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The Implication Doctrine after Touche Ross and Transamerica: The State of Implied Causes of Action in Federal Regulatory Statutes

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I. INTRODUCTION

Prior to the twentieth century, federal courts would not allow a plaintiff to assert a private cause of action under a federal statute unless the legislation expressly provided for such a right. In Texas & Pacific Railway Co. v. Rigsby, however, the Supreme Court extended the consequences of a railroad's violation of the Federal Safety Appliance Act (FSAA) beyond the penal provisions contained in the statute, to allow a civil recovery by an injured employee.

As the implication doctrine evolved, it changed from the statutory-tort approach used in Rigsby. Because many federal statutes are enacted to protect some class of persons, such an analysis would give rise to an implied private action under all such legislation, resulting in a flood of litigation in the federal courts. This fact, coupled with the tremendous increase in regulatory legislation in recent years, has acted

2. 241 U.S. 33 (1916). For further discussion of Rigsby, see notes 12-18 and accompanying text infra.
4. 241 U.S. at 39-40. The parties conceded that the safety standards contained in the Act had not been complied with. Id. at 36.
5. See Note, supra note 1, at 376. The statutory-tort approach involves examination of three elements: the violation of a federal statute, the injury resulting from this violation, and whether the injured party is a member of the class of persons that Congress sought to protect. Id. It should be noted that the courts do not use the terms "statutory-tort," "statutory-interpretation," or "statutory-policy" in their opinions. However, these terms have been widely accepted in legal literature, and will be useful in the discussion of various judicial approaches. See id. at 375 n.49.
6. See Comment, Private Rights of Action under Amtrak and Ash: Some Implications for Implication, 123 U. Pa. L. Rev. 1992, 1394 (1975). Another argument against the use of the statutory-tort test is based on the difference between regulatory legislation and tort law. One commentator has noted that "[s]ince tort damages are generally compensatory rather than based on the degree of fault, the implication of a civil remedy may inflict a disproportionate punishment in some cases." See Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 291-92 (1963).
as a catalyst for the refinement and restriction of the implication
document.7

This comment will trace the development of the implication doc-
trine; 8 examine recent Supreme Court decisions in the area; 9 examine
the reaction of the lower federal courts to these decisions; 10 and propose
an analysis to be used in future implication cases.11

II. THE DEVELOPMENT OF THE JUDICIALLY-RECOGNIZED IMPLIED
PRIVATE CAUSE OF ACTION

A. The Implication Doctrine in its Initial Stages — The
Search for a Standard

The Rigsby decision was the first case in which the Supreme Court
recognized the existence of an implied private cause of action arising
from a federal statute.12 There, the Court permitted a railroad em-
ployee who had been injured as a result of his employer’s failure to
maintain railroad equipment in the condition required by the FSAA,13
a statute which contained no express civil remedies,14 to bring his per-
sonal injury claim in federal court.15 The Court reasoned that because
the disregard of the regulatory command of a statute is in itself a wrong-
ful act, a right to recover civil damages is implied in favor of the injured
party.16 Thus, the Court concluded that where conduct violative of a

7. See Note, supra note 1, at 388-89.
8. See notes 12-69 and accompanying text infra. It should be noted that
the scope of this comment is limited to cases dealing with federal regulatory
statutes and does not include analysis of implication cases arising under the
403 U.S. 388 (1971) (private cause of action for damages implied under the
fourth & fourteenth amendments); Davis v. Pasman, 442 U.S. 228 (1979)
(private cause of action for damages implied under the Due Process Clause of
the fifth amendment).
9. See notes 71-150 and accompanying text infra.
10. See notes 155-230 and accompanying text infra.
11. See notes 231-51 and accompanying text infra.
12. See Note, supra note 1, at 373. See also notes 2-7 and accompanying
text supra.
rent version at 45 U.S.C. §§ 1-16 (1976)).
15. Id. at 39-40.
16. 241 U.S. at 39-40. There are several factors which are relevant to the
Court’s use of a statutory-tort approach. First, under the rule of Swift v.
Tyson, 41 U.S. (16 Pet.) 1 (1842), and until the Swift doctrine was overruled
by Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the federal courts were free to
create standards of care as part of a body of federal common law. See C.
federal statute injures a member of the class for whose benefit the statute was enacted, a federal cause of action may be implied on behalf of the injured party when the statute does not expressly provide for one.\(^\text{17}\)

The Court's analysis was similar to that used in a negligence action, with the regulatory standards of the FSAA serving as the standard of care with which the railroad was required to comply.\(^\text{18}\)

The Court, in *J.I. Case Co. v. Borak*,\(^\text{19}\) added as another basis for implying a private cause of action from a federal statute the effectuating of the congressional purposes in enacting the statute. There, following a merger in which stockholder pre-emptive rights were allegedly eliminated,\(^\text{20}\) the plaintiff brought an action alleging that the merger was undertaken pursuant to a fraudulent proxy statement\(^\text{21}\) and, therefore, in violation of section 14(a) of the Securities Exchange Act of 1934.\(^\text{22}\)

While section 14(a) does not provide an express private cause of action for damages,\(^\text{23}\) the *Borak* Court used a statutory-policy

\(^{17}\) This enabled the Court to incorporate the statute into its tort analysis, using the statutory violation as the breach of the duty owed to the plaintiff. 241 U.S. at 39.

\(^{18}\) The Court found support for the inference of a private action in the language of the Act which provided that any employee injured by any equipment which did not comply with the Act would be deemed not to have assumed the risk of using the faulty equipment. *Id.* at 40.

\(^{19}\) The plaintiff, owner of 2000 shares of J.I. Case Co. stock, initially brought suit to enjoin the proposed merger of Case with the American Tractor Company (ATC). *Id.* at 429. The plaintiff alleged breach of fiduciary duties by the directors of Case, self-dealing by the management of Case and ATC and misrepresentation in the material circulated to solicit proxies. *Id.* The injunction was denied and the merger was thereafter consummated. *Id.*

\(^{20}\) The plaintiff alleged that the proxy solicitation material was false and misleading, that the merger was approved by a small number of votes, and that the merger would not have been approved but for the false and misleading statements in the proxy materials. *Id.*


> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such
test to determine whether such a cause of action should be implied. The Court first examined the legislative history of the section and concluded that in enacting the section, Congress meant to achieve "broad remedial purposes." Those purposes, the Court found, included preventing "management or others from obtaining authorization for corporate actions by means of deceptive or inadequate disclosure in proxy solicitation" and the protection of fair corporate suffrage. The Court considered this conclusion to be reinforced by the language of the section itself, which allowed the Securities and Exchange Commission (SEC) to promulgate rules and regulations "for the protection of investors." Because the Court concluded that a private damage action was a necessary supplement to action by the SEC to assure compliance with the disclosure provisions of section 14(a), the Court found it appropriate to recognize an implied private damage remedy.

A more restrictive approach to the implication of private causes of action was formulated in National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak). In Amtrak, an...
organization of rail passengers, relying on section 307(a) of the Amtrak Act, sought to enjoin the discontinuance of certain passenger routes.

The Court considered its task to be to determine whether Congress intended to create a private cause of action and acknowledged that the answer to this question must be found within the language and legislative history of the statute. In reviewing the language and history, the Court noted that Congress expressly rejected an attempt to amend section 307(a) to include a private cause of action. Additionally, the Court considered the inclusion of an express private remedy against the corporation in favor of employees affected by labor disputes to be further evidence that Congress would have included an express private cause of action had it intended to include one at all.

33. 45 U.S.C. § 547(a) (1976). The Amtrak Act created a federal rail passenger corporation to facilitate the maintenance of a "modern, efficient, inter-city rail passenger service." Id. § 501(a). Section 307(a) of the Amtrak Act provides in pertinent part:

If the Corporation... engages in... any action... inconsistent with the policies and purposes of this chapter,... the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction,... upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct or threat. Id. § 547(a).

34. 414 U.S. at 545. The defendants in the suit were Central Georgia Railway Co. (Central), its parent, Southern Railway Co. (Southern), and the National Railroad Passenger Corp. (Amtrak). Central had contracted with Amtrak to assume Central's intercity rail service. After a time, Amtrak announced the discontinuance of certain of the passenger trains previously operated by Central. Id. The plaintiff sued to enjoin the discontinuances, claiming that they were prohibited by the Amtrak Act. Id. at 454-55.

35. Id. at 455-56. The Court noted that although the parties had framed the issues in terms of the availability of an implied private action, federal court jurisdiction and the plaintiff's standing to sue, the only question to be considered was whether the Amtrak Act created a cause of action which would enable a private party to enforce the duties and obligations imposed by the Act. Id.

36. Id. at 456-57. Because the plaintiff had no basis upon which to rest his claim other than the Amtrak Act, the Court examined the "four corners" of the Act to search for evidence of congressional intent to create a private action in favor of the plaintiff. Id. at 456. This search included an examination of both the language of the Act itself and its legislative history. The Court's examination of legislative history, however, differed significantly from that undertaken by the Borak Court. In Borak, the Court used the legislative history as a vehicle for determining the congressional purposes behind the enactment of the statute. See notes 19-30 and accompanying text supra. In Amtrak, the Court focused more narrowly on whether the legislative history contained any affirmative indication of congressional intent to create a private action. Id. at 456-61. This focus has been interpreted as being indicative of the Court's more restrictive attitude toward the recognition of implied private actions. See Note, supra note 1, at 380-81.

37. 414 U.S. at 458-61.

38. Id. at 457-58. In its discussion of the limited express remedy given in § 307(a), the Court relied on the statutory construction principle of *expressio
Court concluded that because neither the language nor legislative history of the Act evidenced a congressional intent to create an implied cause of action, it should not recognize such a remedy. The statutory-interpretation approach used in Amtrak was more restrictive than the approaches used in the Rigsby and Borak decisions. However, the federal courts were still left without a definitive standard with which to analyze federal statutes in order to determine whether they contain an implied remedy.

B. The Four-Factor Test of Cort v. Ash

The lack of a definitive standard for federal court recognition of implied remedies was addressed and temporarily resolved in the landmark 1975 decision of Cort v. Ash. In Cort, the plaintiff-stockholder brought an action for damages against the directors and officers of Bethlehem Steel Corp. alleging violation of the Federal Election Campaign Act Amendments of 1974. In its analysis, the Court combined unius est exclusio alterius, noting that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Id. at 458, quoting Botany Mills v. United States, 278 U.S. 282, 289 (1929). The Court concluded that the application of this principle compelled the conclusion that because only a very limited private remedy was expressly given by Congress, this was intended to be the exclusive means of enforcement of the duties created by the Act. 414 U.S. at 458. Thus, as one commentator has noted, the Court showed a great hostility toward the recognition of implied private actions by creating a presumption against implication. Note, supra note 1, at 381. This presumption can be rebutted only by "clear contrary evidence of legislative intent." 414 U.S. at 458.

39. 414 U.S. at 460-61.
40. For a discussion of the statutory-interpretation test, see Note, supra note 1, at 377-78. The statutory-interpretation approach requires the court to examine the statutory language and the relevant legislative history to determine whether Congress intended, without expressly saying so, to give a private cause of action to the plaintiff. Id. at 377.
41. For a discussion of the Rigsby decision, see notes 12-18 and accompanying text supra.
42. For a discussion of the Borak decision, see notes 19-30 and accompanying text supra.
44. 422 U.S. 66 (1975).
45. Id. at 71. The plaintiff, the owner of 50 shares of Bethlehem stock, alleged that the directors and officers of Bethlehem violated § 610 of the Federal Election Campaign Act Amendments of 1974 by authorizing the expenditure of corporate funds for advertisements and mailings relating to the management's opinion on the issues presented during the 1972 Presidential election. Id. at 68-72. For the text of the Federal Election Campaign Act see 18 U.S.C. § 610 (Supp. III 1974) (repealed 1976).
46. See Note, supra note 1, at 382-88.
the statutory-tort,\textsuperscript{47} the statutory-policy,\textsuperscript{48} and the statutory-interpretation\textsuperscript{49} approaches which it had used in previous cases\textsuperscript{50} and formulated an analysis based on four factors which it considered to be "relevant" to the determination of whether a private remedy was to be implied.\textsuperscript{51}

The Court stated:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?\textsuperscript{52}

\textsuperscript{47} For a discussion of the statutory-tort test, see note 5 and accompanying text \textit{supra}.

\textsuperscript{48} For a discussion of the statutory-policy test, see note 24 and accompanying text \textit{supra}.

\textsuperscript{49} For a discussion of the statutory-interpretation test, see note 40 and accompanying text \textit{supra}.

\textsuperscript{50} 422 U.S. at 78. The Court cited the Rigsby decision as support for the first prong of its four-factor analysis dealing with whether the plaintiff was an "especial beneficiary" of the statute. \textit{Id}. For a discussion of the "especial beneficiary" standard of Rigsby, see notes 12-18 and accompanying text \textit{supra}. The Amtrak decision was cited as support for both the second and third factors in the Cort analysis, dealing with the indication of legislative intent to create or deny a private remedy and with the consistency of recognizing such a remedy in relation to the congressional purposes for enacting the statute. 422 U.S. at 78. For a discussion of Amtrak, see notes 32-39 and accompanying text \textit{supra}. Finally, the Court discussed both Rigsby and Borak and distinguished the result reached in those cases from its decision not to recognize an implied remedy under \textsection{610}. The Court stated that in Borak and Rigsby "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone. Here, there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80. For a discussion of Borak, see notes 19-30 and accompanying text \textit{supra}.

\textsuperscript{51} 422 U.S. at 78.

\textsuperscript{52} \textit{Id}. (emphasis by the Court) (citations omitted). It is interesting to note that in formulating the four-factor test, Bivens v. Six Unknown Federal Narcotics Agents, 408 U.S. 588 (1971), was incorporated into the fourth factor of the analysis. 422 U.S. at 78. Bivens was not a case of implication under a federal statute, but rather, a case of an implied damage remedy under the fourth amendment to the Constitution. 403 U.S. at 397. The Court's discussion of Bivens raised a question as to whether the Cort test was to be applied to future cases seeking implication of constitutionally-based private remedies. \textit{See} Note, Bivens Actions for Equal Protection Violations: Davis v. Passman, 92 \textit{Harv. L. Rev.} 745 (1978).
In its application of the first factor, the Court emphasized that the statute was primarily concerned with keeping the federal election process free from the possibly corrupting influence of large corporate contributions.\footnote{53} Because the legislation was only secondarily concerned with the stockholder-corporation relationship,\footnote{54} the Court concluded that corporate stockholders were not the "especial beneficiaries" of the statute.\footnote{55} In considering the second factor — indications of legislative intent — the Court undertook an examination of the legislative history of the statute.\footnote{56} Finding no indication of an affirmative legislative intent to provide a private remedy, the Court concluded that the second factor also militated against the recognition of an implied remedy.\footnote{57} Turning to the third factor, the Court considered the underlying purpose of the legislative scheme — preventing corporate contributions from influencing federal elections — and concluded that an implied cause of action would do nothing to cure the evil that the statute was intended to prevent.\footnote{58} Finally, relying on the availability of state law actions for ultra vires actions by corporate officers and for breaches of fiduciary duties, the Court concluded that it was proper to relegate the plaintiff to whatever remedies he may have at state law.\footnote{59} The Supreme Court applied the Cort four-factor test in the case of \textit{Piper v. Chris-Craft Industries}.\footnote{60} The Court in \textit{Piper} considered whether

\footnote{53} 422 U.S. at 82.
\footnote{54} Id. The Court noted that "the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders." Id.
\footnote{55} Id. The Court emphasized that remedies should only be implied in situations where there is "a clearly articulated federal right in the plaintiff... or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard." Id.
\footnote{56} Id. at 82-84. In its examination of the legislative history of §610, the Court concluded that there was "no discussion whatever in Congress concerning private enforcement of §610." Id. at 82 n.14.
\footnote{57} Id. at 82-84. The Court conceded that while it is often not necessary, in the case of a showing that the plaintiff was an intended beneficiary of the statute, to show an intent to \textit{create} a private action, an expressed intention to \textit{deny} one would be controlling. The Court refused to imply a private remedy, however, without a showing of an affirmative intent to provide one where it was "at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations..." Id. at 82-83.
\footnote{58} Id. at 84.
\footnote{59} Id. at 84-85. The Court emphasized that because corporations are creatures of state law and investors rely on state law to govern the relationship between the stockholders and the corporation, an implied federal remedy should be recognized only when the intent of Congress might be frustrated by state-created causes of action. Because Congress was primarily concerned with the prevention of corporate influence on federal elections, and not with the regulation of corporations as such, the Court concluded that leaving the plaintiff to his state-created remedies would do nothing to frustrate congressional intent. Id.
\footnote{60} 430 U.S. 1 (1977).
section 14(e) of the Securities Exchange Act of 1934 provided a defeated tender offeror with a private right of action against a successful takeover bidder. The Court, after examining the legislative history of section 14(e), noted that the "sole purpose" of the Act was to protect investors, and concluded that defeated takeover bidders were therefore not the intended beneficiaries of the statute and could not satisfy the first of the Cort factors. The Court, nevertheless, examined the remaining three Cort factors and determined that these, too, did not support the implication of a private action. Therefore, the Court

61. 15 U.S.C. § 78n(e) (1976). Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

62. 430 U.S. at 4-9. The plaintiff, Chris-Craft Industries, Inc. (Chris-Craft), was the unsuccessful tender offeror in a contest for the control of Piper Aircraft Corp. (Piper). After a protracted battle for control, Bangor Punta Corp. (Bangor Punta), with the support of the Piper family, secured a majority of the Piper stock. Id. at 4. Chris-Craft brought suit against Bangor Punta, the Piper family, and Bangor Punta's underwriter, First Boston Corp., alleging that certain sales of Piper stock and certain communications made to Piper stockholders were violative of § 14(e) and SEC Rule 10b-6, 17 C.F.R. § 240.10b-6 (1976). 430 U.S. at 4.

63. 430 U.S. at 26-35. The Court cited extensively to passages from the hearings and debates surrounding the consideration of § 14(e). Id. From this examination, the Court concluded that § 14(e) was not designed to favor either management or the takeover bidder, but was intended solely to require full and fair disclosure for the benefit and protection of investors. Id. at 31.

64. Id. at 35.

65. Id. The Court found "no hint" in the legislative history that Congress intended either a successful or defeated takeover bidder to have a private remedy under § 14(e). Id.

66. Id. For a discussion of the Cort four-factor test, see notes 44-59 and accompanying text supra.

67. 430 U.S. at 38-42. While it gave no indication as to which of the factors was most important or the relative weight to be given to each factor, the Piper Court's approach indicated that the absence of the first Cort factor was not necessarily fatal to the recognition of an implied private remedy under the four-factor Cort test. See id.

68. Id. at 38-41. In its examination of the second factor, the Court concluded that the legislative history indicated no express congressional intent either to grant or to deny a private remedy, but rather evidenced only the narrow intent to curb unregulated activities by takeover bidders. Id. at 38. Fairly read, concluded the Court, this narrow declaration of purpose negates the claim that tender offerors were intended to have a private damage remedy. Id.

In its examination of the third Cort factor, the Court emphasized that the purpose of § 14(e) was to protect shareholders. Id. at 39. Because allowing defeated takeover bidders a private damage remedy may be detrimental to the protection of the shareholder, the Court concluded that the purposes of the
declined to recognize an implied private cause of action under section 14(e) of the 1934 Act.69

C. Recent Supreme Court Decisions Restricting the Applicability of the Cort Test

Recent decisions of the Supreme Court evidence an unwillingness to continue the pattern of liberal implication of private remedies from federal statutes. As a result, the four-factor test of Cort has been modified and restricted at least in its application to statutes which are regulatory in nature.70

The first explicit indication that the Court would look less favorably on the implication doctrine as a theory of relief in federal court71 came in Cannon v. University of Chicago.72 Although the four-factor test of Cort was applied in Cannon, the Court gave warnings that, in the future, it would not continue to be as liberal in applying the implication doctrine and that Congress should expressly provide for private remedies in future statutes if it desired to create them.73

In Cannon, the plaintiff alleged that she had been denied admission to medical school on the basis of her sex74 in violation of section 901(a) of Title IX of the Education Amendments of 1972 (Title IX),75 a federal civil rights statute which prohibits sex discrimination by certain educational institutions.76 Although Title IX contains no express private remedy for violation of its provisions, the plaintiff contended that a remedy for victims of the proscribed discrimination was to be implied.77

legislative scheme would not be served by the recognition of an implied damage remedy. Id. at 39-40.

Finally, because the Court determined that the plaintiff would have a common law cause of action for interference with a prospective commercial advantage, the Court concluded that it was proper to relegate the plaintiff to the remedies provided by state law. Id. at 40-41.

69. Id. at 42. After the Piper decision, the Court had several opportunities to reevaluate the Cort test. See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). However, the Court did not thoroughly analyze the Cort test until its decision in Cannon v. University of Chicago, 441 U.S. 677 (1979). For a discussion of Cannon, see notes 71-96 and accompanying text infra.

70. See notes 71-150 and accompanying text infra.


73. See notes 84-96 and accompanying text infra.

74. 441 U.S. at 680.


76. Title IX provides in part that "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." Id.

77. 441 U.S. at 683-85.
The Court, noting the applicability of the Cort analysis, undertook an extensive analysis of the legislative history of Title IX. The Court observed that Title IX was patterned after Title VI of the Civil Rights Act of 1964 which, for several years, had been construed by the federal courts as containing a private remedy. Furthermore, the Court noted that Congress had explicitly assumed that Title IX would be enforced in the same manner as Title VI. Based on these two factors, the Court concluded that the plain intent of Congress was to provide a damage remedy for victims of such discrimination so that full effect could be given to the purpose of the statute.

Even though the Cannon Court employed the Cort test, the Cannon decision was less than a whole-hearted endorsement of the Cort analysis. The majority tempered its holding by saying that when

78. Id. at 688-89.
79. Id. at 694-703. In addition to its extensive discussion of the legislative history of Title IX, the Court also examined the other three factors of the Cort analysis. In its examination of the first factor, the Court looked to the language of Title IX, and noted that, unlike the criminal statute considered in Cort, it explicitly conferred a benefit on a certain class of persons — those discriminated against on the basis of sex. Id. at 698-94. Further, the plaintiff was clearly a member of the class for whose special benefit Congress enacted the statute. Id. at 694. Thus, the Court concluded that the first factor favored the implication of a private cause of action. Id. at 693-94.

In examining the third factor, the Court noted that when an implied remedy is "necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." Id. at 703. Because one of the purposes of the statute was to provide individuals protection against sex discrimination and because a private cause of action was consistent with, and necessary to, the effectuation of this purpose, the Court concluded that the third Cort factor also favored implication. Id. at 704-06.

Finally, because the prohibition of discrimination of any sort, including that on the basis of sex, is clearly a matter of federal concern, the Court concluded that the fourth Cort factor also favored the implication of a private federal remedy. Id. at 708-09.

80. 42 U.S.C. § 2000d (1976). See 441 U.S. at 694. The Court noted that, except for the substitution of the word "sex" in Title IX for the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the class of protected persons. Id. at 695. Further, both statutes provide the same express administrative remedies. Id. at 695-96.

81. 441 U.S. at 694-99. Most particularly, the Court noted that the 1967 case of Bossier Parish School Bd. v. Lemon, 570 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967), had squarely decided that an implied private action was contained in Title VI and that this case had been the basis for at least twelve similar decisions in the federal courts by 1972, when Title IX was enacted. 441 U.S. at 696.

82. 441 U.S. at 696. The Court pointed to several passages in the Congressional Record in which the supporters of Title IX stated that the cases construing Title VI would serve as precedent in the enforcement of Title IX. Id. at 696 n.19. See 118 CONG. REC. 5807 (1972) (remarks of Sen. Bayh); 117 CONG. REC. 60,408 (1971) (remarks of Sen. Bayh).
83. 441 U.S. at 694-703.
84. Id. at 688-89.
85. See Steinberg, supra note 71, at 37-38.
Congress intended private litigants to have a cause of action to support their statutory rights, "the far better course" would be to specifically state that such a cause of action was being created. The Court further pointed out that Title IX presented an atypical situation in that all four of the Cort factors were satisfied. Finding that this was one of the "certain limited circumstances" in which an implied private remedy should be found, the Court allowed the plaintiff to pursue her cause of action under Title IX.

Justices Rehnquist and Stewart concurred, but noted that the question of the existence of a private remedy is basically one of statutory construction. The concurring Justices noted that the attitude of the Supreme Court toward the recognition of implied causes of action had become stricter and that the analysis used in the Borak decision is no longer of practical utility. The concurrence noted that even though evidence of congressional intent to provide a private remedy was very strong in this case, Congress should be explicitly warned that it is "far better" to be specific when it intends to provide private litigants with a cause of action. Further, in the concurring Justices' view, the Supreme Court should be "extremely reluctant" to imply a cause of action in the future without such specificity by the legislature.

86. 441 U.S. at 717.

87. Id. It is also important to note that since Cannon involved a civil rights statute, the Court may have been more willing to imply a private remedy in favor of the injured plaintiff. For a discussion of the Court's treatment of cases arising under regulatory statutes, see Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). See also notes 97-150 and accompanying text infra.

88. 441 U.S. at 717. The Court noted that it had "long recognized that under certain limited circumstances" the courts may recognize a private cause of action when Congress fails to expressly provide for one in the statute. Id.

89. Id. at 717 (Rehnquist, J., concurring).

90. Id. Justice Rehnquist noted that, unlike state courts of general jurisdiction which enforce the common law in conjunction with state statutes, federal courts which enforce the laws enacted by Congress must look solely to those laws to determine whether a private cause of action may be brought under them. Id.

91. Id. at 718 (Rehnquist, J., concurring). Justice Rehnquist's implication was that Borak's analysis is no longer viable insofar as it does not rely on statutory language and legislative history as indicia of congressional intent to create a private cause of action. For a discussion of Borak, see notes 19-80 and accompanying text supra. Justice Rehnquist noted that cases like Borak gave the legislature reason to believe that when it failed to decide the question of whether a private remedy should be allowed in a statute the Court would assume the task. Because, in Justice Rehnquist's view, this question is properly one for the legislature rather than the courts, his statement was a warning to Congress that the Court would no longer be willing to assume this task. Id. at 717-18 (Rehnquist, J., concurring).

92. 441 U.S. at 718 (Rehnquist, J., concurring). The concurring justices also noted that the legislature should be apprised of the fact that "the ball, so to speak, may well now be in its court." Id.

93. Id.
Justice Powell dissented, warning against the continued use of the Cort test. He noted that the four-factor analysis is an invitation to federal courts to legislate causes of action not authorized by Congress—a course of action which would, in his view, violate the constitutional principle of separation of powers.

The Court further limited the utility of the implication doctrine by considering only the first two of the Cort factors in Touche Ross & Co. v. Redington. In Touche Ross, an action was brought against the defendant public accounting firm by the plaintiff, trustee in bankruptcy of Weis Securities, Inc. (Weis), alleging that the defendant breached duties owed to the customers of Weis and others under section 17(a) of the Securities Exchange Act of 1934 (1934 Act) by

94. Id. at 730 (Powell, J., dissenting).
95. Id. at 731 (Powell, J., dissenting). Justice Powell indicated that the Cort analysis was a product of a "more or less haphazard line of cases", was not faithful to constitutional principles, and should, therefore, be rejected. Id. Justice Powell maintained that absent the "most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." Id. Further, the Cort test "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement." Id. at 740 (Powell, J., dissenting).

96. Id. at 730-31 (Powell, J., dissenting). Justice Powell stated that the decision in Cannon illustrates how the implication of a private right of action "denigrates the democratic process." Id. at 747 (Powell, J., dissenting). Because the decision will, in Justice Powell's view, put a burden of expensive and vexatious litigation on many of the nation's educational institutions, he feared that the institutions would alter their admissions processes making them less flexible. Id. at 747-48 (Powell, J., dissenting). Such a significant intrusion into the liberty of academic institutions, Justice Powell opined, should be a decision made by Congress rather than the courts. Id. at 748 (Powell, J., dissenting).

98. Id. at 563. Touche Ross was retained as the independent auditor for Weis Securities, Inc. from 1969 to 1973. Id. While engaged in this capacity, Touche Ross conducted annual audits of Weis' books and records and prepared for filing with the SEC all reports of Weis' financial condition as required by § 17(a) of the 1934 Act. Id. For the text of § 17(a), see note 100 infra.
99. 442 U.S. at 564-66. In 1973, the SEC and the New York Stock Exchange discovered that the financial condition of Weis was far worse than the reports prepared by Touche Ross indicated. Id. at 564. After a United States District Court adjudged Weis' customers in need of the protection afforded by the Securities Investors Protection Act (SIPA), 15 U.S.C. §§ 78aaa-78lll (1976), it appointed Redington as trustee and ordered the liquidation of Weis' assets. Id. at 564-65. Thereafter, pursuant to the statutory authority granted to it under SIPA, the Securities Investor Protective Corp. (SIPC) advanced $14 million to the Trustee in order to reimburse Weis' customers up to the specified statutory limits. Id. Even after this advance, however, over $51 million in customer claims remained unsatisfied. Id. at 565 n.6.
100. 15 U.S.C. § 78q(a) (1976). In 1972, the date relevant to this case, § 17(a) provided:
   Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association,
conducting an improper audit and certification of Weis’ 1972 financial statements.101

The Court began its analysis by emphasizing that the issue of implication is a question of statutory construction—i.e., a determination of congressional intent.102 In its examination of section 17(a), the majority first reviewed the language of the statute103 and observed that it neither outlaws any conduct nor creates a private right of action in favor of anyone.104 The Court noted that in cases in which it had recognized implied private causes of action, the statutes in question at least prohibited certain conduct or created federal rights in favor of private parties.105

and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memorandum, papers, books and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.


101. 442 U.S. at 565-66. The complaint was filed by both the trustee in liquidation and the SIPC, which sued on its own behalf and as the subrogee of Weis’ customers whose claims it paid under SIPA. Id. at 566. In addition to the §17(a) claim, the complaint also alleged breach of duties owed to the trustee and SIPC under state law, including negligence, breach of contract and breach of warranty. Id. The complaint further averred that Touche Ross’ breach of duty prevented disclosure of Weis’ dire financial condition until it was too late to take whatever remedial action could be taken to avoid or lessen the adverse financial consequences suffered by Weis’ customers. Id.

102. Id. at 568. Therefore, the Court noted, the SIPC's argument in favor of implication based on tort principles was "entirely misplaced." Id.

103. Id. at 568-89.

104. Id. The Court went on to note that the express intent of §17(a) was to provide the SEC with the necessary information to ensure compliance with the "net capital rule," the principal regulatory tool used by the SEC to protect customers who leave assets on deposit with broker-dealers. Id. at 569-70. See 15 U.S.C. §78o(c)(3); 17 C.F.R. §240.15c3-1 (1978). Accordingly, the Court concluded that as §17(a) is forward-looking and seeks to forestall broker insolvency rather than to serve as a compensatory mechanism to be used after insolvency has occurred, the language of the statute gives no basis for inferring a private cause of action. 442 U.S. at 570-71.

The Court next considered the legislative history of section 17(a) and found it to be silent on the question of whether Congress intended a private remedy to be available. Rejecting an argument that, in the absence of an express congressional intent to deny a private cause of action, one should be inferred, the Court drew further support for its decision from the structure of the statute.

After this analysis, which encompassed only the first and second Cort factors, the majority concluded that no further inquiry was necessary. While recognizing that Cort had established that four factors were "relevant" to the determination of whether a cause of action may be implied in a federal statute, the Touche Ross Court noted that the Cort decision had not said that each factor was to be given equal weight. Given its task of determining congressional intent, the Court concluded that in a case where the statutory language neither confers private rights nor prescribes conduct and the legislative history is silent

supra. For a discussion of Cannon, see notes 70-96 and accompanying text supra.

106. 442 U.S. at 571.

107. Id. The Court noted several House and Senate Reports which indicated that § 17(a) was intended only as a preventative monitoring provision and not to provide customers an action for losses after liquidation. Id. at 571 n.17. See S. REP. No. 792, 73d Cong., 2d Sess. 13, 21 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 25 (1934).

108. 442 U.S. at 571. The Court noted that recognizing an implied cause of action based on congressional silence was a "hazardous enterprise at best." Id.

The Court further stated that where "the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section." Id. (citations omitted).

Further, the Court went on to note that § 18(a) of the Act provides an express damage remedy for certain persons harmed by materially misleading statements made in reports required by § 17(a). Id. at 572. See also 15 U.S.C. §78r(a) (1976). The Court declined to imply a much broader remedy than that which it concluded Congress chose to provide. 442 U.S. at 572.

109. 442 U.S. at 571-72. The Court emphasized that there are many sections of the 1934 Act in which private rights of action are explicitly granted, among them §16(b), 15 U.S.C. § 78p(b) (1976), §18(a), 15 U.S.C. § 78r(a) (1976), and § 9(e), 15 U.S.C. § 78i(e) (1976). 442 U.S. at 571-72. To the Court, this indicated that when Congress wanted to provide a private right of action, it knew how to do so and did so expressly. Id. at 572.

110. 442 U.S. at 576.

111. Id. at 575-76. See also Cort v. Ash, 422 U.S. at 78.

112. 442 U.S. at 575. The Court noted that further inquiry was unnecessary since the question of whether Congress, either expressly or by implication, intended to create a private cause of action had definitely been answered in the negative. Id. at 576.

The Court also rejected the argument that a private remedy should be implied based on a broad invocation of the "remedial purposes" of the 1934 Act. Id. at 578. See also SEC v. Sloan, 436 U.S. 103, 116 (1978).
as to private remedies, there is no need for further inquiry and a cause of action is not to be implied.

The restrictive trend against the implication of private rights of action continued in Transamerica Mortgage Advisers, Inc. v. Lewis, in which the Court was faced with the issue of whether an implied private remedy existed under sections 206 and 215 of the Investment Advisers Act of 1940 (Act). In Transamerica, the plaintiff, a shareholder in a trust of which the defendant, Transamerica Mortgage Advisers, Inc., (TAMA) was an investment adviser, brought suit based on allegations that the defendant had committed various frauds and breaches of fiduciary duty. The complaint set forth several claims said to arise under the Act, on the theory that the clients of investment advisers were the intended beneficiaries of the Act and, therefore, that an implied private cause of action in their favor should be recognized.

The Court began its analysis by again emphasizing that the question of whether a statute contains an implied private right of action is one of statutory construction and that the ultimate determination to be made is whether Congress intended to create the private remedy asserted. The Court cited Touche Ross for the proposition that the

113. 442 U.S. at 576.
114. Id.
117. 444 U.S. at 13. The suit was brought both as a derivative action on behalf of the trust and as a class action on behalf of the trust's shareholders. Id. Also named as defendants were the trust, several individual trustees, and two corporate affiliates of TAMA. Id.
118. Id.
119. Id. at 13-14. The complaint set out three causes of action. The first alleged that the investment advisers' contract was unlawful because of failure to register and because the contract called for excessive compensation. Id. at 13. The second alleged a breach of fiduciary duty based on the purchase by the trust of low-quality securities. Id. The third alleged that profitable investment opportunities had been diverted from the trust to affiliates of Transamerica. Id. at 13-14.
120. Id. at 14-15. The Court noted that the Act nowhere expressly provides for a private cause of action. Id. at 14. The only section of the Act which gives any authorization to bring suit is § 209, which gives the SEC power to seek an injunction in federal court to enjoin violations of the Act. 444 U.S. at 14. See 15 U.S.C. § 80b-9 (1976).
121. 444 U.S. at 15.
122. Id. at 15-16. The court emphasized that while some earlier opinions, such as Borak, had placed "considerable emphasis upon the desirability of implying private rights of action in order to effectuate the purposes of a given statute, . . . what must ultimately be determined is whether Congress intended to create a private remedy." Id. at 15. For a discussion of Borak, see notes 19-30 and accompanying text supra. The court cited Touche Ross as support for the assertion that recent decisions had made clear that congressional intent was the relevant inquiry in deciding whether to recognize an implied action. 444 U.S. at 16. For a discussion of Touche Ross, see notes 97-114 and accompanying text supra.
first factor relevant to this determination is the language of the statute itself and, accordingly, examined the language of both sections 206 and 215. From its examination of the express language of section 215, the Court concluded that Congress intended to create a private cause of action. The Court reasoned that by expressly declaring certain types of contracts to be "void," Congress obviously intended that the issue of voidness should become part of the federal remedy under section 215, and so recognized the existence of a private cause of action in favor of the trust seeking to void the investment adviser's contract.

The Court took a different view, however, of the plaintiff's claims under section 206. Because, unlike section 215, section 206 simply proscribed certain conduct and did not by its terms create or alter any civil liabilities, the Court concluded that if a private right of action was to be found in section 206, it must be read into the section. However, the Court noted that it 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." Read-
ing section 206 in the overall context of the statute, the Court noted that Congress provided express judicial and administrative remedies for violation of section 206. In view of those express remedies, the Court found it "highly improbable that 'Congress absent-mindedly forgot to mention an implied private action.'" 

The Court went on to note that even established canons of statutory construction must yield to persuasive evidence of congressional intent to provide a private remedy. In its search for such evidence, the Court noted that in each of the securities statutes enacted prior to, or as a companion statute with the Act, Congress had expressly granted private damage actions in certain prescribed circumstances. Because this established that Congress knew how to provide a private remedy when it wanted one to exist, the fact that there was no express damage provision in the statute in issue strongly suggested to the Court that Congress was unwilling to provide a private cause of action for damages.

Next, the Court examined the relationship of an implied cause of action under section 206 and the Court four-factor analysis. In reject-

130. 444 U.S. at 20.

133. Id. at 20.
134. Id. at 20-21. Specifically, the Court noted the existence of express private damage actions in sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k & 77l (1976); sections 9(e), 16(b) and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(e), 78p(b) & 78r (1976); sections 16(a) and 17(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79p(a) & 79q(b) (1976); section 528(a) of the Trust Indenture Act of 1939, 15 U.S.C. § 77www(a) (1976) and section 30(f) of the Investment Company Act of 1940, 15 U.S.C. § 80a-29(f) (1976). 444 U.S. at 20 n.10.

135. 444 U.S. at 21. The Court observed that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." Id., quoting Touche Ross & Co. v. Redington, 442 U.S. at 572 ("When Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.")

136. 444 U.S. at 21. The Court further noted that the omission of an express private damage action from the substantive provisions of the Act was paralleled by the jurisdictional section, § 214, 15 U.S.C. § 80b-14 (1976). 444 U.S. at 21. During the course of its consideration, all references to federal court jurisdiction over "actions at law" to enforce any "liability" created under the Act were deleted. Id. at 20-21.

137. 444 U.S. at 23-24. For a discussion of the Court decision, see notes 44-59 and accompanying text supra.
ing the assertion of the dissent 138 that the straightforward application of the Cort analysis favored implication, 139 the majority emphasized that the Touche Ross decision 140 counselled against the examination of any factor which is not indicative of congressional intent. 141 Because its examination of the language and legislative history of section 206 had led to the conclusion that Congress did not intend to create a private damage remedy, 142 the Court declined to consider the utility of a private remedy and the fact that the area may not be one traditionally relegated to state law, 143 and considered its inquiry at an end. 144

In its examination of section 206, the Court exhibited a stricter attitude toward the implication of private remedies than had been illustrated even in the narrow analysis undertaken in Touche Ross; 145 where the Court focused on the fact that the statute neither granted private rights to any class of persons nor proscribed any conduct as unlawful. 146


139. Id. at 26-36 (White, J., dissenting). An important aspect of the analysis used by the dissent was its discussion of the relationship between §§ 206 and 215. Id. at 29 (White, J., dissenting). Justice White asserted that § 215 was meant only to specify one of the consequences of a violation of § 206 or other substantive provisions, namely that a violative contract would be declared void. Id. Believing there to be a practical necessity of a private remedy to enforce this particular consequence of a § 206 violation, the dissent concluded that Congress contemplated the use of private actions to give other forms of relief for violations of § 206 and that Congress did not intend the express administrative and judicial remedies provided in the Act to be exclusive. Id.

140. For a discussion of the Touche Ross decision, see notes 94-114 and accompanying text supra.

141. 444 U.S. at 23. In particular, the Court noted that in Touche Ross, the Court had refused to consider the utility of a private remedy and the fact that it may be one not traditionally relegated to state law, in circumstances where the intent of Congress to create a private action could not be discerned from an examination of statutory language and legislative history. Id.

142. Id. at 15-22. See notes 127-36 and accompanying text supra.

143. 444 U.S. at 23. Justice White, in dissent, noted that the majority refused to consider the third and fourth prongs of the Cort test because they were ignored in Touche Ross. Id. at 34 n.10 (White, J., dissenting). He asserted, however, that the Touche Ross Court refused to consider these factors only because the first two prongs of the test had not been satisfied. Id. By contrast, the majority conceded that under § 206, the clients of investment advisers were the intended beneficiaries of the statute, and so at least the first prong of the Cort test was satisfied. Id.

144. Id. at 24. Mr. Justice Powell filed a concurring opinion in which he stated that he viewed the decision as compatible with the views expressed in his dissent in Cannon. Id. at 25 (Powell, J., concurring). Therefore, in Justice Powell's view, a court may imply a cause of action only when it finds "most compelling evidence of affirmative congressional intent." See Cannon v. University of Chicago, 441 U.S. at 781 (Powell, J., dissenting); note 95 supra.

145. For a discussion of the Touche Ross decision, see notes 97-114 and accompanying text supra.

146. 444 U.S. at 24. See note 113 and accompanying text supra.
In that situation, it was “evident” to the Court that no implied private damage remedy should be recognized.\(^{147}\) In contrast, the Court conceded that section 206 clearly prohibited certain conduct by investment advisers\(^{148}\) and further, that it was intended to protect the victims of the proscribed practices.\(^{149}\) The Court, however, refused to recognize an implied private cause of action, noting that “the mere fact that the statute was designed to protect advisers’ clients does not require the implication of a private cause of action for damages on their behalf.”\(^{150}\)

### III. REACTIONS TO THE RESTRICTIVE TREND OF THE SUPREME COURT — RECENT IMPLICATION CASES IN THE LOWER FEDERAL COURTS

The reaction in the lower federal courts to the *Touche Ross* and *Transamerica* decisions has been far from uniform. As will be seen in the discussion of the cases which follow, while commonly acknowledging that the task of the court is the determination of congressional intent to create a private cause of action,\(^{151}\) some of the courts of appeals have followed the Supreme Court’s lead, adopting a restrictive attitude toward both the recognition of implied causes of action and the viability of the *Cort* test;\(^{152}\) but others continue to buck the apparent trend, retaining a more liberal attitude and have either adopted a narrow view of the impact of *Touche Ross* and *Transamerica* on the *Cort* test,\(^{153}\) or have apparently ignored or misapplied these decisions.\(^{154}\)

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147. 444 U.S. at 24.
148. Id. See note 124 supra.
149. 444 U.S. at 24.
150. Id. Thus, it is submitted that the *Transamerica* decision indicates a broad-based rejection of the four-factor analysis used in *Cort*, as the *Transamerica* Court refused to consider the last two factors of the *Cort* test even where the statute protected an identifiable class and proscribed conduct. In *Touche Ross*, it was the absence of these two elements which formed the basis for the Court’s refusal to consider the third and fourth *Cort* factors. See note 113 and accompanying text supra. More recently, the Supreme Court has confirmed the vitality of the analyses used in *Touche Ross* and *Transamerica* in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 148-49 (1980). See also *Carlson v. Green*, 446 U.S. 14, 39 n.5 (1980) (Rehnquist, J., dissenting).


152. See notes 155-97 and accompanying text infra.
153. See notes 198-219 and accompanying text infra.
154. See notes 220-30 and accompanying text infra.
A. Decisions of the Courts of Appeals Reflecting the Restrictive Trend

The Fifth Circuit followed the lead of the Supreme Court in taking a restrictive stance toward the recognition of implied actions in the case of Rogers v. Frito-Lay, Inc. The Rogers court was faced with the issue of the implication of a cause of action from section 503 of the Rehabilitation Act of 1973, which requires most government contracts to contain an agreement by the contractor to create and maintain affirmative action programs for the handicapped. The statute also permits any handicapped person to file a complaint with the Secretary of Labor if that person believes that a government contractor has failed to comply with the agreement. The plaintiffs in Rogers, handicapped former employees of the defendant, brought an action in federal court asserting that a private cause of action for damages was implicit in section 503.

The Rogers court refused to engage in a mechanical application of the Cort four-factor test and emphasized that the heart of the issue was a determination of whether Congress intended to create a private cause of action. Looking exclusively at the language of the statute and its legislative history, the court concluded that inasmuch as neither factor

155. 611 F.2d 1074 (5th Cir. 1980).
156. 29 U.S.C. § 793 (1976). Section 503(a) requires that any contract entered into by the federal government in excess of $2,500 contain a provision that the contracting parties will institute and maintain an affirmative action program to employ certain qualified handicapped individuals. Id. § 793(a). Section 503(b) provides that handicapped individuals who allege that the parties have failed to comply with the affirmative action covenant in the contract may file a complaint with the Department of Labor. Id. § 793(b).
157. 611 F.2d at 1077.
158. 29 U.S.C. § 793(b) (1976). Upon receipt of such a complaint, the Secretary is required to make a prompt investigation and to take whatever action is warranted by the facts and circumstances, consistent with the terms of the contract and the laws and regulations applicable thereto. Id.
159. 611 F.2d at 1077-78 & nn.2 & 3. The plaintiffs did not request that a private right of action be inferred in order to force the inclusion of an affirmative action program into the contract, but to provide a remedy against federal contractors who they claim discriminated against the handicapped. Id. at 1078 n.3.
160. Id. at 1078. The court noted that mechanical adherence to Cort should not replace the "judgmental wisdom that is sought from courts." Id.
161. Id. at 1078 & n.4. See also Micklus v. Carlson, 632 F.2d 227, 234 (3d Cir. 1980) (the Cort factors are useful only as "guideposts" for determining legislative intent).
162. See 611 F.2d at 1079-85. In its analysis, the Rogers court used the statutory language to determine: 1) if the plaintiff was a member of the class upon which Congress sought to confer federal rights and 2) whether a private remedy is consistent with the purposes of the statutory scheme as a whole. Id. Legislative history was examined in order to find any indication of congressional intent to allow private relief. See id. The court concluded that neither factor supported the plaintiff's claim for damages. Id. However,
provided a positive indication of congressional intent to create a private damage remedy, the dismissal of the plaintiffs' claims was proper.

The Ninth Circuit, in *Jablon v. Dean Witter & Co.*, adopted the modified test of *Touche Ross* and *Transamerica* as the new guidepost to be used in determining whether to imply a private cause of action. In *Jablon*, the plaintiff alleged that the defendant participated in various frauds relating to her margin account. The plaintiff contended

it is important to note that by examining the overall statutory scheme — the third factor of the Cort analysis — the Rogers court departed from the narrower analyses of *Touche Ross* and *Transamerica*, which used statutory language for the sole purpose of determining whether Congress intended to confer federal rights on the plaintiff. For a discussion of *Touche Ross* and *Transamerica*, see notes 97-150 and accompanying text supra. See also Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1237-44 (7th Cir. 1980) (section 503 contains no private remedy, either for damages or for an injunction to force compliance with the terms of the contract). It is also important to note that in its examination of statutory language, the Rogers court departed from the first factor of the Cort analysis in a very important way. The Rogers court gave no weight to the assertion that the plaintiff was arguably a member of the class Congress sought to protect — an "intended beneficiary" of the statute. 611 F.2d at 1079. Rather, the court framed the issue as being whether Congress intended to confer federal rights on the class. Id. at 1079-80.

163. 611 F.2d at 1085. The Rogers court noted that when asked to imply a remedy where Congress has made no mention of one, the judiciary should be careful to "resort neither to our own notions of sound policy nor to our concept of what best suits the public weal." Id. The court noted that Congress may have been silent as to the existence of a private cause of action for many reasons, all of them inconsistent with the implication of a private remedy: 1) a private remedy never occurred to Congress; 2) congressional oversight in failing to deal with a matter intended to be covered; and 3) deliberate obscurity for political reasons. Id. The proper inquiry, the court noted, is not whether the advocates of judicially-implied remedies have a better case than their opponents, "but whether, considering the purpose and function of the statute and its legislative history, we can find a legislative intent to recognize a judicial remedy." Id.

164. *Id.* In dissent, Judge Goldberg noted that "[o]nly a cave dweller or other layman would not realize that there has been a remarkable change of attitude by the Supreme Court regarding the inference of private rights of action in the last fifteen years." *Id.* at 1088 (Goldberg, J., dissenting). However, he disagreed that the recent Supreme Court decisions should have such a limiting effect on the Cort test. *Id.* at 1108 (Goldberg, J., dissenting). Judge Goldberg noted: "Recent Supreme Court decisions have made it clear that private remedies are not lightly to be inferred. The majority, I fear, has overreacted to these words of caution and, instead of vindicating the congressional purpose, defeat it. Their approach would, in my opinion, reduce Cort to ashes." *Id.*

165. 614 F.2d 677 (9th Cir. 1980).

166. *Id.* at 679.

167. *Id.* at 678-79. Specifically, the plaintiff alleged that an account executive at Dean Witter urged her to open a margin account without inquiring into her financial position, business expertise, or investment goals; that she was not advised that she could close her margin account at any time and thereby avoid the payment of interest and the payment of additional funds to meet margin calls; and that her account executive improperly recommended that she purchase several highly speculative securities on margin. *Id.* at 678.
that section 6(b) of the 1934 Act,168 which requires that exchanges adopt rules promoting "just and equitable principles of trade," 169 provided the statutory basis for her claim on the theory that Congress intended to delegate to the exchanges the authority to establish rules from which a private right of action may be implied.170 The plaintiff claimed that the rules of the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD)171 were drafted in such a way that an implied right of action in her favor could legitimately be recognized.172

In its examination of section 6(b), the court noted that the proper standard for implying private rights of action was the determination of legislative intent.173 This, the court opined, was best accomplished through statutory construction as evidenced by Touche Ross and Transamerica.174 Accordingly, relying on the Court's analysis in Touche Ross, the court refused to recognize an implied private cause of action

168. 15 U.S.C. § 78f(b) (1976). Section 6(b) provides:
No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

Id.


170. 614 F.2d at 679.

171. Id. at 678. Specifically, the plaintiff's claims were under NYSE Rule 405, the "know your customer" rule, which requires that securities dealers use due diligence to ascertain the essential facts relating to every customer they service, every order they process and every cash or margin account they carry. See id. at 678 n.1. A claim was also made under section 2 of the NASD rules, the "suitability rule," which requires that a securities dealer, when recommending the purchase or sale of a security to a customer, have reasonable grounds to believe that the recommendation is suitable for the customer. See id. at 678 n.2.

172. Id. at 679. Because the court concluded, in its analysis of the first step of the plaintiff's claim, that Congress did not intend to create private rights of action for violation of stock exchange rules, the court did not decide the merits of the second step of the plaintiff's claim. Id.

173. Id. at 680.

174. Id. at 679. These decisions, the court stated, "reflect a restrictive approach to implying private causes of action [which] . . . should apply in this case." Id. It is interesting to note that Cort was nowhere mentioned in the Jablon decision.

175. Id. at 680. The court rejected a claim based on § 27 of the Act, as it is simply jurisdictional and creates no rights on its own. Id. at 679-81. This was the same analysis of § 27 used by the Supreme Court in Touche Ross. See Touche Ross & Co. v. Redington, 442 U.S. at 577.

What makes this decision all the more significant is the fact that several courts and commentators had previously concluded that implied private causes of action should be recognized for exchange rule violations under §§ 6(b) and 27 of the Act. See Buttery v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir.), cert. denied, 396 U.S. 858 (1969); Geyer v. Paine,
because section 6(b) "neither confers rights on private parties nor pro-
scribes any conduct as unlawful." 176 Similarly, both Touche Ross and 
Transamerica were cited as support for rejecting the argument that an 
implied cause of action should be recognized because of the broad 
remedial purposes of the 1934 Act and a general congressional purpose 
to protect the public.177

As "further support" for its conclusions, the court noted the express 
private remedies provided by other sections of the Act.178 This was 
cited as evidence that Congress knew how to provide a damage remedy 
when it wanted to179 and that it was highly unlikely that "Congress 
absentmindedly forgot to mention an intended private action."180

The Second Circuit showed its agreement with the Jablon decision 
in CETA Workers' Organizing Committee v. City of New York.181 There, the Second Circuit was faced with the question of whether the 
Comprehensive Employment and Training Act (CETA)182 contained an 
implied private remedy in favor of individual program participants 
against recipients of federal funds under CETA work programs.183 The

Webber, Jackson & Curtis, Inc., 389 F. Supp. 678 (D. Wyo. 1975); Lowenfels, 
Implied Liabilities Based Upon Stock Exchange Rules, 66 COLUM. L. REV. 
12, 16-17 (1966).

176. 614 F.2d at 680, quoting Touche Ross & Co. v. Redington, 442 U.S. 
at 569. See also Falzarano v. United States, 607 F.2d 506, 509 (1st Cir. 1979) 
(reading Touche Ross as proscribing implication where the statute neither 
creates federal rights nor proscribes conduct); note 89 and accompanying text 
supra. But see Cedar-Riverside Assoc., Inc. v. City of Minneapolis, 606 F.2d 
254, 258 (8th Cir. 1979).

177. 614 F.2d at 680-81. The Court pointed out that in Touche Ross, a 
public protection argument was rejected because "the mere fact that [a statute] 
was designed to provide protection for brokers' customers does not require the 
implication of a damage action on their behalf." Id. at 680, quoting Touche 
Ross & Co. v. Redington, 442 U.S. at 578.

Similarly, the court noted that the Transamerica Court had rejected a 
public protection argument in almost identical terms, stating "the mere fact 
that the statute was designed to protect advisers' clients does not require the 
implication of a private cause of action for damages on their behalf." 614 
F.2d at 680, quoting Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 
at 24.

178. 614 F.2d at 181. Express private damage remedies are provided to 
investors under sections 9(e), 16(b) and 18 of the Act. See 15 U.S.C. §§ 78i(e), 
78p(b) & 78r (1976).

179. 614 F.2d at 181. See note 135 and accompanying text supra. For a 
discussion of the possible reasons for congressional omission of a private cause 
of action, see note 163 supra.

180. 614 F.2d at 681, citing Transamerica Mortgage Advisers, Inc. v. Lewis, 
444 U.S. at 20, quoting Cannon v. University of Chicago, 441 U.S. at 742 
(Powell, J., dissenting).

181. 617 F.2d 926 (2d Cir. 1980).

182. 29 U.S.C. §§ 801-999 (Supp. 1979). CETA is designed to provide 
federal funds to local sponsors of work programs, to be used to provide job 
training and employment opportunities for economically disadvantaged, un-
employed and underemployed persons. See id. § 801.

183. 617 F.2d at 928-29. The plaintiffs' principal claim was that they 
had not received adequate training, counseling or services while participants
court, although questioning the validity of exclusive reliance on the four-factor Cort analysis, expressed the view that the Cort test was a “useful guide” for determining congressional intent in the absence of explicit statutory language or legislative history. The court also noted that while Touche Ross and Transamerica did not overrule decisions such as Borak in which implied causes of action were found to exist, the more recent cases were a message to Congress and the lower courts that “in future statutory drafting, more explicitness will be required. . . .”

In its examination of CETA, the court noted that individual program participants were arguably members of the class Congress intended to protect. Even though this first prong of the Cort test had been satisfied, the court concluded that, in view of the complex and comprehensive scheme of administrative remedies expressly provided private

in a CETA work program because the local sponsors had unlawfully allocated insufficient funds for these purposes, in alleged violation of sections 232(b)(2), 603(a) and 605(c) of the Act. Id. See 29 U.S.C. §§ 854(b)(2), 963(a) & 965(c) (1976). The failure to provide training was also alleged to violate sections 201, 205(c)(4), 602(a) and 602(c) of the Act. 617 F.2d at 928. See 29 U.S.C. §§ 841, 845(c)(4), 962(a) & 962(c) (1976).

The plaintiffs also claimed that an express right of action was created by § 106(l) of the Act. 617 F.2d at 928. See 29 U.S.C. § 816(l) (1976). The court rejected this claim, noting that § 106(l) was designed to be a part of a comprehensive and complex system of administrative enforcement of CETA and to preserve all rights created by the Act, rather than to create new ones. 617 F.2d at 931. The court concluded that the most that could be said about § 106(l) was that if an implied private cause of action was recognized elsewhere in the statute, § 106(l) would not stand in the way of its assertion. Id.

184. 617 F.2d at 932 n.2. The court noted that the decisions in Transamerica, Touche Ross and Amtrak counsel that a court should not “look abstractly at the ‘desirability’ of inferring private rights of action thought by us to provide remedies effectuating the purposes of the given statute,” and should thus use the tools of statutory construction to examine the statute and discern congressional intent. Id. at 932 (emphasis by the court). See also Guardians Ass’n of the New York City Police Dept. v. Civil Serv. Comm’n, 633 F.2d 232, 258-59 (2d Cir. 1980).

185. 617 F.2d at 932. In so framing their analysis, the court appears consistent with the Touche Ross formulation — negative congressional intent is conclusively shown where the legislative history is silent and where the clear language of the statute neither confers rights on private parties nor prescribes any conduct as unlawful. See Touche Ross & Co. v. Redington, 442 U.S. at 569. See also Guardians Ass’n of the New York City Police Dept. v. Civil Serv. Comm’n, 633 F.2d 232, 258-59 (2d Cir. 1980); note 104 and accompanying text supra.

186. 617 F.2d at 932 n.3. For a discussion of Borak, see notes 19-30 and accompanying text supra.

187. 617 F.2d at 932 n.3.

188. Id. at 932-33. The court observed that it is often easier to discern congressional intent to create a private right of action when the statute explicitly protects a specified class of persons than when the statute arguably only offers a form of financial assistance. Id. at 932. However, the court concluded that it was at least arguable that Congress intended to protect the narrow class of persons who are accepted for participation in a CETA work program. Id. at 932-33.
litigants in CETA,\textsuperscript{189} there was not sufficient evidence of congressional intent to infer a private cause of action.\textsuperscript{190}

Similarly, the Sixth Circuit, in \textit{Taylor v. Brighton Corp.},\textsuperscript{191} was faced with the question of whether section 11(c) of the Occupational Safety and Health Act (OSHA)\textsuperscript{192} impliedly creates a private cause of action in favor of an employee allegedly discharged in retaliation for reporting OSHA safety violations.\textsuperscript{193}

The court took note of the four-factor test of \textit{Cort}, but emphasized that the factors are only a "signpost" that guide the most central inquiry — the intent of Congress.\textsuperscript{194} Beginning with a review of the language of the statute, the court noted that while Congress had provided an express administrative remedy, it was silent as to a private judicial remedy.\textsuperscript{195} Further, the court read the legislative history as

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} at 933-34. Section 106(b) of CETA allows aggrieved persons to file a complaint with the Secretary of Labor for an alleged violation of the Act. 29 U.S.C. §816(b) (1976). The Secretary must conduct an investigation and render a decision not later than 120 days from receiving the complaint. \textit{Id.}
\item \textsuperscript{190} Under §106(c)(2)(G), the Secretary is empowered to terminate the funding of the program sponsor. \textit{Id.} §816(c)(2)(G). The Secretary also has authority to terminate the financial assistance of any other recipient of funds, \textit{Id.} §816(d)(1), or to withhold funds otherwise payable in order to recover any amounts expended in violation of the Act. \textit{Id.} §816(g). See \textit{617 F.2d} at 930.
\item \textsuperscript{191} \textit{617 F.2d} at 933-34. The court first noted that when a statute provides for specified remedies, the courts should not expand the statute's coverage to subsume other remedies, at least in circumstances where the express administrative remedies provide relief for the specific claims of the plaintiff. \textit{Id.} at 933 & n.5. Next, the court observed that Congress had placed significant reliance on the ability and expertise of the Secretary of Labor, as his unique perspective on the area enables him to balance the various elements of the program in the interest of the various recipients and participants. \textit{Id.} at 933. To the court, these factors indicated that Congress intended its administrative enforcement scheme to be the exclusive remedy under the Act. \textit{Id.} at 934.
\item \textsuperscript{192} 29 U.S.C. §660(c) (1976). Section 11(c)(1) prohibits the retaliatory discharge of or discrimination against any employee who reports OSHA violations of the employer. \textit{Id.} §660(c)(1). Section 11(c)(2) gives complaining employees an express private administrative remedy for violations of §11(c)(1) in the form of a complaint to the Secretary of Labor. \textit{Id.} §660(c)(2). The Secretary must investigate all complaints and must institute judicial action to force compliance with the Act on behalf of all meritorious claimants. \textit{Id.}
\item \textsuperscript{193} \textit{616 F.2d} at 257. The plaintiffs alleged that they were wrongfully discharged from the employ of the defendant in retaliation for reporting safety violations to OSHA or for opposing the company's retaliatory and discriminatory treatment of other such employees. \textit{Id.}
\item \textsuperscript{194} \textit{Id.} at 258-59. \textit{See also} Micklus v. Carlson, 632 F.2d 227, 234 (3d Cir. 1980) (\textit{Cort} factors are merely "guideposts" for the determination of intent); Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177 (6th Cir. 1979) ("central inquiry" is congressional intent to create a private remedy).
\item \textsuperscript{195} \textit{616 F.2d} at 259. The court noted that "in view of the express provisions for enforcing the [statutory prohibition], it is highly improbable that 'Congress absentlymindedly forgot to mention an intended private action.'" \textit{Id.}, \textit{quoting} Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. at 20. \textit{See also} Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177 (6th Cir. 1979) ("Where Congress has provided a specific provision, the court should not expand the remedy beyond the limits where Congress was prepared to go").
\end{itemize}
suggesting that Congress intended to make the administrative enforcement provisions the exclusive statutory remedy. Given this expression of intent, the court declined to recognize the existence of an implied private cause of action.

B. Decisions of the Courts of Appeals Reflecting Resistance to the Modification of the Cort Test

The Second Circuit recently held, in Leist v. Simplot, that, in certain circumstances, it will not follow the restrictive trend of Touche Ross and Transamerica.

In Leist, the plaintiffs were traders in the commodities futures market who brought suit against other traders, the New York Mercantile Exchange, and certain brokers for damages allegedly suffered as a result of the defendants' manipulation of the market which resulted in a huge default in the delivery of certain commodities contracts. Claims were brought under various sections of the Commodities Exchange Act.

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196. 616 F.2d at 259-63. The court noted that as the retaliatory discharge provision proceeded through Congress, it was amended on several occasions. Id. at 259-61. The purpose for the changes, the court noted, was to provide a mechanism which would enable the Secretary to screen out frivolous complaints so as not to overburden the courts. Id. at 261. Given this congressional purpose, the court stated that an implied private cause of action would be inconsistent with the express statutory remedies, saying: "We conclude it to be unlikely that Congress, having deliberately interposed the Secretary's investigation as a screening mechanism between complaining employees and the district courts, intended to permit those employees whose claims are screened out to file individual actions in those same courts." Id. at 262.

197. Id. at 264. Interestingly, in Taylor, the Secretary of Labor filed an amicus brief urging the recognition of an implied private remedy because he had neither the personnel nor the resources to handle all the claims brought under §11(c). Id. at 263. The court rejected this argument, noting that the Secretary "should address his argument to Congress, not the courts." Id. at 264. The court reiterated that the "dispositive question" is not whether it is desirable to recognize an implied private cause of action, but whether Congress intended to provide one. Id.

198. 638 F.2d 283 (2d Cir. 1980).

199. But see CETA Workers' Organizing Comm. v. City of New York, 617 F.2d 926 (2d Cir. 1980), discussed at notes 181-90 and accompanying text supra.

200. 638 F.2d at 288-92. Specifically, the plaintiffs alleged that the defendant-traders, along with many co-conspirators, engaged in a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange. Id. at 289. The defendant-brokers through which the conspirators operated were alleged to have contributed to the damage suffered by the plaintiffs because they knew or should have known the contracts they purchased for them could not be delivered, and were purchased only for the purpose of unlawful price manipulation. Id. at 289-90. The New York Mercantile Exchange was included as a defendant based on its allegedly negligent failure to maintain an orderly market and its failure to report the various violations of the Act alleged by the plaintiffs. Id. at 290. It is important to note that none of the defendants stood in a broker-customer relation with the plaintiffs, nor was there any allegation of fraud or manipulation with regard to the plaintiffs' accounts. See id. at 300-01.
(CEA), which contains no express private right of action for violation of its provisions. Thus, the Second Circuit was faced with the issue of whether an implied private cause of action should be recognized in favor of traders on the commodities futures market under the CEA.

The court began its analysis by noting that prior to the 1974 amendments to the CEA, there was widespread judicial recognition of an implied remedy under the CEA. Consequently, the court did not frame the issue as whether Congress intended to create an implied cause of action when it enacted the CEA, but rather whether in 1974, when it

201. 7 U.S.C. §§ 1-19 (1976). The specific sections relied on by the plaintiffs included §§ 4b, 9(b), 5(d), & 5a(8) of the CEA, 7 U.S.C. §§ 6b, 13(b), 7(d), & 7a(8) (1976).
202. 638 F.2d at 303.
203. Id. at 302.
204. Id. at 296-302. The majority noted that in many of the statutes administered by the SEC, there were extensive administrative reparations procedures provided in the statute. Id. at 297. Arguments that these procedures were intended by Congress to be the exclusive means of enforcement of the Act were rejected in many of the pre-1974 cases. Id. at 297-98. See, e.g., Dann v. Studebaker-Packard Corp., 288 F.2d 201, 208-09 (6th Cir. 1961); Fratt v. Robinson, 203 F.2d 627, 629 (9th Cir. 1953); Goldstein v. Groesbeck, 142 F.2d 422, 426-27 (2d Cir.), cert. denied, 328 U.S. 737 (1944); Baird v. Franklin, 141 F.2d 238, 244-45 (2d Cir.), cert. denied, 323 U.S. 737 (1944). Further, the Leist majority emphasized that the Supreme Court had sanctioned the implication doctrine in several cases, including Rigsby and Borak. 638 F.2d at 298-99. For a discussion of the Rigsby decision, see notes 12-18 and accompanying text supra. For a discussion of the Borak decision, see notes 19-30 and accompanying text supra.


The majority noted that most of these decisions involved fraud by a broker on his customers, but that one case, the Deaktor decision, did not involve fraud. 638 F.2d at 300. The dissent pointed out that the Deaktor case was the only decision to allow a private cause of action by a trader against an exchange. Id. at 324 (Mansfield, J., dissenting). Further, the Supreme Court had never ruled on the implication of a private action under the Act, and the remainder of the pre-1974 decisions involved the existence of fraud in the customer-dealer relationship. Id. In Judge Mansfield’s view, because neither Deaktor nor any of the other pre-1974 decisions were ever cited to or relied on by Congress, “to presume . . . that Congress was aware of and approved these prior cases is to substitute sheer speculation for hard evidence of intent.” Id. The majority disagreed with the dissent’s conclusion that there was insufficient evidence that Congress had been aware of the pre-1974 cases, saying that such an assertion “seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.” Id. at 301. The majority did recognize, however, that the lower courts have been split as to whether there should be a continued recognition of an implied private cause of action after the 1974 Amendments. Id. at 302 & n.19.

205. 638 F.2d at 303. The court termed the existence of the pre-1974 cases and Congress’ failure to expressly disapprove of them as a “differentiating
amended the CEA, Congress was justified in assuming that the courts would continue to find a private cause of action. 206

To determine whether a continuing implied cause of action should be recognized, the court used the four-factor test of Cort. 207 The court factor of . . . transcendent importance." Id. Thus, the question was not whether Congress intended to create a new right of action in 1974, but rather whether it intended, sub silentio, to legislatively overrule all the cases which had previously recognized one. Id. The court emphasized that whether rightly or wrongly decided under recent Supreme Court decisions, the pre-1974 cases had uniformly recognized an implied action, and thus the burden was placed on the defendant to show that Congress intended to change the existing law. Id.

The court also examined the significance of Touche Ross and Transamerica and their impact on the decision in this case. Id. at 316-17. The court emphasized that even assuming arguendo that the rationale of Touche Ross and Transamerica would deny the recognition of a private remedy if the statute were enacted after those decisions, Congress had taken no steps to expressly disapprove the unanimous course of cases which had recognized private damage actions under the CEA, which in turn, were based on the Supreme Court's decision in Borak. Id. at 317. Even if Borak should now be presumed to be wrongly decided, the court reasoned, there is no basis to assert that, in 1974, Congress knew that such a drastic change in the Court's thinking would be forthcoming. Id. Thus, without an explicit showing of intent to change what Congress knew to be the law, the court concluded that a private cause of action should be continued. Id.

The dissent chided the majority for reaching this conclusion because recent Supreme Court decisions have made clear that the pre-1974 decisions were erroneous, as they were based on a tort theory rather than congressional intent. Id. at 356 (Mansfield, J., dissenting). The dissent concluded that it was "unreasonable to assume that Congress . . . intended to compound the error by tacitly giving effect to them." Id.

206. Id. at 308. In this regard, the court called attention to the canon of construction that "the reenactment of a statute incorporates preceding judicial interpretations." Id. at 310, quoting VanVranken v. Helvering, 115 F.2d 709, 710 (2d Cir. 1940), cert. denied, 313 U.S. 585 (1941). In his dissent, Judge Mansfield asserted that the majority's framing of the issue so as to put the burden of proof on the defendant to show congressional intent to terminate an existing cause of action "puts the cart before the horse." 638 F.2d at 340 (Mansfield, J., dissenting). He emphasized that the proper matter to be resolved is whether Congress intended to create a private cause of action, not whether Congress intended to destroy such a pre-existing right, which assumes the matter in controversy. Id. Judge Mansfield stated: "Where, as here, Congress has expressly provided for judicial and administrative means of enforcement, the burden is on the plaintiffs to show a clear and affirmative congressional intent to approve a private right of action, not on Congress or defendants to show that the remedies provided by it are exclusive." Id.

207. 638 F.2d at 302-22. The court noted that Touche Ross directed that the basic inquiry is into congressional intent and that Cort is simply helpful to the determination. Id. at 302 n.20. The court then embarked on a step-by-step analysis using the four prongs of the Cort test. Id. at 302-22. The majority concluded that all four of the Cort factors favored implication, and so recognized an implied private remedy in favor of the injured traders. Id. at 322.

The dissent took issue with the majority's adherence to the Cort four-factor analysis. Id. at 324-25 (Mansfield, J., dissenting). Judge Mansfield asserted that, under the Supreme Court's decisions in Touche Ross and Transamerica, courts are instructed to "look principally to the language and structure of the statute at issue . . . rather than engage in judicial legislation supported only by our own view that a private suit would be a salutary enforce-
concluded that it is irrelevant whether, under the present Supreme Court
decisions, the pre-1974 cases were decided rightly or wrongly.\textsuperscript{208} Instead, the court considered the pre-1974 decisions relevant to the issue
of congressional intent since Congress presumably knew of them and
expressed no intention to change them.\textsuperscript{209} In the absence of such an
intent, the court concluded that the existence of an implied remedy
under the CEA should be continued.\textsuperscript{210}

The Third Circuit, in \textit{Zeffiro v. First Pennsylvania Banking \& Trust Co.},\textsuperscript{211} exhibited a continuing fidelity to the Cort test, even when construing a regulatory statute such as those in issue in \textit{Touche Ross} and \textit{Transamerica}. In \textit{Zeffiro}, the plaintiffs, the holders of debentures which were issued under a trust indenture which named the defendant as trustee, alleged that the defendant had failed to carry out certain duties

\textsuperscript{208.} Id. at 317. The majority reasoned that, unlike the congressional action in 1974 at issue in this case, the congressional actions in 1934 and 1940 under review in \textit{Touche Ross} and \textit{Transamerica} were not taken against a background of widespread judicial recognition of implied causes of action either as a general matter or with respect to the specific statutes in issue in those cases. \textit{Id.}

\textsuperscript{209.} Id. at 317. The court recognized that the 1974 amendments to the CEA created an extensive and comprehensive "reparations" administrative procedure to provide money damages to investors damaged by violations of the CEA. \textit{Id.} at 312. The court rejected, however, the principle of \textit{expressio unius est exclusio alterius} which was adopted by both the \textit{Touche Ross} and \textit{Transamerica} Courts. \textit{Id.} at 313.

In his dissent, Judge Mansfield chided the majority for its refusal to recognize that the express administrative remedies provided in the CEA were exclusive, based on his assertion that where it is claimed that Congress has created a private action for damages which could result in civil liability for hundreds of millions of dollars, primary weight should be placed on the language of the statute or, at the very least, on unequivocal statements by those responsible for its enactment. \textit{Id.} at 327 (Mansfield, J., dissenting).

\textsuperscript{210.} Id. at 322-23. The court asserted that "the rumors about the death of the implied private cause of action . . . are exaggerated, at least as far as previously enacted statutes are concerned." \textit{Id.} at 316. The majority opined that the effect of the recent Supreme Court decisions in \textit{Touche Ross} and \textit{Transamerica} is simply to emphasize that congressional intent is the ultimate issue and not judicial notice of what would constitute sound policy, but failed to note any effect that those decisions might have had on the Cort test. \textit{Id. See also} Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 622 F.2d 216 (6th Cir. 1980).

\textsuperscript{211.} 623 F.2d 290 (3d Cir. 1980).
imposed on it by the indenture which were required by the Trust Indenture Act of 1939 (TIA). The Court noted that the TIA gives no express private cause of action for damages, and stated that in view of the Supreme Court's recent decisions in *Touche Ross* and *Transamerica*, its task was to determine whether Congress intended to create the implied private damage action asserted by the plaintiffs.

In the majority's view, the *Cort* test, while not wholly dispositive of the issue, provided the "lodestar for guiding a court in determining legislative intent." Finding each of the four elements of the *Cort* test, while not wholly dispositive of the issue, provided the "lodestar for guiding a court in determining legislative intent."
test to weigh in favor of the implication of a private cause of action in this case, the court concluded that such an action should be recognized in favor of injured debenture holders.

The Seventh Circuit, in *Bratton v. Shiffrin*, was asked to recognize an implied cause of action in favor of an air traveller who alleged that his charter carrier failed to comply with certain Civil Aeronautics Board (CAB) security regulations. On remand for reconsideration in light of *Touche Ross*, the court began its analysis by stating that the latter decision had been based upon the Supreme Court's application of the Cort analysis. Applying that analysis to the statute at issue, the court concluded that although legislative history was sparse concerning an intent to create a private remedy and the statute was silent on the point, 224

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218. Id. at 296-301. The court first concluded that the plain language of the statute made it clear that debenture holders are the special beneficiaries of the TIA. *Id.* at 296-97. In its examination of the legislative history of the TIA, the court noted that Congress did not explicitly deal with the ability of debenture holders to sue in federal court. *Id.* at 297. However, the legislative history did provide evidence that Congress intended to allow investors to sue on the indenture contract and, because this was a federally-created right, concluded that the federal courts were the proper forum. *Id.* at 297-98. In examining the third Cort factor, the court concluded that an implied federal remedy was “necessary to effectuate purposes of the Act,” or was, at the very least, “helpful” to the effectuation of congressional intent. *Id.* at 300. Finally, the court concluded that Congress intended to deal with the problem of the regulation of trust indentures on a national scale. *Id.* at 301. Further, observing that any action regarding the indenture would concern the meaning of the Act, not the intent of the parties as in a normal contract suit, the court concluded that the subject matter in issue was not one traditionally relegated to state law. *Id.*

219. Id. at 301. Judge Layton, of the District of Delaware, sitting by designation, noted in his dissent that the majority applied a mechanical approach to the Cort four-factor test, which ignores a "basic question"—the effect of *Touche Ross* on Cort. *Id.* at 302 (Layton, J., dissenting). Considering the evidence examined by the court to be ambiguous and inconclusive, and "in light of the apparent intention of the Supreme Court to limit sharply the doctrine of implication," the dissent disagreed with the majority’s conclusion as to the existence of congressional intent to create a private cause of action. *Id.* at 302-03 (Layton, J., dissenting).

220. 15 Av. Cas. 18,076 (7th Cir. 1980).

221. *Id.* at 18,076. The CAB regulations at issue were promulgated pursuant to § 401(n)(2) of the Federal Aviation Act, 49 U.S.C. § 1371(n)(2) (1976). *Cf.* Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980), discussed at notes 165-80 and accompanying text *supra*.

222. 15 Av. Cas. at 18,076.

223. See *id.* The court also indicated that the Supreme Court in *Touche Ross* “reaffirmed that the four indicia identified in Cort are useful guides to determining whether or not a private right of action exists.” *Id.* at 18,079. It is submitted that the *Bratton* court misread the Supreme Court’s decision in *Touche Ross*, as the Court clearly did not use the four-factor analysis of Cort in their examination of the statute at issue, but rather modified the Cort test. For a discussion of *Touche Ross*, see notes 97-114 and accompanying text *supra*.

224. 15 Av. Cas. at 18,077. The court pointed to only one statement made by a witness before a Senate subcommittee which indicated that the security provisions, which required that charter carriers be bonded, were designed to provide some recourse to previously helpless air travellers. *Id.*
the congressional silence provided an affirmative indication of Congress' intent to create such an implied cause of action. 225

Similarly, the Sixth Circuit, in Chumney v. Nixon, 226 was faced with the issue of whether section 113 of the Federal Aviation Act 227 contained an implied cause of action in favor of an air passenger who was the victim of a simple assault by another passenger. 228 The Court began its analysis by noting Touche Ross and Transamerica, and stated that in those cases the Supreme Court had followed and emphasized the Cort test. 229 Applying this test to the statute in issue, the Court recognized the existence of a private cause of action implicit in section 113. 230

IV. Summary and Analysis

The decisions of the Supreme Court in the Touche Ross and Transamerica cases 231 have sent an explicit message to the lower courts that the court failed to note, however, whether Congress intended air travellers to have a right to recover from the bonding company only or against charter carriers who fail to comply with the CAB regulations by failing to procure the bond. See id. at 18,079-80 (Bauer, J., dissenting).

225. Id. at 18,077. Judge Bauer, in dissent, pointed out that the majority decision represents a misapplication of Touche Ross, which in his opinion, was dispositive of the issue. Id. at 18,079 (Bauer, J., dissenting). Because §401 (n)(2) neither prohibits conduct nor creates private rights in favor of any class of persons, Judge Bauer reasoned that Touche Ross clearly counsels that an implied private remedy should not be recognized. Id. at 18,078-79 (Bauer, J., dissenting).

226. 615 F.2d 389 (6th Cir. 1980).

227. 18 U.S.C. §113 (1976). Section 113 expressly makes criminal all assaults which occur on any aircraft within the special aircraft jurisdiction of the United States. Id. The Chumney court noted that this section was enacted in order to prevent airplane hijackings. 615 F.2d at 395.

228. 615 F.2d at 390. The plaintiff claimed that while he was a passenger on board a charter flight from Rio de Janiero to Memphis, he was assaulted by the defendant and others, who broke some of his teeth and caused him to suffer serious, and possibly permanent, injuries. Id.

229. Id. at 394. Although the court cited both Touche Ross and Transamerica in noting that the Supreme Court had recently spoken on the implication question, the court made no further mention of these decisions. Id. at 399. Rather, the court cited Cannon for the proposition that courts are empowered to recognize an implied private action when none is explicitly authorized in the statute. Id. at 393-94. Then, the court simply concluded that the recent cases had "repeatedly followed and emphasized" Cort. Id. at 394. It is submitted that in reaching this conclusion, the court ignored the restrictions placed upon the use of the Cort test which are evident in both Touche Ross and Transamerica. For a discussion of these decisions, see notes 97-150 and accompanying text supra.

230. 615 F.2d at 394. The court first concluded that air passengers were the special beneficiaries of §113. Id. The court then noted that although the legislative history was silent concerning private civil remedies, Congress had clearly intended to enact comprehensive legislation designed to protect the safety of passengers flying in the aircraft jurisdiction of the United States. Id. Thus, the court concluded that a civil action for damages would be consistent with the overall purpose, and should be inferred therefrom. Id.

231. For a discussion of Touche Ross and Transamerica, see notes 97-150 and accompanying text supra.
in an examination of a statute in order to determine whether it contains an implied private cause of action, only one relevant determination need be made — the intent of Congress when it enacted the statute.\textsuperscript{232} Although the lower courts have almost uniformly accepted this as their task,\textsuperscript{233} they have adopted widely divergent methods of analysis, some adhering to the four-factor \textit{Cort} test as "evidence" of this intent\textsuperscript{234} and some using a more restricted analysis which more closely comports with the examination of statutory language and legislative history undertaken by the Court in \textit{Touche Ross} and \textit{Transamerica}.\textsuperscript{235}

The Supreme Court's decisions in \textit{Touche Ross} and \textit{Transamerica} indicate that an examination of the language of the statute and its legislative history are the most important tools in the task of the determination of congressional intent.\textsuperscript{236} In utilizing those tools, the courts have examined several factors, a summary of which may serve as an indication of the factors to which courts will, or should, look in future implication cases.

\section*{A. The Examination of Statutory Language}

Because any statutory provision being examined to determine whether it contains an implied cause of action will not, of course, contain an express cause of action, the language of the statute must be examined for indications of an unarticulated congressional intent to create a private remedy. Under \textit{Touche Ross}, whenever the language of the statute creates no rights in an identifiable class or proscribes no conduct as unlawful, that fact is an important factor weighing against implication.\textsuperscript{237} However, as \textit{Transamerica} illustrates, even when the language of the statute \textit{does} create rights or proscribe conduct, that fact alone does not automatically weigh in favor of implication.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{232} See \textit{Transamerica Mortgage Advisers, Inc. v. Lewis}, 444 U.S. at 15-16; \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 568; notes 102 & 122 and accompanying text \textit{supra}.
\item \textsuperscript{233} See, e.g., \textit{Leist v. Simplot}, 638 F.2d at 303; \textit{Zeffiro v. First Pa. Banking & Trust Co.}, 623 F.2d at 296; \textit{Jablon v. Dean Witter & Co.}, 614 F.2d at 680; \textit{Rogers v. Frito-Lay, Inc.}, 611 F.2d at 1078 & n.4; \textit{Taylor v. Brighton Corp.}, 616 F.2d at 258-59.
\item \textsuperscript{234} See, e.g., \textit{Leist v. Simplot}, 638 F.2d at 303-22; \textit{Zeffiro v. First Pa. Banking & Trust Co.}, 623 F.2d at 296; \textit{Chumney v. Nixon}, 615 F.2d at 394. For a discussion of \textit{Cort}, see notes 44-59 and accompanying text \textit{supra}.
\item \textsuperscript{235} See, e.g., \textit{Jablon v. Dean Witter & Co.}, 614 F.2d at 679; \textit{Rogers v. Frito-Lay, Inc.}, 611 F.2d at 1079-85; \textit{Taylor v. Brighton Corp.}, 616 F.2d at 259-63. For a discussion of \textit{Touche Ross} and \textit{Transamerica}, see notes 97-150 and accompanying text \textit{supra}.
\item \textsuperscript{236} See \textit{Transamerica Mortgage Advisers, Inc. v. Lewis}, 444 U.S. at 16-18; \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 568-69.
\item \textsuperscript{237} See \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 569.
\item \textsuperscript{238} See \textit{Transamerica Mortgage Advisers, Inc. v. Lewis}, 444 U.S. at 24; note 150 and accompanying text \textit{supra}.
\end{itemize}
Another important factor in the examination of the statutory language is an evaluation of the statutory scheme as a whole, to determine whether alternative remedies are expressly provided in the statute.\textsuperscript{239} Following the lead of \textit{Touche Ross},\textsuperscript{240} several courts have refused to recognize an implied private remedy where the statute contains express judicial remedies,\textsuperscript{241} administrative remedies,\textsuperscript{242} or administrative enforcement provisions.\textsuperscript{243} If such remedies or procedures are present in the statute, the court will often refuse to recognize an implied private action, based on the assertion that when Congress intended certain remedies to be allowed, they knew how to provide for them and did so expressly.\textsuperscript{244}

\section*{B. The Examination of Legislative History}

Typically, the legislative history of a statute will be silent as to congressional intent to create a private damage action, as was the case in both \textit{Touche Ross}\textsuperscript{245} and \textit{Transamerica}.\textsuperscript{246} While the absence of affirmative evidence of congressional intent does not favor the recognition of an implied private action, it does not automatically undermine the claim that one exists.\textsuperscript{247}

Two factors in an examination of legislative history have been interpreted by the courts to weigh in favor of the implication of a private cause of action. The first is an indication that the statute in issue had been modelled after another statute which had been previously interpreted to contain an implied private right of action.\textsuperscript{248} The second is an amendment to a statute in which an implied private

\begin{itemize}
 \item \textsuperscript{239} See, \textit{e.g.}, CETA Workers' Organizing Comm. v. City of New York, 617 F.2d at 933-34; Jablon v. Dean Witter & Co., 614 F.2d at 681; Rogers v. Frito-Lay, Inc., 611 F.2d at 1077-78; Taylor v. Brighton Corp., 616 F.2d at 259-63.

 \item \textsuperscript{240} See \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 572. \textit{See also} Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. at 20 (“it is highly improbable that Congress absentmindedly forgot to mention a private action”).

 \item \textsuperscript{241} See \textit{Jablon v. Dean Witter & Co.}, 614 F.2d at 681.

 \item \textsuperscript{242} See, \textit{e.g.}, CETA Workers' Organizing Comm. v. City of New York, 617 F.2d at 933-34; Jablon v. Dean Witter & Co., 614 F.2d at 681; Rogers v. Frito-Lay, Inc., 611 F.2d at 1077-78.

 \item \textsuperscript{243} See, \textit{e.g.}, CETA Workers' Organizing Comm. v. City of New York, 617 F.2d at 933-34; Jablon v. Dean Witter & Co., 614 F.2d at 681; Rogers v. Frito-Lay, Inc., 611 F.2d at 1077-78; Taylor v. Brighton Corp., 616 F.2d at 259-63.

 \item \textsuperscript{244} See, \textit{e.g.}, Jablon v. Dean Witter & Co., 614 F.2d at 681; Rogers v. Frito-Lay, Inc., 611 F.2d at 1077-78; Taylor v. Brighton Corp., 616 F.2d at 259-63.

 \item \textsuperscript{245} See \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 570-71.

 \item \textsuperscript{246} See Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. at 18.

 \item \textsuperscript{247} See \textit{id.}; \textit{Touche Ross & Co. v. Redington}, 442 U.S. at 570-71; note 125 and accompanying text \textit{supra}.

 \item \textsuperscript{248} See \textit{Cannon v. University of Chicago}, 441 U.S. at 694-99.
\end{itemize}
action had previously been recognized without an express disapproval of the private remedy. It is important to note, however, that these two factors should no longer favor implication in any statute enacted after the Touche Ross and Transamerica decisions as these cases have put Congress on notice that the courts will no longer be liberal in their recognition of implied causes of action and that if it is desired that private litigants should have judicial remedies, they should be expressly provided.

V. CONCLUSION

As can be seen by the cases discussed above, the recognition of an implied private cause of action is often as much an exercise in the consistent application of precedent as it is a product of the struggle within the individual judge between the policy of interpretive consistency and the attempt to do justice in the particular case before him. In this respect, the implied private cause of action can sometimes be a valuable tool to further the ends of justice. Its use, however, must be tempered and, moreover, it must be consonant with the notion that the decision on the proper method to enhance the public interest is the role of the legislature, not the courts.

Though this problem may be a continual one because of the many pressures on Congress to be purposely vague, the desire to do justice in a particular case must be tempered to avoid the temptation, in the name of statutory interpretation, to step over the line into the realm of judicial legislation.

249. See Leist v. Simplot, 638 F.2d at 317; notes 204-10 and accompanying text supra.
250. See Leist v. Simplot, 638 F.2d at 317; note 205 and accompanying text supra.
253. See note 163 supra; Steinberg, supra note 71 at 51. Further, a court should realize that by recognizing a private cause of action where there was no intent to create one, it is doing more than simply extending the remedial reach of an existing statute — it is making law. It is creating a new action, and in doing so, must define its scope, its elements and its defenses. See Glus v. G.C. Murphy Co., 629 F.2d 248, 259-68 (3d Cir. 1980) (Sloviter, J., dissenting).
As the implication doctrine has evolved over the years, the trend has swung from a very liberal judicial attitude toward implication to a much more restrictive outlook, as evidenced by the Supreme Court's recent decisions in *Touche Ross* and *Transamerica*.

The response of the lower federal courts to the new restrictive trend has been far from uniform. For this reason, an approach has been suggested under which the courts would search for congressional intent by looking at only two factors — statutory language and legislative history. It is hoped that by using such an analysis, two important policies will be served — consistency within the judiciary and consistency of application of federal statutes in accordance with the intent of Congress.

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254. For a discussion of early implication cases, see notes 12-39 and accompanying text *supra*.

255. For a discussion of *Touche Ross* and *Transamerica*, see notes 97-150 and accompanying text *supra*.

256. For a discussion of recent decisions of the courts of appeals after *Touche* and *Transamerica*, see notes 155-230 and accompanying text *supra*.

257. For a proposed analysis to be used in future implication cases, see notes 231-51 and accompanying text *supra*. 