

214. See *supra* pt. II(A).

215. See, e.g., California v. Sierra Club, 101 S. Ct. 1775, 1780 (1981) ("This silence on the remedy question serves to confirm that . . . Congress was concerned not with private rights but with the federal government's ability to respond to obstructions on navigable waterways." (footnote omitted)); Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1582 (1981) (although congressional silence and congressional intent to provide an implied right of action are not necessarily inconsistent, "unless this congressional intent can be inferred . . . the essential predicate for implication of a private remedy simply does not exist"); Kissinger v. Reporters Comm., 445 U.S. 136, 149 (1980) ("such silence is purposeful"); Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979) ("implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best"); *The 1980 Term, supra* note 130, at 297 ("congressional silence is interpreted as a prohibition of private remedies").

216. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980).

217. Greene, *supra* note 4, at 485; see *The 1980 Term, supra* note 130, at 299.

tional principle of separation of powers.²¹⁸ In its recent decisions, however, a majority of the Court frequently has suggested that the policy-making implicit in the resolution of the issue of private remedies is more appropriately suited to, and dependent upon, the unique institutional competence of Congress.²¹⁹ Thus, the Justices have sug-

218. Greene, *supra* note 4, *passim*; *accord* United States v. Republic Steel Corp., 362 U.S. 482, 510 (1960) (Harlan, J., dissenting); *see, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (Rehnquist, J.) (majority opinion); Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring); *id.* at 730 (Powell, J., dissenting). Similar protests have been made in the context of judicial implication of remedies under provisions of the Constitution. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 28-29 (1980) (Powell, J., concurring in the judgment); *id.* at 53-54 (Rehnquist, J., dissenting); Davis v. Passman, 442 U.S. 228, 250-51 (1979) (Burger, C.J., dissenting); *id.* at 252-55 (dissenting opinion of Powell, J., joined by Rehnquist, J.); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411-12, 422 (1971) (Burger, C.J., dissenting); *id.* at 429 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting). Nevertheless, the Court has more readily inferred private remedies under provisions of the Constitution than it has under federal statutes. *See* Carlson v. Green, 446 U.S. 14 (1980) (inferring a damage remedy under the eighth amendment even though the allegations could also support a suit against the United States under federal statute); Davis v. Passman, 442 U.S. 228 (1979) (inferring a damage remedy under the due process clause of the fifth amendment); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (inferring a damage remedy under the fourth amendment). In earlier decisions, there was apparent disagreement among the Justices as to whether the federal judiciary had the constitutional power in the first instance—that is, jurisdiction—to imply a cause of action under a federal statute or a provision of the Constitution. Greene, *supra* note 4, *passim*. *Compare* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 399-408 (1971) (Harlan, J., concurring) (federal courts have constitutional power), *with* Cannon v. University of Chicago, 441 U.S. 677, 730-32, 745-47 (1979) (Powell, J., dissenting) (no constitutional power), *and* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 428 (1971) (Black, J., dissenting) (same), *and id.* at 418, 421 (Burger, C.J., dissenting) (same). For a discussion refuting the argument that the Court lacks this constitutional power, *see* Greene, *supra* note 4, *passim*. Although the jurisdictional issue was never explicitly resolved by the Court, its recent decisions suggest that the Court has assumed the existence of its power; the question is more often articulated in terms of deciding in what circumstances it is “appropriate” to exercise its power to afford a remedy. Greene, *supra* note 4, at 469; *see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 101 S. Ct. 2615, 2627 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc. 101 S. Ct. 2061, 2070 (1981); Universities Research Ass’n v. Coutu, 450 U.S. 754, 784 (1981); Carlson v. Green, 446 U.S. 14, 42 (1980); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979). “The question whether a cause of action exists is not a question of jurisdiction, and [an implied cause of action] therefore may be assumed without being decided.” *Id.*; *accord* Fogel v. Chestnutt, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,388, at 92,348-49 (2d Cir. Dec. 17, 1981).

219. Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1582 (1981) (“It is . . . not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy”); *see* Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2070 (1981) (“The policy questions presented by petitioner’s claimed right . . . are far reaching. . . . [W]e recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.”); Northwest Airlines,

gested not only that it is inappropriate for the federal judiciary to "supplement" the intricate and detailed provisions of comprehensive legislative schemes,²²⁰ but that the Court is ill-equipped and lacks the expertise necessary to deal adequately with the highly technical and complex subject areas contained in these schemes.²²¹ The Court is

Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1584 n.41 (1981) ("The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy considerations. . . ."); *id.* at 1582 ("[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government. . . ."); *see also* Reply Brief on Writ of Certiorari for Petitioners City of New York and Beame at 5-8, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981) (suggesting that the federal judiciary lacks institutional competence to create federal common law); Brief on Writs of Certiorari for Petitioners Middlesex County Sewerage Authority, Township of Middletown Sewerage Authority and Bergen County Sewerage Authority at 25-30, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981) (same); *cf.* *Rostker v. Goldberg*, 101 S. Ct. 2646, 2652 (1981) (acknowledging lack of judicial competence for determinations in the area of military affairs). *See generally* J. Freedman, *supra* note 17, at 94 ("institutional competence [is] implicit in the structural premises of the Constitution itself [and relates to] the capacity of particular institutions of government uniquely to perform certain tasks committed to them by the Framers").

220. *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1581-82 (1981) ("The comprehensive character of the remedial scheme . . . strongly evidences an intent not to authorize additional remedies. . . . It is . . . not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress."); *see* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981) ("[i]n view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 (1981) ("presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement" (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571, 1584 (1981))); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 783 (1981) ("implication . . . would undercut . . . the elaborate administrative scheme" in the Davis-Bacon Act); *cf.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2626 (1981) ("remedial devices provided in a particular act [that] are sufficiently comprehensive . . . may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"); *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1792-93 (1981) (Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. . . . The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.").

221. *See* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2070 (1981) ("complex issue" of deciding "whether a right to contribution should exist . . . calls for inquiry into the entire spectrum of antitrust law"); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 784 (1981) ("complex coverage determina-

therefore reluctant to find and is likely to deny private remedies in the face of schemes of such magnitude.

The Court's generalized and conclusory references to the comprehensiveness and complexity of these schemes, however, provide little in the way of specific standards.²²² Thus, the Court may merely be responding in understandable frustration to statutes that inexplicably, beneath their detailed broad sweep, brush over the issue of private remedies. Members of Congress have avoided determining the availability of private remedies under these federal statutes despite the prevalence of implication cases in the federal courts.²²³ The Court,

tions" under the Davis-Bacon Act); *cf.* *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1796 (1981) (federal common law in the "complex" area of water pollution control in which the "technical" problems are "difficult"). The Court noted that the district court conceded that the "arcane subject matter . . . was sometimes over the heads of all [involved]." *Id.* Lower federal courts have voiced similar concerns. *See Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 902, 903 n.16 (2d Cir. 1981) (complexity in the determinations involved with respect to "hazardous substances"); *Caceres Agency, Inc. v. Trans World Airways, Inc.*, 594 F.2d 932, 934 (2d Cir. 1979) (complexity in the area of aviation).

222. *See City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981) (Blackmun, J., dissenting). Justice Blackmun rejected the majority's emphasis on the comprehensiveness of a legislative scheme. He stated: "[T]here is nothing talismanic about such generalized references. The fact that legislators may characterize their efforts as more 'comprehensive' than prior legislation hardly prevents them from authorizing the continued existence of supplemental legal and equitable solutions to the broad and serious problem addressed. . . . There is nothing new about federal law in this area being characterized by its proponents as comprehensive. Similar claims were made in advancing the legislation [in prior years]." *Id.* at 1805 & n.13 (footnote omitted) (citing S. Rep. No. 462, 80th Cong., 1st Sess. 1, reprinted in 1948 U.S. Code Cong. & Ad. News 2215, 2215; 94 Cong. Rec. 8195 (1948)); *see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2630 (1981) (Stevens, J., concurring in part and dissenting in part) ("No matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open."); *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1803 (1981) (Blackmun, J., dissenting) ("a reviewing court is obligated to look not only to the magnitude of the legislative action but also with some care to the evidence of specific congressional intent"). *But see The 1980 Term*, *supra* note 130, at 296 n.56 ("Court's use of 'comprehensive' includes completeness, in the sense that the Act addressed all legitimate federal concerns, and exclusivity, in the sense that additional remedies would upset the balance created by Congress"). Justice Blackmun, in *City of Milwaukee v. Illinois*, stated, "that the technical difficulty of the subject matter . . . [and] [t]he complexity of a properly presented federal question [are] hardly a suitable basis for denying federal courts the power to adjudicate. Indeed, the expert agency charged with administering the Act has not hesitated to invoke this common law jurisdiction where appropriate." 101 S. Ct. at 1809 n.25 (Blackmun, J., dissenting) (citation omitted); *see* S. Rep. No. 414, 92d Cong., 1st Sess. 81, reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3747 ("Enforcement of pollution regulations is not a technical matter beyond the competence of the courts. . . . [The FWPCA] requirements should provide manageable and precise benchmarks for enforcement.").

223. *Cannon v. University of Chicago*, 441 U.S. 667, 741-42 (1979) (Powell, J., dissenting); *see supra* pt. II(B).

however, may be unfairly overemphasizing what Congress has expressly afforded in its legislation, while failing to carefully scrutinize what may be the reasons for its omissions. Congressional inaction may be, in part, Congress's response to its traditional reliance on the courts, and its concurrence in the propriety of the judiciary's determining whether private rights of action should be implied and what relief should be granted.²²⁴ Indeed, what one commentator has noted in an analogous context²²⁵ is relevant here:

There will of course be occasions when Congress cannot make wise decisions because experience with the substantive areas under consideration is too limited and the policy questions that must be answered are still too indistinct

But there are many quite different cases in which Congress has not provided standards only because it could not resolve hotly controverted issues of policy, or has chosen not to do so. . . . If courts were to insist more forcefully than they have in the past that Congress resolve the basic policy issues implicit in such legislation, the consequence might sometimes be no legislation rather than legislation without very much in the way of specific standards.²²⁶

The Court's reasons for deferring to congressional initiative ignore the utility of the implication doctrine. Suits by private parties may aid in effectuating the congressional purpose: They encourage detections of statutory violations and thereby promote effective enforcement of federal law.²²⁷ Furthermore, as initially articulated in *Texas &*

224. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 32 n.8 (1979) (White, J. dissenting) (recognizing that Congress has traditionally relied on the courts to determine these issues); *see Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (same).

225. J. Freedman, *supra* note 17, at 93-94. These statements were made in the context of a suggestion for the reconstruction of the nondelegation doctrine, pertaining to administrative agencies. *Id.*

226. *Id.*

227. Frankel, *supra* note 52, at 556, 566 & n.76, 578; *Implying Civil Remedies From Federal Regulatory Statutes*, *supra* note 202, at 291; *Some Implications for Implication*, *supra* note 24, at 1426-31. This factor has been considered by the Court in its earlier implication decisions. *E.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 706-08 & nn. 41-42 (1979) (Court was persuaded to imply a remedy, in part, as a result of HEW's advocating that the implied remedy would assist the agency in enforcing Title IX because it lacked the necessary enforcement resources); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967) (inadequacy of the criminal penalties under § 16 of the Rivers and Harbors Appropriation Act was a factor considered by the Court in deciding the availability of an implied remedy in favor of the United States); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) (Court was influenced by the SEC, as *amicus curiae*, which advocated that an implied remedy was necessary in light of the limited resources of the SEC in enforcing the proxy section of the securities laws). *But see The Phenomenon of Implied Private Actions*, *supra* note 32, at 448 ("by considering the lack of enforcement of the statute as a factor favoring implied private causes of action, courts encroach on the provinces of the legislative and executive branches").

Pacific Railway v. Rigsby,²²⁸ the prospect of private suits under federal statutes may deter statutory violations.²²⁹

As it stands, Congress and the Court seem to be passing back and forth between themselves an issue that does not lend itself to a comfortable answer or solution.²³⁰ Institutional competence concerns and prudential considerations of thwarting potential burdens on the judiciary²³¹ are neither sufficient nor desirable justifications for precluding the availability of implied private remedies to injured citizens seeking redress at the federal courthouse. Despite the magnitude of present legislative schemes, the federal courts should exercise their unique ability to utilize hindsight in weighing and assessing the practical impacts of statutes so as to provide effective enforcement and, where appropriate, relief.²³²

228. 241 U.S. 33 (1916); see *supra* notes 21-23 and accompanying text.

229. 241 U.S. at 42; see Frankel, *supra* note 52, at 556.

230. *Transamerica Mtge. Advisors, Inc. v. Lewis*, 444 U.S. 11, 32 n.8 (1979); see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) ("if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent"); *Cannon v. University of Chicago*, 441 U.S. 677, 743 & n.14, 749 (1979) (Powell, J., dissenting). Justice Powell stated in *Cannon*: "[Cort] invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide . . . [T]his Court is [not] obliged to indulge Congress in its refusal to confront these hard questions. . . ." *Id.* at 743 & n.14. "I believe the need . . . to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling." *Id.* at 749; see *id.* at 718 (Rehnquist, J., concurring) ("It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court.").

231. *Gordon v. City of Cartersville*, 522 F. Supp. 753, 756 (N.D. Ga. 1981) ("prudential limitations reflect the Court's concern with managing its caseload . . . they are matters of judicial self-governance"); see *supra* pt. III(A) & note 197.

232. The legitimacy and institutional competence of the federal judiciary in the implication area has been asserted by many commentators. *E.g.*, *The Emergence of a Conservative Doctrine*, *supra* note 202, at 451; *Implying Civil Remedies From Federal Regulatory Statutes*, *supra* note 202, at 291; see D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973); Steinberg, *supra* note 51, at 51; *A New Direction for Implied Causes of Action*, *supra* note 24, at 512-13 & n.58; *From Borak to Ash*, *supra* note 2, at 374; see also E. Dolgin & T. Guilbert, *Federal Environmental Law* 219-29 (1974) (justifying the federal courts' policy-making in the area of environmental protection); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 *Colum. L. Rev.* 612, 629-30 (1970) (same). In an analogous context, addressing the issue of federal common law, Justice Blackmun remarked: "Whether a particular interference qualifies as unreasonable, whether the injury is sufficiently substantial to warrant injunctive relief, and what form that relief should take are questions to be decided on the basis of particular facts and circumstances. The judgments at times are difficult, but they do not require courts to perform functions beyond their traditional capacities or experience." *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1808 (1981) (Blackmun, J., dissenting) (footnotes omitted).

CONCLUSION

Implicit in the *Cort* analysis were traditional concerns of the Court: preventing excessive burdens on the judiciary, acting within judicial capacity, and inferring congressional intent. Although application of the *Cort* factors might well have produced the Court's recent restrictive holdings, the overemphasis of these concerns has produced murky analyses. It is now clear only that the Court's current restrictive standard is no longer that invoked in *Cort v. Ash*. The Court must clarify its standard so as to afford a workable approach to implication.

Furthermore, the prior and well-reasoned theoretical basis for the implication doctrine—the deterrent effect of the prospect of liability to private suit—should not be overlooked. Consideration of this deterrent effect is conducive to effective enforcement of federal law. In addition, implied rights may afford the only adequate means of compensation to unjustly injured parties. These considerations should not be subordinated to the Court's fear of crowded federal dockets. To the extent that the Court fails to provide adequate guidelines for the lower federal courts, however, that fear will be realized.

Moreover, even under the Court's restrictive approach, courts interpreting congressional silence should consider certain factors that may weigh in favor of implication. Courts construing older statutes should consider congressional silence in light of the then justifiable reliance of Congress on federal courts to provide implied rights. Courts construing amended statutes should consider uniform judicial recognition of an implied right prior to the statutes' amendments. Congressional silence in this context may indicate sub silentio approval of the implied right.

It must be conceded, however, that the Court's frustration with its role in determining the availability of implied private rights under recently enacted or amended legislative schemes is understandable. Congress can no longer evade the foreseeable consequence of its legislation—that private litigants will seek compensatory relief for injury resulting from another's violation of a federal statute. The judiciary's plea to Congress has been made frequently over the past two years and Congress must heed the warnings: Congress should, at the very least, consider the issue of private compensatory relief and is obliged to make its intent clear.

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