A New Direction for Implied Causes of Action

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NOTES
A NEW DIRECTION FOR IMPLIED CAUSES OF ACTION

INTRODUCTION
Since the Supreme Court first inferred a private right of action1 from a federal statute more than sixty years ago,2 the lower federal courts have refined and expanded upon the practice with increasing frequency.3 Despite attempts by the Court to develop appropriate guidelines4 for resolving implication questions, however, implied actions continue to present analytical problems for the federal judiciary.5 The current confusion regarding the proper analysis for inference of a

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

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

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

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

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

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

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

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  \item[6.] See notes 28-31 infra and accompanying text.
  \item[8.] See pt. I infra.
  \item[11.] 377 U.S. 426, 430-31 (1964). The \textit{Borak} Court relied on several rationales to justify its inference of a private right of action in favor of the plaintiff shareholder. The action was based on the defendant corporation's issuance of an allegedly false and misleading proxy statement in connection with a merger. The Court ruled that § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), which grants the appropriate district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created' under the Act," gives private parties a right to bring suit for violations of § 14(a), which does not expressly provide for any private actions. 377 U.S. at 431. In so doing, the Court stressed the generally "broad remedial purposes" of § 14(a), the section's chief purpose of investor protection, and the need for private enforcement of the proxy rules to supplement actions taken by the Securities Exchange Commission (SEC). \textit{Id.} at 431-32. \textit{Borak} evidenced a shift away from a purely statutory tort approach to implication. \textit{See} note 2 supra. The Court emphasized the need for courts to approach implication problems mindful of their duty to provide "such remedies as are necessary to make effective the congressional purpose" in enacting the statute in question. 377 U.S. at 433; \textit{see From Borak to Ash}, supra note 2, at 379-80.
  \item[12.] The Court apparently continued to favor a broad approach to implication through the late 1960's. \textit{See}, e.g., \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388, 389 (1971) (violation of the fourth amendment by federal agents gives rise to a private cause of action for damages); \textit{Wyandotte Transp. Co. v. United States}, 389 U.S. 191, 200 (1967) (remedies and procedures specified in Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-467e (1976), were not intended to be exclusive; United States can, therefore, bring suit to recover costs incurred in removing a negligently sunk barge, although act does not provide for this remedy); cf. \textit{Superintendent of Ins. v. Bankers Life & Cas. Co.}, 404 U.S. 6, 13 n.9 (1971) (Court recognized that an implied action under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), is now well established).
Court sought not only to limit future use of the implication doctrine, but to reduce the scope and effectiveness of previously recognized implied actions as well. The Court's unanimous decision in Cort v. Ash most clearly enunciated this new implied action conservatism. The adoption in Cort of a structured approach to implication analysis, more than the precise holding of the case, attested to a new caution in the area of implied actions. Drawing on the rationales and approaches of prior implication cases, the Court formulated four relevant factors to be considered by a court addressing an implied action question:

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

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

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


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

19. See note 16 supra.
a variety of statutes that differ in nature, scope and purpose. Developed as merely a suggested approach to a complex problem of statutory construction and the discernment of legislative intent, the test has become the analytical focal point for most courts deciding an implication issue. Frequent applications of the loosely-structured and overlapping criteria, however, have disclosed their weakness as an analytical model and their susceptibility to judicial manipulation. Moreover, the method of reconciling the often conflicting results produced by the factors was not discussed in the Cort opinion. Consequently, the


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

22. The Court has often characterized the question of the existence of an implied action as one of statutory construction. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 2424, 245 (1979); Touche Ross & Co. v. Redington, 99 S. Ct. 2479, 2485 (1979); cf. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (Court employed statutory construction theory in its implication analysis). Although a distinction has sometimes been drawn between "statutory construction" and "statutory interpretation" on the ground that "interpretation" refers to the meaning of words and "construction" to the application of words to the facts at issue, in judicial practice the terms are used interchangeably. 2A J. Sutherland, Statutes and Statutory Construction § 45.04 (4th ed. C. Sands 1973). Legislative intent is the traditional standard used in the interpretation of statutes. Id. While the concept of using legislative intent to decide questions of statutory interpretation has provoked debate, id. § 45.06; MacCallum, Legislative Intent, 75 Yale L.J. 754, 754 (1966), it continues to be favored by the courts over the meaning given to the statute by "members of the public to whom it is addressed." 2A J. Sutherland, supra, § 45.08; see note 147 infra and accompanying text.

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

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


26. See Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (referring to situation when all four Cort factors point to implication as "atypical"); Clark v. Gulf Oil Corp., 570 F.2d 1138, 1145-50 (3d Cir. 1977) (finding plaintiffs within special class was insufficient to outweigh inconsistencies of implied action with legislative scheme; remaining factors provided little guidance on issue), cert. denied, 435 U.S. 970 (1978); Rauch v. United Instruments, Inc., 548 F.2d 452, 460 (3d Cir. 1976) (concluding that plaintiff was not a member of an especial class and that the action was a matter of state concern, court found it unnecessary to consider second and third factors; implied action denied); National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp. [Vol. 48]
federal courts have felt free to select the factors to be applied to a particular statute and have continued to infer private causes of action frequently, despite the Supreme Court's original goal of limiting such practices through the Cort test.

Nowhere is the uncertainty as to the proper analysis for inferring private causes of action as evident as in the Supreme Court decisions that have confronted the issue in the past year. Although they evidence a certain consistency of result, usually refusing to infer a cause of action, they lack consistent analysis.

This Note explores these recent decisions and in particular examines their impact on the future of the implication doctrine in the context of federal securities law, an area which has been the subject of a significant portion of implied action litigation. Using the securities laws as a conceptual model, the Note also proposes a specialized approach for determining the existence of private rights of action within a federal regulatory scheme.

I. RECENT SUPREME COURT DECISIONS

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

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


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


30. See pt. 1 infra.

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

sity of opinion among the Supreme Court Justices on the subject of implied actions and the need for refinement of the guidelines used to determine whether inference of an action is justified.44

A. Cannon v. University of Chicago

Using a full Cort analysis, the Supreme Court held in Cannon v. University of Chicago35 that section 901(a) of Title IX of the Educational Amendments Act of 197236 confers an implied right of action on victims of sex discrimination in federally financed educational programs.37 Although another section of Title IX establishes an administrative procedure for termination of federal support to institutions that discriminate on the basis of sex,38 the Supreme Court rejected the argument that Congress intended this express procedure to be the exclusive means of enforcement.39 The Court's reluctance to accept such an argument is consistent with its pre-Cort decisions in National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)40 and Securities Investor Protection Corp. v. Barbour (SIPC).41 In Amtrak and SIPC, the Court found

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

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


36. 20 U.S.C. § 1681(a) (1976). Section 901(a) provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Id.

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

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

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

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

41. 421 U.S. 412 (1975). The SIPC Court held that customers of a failing broker-dealer did not
that an "express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature."42 This conclusion will yield, however, when there is "clear contrary evidence of legislative intent."43 to imply a right of action. Evidently, the strict adherence to the Cort criteria in the Cannon analysis of Title IX44 produced sufficiently convincing evidence of a congressional private right of action intent to warrant inference despite the existence of express enforcement procedures.45

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

have a private right of action under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78111 (1976), to compel the Securities Investor Protection Corp. (SIPC) to perform its statutory functions. 421 U.S. at 425. The Court found that the SEC's authority under § 7(b) of the act to compel the corporation to perform its duties, see 15 U.S.C. § 78ggg(b) (1976), was the exclusive means by which SIPC could be forced to act. See 421 U.S. at 417-18, 421.


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

45. The Cort criteria themselves do not contain any specific reference to the theory of statutory construction followed in Amtrak and SIPC, although the maxim used in those cases, see notes 39-43 supra and accompanying text, has been incorporated by some courts into their discussion of the Cort factors. See, e.g., Caceres Agency, Inc. v. Trans World Airways, Inc., 594 F.2d 932, 933 (2d Cir. 1979); Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 358 F.2d 1216, 1223 (9th Cir.), cert. denied, 100 S. Ct. 49 (1979); Bratton v. Shiffrin, 585 F.2d 223, 233 (7th Cir. 1978) (Bauer, J., dissenting), vacated, 99 S. Ct. 3094 (1979). The Cort and Cannon opinions both reiterate the need for additional, convincing evidence beyond the mere existence of an express remedy for this maxim to be applied validly. See 441 U.S. at 711; Cort v. Ash, 422 U.S. 66, 82 n.14 (1975). It has been argued that Cort's brief discussion of this maxim was directed at limiting its use to the particular facts of Amtrak and SIPC. See Emergence of a Conservative Doctrine, supra note 1, at 451-52; cf. Bratton v. Shiffrin, 585 F.2d at 229-30 (Amtrak maxim does not detract from duty to consider effectuation of congressional purpose). The Supreme Court's increasingly strict approach to implication, however, is likely to result in the more frequent use of this statutory construction principle. See pt. I(c) infra.

46. 441 U.S. at 689.

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

48. Id. at 709. The consistent results of the factors as applied in Cannon were atypical. Id. at 717; see note 26 supra and accompanying text.
Second, although the four factor Cort method received the general approval of the Cannon majority, the Justices questioned the basic premise of inferring private causes of action. The majority noted that only in certain limited circumstances, which it failed to delineate, will congressional failure to provide an express civil remedy be consistent with a congressional intent "to have such a remedy available to the persons benefited by its legislation." Both concurring and dissenting opinions echoed this readiness to substantially curtail future inferences of private actions.

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

49. See 441 U.S. at 688.
50. The Justices split into several factions in Cannon, each stressing different approaches or areas of emphasis with regard to the interpretation of § 901. Justice Stevens, writing for the Court, was joined by Justices Brennan, Stewart, Marshall and Rehnquist in holding that a private action should be inferred. Id. at 680-717. Chief Justice Burger concurred in the judgment. Id. Justice Rehnquist, joined by Justice Stewart, filed a concurring opinion discussing the implication doctrine generally. Id.; see notes 54-57 infra and accompanying text. Justice White's dissent, in which Justice Blackmun joined, attacked the majority's reading of both Title IX and the legislative history of that act, but did not challenge the Court's overall approach to implied actions. See 441 U.S. at 718-30. In contrast, Justice Powell's separate dissent offered an entirely different approach to implication issues. Id. at 730-49; see notes 60-64 infra and accompanying text.
51. 441 U.S. at 717. Discussing the second Cort factor, however, the Court noted that "it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." Id. at 694 (quoting Cort v. Ash, 422 U.S. 66, 82 (1975)).
52. 441 U.S. at 717-18 (Rehnquist, J., concurring); see notes 54-57 infra and accompanying text.
53. 441 U.S. at 730 (Powell, J., dissenting); see notes 60-64 infra and accompanying text.
54. 377 U.S. 426 (1964). See also notes 11-12 supra and accompanying text.
56. 441 U.S. at 718.
57. Id. While many of the Justices comprising the Cannon majority might agree with Justice Rehnquist that there has been a conservative shift in the Court's attitude towards implied actions, it is doubtful that all would go along with Justice Rehnquist in favoring a continuation of this narrowing process. See id.; Young, supra note 5, at 88.
58. See 2A J. Sutherland, supra note 22, § 45.04; accord, Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 253 n.8 (1979) (White, J., dissenting); Steinberg, supra note 32, at 51; cf.
question under existing statutes should require congressional action only when judicial inference would exceed the bounds of interpretation and border on judicial legislation. Thus, the development and refinement of sound guidelines to aid in the interpretation of existing statutes should be stressed rather than the elimination of judicial action altogether.

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

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

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

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

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

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

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

64. Cf. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) ("efficient regulation of securities trading could not be accomplished under a rigid statutory program"). See also Steinberg, supra note 32, at 40 (Justice Powell's test "premised on unduly strict notions of judicial restraint").
Aside from its new focus on the especial benefit criterion as a primary factor, the Cannon decision provides little additional guidance to aid a court in the integration and evaluation of the Cort criteria. In fact, the opinions indicate that the use of the Cort factors for analysis of implied actions is no longer unanimously supported by the members of the Court.

B. Touche Ross & Co. v. Redington

One month after Cannon, in Touche Ross & Co. v. Redington,65 the Supreme Court considered its most important implication case arising under the securities laws66 since its 1977 decision in Piper v. Chris-Craft Industries, Inc.67 In Piper, the Court held that section 14(e) of the Exchange Act68 did not provide a private cause of action to a defeated tender offeror.69 Although the Piper Court applied the Cort test to section 14(e),70 it did not discuss the implication issue strictly in Cort terms.71 The Court also focused on the absence of a need for an implied

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


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

69. 430 U.S. at 42.

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

71. The Court at times seemed to treat the issue in Piper as one of standing, although the predominant language in the opinion relates to the existence of an implied action. See A. Bromberg & L. Lowenfels, supra note 24, § 2.4, at 384. The Court began its analysis with an examination of the statute itself and the legislative history of the Williams Act, which added § 14(e) to the Exchange Act in 1968. Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. § 78n(e) (1976)). The Williams Act was adopted "in response to the growing use of cash tender offers as a means for achieving corporate takeovers." 430 U.S. at 22 (footnote omitted). From this limited analysis, the Court concluded "that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer" and that Congress did not contemplate a private cause of action for damages by a contending offeror against either the target corporation or competing offerors. Id. at 35 (emphasis added). The Court then used the Cort factors to confirm its conclusions as to § 14(e)'s legislative history. Finally, the Court
action to effectuate congressional purposes.\textsuperscript{72} Redington's significance as an implication case lies not in its interpretation of section 17(a) of the Exchange Act,\textsuperscript{73} but in its express recognition of a threshold requirement which must be met to justify a full Cort analysis.\textsuperscript{74} Moreover, Redington conclusively rejected prior, more expansive rationales which had been used to justify the inference of private causes of action.\textsuperscript{75}

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

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

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

\textsuperscript{72} 430 U.S. at 25, 41.
\textsuperscript{73} 15 U.S.C. § 78q(a) (1976). Section 17(a) was described by the Court as a "forward-looking" statute, designed simply to aid the SEC in its monitoring of the financial condition of brokerage firms and to prevent broker-dealer insolvency. The Court also classified § 17(a) as a reporting statute, similar to countless other recordkeeping requirements found in regulatory statutes. 99 S. Ct. at 2486. The Supreme Court found it unnecessary to decide whether § 18(a), which provides a private cause of action to purchasers and sellers acting in reliance on a misleading statement, see 15 U.S.C. § 78r(a) (1976), provides the exclusive remedy for misstatements in § 17(a) reports. Because the plaintiffs did not meet § 18(a)'s purchaser-seller requirement, the Court was "extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the [express] remedy that Congress chose to provide" in § 18(a). Id. at 2488.

\textsuperscript{74} See 99 S. Ct. at 2489.
\textsuperscript{75} See notes 81-89 infra and accompanying text.
\textsuperscript{76} 99 S. Ct. at 2489.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 2486.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 2487.
\textsuperscript{81} Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40 (1916); see note 2 supra and accompanying text.
"entirely misplaced."82 The Court also rejected the argument that the jurisdictional section of the Exchange Act,83 relied on to justify implication in Borak, could by "its own force and effect" create a right of action,84 despite its reference to "all suits in equity and actions at law" arising under the act.85 Finally, the Redington Court disapproved of the theory that a statute can support an implied action because of its remedial nature.86 According to the Court, reliance on an often vague remedial purpose does not provide any substantial basis for judicial inference of a private action. Rather, it is the specific statutory language, history and scheme that must dictate a court's decision.87

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

82. 99 S. Ct. at 2485.
84. 99 S. Ct. at 2490. Instead, the Court ruled that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce." Id.
85. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (emphasis added). Rejection of this jurisdictional section argument reduces even further the courts' implied action flexibility. Such sections, however, may still be useful in the context of a court's overall analysis of the legislative scheme of an act and the type of relief available if an implied action is established. See notes 119-22 infra and accompanying text.
87. See 99 S. Ct. at 2489.
88. Id.
89. 430 U.S. at 25-61, 41. Since the Supreme Court's broad use of this concept in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), courts have frequently included it within a discussion of the third Cort factor—legislative scheme. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979); Olsen v. Shell Oil Co., 561 F.2d 1178, 1189 (5th Cir. 1977); Abrahamson v. Fleschner, 568 F.2d 862, 876-78 (2d Cir. 1977), cert. denied, 436 U.S. 913 (1978). The "necessity" concept is not technically part of the third Cort factor and when used as such can be misleading. Only if the necessity for private action was evident and recognized at the time of enactment or amendment will this line of inquiry be helpful. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 199-200 (1963); notes 155, 165-67, 174 infra and accompanying text. Inferring a cause of action based on a recently developed or increased need for supplementary enforcement can lead to judicial legislation and frustration of congressional intent. See Redington v. Touche Ross & Co., 592 F.2d 617, 631, 634 (2d Cir. 1978) (Mulligan, J., dissenting), rev'd, 99 S. Ct. 2479 (1979).
90. Cf. Pillai, supra note 1, at 35-36 (Cort factors subordinated in Piper to an overriding and dispositive test of necessity). Professor Pillai distinguished the necessity test used in Piper from that
The relevance of the *Borak* opinion to future implication decisions is also questionable in light of *Cannon* and *Redington*. Although the Court endeavored to distinguish *Borak* in these cases,\(^91\) it simultaneously undermined most of the implication theories that formed the basis of the *Borak* decision.\(^92\) After *Redington*, only the "necessity" argument of *Borak* retains any validity, yet it remains the subject of confusion.\(^93\) While acquiescing in the existence of the particular cause of action recognized in *Borak*,\(^94\) the Court has virtually eliminated the case's precedential value.

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

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

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

92. See note 11 supra and accompanying text.

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


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

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

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

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

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

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

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


102. 100 S. Ct. at 249.
Prior to *Lewis*, the circuit courts which considered the question of private actions for damages under the Advisers Act examined the issue in the context of section 206 of the act, a broad antifraud provision that expressly forbids any fraudulent or deceptive conduct by investment advisers. Utilizing the *Cort* method of analysis, each of these courts, including the Ninth Circuit in *Lewis*, concluded that a private action for damages should be inferred under section 206 implication question.

The Supreme Court, however, refused to make this inference. It premised its denial on the selective use of the restrictive implication concepts found in *Amtrak*, *Cannon*, and *Redington*. This approach seems to be an inadequate substitute for the detailed, comprehensive analysis that the section 206 implication question required.

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104. 15 U.S.C. § 80b-6 (1976). Section 206 prohibits investment advisers from (1) employing "any device, scheme, or artifice to defraud any client or prospective client"; (2) engaging in transactions or practices designed to operate as a fraud upon such persons; and (3) engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative." *Id.*


106. 100 S. Ct. at 249.

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

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

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

110. *See* 100 S. Ct. at 250-51 (White, J., dissenting). *See generally Private Actions*, *supra* note 104, at 314-24 (*Cort* factors found to support a private action under § 206); 30 Vand. L. Rev. 905, 917-21 (1977) (criticizing Second Circuit's use of the *Cort* factors as applied to § 206; full *Cort* analysis indicates that such an action should be denied).
Ignoring the *Cort* factors, the *Lewis* majority began its inquiry into section 206 with a reiteration of the *Amtrak* rationale that express statutory enforcement provisions ordinarily preclude the inference of additional remedies. The Court found this theory relevant in light of the enforcement authority expressly granted to the Securities and Exchange Commission (SEC) in the Advisers Act and the Court's finding of "circumstantial" evidence of legislative intent to provide no private remedy other than the one that flowed from section 215 of the act. The Court found persuasive two pieces of circumstantial evidence arising out of a comparison of the statutory scheme of the Advisers Act with that of other securities statutes. The first significant difference is the absence of express authorization for private damage suits in the Advisers Act; certain sections of the other major securities acts allow private damage suits in prescribed circumstances. The Court found the absence of express provisions in the Advisers Act indicative of Congress' unwillingness to extend a damage remedy to a private litigant.

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

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

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

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

114. 100 S. Ct. at 247.

115. *Id.* at 247-48.


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

119. See 100 S. Ct. at 248.


121. 100 S. Ct. at 248. Although the Court established in *Redington* that the jurisdictional section of an act creates no private right of action by its own effect, see 99 S. Ct. at 2490, the *Lewis*
remedies, to persuade the Court that "Congress did not intend to authorize a cause of action for anything beyond limited equitable relief."\textsuperscript{122}

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

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

\textsuperscript{122} 100 S. Ct. at 253-54 (White, J., dissenting).
\textsuperscript{125} 100 S. Ct. at 247 (footnote omitted).
\textsuperscript{126} 100 S. Ct. at 248 (footnote omitted). The "void contract" provision of the Exchange Act has frequently been cited as support for the inference of a private right of action under § 10(b) of that act, 15 U.S.C. § 78j(b) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), promulgated thereunder. \textit{See, e.g.}, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735 (1975); Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). \textit{See generally} 1 A. Bromberg & L. Lowenfels, \textit{supra} note 24, § 2.4(1)(b); 3 L. Loss, \textit{supra} note 101, at 1757-59. The void contract provision of the Advisers Act was applied in a similar manner in Abrahamsson v. Fleschner, 568 F.2d 862, 874 (2d Cir. 1977), \textit{cert. denied}, 436 U.S. 913 (1978), to support an implied action under § 206. Lewis, however, utilized the void contract provision of the Advisers Act in a different manner. Section 215 was seen not as supporting a private right of action under another section of the Advisers Act, but as giving rise itself to a private action. \textit{See 100 S. Ct. at 246-47.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.} at 249.
\textsuperscript{129} \textit{Id.} at 249.
\textsuperscript{130} \textit{See note} 104 \textit{supra} and accompanying text.
rately, the minimum requirement established therein should have mandated a more detailed examination of section 206(131) that might have strengthened the Court's conclusions(132) and brought some consistency to implication analysis.

D. Summary

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

II. A Proposed Approach for Implied Causes of Action

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

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


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

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

135. See notes 24-27 supra and accompanying text.
for the development of an integrated approach to implied actions, the Court's recent decisions are indicative of its continuing failure to develop such an approach from Cort, its predecessors or its progeny. Because of the natural differences among statutes, the development of universal implication criteria has proved impractical. Thus, a new conceptual approach to implication analysis that synthesizes Cort and the more recent Supreme Court cases is warranted.

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

136. See Emerging Standards, supra note 7, at 321.
137. See Pillai, supra note 1, at 41; cf. Frankfurter, supra note 60, at 543-44 (informal, less structured approach to statutory construction advocated).
138. Professor Pillai suggests a legislative solution to the implication analysis problem, recommending that a general private right of action should be enacted to enable “individual[s] to claim damages for injur[ies] sustained from violations of federal statutes by anyone other than the federal government.” Pillai, supra note 1, at 39.
141. See 1 L. Loss, supra note 101, at 129.
142. Cf. ALI Fed. Securities Code § 101 (Proposed Official Draft 1978) (need to integrate securities statutes). The proposed Federal Securities Code also presents a set of criteria for the determination of private rights of action under Code provisions which do not expressly provide therefore. Id. § 1722(a). Civil liability, considered in light of the nature of the defendant's conduct, the degree of his culpability, plaintiff's injury and the deterrent effect of such liability, should be judicially inferred if four criteria are met. Id. The Code requires that: (1) the implied action be consistent with the conditions or restrictions of the express Code provisions providing for civil liability; (2) the Code provision under which an implied action is sought is designed for the "special benefit" of a class of persons, to which plaintiff belongs, against the harm alleged; (3) the remedy sought is not disproportionate to the alleged violation; and (4) in cases comparable to those provisions of the Code which specify a maximum measure of damages, a comparable maximum is imposed on the implied remedy. Id. Although these rules bear some resemblance to the Cort factors, id. Note 3, they are designed to function solely within the context of the Code. Unlike the Cort criteria, the Code
The recent Supreme Court decisions in *Cannon*, *Redington* and *Lewis*, along with the *Cort* factors and other implication theories, suggest that a court faced with an implied action question should follow a two-step approach. First, a simple minimum requirement—membership in a class benefited by the statute—should be met before a court undertakes any detailed investigation of legislative intent. If this minimum test is not satisfied, the court's inquiry should end and a private right of action be denied. If, however, the statute under which the action is asserted meets the threshold requirement, the court should proceed to a second and more intricate analysis, designed to focus attention on four areas chosen to further the ascertainment of congressional intent.143 These secondary factors—additional congressional purposes behind the statute, the legislative scheme of the statute, inter-act relationships with other securities provisions, and the role of administrative agencies—should be accorded more or less equal weight.144 When, however, the balancing of factors produces equally conflicting indications of congressional intent, the Supreme Court's current conservative stand on implication would seem to favor the disallowance of a private remedy.

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

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

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

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

145. The emphasis of this minimum requirement, as in *Cort*, is on the *especial* nature of the beneficiary. Although the phrase "for whose especial benefit the statute was enacted" as used in *Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)*, was initially construed as applying to all "intended" beneficiaries of a statute, *see note 2 supra*, *Cort* interpreted the phrase such that only primary beneficiaries could be deemed "especial." *Cort v. Ash, 422 U.S. 66, 78 (1975)*; *see* Pillai, *supra* note 1, at 20; *Emerging Standards*, *supra* note 7, at 308-09.
than the one suggested in Redington, which would also permit inference under statutes prohibiting specified conduct,\textsuperscript{146} it is consistent with the tendency of the Supreme Court and the lower federal courts to emphasize the especial benefit criterion of Cort in their analyses.\textsuperscript{147} Second, this criterion can be traced not only to the Supreme Court's earliest implication decision,\textsuperscript{148} but to established common law principles.\textsuperscript{149} Although the existence, without more, of an especial beneficiary is no longer accepted by the Supreme Court as a sufficient reason for granting an implied action,\textsuperscript{150} it should be a threshold requirement for analysis of securities implication issues.\textsuperscript{151} More rigorous than the test for standing,\textsuperscript{152} this requirement should effectively reduce needless securities litigation and the possibility of judicial legislation of private actions that favor persons only tangentially benefited by the statute.\textsuperscript{153}

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


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

\textsuperscript{148} See note 2 supra and accompanying text.

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


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

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

\textsuperscript{153} Courts do not seem to have had any difficulty distinguishing between secondary beneficiaries and especial beneficiaries of a statute. See note 147 supra and accompanying text. But see Emerging Standards, supra note 7, at 309 (especial benefit factor is not a viable measure of legislative intent; it does not aid in distinguishing especial beneficiaries from secondary beneficiaries).
purposes behind the statute in question. Like the especial benefit requirement, congressional purpose may also be discerned from statutory language and legislative history. The court should concentrate on effectuating, in the words of Justice Frankfurter, not the purpose which Congress should have enacted, or would have [enacted, but]... that which it did enact, however inaptly, because it may fairly be said to be embedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

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

Next, a court should review the scheme and structure of the particular securities act under analysis, examining the relationships of the various provisions of the act inter se. The court should consider whether an implied action will undermine the often delicately balanced purposes of the act or disrupt the legislative scheme, thereby frustrating legislative intent. Many of the acts are directed at regulating a particular segment of the securities industry and provide detailed systems of control. The court should carefully consider whether an implied action will unduly upset this established pattern of regulation.

Congressional limitations evident in the structure of the act are an important reflection of congressional intent regarding private actions and

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

155. Frankfurter, supra note 60, at 539.

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


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


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

The third proposed inquiry directs the court to examine the relationship between the section under which the plaintiff seeks to infer a cause of action and any parallel provisions in the other securities acts. Thus, the court should examine the relevant section in the context of a body of securities law.163 The nature and scope of these related private actions, whether express or implied, can enlighten the court as to the type of private action, if any, that Congress might have intended to include in the statute at issue.164 For example, in its interpretation of the Investment Advisers Act in Lewis, the Court briefly noted that through an amendment to the Investment Company Act in 1970,165 Congress created a very narrowly defined private action for damages in favor of investment companies against their investment advisers.166 Such a provision seems to support the Lewis Court’s conclusion that Congress’ silence at both the time of enactment and at the time of amendment of the Advisers Act in 1960167 indicated an unwillingness to impose broad damage liability on investment advisers. This related provision in the Investment Company Act is

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163. See 1 L. Loss, supra note 101, at 139; cf. ALI Fed. Securities Code § 101 (Proposed Official Draft 1978) (necessity for a code); 3 A. Bloomenthal, supra note 20, § 9.05A (describing general federal securities antifraud provisions as “persuasive and overlapping.”).
164. The function and operation of express private liabilities in the act and the detail with which Congress has defined those express provisions in terms of statutes of limitations, relief available, standing to sue, and the degree of culpability should be considered by the court. Although the existence of express private actions should not deter judicial inference of a private action under another section of the act, see Cannon v. University of Chicago, 441 U.S. 677, 711 (1979), the absence of parameters for a court to follow in defining the implied action can work against recognition of an implied action. See Hazen, supra note 104, at 658.
166. A security holder of a registered investment company may bring an action on behalf of that company against its investment adviser based on breach of fiduciary duty for compensation or payments paid by the investment company or its security holders to the investment adviser. Id.
167. Act of Sept. 13, 1960, Pub. L. No. 86-750, § 9, 74 Stat. 887 (1960). Section 205 was amended to give the SEC the authority to define and prescribe means reasonably designed to prevent violations of the section. Id. In 1975, an SEC proposal for amending the Advisers Act to include, inter alia, the phrase “actions at law” in § 214 was submitted to Congress. See Proposed Amendments to the Investment Advisers Act of 1940: Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 17 (1976). The § 214 change was proposed to ensure “the right of an individual who has been injured as a result of a violation of the Advisers Act to sue for civil damages in Federal courts.”Id. at 2. But see id. at 233 (statement of Prof. Loss) (amendment to § 214 “will not assure civil liability; it will simply remove a possible impediment”). At the time of the proposed 1976 amendment, no circuit court had yet ruled on the § 206 implied action issue, although there was apparent confusion in the district courts on the subject. Compare Bolger v. Laventhal, Krelstein, Horwath & Horwath, 381 F. Supp. 260, 262-64 (S.D.N.Y. 1974) (allowing private cause of action for damages under § 206 with Greenspan v. Del Toro, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 95,488 (S.D. Fla. 1974) (private cause of action denied based on jurisdictional section). Although reported on favorably by the committee, the bill never reached the floor of the Senate or House of Representatives. See Ahart, Suggested Amendments to the Investment Advisers Act, 6 Sec. Reg. L.J. 276, 228 (1978).
more pertinent and should have received greater emphasis than the "circumstantial" evidence so heavily relied on by the Lewis majority. 168

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

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

168. See notes 115-22 supra and accompanying text.
171. See note 73 supra and accompanying text.
172. See note 167 supra and accompanying text.
the courts a more substantial basis for their examination of an implied action issue.

Conclusion

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

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