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# Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective

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# IMPLIED PRIVATE RIGHTS OF ACTION AND THE FEDERAL SECURITIES LAWS: A HISTORICAL PERSPECTIVE

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## I. Introduction

While judicial consideration of private rights of action said to be implied by federal statutes has a relatively short history,[1] treatment of the subject has hardly been concise[2] or internally consistent. Federal securities laws[3] are prominent in this history and its inconsistencies. Thus, within the past two decades, the Securities Exchange Act of 1934[4] ('34 Act) and the Investment Advisers Act of 1940[5] (Advisers Act) have provided vehicles for Supreme Court articulation of remarkably contrary approaches to determining whether a federal statute[6] implies a private cause of action. In 1964, while remarking that section 14(a) of the '34 Act implied a private cause of action, the Court stated that federal courts had an affirmative *duty* of alertness to provide "remedies" necessary to effec-

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[1] Various commentators cite Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916) as the initial case recognizing a private cause of action implied by federal statute. *See, e.g.*, Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of* Cort v. Ash, 23 VILL. L. REV. 657, 659 (1978) [hereinafter cited as Crawford & Schneider]; McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167, 169 & n.14 (1976) [hereinafter cited as McMahon & Rodos]; Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.C.L. L. REV. 425, 431 & n.31 (1978) [hereinafter cited as *Title IX Private Rights*]; Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 453, 485 & n.5 (1963).

[2] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 100 S.Ct. 960, 967-68 (1980) ("[the] Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here").

[3] The primary federal securities laws are: the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976 & Supp. II 1978); the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supp. II 1978); the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z (1976 & Supp. II 1978); the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 52 (1976 & Supp. II 1978); and the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 21 (1976 & Supp. II 1978).

[4] 15 U.S.C. § 78m(a) (1976).

[5] 15 U.S.C. § 80b-6 (1976).

[6] Standards applied when considering claims that private rights of action are implied by the Constitution differ from those used when addressing a federal statute. *See* Davis v. Passman, 442 U.S. 228, 241 (1979); text accompanying notes 173-74 *infra*.

tuate remedial purposes of legislation.[7] Fifteen years later, in a decision denying a private right of action under section 206 of the Advisers Act, the Court effectively revoked this call to judicial activism, stressing that the first step is determination of whether Congress intended to create a private "cause of action".[8] Although the difference between a remedy and a cause of action is well understood,[9] the Court's rhetoric has not always assisted in observing this distinction.[10]

The years between these contrary expressions of judicial policy involved constant questions and inconsistent answers regarding the standards counsel and lower courts should employ in identifying implied causes of action.[11] Use of the "implied cause of action" legend invited inquiry as to whether such implication properly proceeded from merely permissive as opposed to mandatory inference. Need for authoritative indicia was accentuated by the undoubted fact that the jurisdiction of federal courts does not admit of the free development of a federal common law.[12] In a unanimous 1975 decision, *Cort v. Ash*,[13] the Supreme Court revealed its sensitivity to this need by elucidating four factors relevant to determining whether a private cause of action is implicit in a federal statute:

> First, is the plaintiff 'one of the class for whose especial benefit

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[7] J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[8] Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S.Ct. 243, 245 (1979).

[9] In Davis v. Passman, 442 U.S. 228 (1979), the Supreme Court recently emphasized the distinction between a remedy and a cause of action. The availability of a cause of action involves consideration of whether the plaintiff is an appropriate party to invoke the power of the courts to apply a substantive rule of decision. *Id.* at 239 & n.18. A remedy, by contrast, involves determination of the relief, if any, that a court may award a litigant. *Id.* at 240 n.18. Thus, it is conceivable for a plaintiff to have a cause of action but the forum lack a remedy with which to vindicate his cause. *Id. See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 440-43 (1977).

[10] *See, e.g.*, text accompanying note 14 *infra*.

[11] The Supreme Court has acknowledged, or at least decided questions subordinate to, causes of action allegedly implied by a wide variety of statutes. *See, e.g.*, Allen v. State Bd. of Elec., 393 U.S. 544, 557 (1969) (§ 5 of Voting Rights Act of 1965); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (§ 16 of Civil Rights Act of 1870). The Court has refused to recognize implied private rights of action under an equally wide range of statutes. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 218, 317 (1979) (Freedom of Information Act); National R.R. Pass. Corp. v. National Ass'n of R.R. Pass., 414 U.S. 453, 464-65 (1974) (§ 307 of Amtrak Act).

In recent years, the Court has been alert to recognizing private causes of action under the Constitution. *See, e.g.*, Carlson v. Green, 100 S.Ct. 1468, 1472 (1980) (eighth amendment); Davis v. Passman, 442 U.S. 228, 244 (1979) (fifth amendment); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (fourth amendment). The *Carlson* decision, which held that a remedy provided by the Federal Tort Claims Act does not preclude implication of a cause of action under the eighth amendment, will start a new line of debate over the relationship between statutory and constitutional causes of action.

[12] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[13] 422 U.S. 66 (1975).

> the statute was enacted' . . .? 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? . . . [F]inally, is the cause of action one traditionally relegated to the state law, in an area basically the concern for the States, so that it would be inappropriate to infer a cause of action based solely on federal law.?[14]

Although the Court took obvious care to tender these indicia on a nonexclusive basis, the styles of this listing and the entire opinion unfortunately invited not only minimization of the statutory text in question in favor of other "factors" but also equation of evidence of legislative intent to "create . . . or to deny" a private cause of action with otherwise presumably subordinate considerations. While it is clear that the Court did not intend that *Cort v. Ash* reissue the 1964 call to judicial activism,[15] an effect of the unfortunate styles was to provide a rationale for quasi-legislative establishment of private causes of action in the absence of any true evidence of legislative intent.[16] This consequence, of course, served the earlier Supreme Court invocation of a judicial duty to provide "remedies" necessary to promote better the remedial purposes of legislation.

Although some dissatisfaction with the *Cort v. Ash* formulation soon became evident in Supreme Court opinions,[17] discontent of most if not all of the sitting Justices did not become glaringly obvious until 1979. During that year, the Court held that the fifth amendment,[18] Title IX of the Education Amendments of 1972[19] and section 215 of the Advisers Act[20] implied particularized private causes of action while comparable recognitions were denied section 17(a) of the '34 Act[21] and section 206 of the Advisers Act.[22] While one of the effects of these decisions is a sharp albeit perhaps temporary distinction between the Constitution and statutes as predicates from which to infer private causes of action,[23] two other points

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[14] *Id.* at 78.

[15] *See* note 7 *supra.*

[16] *See* Crawford & Schneider, *supra* note 1, at 669.

[17] *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 (1977) (Burger, C. J., opinion of the Court); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (White, J., opinion of the Court).

[18] Davis v. Passman, 442 U.S. 228, 244 (1979); *see* text accompanying notes 165-185 *infra.*

[19] Cannon v. University of Chicago, 441 U.S. 677, 709 (1979); *see* text accompanying notes 149-164 *infra.*

[20] Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S.Ct. 243, 246-47 (1979); *see* text accompanying notes 203-223 *infra.*

[21] Touche, Ross & Co. v. Redington, 442 U.S. 560, 579 (1979); *see* text accompanying notes 186-202 *infra.*

[22] Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S.Ct. 243, 249 (1979); *see* text accompanying notes 203-223 *infra.*

[23] *See* Davis v. Passman, 442 U.S. 228, 241 (1979).

clearly emerge from the many concurrences and dissents accompanying the 1979 decisions. Members of the Court seem unable to achieve consistent agreement as how best to facilitate lower court assessments of claims that private rights of action are implied. More importantly, there is the glimmering of a recognition that federal courts over-extend themselves when they routinely endeavor to perform what amounts to a legislative oversight function.

## II. Background

### A. *General*

Ancient maxims,[24] revered commentaries,[25] contemporary Restatments,[26] and modern treatises[27] demonstrate that certain circumstances may impel a common law court to acknowledge and to fashion appropriate remedies for private causes of action based upon violations of public laws which are themselves silent as to private rights to relief. A court which honors such a tort per se theory engages in lawmaking as it generates a substantive rule of decision in which the statutory duty evidences a duty owed the plaintiff. This is not a concept shocking to those trained in the common law tradition. However, while the methods used by common law courts in construing statutes may commend emulation, the power implicit in the evolution of the common law differs fundamentally from federal courts' exercise of jurisdiction over civil causes asserted "under the Constitution, laws, or treaties of the United States."[28] Although a federal common law of sorts[29] survives the *Erie R.R. Co. v. Tompkins*[30] proscription of a "federal general common law,"[31] this survival does not provide authority for federal courts' routine engagement in marginally permissive inferences as to existence of private causes of action. Operation of a limited, non-diversity judicial regime which generates substantive rules of decision presupposes "federal question" jurisdiction. Impetus for such generation is provided by the need to insulate peculiarly federal interests from parochialism or to accommodate the sovereign in its necessary functions. Examples of such insulation or accommodation in proper operation

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[24] *E.g., Ubi Jus, ibi Remedium* (Where there is a right, there is a remedy). *See generally* 2A SANDS, STATUTES AND STATUTORY CONSTRUCTION § 55.04 (4th ed. 1973) [hereinafter cited as SANDS].

[25] *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES 23 (15th ed. 1807) (Whenever a legal right is invaded, there is a legal remedy).

[26] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 286 (1965).

[27] *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971).

[28] 28 U.S.C. § 1331 (1976).

[29] *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). The Supreme Court announced this decision on the same day as Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See generally* C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 60 (3d ed. 1976).

[30] 304 U.S. 64 (1938).

[31] *Id.* at 78.

are found in subjects such as government procurement programs,[32] issuance or assignment of debt securities by or to the federal government,[33] liens asserted by the federal government,[34] disputes among the states[35] and maintenance of public waterways' navigability.[36]

In contrast, private parties asserting that a federal public law implies a particularized cause of action ordinarily do so to achieve federal jurisdiction. Reasons vary. Plaintiffs may be discontent with burdens of proof imposed in, or the selection of remedies available from, non-federal forums. Nationwide service of process may suggest the desirability of a federal forum but diversity jurisdiction prove unavailable. Even more basically, the substantive content of federal law may appeal to potential plaintiffs. Federal regulatory schemes often prescribe duties beyond those required by state law while reserving exclusive jurisdiction to federal courts.[37] In any event, alleging that a cause of action is implied by federal law involves invocation of the Constitution or other species of federal law as existing substantive rules of decision. The preeminent issue becomes whether private parties of a given class are entitled, in particular circumstances, to invoke immediate benefit of substantive rules prescribed by or pursuant to federal law. While private parties well may argue that a federal statute, or regulation promulgated under it serves a paramount policy that would be frustrated by denial of a private cause of action, their argument, purports to proceed from and not to the substantive rule.

### B. *Before* Erie

Various commentators[38] regard the Supreme Court's 1916 decision in *Texas & Pacific Railway Company v. Rigsby*[39] as the earliest recognition of a private cause of action implied from federal statute. Recent Supreme Court opinions tend to perpetuate this attribution[40] but *Rigsby*'s validity as precedent for the current generation of implied causes of action is dubious.[41]

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[32] *See* American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640, 643-44 (9th Cir. 1961).

[33] *See* Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 34 (1956).

[34] *See, e.g.*, United States v. Acri, 348 U.S. 211, 213 (1955).

[35] *See, e.g.*, Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

[36] *See* Wyandotte Trans. Co. v. United States, 389 U.S. 191, 203-06 (1967).

[37] *See, e.g.*, 15 U.S.C. § 78aa (1976) (§ 27 of '34 Act).

[38] *See* note 1 *supra*.

[39] 241 U.S. 33 (1916). The statute considered in *Rigsby* provided that an employee's use of defective rail cars did not allow his employer to assert an assumption of risk defense. The Court interpreted this provision as mandating inference of a private cause of action. *Id.* at 39-40, 43.

[40] *See, e.g.*, Touche, Ross & Co. v. Redington, 442 U.S. 560, 579-80 (1979) (Brennan, J., concurring); Cort v. Ash, 422 U.S. 66, 78 (1975).

[41] Curiously, the majority's opinion in Cannon v. University of Chicago, 441 U.S. 677 (1979) quotes language from *Rigsby* which emphasized that decision's common law nature. *Id.* at 689 n.10. Dissenting in *Cannon*, Justice Powell expressed strong reservations about

Plaintiff Rigsby was an employee of the Texas and Pacific Railway. Injured in a fall from a rail car, Rigsby alleged his fall was caused by a defective handhold which violated a federal safety statute. The statute provided penal consequences but not private remedies. Rigsby originally sued in state court but the case was removed as a result of the Railway's federal incorporation.[42] Recognizing a private right of action for injury sustained by a special beneficiary of the safety statute, the majority opinion stated that the right to recover "damages from the party in default is implied according to a doctrine of the common law."[43] This reasoning was somewhat consistent with pre-revoluntionary common law precedent concerning a statute lacking *any* remedial or penal structure.[44]

By reason of the defendant's federal incorporation, *Rigsby* was handled as a "federal question". However, in the more than ninety years in which a federal common law flourished,[45] there was no particular pressure to restrict generation of non-maritime substantive rules of decision by reference to the jurisdiction exercised by a federal court. *Rigsby* reflects this period. The 1916 Court used terminology and methodology appropriate to a tort per se theory. It explicitly relied[46] on a nineteenth century Queens Bench decision[47] holding that, when a remedial statute's provision of a remedy is inadequate to the legislative purpose to protect a class of which plaintiff is a member, a private cause of action will be made available even though not contemplated by the statute.[48] Although this reason-

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continued citation of *Rigsby*. *Id.* at 732 (Powell, J., dissenting).

[42] Texas & Pac. Ry. Co. v. Rigsby, 222 Fed. Rep. 221, 222 (5th Cir. 1915), *aff'd*, 241 U.S. 33 (1916). The *Pacific Railroad Removal Cases* of 1885, 115 U.S. 1 (1885), validated *Rigsby*'s removal from state to federal court as a result of the defendant's federal incorporation. Although the Supreme Court later characterized these decisions as "unfortunate," Romero v. International Term. Operating Co., 358 U.S. 354, 379 n.50 (1959), they were preserved from need for judicial overturn by a statute effecting a substantial cure. *See* Judicial Code and Judiciary Amendments of 1948, § 1, 28 U.S.C. § 1329 (1948).

[43] 241 U.S. at 39.

[44] *See* Anonymous, 87 Eng. Rep. 791, 791 (Q.B. 1703). Just before the American Revolution, availability of a damage remedy was extended to one injured by violation of a penal statute enacted to protect the class of which he was a member. *See* Rowning v. Goodchild, 2 Black W. 906 (1773).

[45] Swift v. Tyson, 41 U.S. 1 (1842), which permitted the development of federal common law, was decided in 1842. The Court overruled *Swift* in 1938. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[46] 241 U.S. at 39-40.

[47] Couch v. Steel, 118 Eng. Rep. 1193 (1854).

[48] *Id.* at 1197. The plaintiff in *Couch* was a seaman on one of the defendant's ships. The penal statute in question mandated that shipowners stock various medicines on board ships involved in international voyages. Plaintiff alleged that an unlawful insufficiency of medicines aggravated a previous illness. The court held that the seaman had a damage remedy. *Id.* The holding must be considered, however, in context of the Anglo-American policy of paternalism toward seamen which *inter alia* supports provision of maintenance and cure to seamen who are injured or become ill in the course of a voyage. *See* GILMORE & BLACK, THE LAW OF ADMIRALTY, 272-314 (2d ed. 1975). Apparently, in England, the *Couch* methodology is useful only in employee welfare contexts. *See* Williams, *Legislation in the Law of Torts*, 23 MOD. L. REV. 233, 244 (1960). *Rigsby*'s holding was effectively overruled in Moore

ing may be consistent with the great spirit of the common law, it is quite different from purporting to recognize an unstated legislative intent to provide a private cause of action.

## III. Modern Evolution of Implied Rights of Actions

### A. *Before* Borak

The modern genre of implied federal causes of action dates from the 1940's and the language of the decisions has much of its roots in popular perceptions attending enactment of the securities regulation schemes developed in the 1930's. *Kardon v. National Gypsum Co.*[49] is widely credited as the "seminal" case[50] holding that S.E.C. Rule 10b-5[51] implied a private cause of action. This 1946 federal district court decision was not, however, the first occasion upon which a court held that portions of the '34 Act implied private rights of action.

In 1941, in *Geismar v. Bond & Goodman, Inc.*,[52] another U.S. district court ruled that section 29 of the '34 Act provided a vehicle for not only rescission but also damages.[53] Plaintiff alleged a violation of section 15(c)(1) of the '34 Act[54] which lacked provision for a private cause of action. Section 29 of the Act particularizes circumstances in which contracts made in violation of the Act, or regulations promulgated thereunder, are rendered void.[55] Inference of a right to rescission would seem mandated by a statutory characterization of voidness. This is particularly so when, as in the case of section 29(b) of the '34 Act, characterizing the contract as void is designed to operate against violators and their knowing successors in interest.[56] The *Geismar* court failed to explain, however, how one makes the transition from the equitable remedy of rescission to the legal remedy of damages.

In 1944, the Second Circuit decided two cases central to the evolution of implied causes of action.[57] The first was somewhat cryptic. In *Baird v. Franklin*,[58] the majority affirmed a district court's dismissal of a cause of

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v. C. & O Ry., 291 U.S. 205, 214-15 (1934).

[49] 69 F. Supp. 512 (E.D. Pa. 1946).

[50] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

[51] 17 C.F.R. 240.10b-5 (1979).

[52] 40 F. Supp. 876 (S.D.N.Y. 1941).

[53] *Id.* at 878.

[54] 15 U.S.C. § 780(c)(1) (1976).

[55] 15 U.S.C. § 78cc(b) (1976). Section 29 of the '34 Act has analogues in other securities statutes. *See, e.g.*, 15 U.S.C. § 79z (1976) (§ 26 of Public Utility Holding Company Act of 1935); 15 U.S.C. § 80a-46 (1976) (§ 47 of Investment Advisers Act of 1940). Only the '34 Act, however, bestows exclusive jurisdiction on a federal district court.

[56] *See* 15 U.S.C. § 78cc(b)(1) & (2) (1976).

[57] In 1944, the Supreme Court also recognized a private federal cause of action implied in the Railway Labor Act for a railway employee whose collective bargaining representatives indulged racial discrimination. Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944).

[58] 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

action allegedly implied by section 6(b) of the '34 Act.[59] The trial court had dismissed the case as a result of the plaintiff's failure to prove damages.[60] Section 6(b), under which national securities exchanges are governed, does not expressly provide a private cause of action. Plaintiff alleged actionable injury from an exchange's failure to enforce its own rules for member firms. Affirming dismissal for failure to prove damages, the majority opinion merely assumed availability of a cause of action. Purporting to dissent as to the damage issue, Judge Clark advanced a lengthy argument concerning the liberality with which he thought courts should approach assessment of causes allegedly implied in the federal securities laws.[61] Although his argument was gratuitous in context of the case's disposition, it is nonetheless notable not only for the methodology endorsed but also for the role Judge Clark played in another Second Circuit implication decision in 1944.[62]

In his *Baird* dissent, Judge Clark maintained that failure to recognize an implied private cause of action under section 6(b) would convert the Act's "avowed purpose of 'reasonably complete and effective' protection" into "a snare and a delusion."[63] Buttressing his fear of the public relations consequences from denying a cause of action with somewhat more judicial observations, Judge Clark cited the *Rigsby* case for the propositions that failure of a statute to provide "machinery or procedure" to acquit an individual right is immaterial to judicial ability to fashion a remedy, and that members of a class, for whose protection a statute creates a duty, may sue for injuries resulting from a breach of that duty. He rejected the argument that, since other sections[64] of the '34 Act expressly provide private rights of action, the doctrine of *expressio unius est exclusio alterius*[65] precludes inference of an intent to provide a cause under section 6(b). Contending that the express causes of action provided more unrestricted recoveries than possible at common law, Judge Clark made oblique reference to the statement in section 28(a) of the '34 Act[66] that all rights and remedies of the Act supplement those already existing at law and in equity. He did so as a prelude to opining that traditional rules of statutory construction are subordinated to a principle that courts will construe "details" of an act in conformity with its dominant purpose.[67] Unexplained were how inferences of legislative intent to imply not only a cause of action but also attachment of federal judicial jurisdiction are rel-

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[59] 15 U.S.C. § 78f(b) (1976).

[60] 141 F.2d at 239.

[61] *Id.* at 240-46 (Clark, J., dissenting).

[62] Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944).

[63] 141 F.2d at 245 (Clark, J., dissenting).

[64] *See, e.g.*, 15 U.S.C. § 78i(c) (1976) (§ 9(c)); 15 U.S.C. § 78p (1976) (§ 16); 15 U.S.C. § 78r(a) (1976) (§ 18(a)).

[65] The expression of one thing is the exclusion of another. *See generally* 2A SANDS, *supra* note 24, § 47.23.

[66] 15 U.S.C. § 78bb (1976).

[67] 141 F.2d at 245. (Clark, J., dissenting).

egated to being mere details. While the dissent may be criticized for misciting authority,[68] variations on Judge Clark's analytically questionable theme are encountered throughout the modern history of implied causes of action.

Later in 1944, Judge Clark presided over a merger of the *Geismar* thesis[69] with his tort *per se* approach to supplementing the securities acts. *Goldstein v. Groesbeck*[70] involved "double derivative" actions on behalf of four operating subsidiaries. Plaintiff, a shareholder in the subsidiaries' holding company, sought an accounting for profits generated by another affiliate as a result of contracts with the operating companies. These contracts allegedly violated section 4(a)(2) of the Public Utility Holding Company Act (PUHCA).[71] Section 26(b) of the PUHCA[72] stipulates voidness in much the same manner as section 29 of the '34 Act.[73] Both statutes provide penal sanctions.[74] Judge Clark rejected the defendant's contention that section 4(a)(2) did not provide a private cause of action, writing that such a result would be inconsistent with the legislative policy underlying PUHCA and that private enforcement under the analagous section 29 of the '34 Act was sanctioned in *Geismar*. Finally, Judge Clark opined that public expectations of vigorious securities law enforcement compelled recognition of a private cause of action.[75] Thus, in context of a fear of frustrating rising expectations, a judicially-perceived incompleteness of PUHCA § 26(b) was cured and the path cleared to an implied "remedy" in the nature of accounting.

In the previously noted *Kardon v. National Gypsum Co.*[76] case, the federal district court for the Eastern District of Pennsylvania relied on *Rigsby*[77] but articulated a broader ground for decision. Responding to argument that Rule 10b-5 does not imply a private cause of action because Congress expressly provided civil causes of action under other sections of the '34 Act,[78] the court stated that the general purposes of the Act compel conclusion that "the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies."[79] Thus, in *Kardon*, it was not section 10(b) of the '34 Act or Rule 10b-5 which im-

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[68] Judge Clark's *Baird* dissent relied on S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) for the proposition that courts should construe the details of an act in accordance with the generally expressed legislative policy of the act. 141 F.2d at 245 (Clark, J., dissenting). It must be noted, however, that *Joiner* involved construction of only a part of the statutory definition of a "security." 320 U.S. at 350-55.

[69] *See* text accompanying notes 52-56 *supra*.

[70] 142 F.2d 422 (2d Cir. 1944).

[71] 15 U.S.C. § 78d(a)(2) (1976).

[72] 15 U.S.C. § 79z(b) (1976).

[73] 15 U.S.C. § 78cc (1976).

[74] *See* 15 U.S.C. §§ 78ff, 78z-3 (1976).

[75] 142 F.2d at 427.

[76] 69 F.2d 512 (E.D. Pa. 1946).

[77] *Id.* at 513.

[78] *See* note 64 *supra*.

[79] 69 F. Supp. at 514.

plied a private cause of action but some "general law" other than the Constitution or a federal statute. The Court perceived this "general law" to be so pervasive that the burden was on defendant to demonstrate a legislative intent to deny a cause of action or remedy. The ultimate holding did not rest on Rule 10b-5 alone. Rather, the court noted that the cause of action could also be grounded upon section 29(b).[80] Although *Kardon* involved an accounting, the court explicitly endorsed the *Geismar* holding as to the availability of not only rescission but also damages.[81]

The interval between the *Kardon* decision in 1946 and what proved to be an operationally seminal decision of the Supreme Court in *J.I. Case v. Borak*[82] was not unproductive. For example, the Supreme Court interpreted section 301 of the Taft-Hartley Act[83] as authorizing federal courts to fashion a body of federal law for enforcement of collective bargaining agreements.[84] Lower courts contributed by recognizing private causes implied by such statutes as the Federal Communications Act[85] and the Civil Aeronautics Act.[86] This interval also witnessed the Supreme Court's refusal, in *T.I.M.E., Inc. v. United States*,[87] to infer a private cause of action from the Motor Carrier Act's[88] prohibition of unjust and unreasonable charges.[89] The Court, however, decided the case in the context of an agency's possession of primary jurisdiction over the carrier-defendant. The decision was followed shortly by *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*[90] which addressed a different carrier malpractice in dramatically different terms. In context of the same regulatory scheme, the *Hewitt-Robins* court considered the effect of denying a remedy for misrouting. Since denial of a cause of action would leave shippers helpless against erring carriers, the Court presumed that Congress did not intend this result.[91] Whereas the *T.I.M.E.* decision held that neither statutory language nor legislative history supported inference of a private cause, the majority opinion in *Hewitt-Robins* went further by considering whether recognition of a cause of action would be inconsistent with the Act's legislative purpose. The holding was for plaintiff and in such terms as to invite recognition of statutorily unstated private rights of action when their effect would serve the legislative purpose.

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[80] 15 U.S.C. § 78cc(b) (1976).

[81] 69 F. Supp. at 514.

[82] 377 U.S. 426 (1964). Prior to Cort v. Ash, 422 U.S. 66 (1975), *Borak* was the leading Supreme Court decision concerning implication of private causes from federal statutes.

[83] 29 U.S.C. § 185 (1976).

[84] Textile Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957).

[85] Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

[86] Fitzgerald v. Pan American World Airways, 229 F.2d 499, 501 (2d Cir. 1956).

[87] 359 U.S. 464 (1959).

[88] 49 U.S.C. § 301 (1976).

[89] 49 U.S.C. § 316(b) & (d) (1976).

[90] 371 U.S. 84 (1962).

[91] *Id.* at 89.

It is impossible to reconcile these decisions, only three years apart, as the product of normal judicial progress. A head count of the Justices involved offers some clue as to the sources of a changing philosophy on the Court. Only Justice Brennan was in the majority in both *T.I.M.E.* and *Hewitt-Robins*. Justices Goldberg and White joined the Court after *T.I.M.E.*, replacing Justices Frankfurther and Whittaker who had been in the *T.I.M.E.* majority. The *Hewitt-Robins* decision, which predated *Borak* by two years, was the first manifestation of the Court's new orientation and Justice Clark wrote for the majority in each.

### B. Borak's *Call to Duty*

In *J.I. Case Co. v. Borak*,[92] the Court considered a consummated merger in context of disaffected shareholder charges that proxy solicitation material pertinent to securing shareholder approval had been false and misleading in violation of S.E.C. Rule 14a-9.[93] The trial court ruled that the '34 Act limited its power to granting declaratory relief under section 27 and that, consequently it lacked the power to redress alleged violation of the Act.[94] Section 27 describes the exclusive jurisdiction of U.S. district courts under the '34 Act. This grant includes "all suits in equity and actions at law brought to enforce any liability or duty created by the Act or regulations promulgated thereunder."[95] While the Supreme Court's holding purported to deal only with the narrow issue of section 27's scope,[96] the majority's opinion says more and, although the superfuity can be characterized as dictum, much has been done by reference to it.

Unlike *Rigsby*,[97] the *Borak* defendants made no concessions. Rather, they squarely asserted that Congress did not contemplate a private right of action in section 14(a).[98] Although treating section 27 as dispositive, Justice Clark outlined a rationale for inferring a cause of action under section 14(a). His reasoning proceeded from an undoubted congressional desire to foster fair corporate suffrage for purchasers of equities traded on public exchanges.[99] It must be borne in mind that, absent SEC rule-making, section 14(a) is inoperative. Justice Clark found that the standards provided by Congress for SEC implementation of section 14(a) "evi-

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[92] 377 U.S. 426 (1964).

[93] 17 C.F.R. § 240.14a-9 (1979). The S.E.C. promulgated Rule 14a-9 pursuant to the authority of § 14(a) of the '34 Act. 15 U.S.C. § 78n(a) (1976). Section 14(a) prohibits solicitation of proxies in contravention of rules promulgated by the S.E.C. Rule 14a-9 prohibits certain types of deceptive conduct in connection with proxy solicitation. *Id. See generally* E. ARANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 463-76 (2d ed. 1968).

[94] 377 U.S. at 427-28.

[95] 15 U.S.C. § 78aa (1976).

[96] 377 U.S. at 428.

[97] *See* text accompanying notes 45-48 *supra*.

[98] 377 U.S. at 431.

[99] Id. *See* H.R. REP. No. 1383, 73d Cong., 2d Sess. 13 (1934); S. REP. No. 792, 73d Cong., 2d Sess. 12 (1934).

denced" the broad remedial purposes of the statute.[100] These standards are phrased in the not uncommonly broad terms of being "necessary or appropriate in the public interest or for the protection of investors."[101] This language, of course, is the expression of a Congress constitutionally compelled to provide standards for delegations of rule-making authority and desireous of effecting such provision without unduly limiting a fledgling regulatory agency. Justice Clark put the standards, with italicized emphasis on "protection of investors"[102] to yet another and more creative use.

Having noted section 14(a)'s remedial purpose, he dealt with fulfillment of that purpose in the following broad language:

> Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. . . . Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations . . . at their face value, unless contrary to other material on file. . . .
>
> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.[103]

Although this passage is widely cited, it is analytically suspect on several grounds. Antitrust plaintiffs, for example, pursue treble damages in reliance on an express, rather than implied, statutory cause of action and remedy.[104] Furthermore, SEC authority to promulgate rules under section 14(a) gives the Commission control of the time equation in proxy data clearance. This control, of course, is subject to the practical limitations implicit in Congress' continuing power over appropriations. Finally, it was the Court and not Congress which found that private enforcement of the proxy rules is "necessary." The '34 Act, of course, now embraces many over-the-counter equities and their issuers[105] and subjects them to the proxy solicitation rules on the same basis as listed companies. How is it that a Congress that originally "recognized" the virtues of private enforcement of the proxy rules governing both listed companies and thereafter amended the Act to bring significant over-the-counter companies within the rules' ambit, never thought of the simple expedient of subjecting all materially misleading proxy solicitations *affecting commerce* to private causes of action? This could have been done easily and without

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[100] 377 U.S. at 431-32.
[101] 15 U.S.C. § 78n(a) (1976).
[102] 377 U.S. at 432.
[103] *Id.* at 432-33.
[104] 15 U.S.C. §§ 1, 2, 13, 14 & 15 (1976).
[105] § 12(g), 15 U.S.C. § 78l(g) (1976).

burdening the SEC with review of all proxy data. The jurisdictional sweep of section 10(b) provides an example. Nevertheless, from *Borak* dictum, all else flowed for many years.[106] While it is unnecessary to belabor popularity of implied causes of action,[107] it should be noted that commentators maintain that such causes are a remarkably significant factor in the greatly increasing case loads of federal courts.[108]

The early 1970's saw a continuation of the Court's expansive treatment of implied private rights of action. In 1970, the Supreme Court considered the burden of proof implicit in private prosecutions under section 14(a) and developed the range of remedies available under it.[109] In a 1971 decision, *Superintendent of Insurance v. Bankers Life & Casualty Co.*,[110] the Supreme Court first gave explicit recognition to Rule 10b-5's status in private litigation. In a gratuitous footnote to the majority opinion written by Justice Douglas, the Loss treatise on securities regulation[111] was cited for the proposition that a private right of action was implied in section 10(b).[112]

Citation to the Loss treatise was curious. Professor Loss, noting that the entire 10b-5 superstructure had been erected without a square ruling by the Supreme Court on the existence of a private cause,[113] had indicated considerable disquiet with the proposition. He offered several points of distinction between section 10(b) and the *Borak* context: whereas there was little state law bearing on proxy solicitation, inference of a private remedy from Rule 10b-5 displaces a considerable body of state law; the broad enforcement rationale of *Borak* does not apply so readily to Rule 10b-5 actions; and the '34 Act provides three private rights of actions which are more closely analogous to Rule 10b-5 than they are to the proxy rules.[114] Also remarked was the problem that buyers' successful invocations of 10b-5 have the potential to evade restrictions Congress imposed upon civil actions expressly created by sections 11 and 12 of the Securities Act of 1933 ('33 Act).[115] Despite his reservations, Professor Loss projected that the Supreme Court was not likely to prick the 10b-5 "bubble" because of the Court's readiness to afford private

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[106] *See, e.g.*, Pitt, *Standing To Sue Under The Williams Act After Chris-Craft: A Leaky Boat on Troubled Waters*, 34 BUS. LAW. 117, 119-20 (1978) [hereinafter cited as Pitt].

[107] *See* note 11 *supra*. *See also* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

[108] *See, e.g.*, Pitt, *supra* note 106, at 118-19 n.6.

[109] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-89 (1970).

[110] 404 U.S. 6 (1971).

[111] 6 L. LOSS, SECURITIES REGULATION 3869-73 (1969 Supp.) [hereinafter cited as Loss].

[112] 404 U.S. at 13 n.9.

[113] 6 Loss, *supra* note 111, at 3869.

[114] *Id.* at 3870.

[115] *Id.* Several commentators contend that Rule 10b-5 should not provide relief for defrauded purchasers of a security. *See, e.g.*, Freeman, *Implied Remedies Under Rule 10b-5: Are They Only For Defrauded Sellers?*, Nat'l L. J., Dec. 10, 1979, at 26.

causes when they aid the general objectives of the securities statutes;[116] utility of section 29(b) when the parties are in appropriate relationship; and, broad lower court acceptance of private actions under Rule 10b-5.[117] Can it be that Justice Douglas' sense of humor was at play when he cited the Loss masterwork?

However that may be, there is no escape from the facts that *Borak*'s essential reliance was on a jurisdictional rather than a substantive provision and that Justice Clark's unnecessary and unfortunately-phrased excursion concerning section 14(a) was subsequently taken to sanction lower courts' performance of a legislative oversight function dedicated to implementing presumed congressional purposes. While propriety of such dedication is an obvious question in terms of the separation of powers,[118] lower courts' dutiful response to the *Borak* Court's evocation of "alertness to provide remedies" cannot be doubted.[119]

### C. *The Retreat from* Borak

The opinion written for a unanimous Court in *Cort v. Ash*[120] reflects a great effort to restrain overenthusiasm in inferring causes of action while seeking to avoid explicit repudiation of *Borak*. *Cort*'s aftermath suggests that it represented an uneasy compromise and a considerable communication failure among participating Justices.

While *Cort* was not a securities case, it involved a corporate matter. Plaintiff petitioned a federal district court to compel corporate directors to account for funds expended in an alleged violation of a criminal statute proscribing corporate political contributions on the federal level. The Third Circuit reversed summary judgment for defendants, thereby recognizing propriety of a private cause of action under the statute.[121] Reversing the Court of Appeals, the Supreme Court held that such "relief" was not available under the federal statute "itself" and oriented the parties to seek whatever relief was available under the laws of the state of incorporation.[122]

Articulating its reasoning, the Court identified several factors relevant to determining whether a private "remedy" is implicit in a statute.[123] These factors, which were previously noted,[124] deserve repetition although

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[116] 6 Loss, *supra* note 111, at 3870-71.

[117] *Id.* at 3871.

[118] *See* Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

[119] *See, e.g.*, L. JENNINGS & W. MARSH, SECURITIES REGULATION CASES & MATERIALS 844-1088 (4th ed. 1977); Pitt, *The Long Arm of Securities Exchange Act Rule 10b-5*, in ALI-ABA COURSEBOOK ON FRAUD, INSIDE INFORMATION, AND FIDUCIARY DUTY UNDER RULE 10b-5 9-125 (1975).

[120] 422 U.S. 66 (1975).

[121] *Id.* at 77.

[122] *Id.* at 77-78.

[123] *Id.* at 78.

[124] *See* text accompanying note 14 *supra*.

the author takes the liberty of reordering them. "[I]ndication of legislative intent, explicit or implicit, either to create such a remedy or to deny one" was listed as the second factor. The third consideration, although seemingly better stated as a sub-part of the intent inquiry, concerned whether the "remedy" in question is consistent with the "underlying purposes of the legislative scheme." First was an inquiry, drawn from *Rigsby,* as to whether plaintiff is "one of the class for whose especial benefit the statute was enacted." This factor essentially involves a determination of whether the plaintiff has standing to sue. The final factor is an inquiry as to whether the "cause of action" is one traditionally "relegated" to state rather than federal law.[125]

Use of the word "relegated" in the fourth *Cort* factor is intriguing. The Court probably was not addressing the reservation effected by the tenth amendment of the Constitution[126] since, by definition, matters reserved to the states are not subject to regulation by Congress or federal courts. Presumably, then, Justice Brennan considered congressional failure to exert its maximum authority under, for example, the commerce clause[127] as equivalent to an affirmative dispensation from that authority. Even if this dubious proposition were acceptable, only Congress could be the relegating body. If Congress explicitly or implicitly creates a federal cause of action, it is not within the power of federal courts to dispense with or abstain from enforcement of such a right merely because they deem state remedies to be adequate to the legislative purpose. A clue to what may have been meant is found in the Court's citation of *Borak* in support of the fourth factor. In *Borak,* Justice Clark observed that limiting Rule 14a-9 plaintiffs to declaratory relief would force victims of consummated mergers, approved through use of deceptive proxy solicitations, to rely on state courts for relief in which event, if the law of an appropriate state failed to provide relief, the whole purpose of section 14(a) would be frustrated.[128] By way of contrast observed by Justice Brennan, the *Cort* plaintiffs seemed to have potentials for *ultra vires* and breach of fiduciary duty claims both of which are traditionally recognized by states.[129]

The first *Cort* factor does not merit detailed examination. The Supreme Court has become very conscious of standing and comparable considerations. *Blue Chip Stamps v. Manor Drug Stores,*[130] concerning standing in Rule 10b-5 damage actions, was decided just eight days before *Cort. Rondeau v. Mosinee Paper Co.,*[131] which involved standards for pri-

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[125] 422 U.S. at 78. It is difficult to consider the "fourth" *Cort* factor complementary to the other three unless one views federal courts as generators of substantive rules of decision.

[126] U.S. CONST. amend. X.

[127] U.S. CONST. art. I, § 8, cl. 3.

[128] 377 U.S. at 434-35.

[129] 422 U.S. at 84.

[130] 421 U.S. 723 (1975).

[131] 422 U.S. 49 (1975).

vate injunctive relief under section 13(d) of the '34 Act,[132] was handed down on the same day as *Cort. Blue Chip* and *Rondeau* were not unanimous decisions. Justices Brennan and Douglas were among the dissenters in each. It is important to note that, in *Cort*, Justice Brennan amplified somewhat concerning standing. The Court, in dictum, declined to rule that an exclusively criminal statute may never imply a private cause of action. Hypothetical reference was made to the potency for recognition of private rights of action to acquit the interests of a special group for whom statutory protection was intended.[133] However, intent to protect shareholders was regarded as "at best a subsidiary purpose" of the statute at issue in *Cort* since Congress' purpose was to destroy corporate influence over elections.[134]

Although the issue of legislative intent to imply a private cause of action necessarily becomes enmeshed with the question of standing, the *Cort* decision accorded legislative intent an understated treatment not entirely inconsistent with *Hewitt-Robins*. Justice Brennan opined that, when federal law has granted a class certain protections, it is not necessary to demonstrate an affirmative congressional intent to create a private cause of action although explicit intent to deny a cause of action would be controlling.[135] Thus, if rights can be said to be granted as a principal purpose of legislation, *Cort*'s teaching had it that prudent defendants would do well to discover and brief congressional intent both to deny a private cause of action and to limit remedies.

Justice Brennan's attempt to amplify all four factors provided opportunity for inconsistent lower court interpretations of the *Cort* decision. Although the case could have been decided solely on legislative intent or standing grounds, superfluous amplification concerning consistency of remedies with regulatory purposes entailed recall of the *Borak* exhortation to judicial alertness to the ultimate but unnecessary effect, in *Cort*, that a private remedy would not aid the primary congressional goal of the legislation.[136] To be sure, recovery of funds illicitly spent to influence a past election cannot undo the abuse addressed by Congress but unnecessary laboring of this point opened the door to argument, in later cases, that private rights of action should be recognized whenever the effect would be immediately supportive of a congressionally-defined purpose. If, however, the consistency factor is only a remedial consideration and thereby subordinate to prior recognition of intent to provide a cause of action, the *Cort* decision was not nearly so threatening.

Various commentators viewed *Cort* as addressing the process by which

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[132] 15 U.S.C. § 78m(d) (1976 & Supp. II 1978).

[133] 422 U.S. at 80 (dictum).

[134] *Id.*

[135] *Id.* at 82. Cort v. Ash is similar in concept, if not in language, to the *Kardon* holding. *See* text accompanying notes 76-80 *supra*.

[136] *Id.* at 84.

implied "causes of action" are recognized.[137] Later decisions, however, compel a careful rereading of *Cort* and recognition that Justice Brennan's explicit declination of the term "relief" was responsive to the Third Circuit's holding that "damage relief was proper to the statute in question."[138]

### D. *After* Borak

In 1977, the Supreme Court provided two clues that *Cort v. Ash* was far from the last word about recognition of implied causes of action. In *Piper v. Chris-Craft Industries, Inc.*,[139] the Court considered whether an unsuccessful tender offeror has an implied cause of action for damages under section 14(e) of the '34 Act.[140] Writing for the majority, Chief Justice Burger denied existence of such a cause. Having failed to find even a "hint" in the legislative history of section 14(e) that Congress intended to benefit a losing contender,[141] Chief Justice Burger considered the plaintiff's claim in the *Cort v. Ash* mode. Piper's theory of action was found wanting in terms of each *Cort* factor and all of Justice Brennan's "remedy" usages were respected in a rhetorical sense. This is significant since the Chief Justice took care to avoid foreclosing non-contesting shareholders[142] from a private cause of action under section 14(e). Nevertheless, on an explicit level, it was the cause of action which was denied. Concurring in the result, Justice Blackmun joined the dissenters' premise that the plaintiff enjoyed standing to prosecute a cause of action under section 14(e). He maintained that the plaintiff failed to establish causation.[143]

Justice White authored the majority opinion in *Santa Fe Industries, Inc. v. Green.*[144] The direct holding of the case was that Rule 10b-5, absent deceptive or manipulative conduct, does not provide a cause of action for shareholders squeezed-out in an allegedly unfair short-form merger.[145] Acknowledging availability of a Rule 10b-5 claim under certain circumstances, Justice White cited *Piper* for the proposition that a private cause of action should not be recognized where it is *unnecessary* to ensure fulfillment of a congressional purpose.[146] Citing both *Piper* and *Cort*, availability of an appraisal remedy under statute law was taken to militate against the need for a federal cause of action. This was modified by an observation to the effect that existence of a particular state remedy

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[137] *See, e.g.*, McMahon & Rodos, *supra* note 1, at 187; Crawford & Schneider, *supra* note 1, at 659; *Title IX Private Rights, supra* note 1, at 433.

[138] *See* 422 U.S. at 77-78.

[139] 430 U.S. 1 (1977).

[140] *Id.* at 4; 15 U.S.C. § 78n(e) (1976).

[141] 430 U.S. at 35.

[142] *Id.* at 42 n.28.

[143] *Id.* at 51 (Blackmun, J., dissenting).

[144] 430 U.S. 462 (1977).

[145] *Id.* at 474.

[146] *Id.* at 477.

is not dispositive of whether Congress intended to provide a similar remedy.[147] This came as a relief to those who feared use of the fourth *Cort* factor as an instrument appropriate to boot-strapping a federal cause of action. Much of Justice White's invocation of *Piper* and *Cort* was in a part of the opinion from which Justices Blackmun and Stevens, otherwise concurring in part, explicitly abstained.[148]

After *Santa Fe* and *Piper*, the Supreme Court did not long delay further reconsideration of formulae appropriate to identifying implied causes of action. Nineteen hundred and seventy-nine proved to be a banner year for Supreme Court treatment of implied private rights of action.

In *Cannon v. University of Chicago*,[149] plaintiff alleged that her sex had been the criterion for denial of admission to two medical schools by reason of which she enjoyed a cause of action[150] under Title IX of the Education Amendments of 1972.[151] Title IX does not provide an express private right of action but contemplates administrative action to cut off federal funding for institutions violating the Title's section 901. After decisions adverse to petitioner in U.S. district court and the court of appeals, Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976[152] which authorizes awards to prevailing private parties in Title IX actions *inter alia*. The Seventh Circuit then granted a rehearing but concluded that its original conclusion was correct and that the later 1976 Act could not be taken to create a Title IX remedy.[153]

The Supreme Court held for plaintiff. Justice Stevens wrote for the majority. Although concurring in not only the judgment but also the majority opinion, Justice Rehnquist wrote a separate concurrence in which Justice Stewart joined. The Chief Justice concurred in the result but did not offer a concurring opinion. Justices Powell and White provided dissenting opinions in the latter of which Justice Blackmun joined.

The majority opinion relied heavily on the facts that Congress modeled Title IX after Title VI of the Civil Rights Act of 1964[154] and that six lower courts recognized an implied Title VI private right of action *before* passage of Title IX. Justice Stevens also remarked a belief that there was ample evidence that Congress contemplated private remedies to supplement enforcement of Title IX.[155] He nevertheless paid lengthy homage to the four *Cort* factors and, as the Chief Justice did in *Piper*, paid considerable editorial respect to Justice Brennan's plainly deliberate choice of the word "remedy" in connection with the *Cort* factors. How-

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[147] *Id.* at 478.

[148] *Id.* at 480 (Blackmun, J., concurring); *id.* at 481 (Stevens, J., concurring).

[149] 441 U.S. 677 (1979).

[150] *Id.* at 680 n.2.

[151] 20 U.S.C. § 1681 (1976).

[152] 42 U.S.C. § 1988 (1976).

[153] 441 U.S. at 683; Cannon v. University of Chicago, 559 F.2d 1063, 1077-80 (7th Cir. 1977), *rev'd*, 441 U.S. 677 (1979).

[154] 42 U.S.C. § 2000d (1976).

[155] 441 U.S. at 694-703.

ever, Justice Stevens declined to weigh the *Cort* factors since all of them supported the same result. Justice Steven's closing comments suggested that a behind-the-scene battle was likely to emerge into public view. Conceding that Congress should be explicit about private causes of action when it means them to exist, Justice Stevens argued that "certain limited circumstances" nonetheless justify recognition that failure of Congress to do so is not inconsistent with an intent to create such a remedy.[156]

The succinct Rehnquist-Stewart concurrence pointed out that the majority's statutory construction approach differed significantly from the analysis employed in cases such as *Borak*.[157] This concurrence also recognized the essential difference between federal and common law courts but did so without derogation of federal courts' duty to determine whether Congress intended to create a private cause. Recognizing that cases such as *Borak* may have misled Congress into believing that the courts would relieve it from the burden of deciding refined policy questions, Justice Rehnquist warned that recent decisions make it clear that Congress should begin to retake an active role in providing private remedies.[158]

Via a footnote, Justice Powell endorsed the idea that past Supreme Court decisions had relieved Congress from considering difficult cause of action questions but he argued that it does not follow that the Court is obliged so to indulge Congress.[159] Justice Powell's dissent is impressive for its research, thoughtfulness and expression. Concluding that federal courts should not infer a private cause of action "[a]bsent the most compelling evidence of affirmative congressional intent,"[160] he asserted that the *Cort* mode of analysis is inconsistent with the separation of powers.[161] Describing *Cort*'s predecessors as a haphazard line of decisions, Justice Powell characterized *Cort*'s four factors as an open invitation to judicial legislation. The legitimacy of citation to *Rigsby* is also called into question,[162] and *Borak* is cast as an aberrant interpretation of a federal regulatory statute.[163] In terms of what must have been the argument in conference, the most important aspect of Powell's dissent may have been a reminder that the *Erie* court, when satisfied as to error perpetrated in *Swift v. Tyson*, did not attempt to construct a half-way position.[164]

*Davis v. Passman*[165] confirmed existence of not only a private cause of action under the Fifth Amendment but also a damage remedy to acquit the objectives of the due process clause.[166] The issue, sex discrimination,

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[156] *Id.* at 711.
[157] *Id.* at 718 (Rehnquist, J., concurring).
[158] "[T]he ball, so to speak, may well now be in" Congress. *Id.*
[159] *Id.* at 743 n.14 (Powell, J., dissenting).
[160] *Id.* at 731.
[161] *Id.* at 730.
[162] *Id.* at 732.
[163] *Id.* at 736.
[164] *See id.* at 742.
[165] 442 U.S. 228 (1979).
[166] *Id.* at 244-45.

was presented in an unusual context. Plaintiff was fired from a job in the office of a member of Congress in order to accommodate the congressman's conviction that a man could better handle the position. The Representative spelled out his purpose in a letter of dismissal.[167] Section 717 of the Civil Rights Act of 1964, which is designed to protect federal employees from invidious discrimination, omits non-civil service congressional employees.[168] Plaintiff brought suit under the fifth amendment, seeking back pay and reinstatement with appropriate consideration for lost promotion and salary increase opportunities. The district court dismissed for want of a cause of action. A Fifth Circuit panel reversed but was itself reversed by the court sitting en banc.[169] Using the *Cort* factors, the Fifth Circuit held that the due process clause does not imply a right of action and that the proposed damage remedy was not constitutionally compelled.[170]

In a five to four decision, the Supreme Court reversed as to availability of the damage action. The Court held that the plaintiff had stated a cause of action and that relief in the form of damages is an appropriate remedy.[171] Defendant's departure from office mooted the equity issues. The Court, however, remanded the case to the Circuit Court for consideration of congressional immunity issues.[172]

Justice Brennan wrote for the majority. Dissenting opinions were written by the Chief Justice as well as Justices Stewart and Powell. Justice Rehnquist joined in all of the dissents. The Chief Justice and Justice Powell indulged reciprocal endorsements.

The majority opinion ruled that the Fifth Circuit erred when it applied the *Cort* factors to assess the enforcement of Constitutional rights because such an inquiry is fundamentally different from consideration of who may enforce a statutory right.[173] A *Cort* analysis was said to be appropriate to divining congressional intent underlying complex legislation which authorizes others to introduce even greater complexity whereas the Constitution speaks with majestic simplicity resistant to *Cort* analyses absent constitutional commitment of an issue to a coordinate function. The majority presumed that justiciable constitutional rights are to be enforced through the courts. This presumption was indulged for the very good reason that, if individuals have no effective means to enforce constitutional rights, such rights become ephemeral or, in the word of the majority, "precatory."[174] Since Davis had no avenue of vindication other

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[167] *Id.* at 230 n.3.

[168] 42 U.S.C. § 2000e-16(a) (1976).

[169] 571 F.2d 793, 795 (5th Cir. 1978).

[170] *Id.* at 800-01.

[171] Davis v. Passman, 422 U.S. 228, 244-45 (1979).

[172] *Id.* at 249.

[173] *Id.* at 241.

[174] *Id.* at 245. Survival of the presumption that courts will enforce justiciable constitutional rights is dependent upon Congress' benign use of its power to define the jurisdiction of federal courts. *See* Carlson v. Green, 100 S.Ct. 1468, 1481-85 (1980) (Rehnquist, J.,

than the courts, the Court held that she was a proper party to invoke federal jurisdiction for the disposition of her fifth amendment cause of action.

Justice Brennan then considered availability of a damage remedy. The opinion placed principal reliance on *Bell v. Hood*[175] and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[176] In the former, the Court sustained the concept that federal courts could enjoin state officials from acts contravening the fourteenth amendment and observed that, when "legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[177] *Bivens* held that a damage remedy was available for a violation of fourth amendment rights unless special factors demand "hesitation."[178] The nature of such factors presents courts with troubling application problems which can be alleviated only by balancing distinct constitutional concerns of general application when their particular applications come into conflict. The ad hoc majority seems sympathetic to such balancing. In *Davis,* a possibility that the speech and debate clause[179] may have immunized Congressman Passman's action was held sufficient to demand "hesitation" abiding circuit court resolution.[180] Another interesting aspect of the case is the reversal of the classic formula that equity acts when the law cannot afford a remedy. Since the equitable remedy of reinstatement was impossible because of the Congressman's retirement in the wake of a losing primary run, damages were Davis' only opportunity for relief.[181]

The Chief Justice avoided the cause of action and remedy issues, expressing concern for the separation of powers in the context of a Congressman's need to be assured of total loyalty from his staff.[182] Justice Powell expanded on the separation of powers thesis. He maintained that the majority opinion is susceptible of interpretation as a shift from *Biv-*

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dissenting).

[175] 327 U.S. 678 (1946).

[176] 403 U.S. 388 (1971).

[177] 327 U.S. at 684.

[178] 403 U.S. at 396.

[179] U.S. CONST. art. I, § 6. The Speech and Debate clause serves to insulate Congress from executive or judicial pressures in order that the members of Congress may freely perform their legislative tasks. *See* Powell v. McCormack, 395 U.S. 486, 505 (1969). The clause is applicable in both criminal and civil proceedings. *See* Eastland v. United States Serviceman's Fund, 421 U.S. 491, 502-03 (1975). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18 (1978).

[180] The Fifth Circuit refrained from addressing whether the Speech and Debate clause immunized Passman from suit and the Supreme Court deferred for the time. 442 U.S. at 235 n.11.

[181] *Id.* at 245. Proceeding predominately via footnotes, Justice Brennan afforded an interesting lecture concerning connotations of "jurisdiction", "standing", "cause of action" and "relief". *Id.* at 237 n.15, 238 n.16, 239 nn. 17 & 18. Regretably he did not extend his labors to "infer" or "imply".

[182] *Id.* at 249 (Burger, C.J., dissenting).

*ens'* recognition that, in appropriate circumstances, a federal court may exercise principled discretion to infer a private cause of action from the Constitution to a *Borak*-like duty to imply a right of action whenever an effective alternative seems lacking.[183]

Despite a bias favoring the *Davis* result and a belief that it is entirely supportable, the author is concerned about the methodology the opinion can be taken to suggest. He would be more comfortable if Justice Brennan's particularized formulations called for plaintiff to plead and to demonstrate lack of another effective means of acquitting personalized constitutional rights. There should be no room to argue that a defendant is burdened with negating a presumption erected on plaintiff's claim. In terms of applications, the plaintiff in *Davis* would not seem to have been prejudiced by need for such a demonstration. The fact that the circuit court would have left her without a judicial remedy cannot be taken, on some sort of a modified *res ipsa loquitor* basis, to demonstrate need to infer a cause of action in comparable cases. The majority's language can be interpreted to justify such a quantum leap.[184]

### E. *Rethinking* Cort

The facts underlying *Touche Ross & Co. v. Redington*[185] instantly stir memories of *Ernst & Ernst v. Hochfelder*.[186] Touche Ross, a distinguished auditing firm, was retained by a brokerage house to audit its books and prepare reports to S.E.C. and an Exchange. The brokerage house failed. Redington, a court-appointed trustee, and the Securities Investor Protection Corporation (SIPC) charged that Touche Ross' improper audit techniques resulted in a failure to discover the brokerage's falsification of financial reports. As a consequence of this falsification, certain of the auditors' reports to the Exchange and a certification of the brokerage's statements were incorrect.[187] Plaintiff predicated his damage action on several theories including a breach of duty owed to investors

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[183] *Id.* at 252-55 (Powell, J., dissenting).

[184] *Id.* at 245.

[185] 442 U.S. 560 (1979).

[186] 425 U.S. 185 (1976). In *Ernst & Ernst*, the defendants allegedly performed a negligent audit which failed to uncover that the president of the company was embezzling large sums of money. *Id.* at 188-90. The Court ruled that the defendant was not liable under Rule 10b-5 since scienter, rather than negligence, is required in a private damage action. *Id.* at 215. *See generally* Maher & Blasi, *Lessons from* Ernst & Ernst*—Enforcement Proceedings and the Uncommon Law of Rule 10b-5*, 82 DICK. L. REV. 1 (1977). This year, the Court ruled that scienter is the requisite culpability standard in SEC injunctive actions under Rule 10b-5 although such is not the rule under § 17(a)(2-3) of the '33 Act. SEC v. Aaron, 100 S.Ct. 1945, 1952 (1980). Although the Supreme Court has not ruled on the issue, many lower courts consider reckless behavior sufficient to meet the scienter requirement. *See, e.g.*, Rolf v. Blyth, Eastmen Dillon & Co., 570 F.2d 38, 44 (2d Cir. 1978), *cert. denied* 439 U.S. 1039 (1978); Sunstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

[187] 442 U.S. at 565-66.

under section 17(a) of the '34 Act[188] which does not expressly provide a private cause of action.

Unlike sections 10(b), 14(a) and 15(a)(1) of the Act, section 17(a) is not introduced with the "It shall be unlawful . . ." rubric. Rather, the section demands that exchanges, registered broker-dealers, and others in the securities trading business observe minimum record-keeping and reporting rules promulgated by S.E.C. for investor protection. S.E.C. Rule 17a-5 directs that independent auditors be retained to verify brokers' reports.[189]

Nonetheless, the Second Circuit reversed[190] a district court's dismissal for failure to state a cause of action.[191] In a seven to one decision, in which Justice Powell did not participate, the Supreme Court held for the auditors. Justice Rehnquist wrote for the majority. Justice Brennan joined in the majority opinion but supplied a concurring opinion as well. Justice Marshall dissented.

Characterizing SIPC's argument that the Court should imply a private right of action on tort principles as entirely misplaced, Justice Rehnquist stressed that recognition of a statutory cause of action is a matter of construction which begins with the statutory language and ultimately is limited to determining whether Congress intended to create the asserted cause of action.[192] He noted that section 17(a) governs broker-dealers as opposed to auditors, does not purport to create private causes of action, and is like "countless other statutes" demanding record-keeping and reporting. Further, the purpose of the desired data assembly is to provide relevant authorities with an early warning[193] and the legislative history is devoid of suggestion of a private cause of action whereas false reporting is the subject of a private right of action expressed in section 18(a) of the '34 Act.[194]

In summary, Justice Rehnquist demolished any basis for inferring a cause of action. Doing so, he implicitly denied vitality of the long standing section 6 theory[195] as well as *Kardon*'s suggestion that defendants have a burden "to negative what the general law implied."[196] Justice Rehnquist sensibly pointed out that *Cort*'s factors cannot be weighed

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[188] 15 U.S.C. § 78q(a) (1976).

[189] 17 C.F.R. § 240.17a-5 (1979).

[190] Touche, Ross & Co. v. Redington, 592 F.2d 617, 619 (2d Cir. 1978), *rev'd*, 443 U.S. 904 (1979).

[191] 428 F. Supp. 483, 492-93 (S.D.N.Y. 1977).

[192] 442 U.S. at 568.

[193] *Id.* at 570.

[194] 15 U.S.C. § 78r(a) (1976). In order to proceed under § 18, a plaintiff must have relied on a misrepresentation in purchasing or selling a security, and the misrepresentation must have affected the value of the security. A defendant may escape liability with the affirmative defense that he acted in good faith and without knowledge of the inaccuracy of his statements. *Id.*

[195] *See* Baird v. Franklin, 141 F.2d 238, 245 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); *see* text accompanying notes 63-68 *supra*.

[196] *See* text accompanying note 79 *supra*.

equally since the "central inquiry" is whether Congress intended a cause of action. The first three *Cort* factors, he opined, are ones traditionally relied on in identifying legislative intent.[197] While *Borak* was preserved from explicit repudiation,[198] the majority opinion dryly noted that the Court now has a stricter standard which does not involve an estimate of the judiciary's ability to "improve upon the legislative scheme."[199]

Concurring, Justice Brennan clung to *Rigsby*'s "especial benefit" language but observed that the third and fourth *Cort* factors are not "by themselves" an adequate basis for inferring a "right of action."[200] Justice Marshall, as did Justice Clark in *Borak,* used section 17(a)'s "protection of investors" delegation standard as a springboard from which to leap to a legislative intention to afford private causes of action for investors and, as in *Touche Ross,* their representatives. He cleverly employed the delegation standard to meet the first *Cort* inquiry as to "especial benefit."[201]

*Transamerica Mortgage Advisors, Inc. v. Lewis*[202] represents a substantial survival of the vintage 1941 *Geismar* analysis[203]—to the degree it led to equity. Twice argued before the Court, *Transamerica* was a five to four decision. Justice Stewart wrote the majority opinion in which Justice Powell joined whilst unable to resist separate characterization of the majority opinion as compatible with his dissent in *Cannon.*[204] A dissent by Justice White was joined by Justices Brennan, Marshall and Stevens. Subjects of debate between the camps ran to both causes of action and remedies.

Section 206 of the Investment Advisers Act of 1940[205] characterizes various actions as unlawful but does not explicitly provide a private cause of action. Section 215 of the Act[206] which is analogous to section 29(a) of

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[197] 442 U.S. at 575-76.

[198] *Id.* at 577.

[199] *Id.* After *Touche Ross,* viability of the Court's reasoning in J. I. Case Co. v. Borak, 377 U.S. 426 (1964), is suspect. *See* text accompanying notes 98-103 *supra.* Indeed, the principal support for an implied private right of action under § 14(a) of the '34 Act appears to be the fact that Congress has not legislatively repealed the *Borak* dictum despite repeated opportunities to do so in the sixteen years following that decision. The language of Rule 14a-9, however, when considered in the context of the approach to Rule 10b-5 adopted in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), suggests that the vitality of a § 14(a) private cause of action may be conditioned upon proof that defendant acted with scienter. *Compare* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970) *and* Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853, 858-65 (D. Del. 1972) (negligence sufficient to establish § 14(a) violation) *with* Adams v. Standard Knitting Mills, Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,382, at 97,514 (6th Cir. 1980) (scienter is requisite culpability standard in § 14(a) actions).

[200] 442 U.S. at 580 (Brennan, J., concurring).

[201] *Id.* at 580-81 (Marshall, J., dissenting).

[202] 100 S.Ct. 243 (1979).

[203] *See* text accompanying notes 52-56 *supra.*

[204] 100 S.Ct. at 246.

[205] 15 U.S.C. § 80b-6 (1976).

[206] 15 U.S.C. § 80b-15 (1976).

the '34 Act,[207] states that contracts violative of the Advisers Act are void with respect to the violator and those claiming under the violator.

Characterizing the legislative history of section 206 as reflecting an intent "to impose enforceable fiduciary obligations", Justice Stewart noted the history's silence as to enforcement through private litigation. This, however, was not taken automatically to undermine any thought of a private remedy.[208] Citing to *Kardon* (while ignoring its endorsement of *Geismar*'s induction of damages) and accepting that section 215 implies an action for rescission or similar relief[209] in context of the Act's provision of penal,[210] injunctive[211] and administrative[212] sanctions, Justice Stewart qualifiedly invoked an anglicized complement to the *expressio unius* maxim to deny a damage remedy under section 206:

> 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode' Botany Mills v. [U.S.], 278 U.S. 282, 289 . . . (1929). . . . Even settled rules of statutory construction could yield . . . to persuasive evidence of a contrary legislative intent.[213]

Plaintiff was unable to adduce that evidence. Speaking to *Cort*-based arguments, the *Transamerica* majority cited *Touche Ross* for the proposition that recognition of a statutory purpose to protect advisers' clients does not mandate inference of a private cause of action.[214] Thus, the primary/secondary objective test suggested by *Cort*[215] is impeached.

Justice White can be suspected of revisionist tendencies. Perhaps sensitive to his fellow *Cannon* dissenter's disdain for the purposes to which past decisions have used *Rigsby*,[216] Justice White neatly recharacterizes *Rigsby* as Supreme Court recognition of the role of implied private rights of action at "the not infrequent common law."[217] This, of course, does not deny that *Rigsby* is a negligence *per se* case. He characterizes *Cort* as outlining the *preferred* mode for determining whether a federal statute implies a private cause of action[218] and maintains that all four factors are satisfied by plaintiff's theory of action. None would doubt that the plaintiff was one of the protected class. Justice White finds no controlling intent to foreclose private actions;[219] rather, the majority's recognition of an

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[207] 15 U.S.C. § 78cc(b) (1976).
[208] 100 S.Ct. at 246.
[209] *Id.*
[210] 15 U.S.C. § 80b-17 (1976).
[211] 15 U.S.C. § 80b-9(c) (1976).
[212] 15 U.S.C. § 80b-3(c) (1976).
[213] 100 S.Ct. at 247.
[214] *Id.* at 249.
[215] 422 U.S. at 80.
[216] *See* Cannon v. University of Chicago, 441 U.S. 677, 732, 737-38 (1979) (Powell, J., dissenting).
[217] 100 S.Ct. at 250 n.2.
[218] *Id.* at 250.
[219] *Id.* at 251.

equitable remedy estabishes existence of a cause of action which triggers "wide" judicial discretion in fashioning relief.[220] He would have it that a private damage action is compatible with the legislative scheme in satisfaction of the "third portion of the Cort standard."[221]Fiduciary standards for investment advisers, the dissent suggests, are not yet common among the states.[222] Evolution of *Cort*'s "relevant factors" to a *standard* is an interesting phenomenon.

## IV. The Future

A pendulum has swung. Whether it has swung too far is a matter of debate. Indeed, debate is proper concerning where, in its path, the pendulum is. While Justice Powell is correct when he worries about a *Borak* in terms of separation of powers, it would be troublesome to dispense with the potential for inferring causes of action from the Constitution and legislation.

In the final analysis, we must rely on the collective good sense of the Court since bright line tests for mandatory inference are impossible. The Court has no warrant again to invite permissive inference from latterly-perceived versions of the spirit of complex legislation.

The author is quite content with the fact of a distinction between the imperatives for inferring private causes from the Constitution and legislation. Doctrines of *necessarily* implied powers serve the federal judiciary, as well as its coordinates, in accomplishing the ends of the Constitutional structure. There is, however, no generalized implication of power for the judiciary to supplement Congress' efforts. Fortunately, Congress has both the opportunity and the staffing to accomplish the oversight function necessary to ensure effectiveness of its legislation. Thus, a judicially administered oversight function is not needed and cannot be deemed an implied judicial power.

However, it is quite predictable that the justifiably active judicial role taken in connection with denial of individuals' constitutional rights, and some of the language used in this activism, will tempt to a reobfuscation and consequent relaxation of the properly demanding tack the Court has taken with regard to causes of action and remedies allegedly implied *by statute*. Courts should be aware that it is more important to be rigorous when considering the existence of *substantive* rules of decision rather than it is when considering availability of remedies appropriate to acquitting undoubted rights. Offhandedly creating causes of action, with invocations about duties to supplement Congress' efforts, is offensive to Con-

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[220] *Id.* at 251-52. Note, in context of *Borak*'s use of a jurisdictional grant to imply a private cause of action for violation of a substantive section, Justice White's alertness to restrict use of a comparable provision in the Advisers Act. *Id.* at 254.

[221] *Id.* at 254-55.

[222] *Compare* CAL. CORP. CODE §§ 25230-37, 25400(d) (West Supp. 1980) *with* PA. CONST. STAT. §§ 102(j), 301, 303-05, 401-02, 404-05, 501 (1978). *See also* L. LOSS, COMMENTARY ON THE UNIFORM SECURITIES ACT (1976).

gress' law-making power. Generating *remedies* under existing grants of general jurisdiction is not inherently offensive although, on occasion, infringements may occur. Induction from general availability of forums and remedy structures to the existence of substantive rules of decision is constitutionally reprehensible.

Due to the recency of reform and the advanced ages of various of the principal actors, only general trends in the Court can be remarked with any certainty. In *Transamerica,* Justice Brennan experienced the majority turning his entirely valid distinctions between causes of action and remedies against a plaintiff who, a few short years ago, would have enjoyed a damage action without the extremism permitted by *Borak.* The positioning and rhetoric of Justice White in *University of California v. Bakke,*[223] *Santa Fe, Cannon* and *Transamerica* provide a clue to a counterattack of sorts on the new demands for rigor. In *Bakke,* he argued against inference of a private Title VI cause of action.[224] In *Cannon,* he was quite persuasive as to Congress' intent to avoid private causes of action under the ice-breaking Title IX in favor of sensitive administrative action.[225] In *Santa Fe,* he wrote for the majority and did so in highly analytical terms. So analytical was he that he ignored, not that it would or should have changed the outcome, the absence of a judicial forum in which a shareholder only unfairly squeezed-out could argue breach of fiduciary duty.[226] Yet, in *Transamerica,* Justice White is a revised *Cort* ideologue and one who can ignore the fact that many states understand the fiduciary relationship implicit in investment advising.[227] The possibility exists that he was pinch-hitting for another Justice. Surely, in the Supreme Court, there are no ego drives sufficient to compel ambition to be the leader of an ideological grouping for the sole purpose of being acknowledged as leader of a group. Assuming that he was not pinch-hitting and that he has no need to be an acknowledged pack leader, Justice White's brilliance is such as to permit the inference that he may have decided to damp the pendulum a mite. Could *Transamerica*'s equity compartmentalization of an acknowledged right have prompted him to adopt this position?

In any event, there is now clear distinction between private causes of action and remedies implied by statutes. The key is legislative intent for which traditional tools of statutory construction are once again mandatory. There is an unstated consensus that the days of courts' being alert to improve on Congress' handiwork are past. District and circuit court judges are on notice that reflexive adoption of ingenious theories of

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[223] 438 U.S. 265 (1978).

[224] *Id.* at 387.

[225] 442 U.S. at 719.

[226] 430 U.S. at 477-80. Singer v. Magnavox Co., 80 A.2d 969 (Del. 1977), which held that Delaware courts must assess the fairness of contested short-form mergers, *id.* at 976, was decided shortly after *Santa Fe.*

[227] 100 S.Ct. at 252-54.

action is no longer fashionable and that judicial homework is both expected and required.[228]

[228] For an excellent example of judicious consideration of an alleged private right of action, see Judge Russell's opinion in Stern v. Merrill Lynch, 603 F.2d 1073 (4th Cir. 1979) (rejecting what amounted to a dram-shop theory asserted under § 7(c) of the '34 Act and Regulation T).