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The Existence Of Implied Private Rights Of Action Under Section 17(A) Of The 1933 Securities Act

THE EXISTENCE OF IMPLIED PRIVATE RIGHTS OF ACTION UNDER SECTION 17(a) OF THE 1933 SECURITIES ACT

Congress enacted the Securities Act of 1933 ('33 Act)[1] to deter and protect the public from fraudulent practices in the securities markets.[2] Section 17(a) of the '33 Act prohibits fraud in the offer or sale of any security.[3] The Securities and Exchange Commission enforces section 17(a) violations by means of criminal prosecutions or injunctions.[4] Congress, however, failed to legislate an express private cause of action in section 17(a).[5] The '33 Act specifically provides two civil enforcement sec-

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[1] 15 U.S.C. §§ 77a-77aa (1976).

[2] *See* H.R. REP. No. 2639, 76th Cong., 3d Sess. 10 (1940) (purpose of statute to prevent fraud in securities markets); H.R. REP. No. 1388, 73d Cong., 2d Sess. (1934); H.R. REP. No. 85, 73d Cong., 1st Sess. 1-5 (1933); S. REP. No. 1775, 76th Cong., 2d Sess. 2 (1940); S. REP. No. 792, 73d Cong., 2d Sess. 1-5 (1934). Courts and commentators agree that the federal securities laws attempt to protect investors from fraud. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 14-15 (1979) (Investment Advisers Act of 1940 protects investors from fraud); United States v. Naftalin, 441 U.S. 768, 776 (1979) (purpose of Securities Act of 1933 ('33 Act) to protect investors and securities market operations from fraud); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (Securities Exchange Act of 1934 ('34 Act) prohibits fraudulent practices to protect securities investors). *See generally* Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933) [hereinafter cited as Douglas]; Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right*, 68 NW. L. REV. 44 (1973) [hereinafter cited as Horton]; Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 GEO. WASH. L. REV. 214 (1959).

[3] 15 U.S.C. § 77q(a) (1976). Section 17(a) of the '33 Act provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
> (1) to employ any device, scheme, or artifice to defraud, or
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Id.

[4] 15 U.S.C. § 77t (1976); *see* Schmidt v. United States, 198 F.2d 32, 35-36 (7th Cir. 1952) (SEC enforcement of § 17(a) violations to protect public against fraud in sale of securities), *cert. denied*, 344 U.S. 896 (1953); SEC v. Northeastern Financial Corp., 268 F. Supp. 412, 417 (D.N.J. 1967) (injunctive relief for protection of investing public rather than punishment of wrongdoer by government).

[5] *See* note 3, *supra*; L. LOSS, 3 SECURITIES REGULATION 1785 (2d ed. 1961) [hereinafter cited as LOSS] (describing enforcement schemes of '33 and '34 Acts); Douglas, *supra* note 1, at 181 (section 17(a) does not expand civil remedies of purchasers provided under §§ 11 and 12). The '33 Act provides for civil, criminal, and injunctive relief. *See, e.g.*, 15 U.S.C. § 77k (1976) (civil liabilities for false registration statement); 15 U.S.C. § 77l (1976) (civil liabilities

tions that do not apply to all circumstances under which section 17(a) liability arises.[6] Consequently, courts have faced the question of whether section 17(a) implies a private right of action.[7] Recent Supreme Court decisions have not settled the conflicting district and circuit court con-

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in connection with prospectuses and communications); 15 U.S.C. § 77t (1976) (injunctions and prosecution of offenses). The '33 Act has two specific enforcement provisions providing civil liabilities. 15 U.S.C. §§ 77k & 77l (1976); Loss, *supra*, at 1785. Section 12(2) provides a civil remedy when § 17(a) is violated. 15 U.S.C. § 77l(2) (1976); *see* Loss, *supra*, at 1785. Section 11 provides a remedy for § 5 as well as § 17(a). 15 U.S.C. § 77k (1976). The remedies afforded by §§ 11 and 12 are not complete, but §§ 11 and 12 embrace all of the substantive rights created by §§ 17(a) and 5. *See* Loss, *supra*, at 1785; notes 6 and 173 *infra* (requirements of enforcement section of '33 Act may not allow enforcement for all § 17(a) violations).

[6] *See* Loss, *supra* note 5, at 1785. Section 17(a) provides no specific enforcement provision, but relies on §§ 11 and 12(2) for civil remedies. *See id.*; note 5 *supra*. Section 11 grants a private cause of action to a purchaser of securities who relied on a material misstatement or omission in an effective registration statement in making the purchase. 15 U.S.C. § 77k(a)(1)-(5) (1976). All participants except the issuer may escape liability by a showing of due diligence, reasonable investigation, or reliance on experts. 15 U.S.C. § 77k(b) 1-3 (1976) (no person other than issuer shall be liable who shall sustain burden of proof that he had, after reasonable investigation, reasonable ground to believe and did believe, at time registration statement became effective, that statements therein were true); *see* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 576-83 (E.D.N.Y. 1971) (directors of corporation held to reasonable investigation standard in tender offer registration statement); Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 682-703 (S.D.N.Y. 1968) (directors, underwriters, auditor and house counsel held to standard of due diligence); Folk, *Civil Liabilities Under the Federal Securities Acts: The* BarChris *Case*, 55 VA. L. REV. 1, 12-13 (1969) (ramifications of reliance on expert or nonexpert statements). Section 12(2) provides a remedy for rescission or damages on behalf of a purchaser when a seller makes material misstatements in the offer or sale of securities. 15 U.S.C. § 77l(2) (1976). Section 12(2) imposes liability for negligent misconduct, requires privity between the defendant and purchaser, provides a defense of reasonable care, places the burden of proof on the defendant, and applies only to seller misconduct in the initial distribution of securities. *Id.*; *see* Steinberg, *Section 17(a) of the Securities Act of 1933 After* Naftalin *and* Redington, 68 GEO. L.J. 163, 178-79 (1979) [hereinafter cited as *'33 Act After* Naftalin *and* Redington]. Section 17(a), on the other hand, applies only to fraudulent practices in the initial distribution and market trading of securities. *Id.* Furthermore, § 17(a) has no requirement of privity and places the burden of proof on the plaintiff. *Id.* The requirements of § 12(2) can place the enforcement provisions of the '33 Act beyond the scope of § 17(a). Thus, even though § 12 acts as the enforcement provision for § 17(a), significant gaps exist in the structure of the legislated remedy. *See id.*

[7] *See* Kirshner v. United States, 603 F.2d 234, 241 (2d Cir.) (language of § 17(a) broad enough to infer private right of action), *cert. denied*, 442 U.S. 909 (1978); SEC v. Coven, 581 F.2d 1020, 1027 n.15 (2d Cir. 1978) (inference of § 17(a) private right of action is open question), *cert. denied*, 440 U.S. 950 (1979); Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, 159 (8th Cir. 1977) (section 17(a) does not give private right of action), *cert. denied*, 434 U.S. 1086 (1978); Newman v. Prior, 518 F.2d 97, 99 (4th Cir. 1975) (section 17(a) supports private damage claim); Ingram Indus., Inc. v. Nowicki, 502 F. Supp. 1060, 1069 (E.D. Ky. 1980) (section 17(a) does not create civil damage claim for violation); Campito v. McManus, Longe, Brockwehl, Inc., 470 F. Supp. 986, 993 (N.D.N.Y. 1979) (recognized implied right of action under § 17(a)); Valles Salgado v. Piedmont Capital Corp., 452 F. Supp. 853, 857 (D.P.R. 1978) (recognized First Circuit's *sub silentio* inference of a § 17(a) cause of action); DeMarco v. Security Planning Serv., Inc., 462 F. Supp. 1066, 1069 (D. Ariz. 1978) (private civil action for damages lies for § 17(a) violation).

clusions concerning judicial inference of a private right of action under section 17(a) of the '33 Act.[8] In the last ten years, however, the Supreme Court has dictated varying guidelines and considerations for the proper inference of private rights of action.[9] Recent cases reflect the Court's movement toward a very restrictive federal doctrine governing the judicial inference of private remedies.[10] The question thus remains whether a court, in light of recent restrictive Supreme Court decisions, properly can find an implied section 17(a) private cause of action.

Prior to 1974, the Supreme Court liberally applied the federal doc-

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[8] *See* Aaron v. SEC, 446 U.S. 680, 689 (1980) (Supreme Court has not addressed question whether private cause of action exists under § 17(a)); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 557 n.9 (1979) (expressing no view on judicial inference of § 17(a) private remedy); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733-34 n.6 (1975) (reserving consideration of inference of § 17(a) cause of action). *Compare* Stephenson v. Calpine Conifers II, Ltd., [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,632 (9th Cir. 1981) (inferring § 17(a) cause of action) *and* Roth v. Bank of Commonwealth, [1981] FED. SEC. L. REP. (CCH) ¶ 98,267, 91,717 (W.D.N.Y. 1981) (inferring cause of action under § 17(a)) *and* Automatic Catering, Inc. v. First Multifund for Daily Income, Inc., [1981] FED. SEC. L. REP. (CCH) ¶ 98,254, 91,662 (S.D.N.Y. 1981) (inferring § 17(a) private remedy) *with* Goodweather v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc., [1981] FED. SEC. L. REP. (CCH) ¶ 98,352, 92,187 (N.D. Ohio 1981) (no implied remedy under § 17(a)); Hill v. Der, 521 F. Supp. 1370, 1376 (D. Del. 1981) (no private remedy under § 17(a)).

[9] *See* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981) (examine language of statute, legislative history, purpose, structure and congressional intent to supplement state remedies); California v. Sierra Club, 451 U.S. 287, 297-98 (1981) (same); Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72 (1981) (determine congressional intent through examination of language and focus of statute, legislative history and purpose); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 17-24 (1979) (congressional intent determinative); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (same); Davis v. Passman, 442 U.S. 228, 241 (1979) (same); Cannon v. University of Chicago, 441 U.S. 677, 688-94 (1979) (same); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25 (1977) (determine legislative purpose and necessity of implied remedy to effectuate purpose); Cort v. Ash, 422 U.S. 66, 78 (1975) (consider whether statute creates right in plaintiff's favor, legislature intends to create remedy, private remedy fulfills purpose of legislative scheme, and basis of claim is state rather than federal concern); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (court should not infer remedy expanding express statutory remedies); J. I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964) (court has common law power to create remedies for enforcement of statutory right). *See also* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1917) (initiation of federal implication doctrine creating remedy whenever right exists).

[10] *See* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981) (no implied private cause of action); California v. Sierra Club, 451 U.S. 287, 297-98 (1981) (same); Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72 (1981) (denying inference of private remedy); Davis v. Passman, 442 U.S. 228, 241 (1979) (same); Note, *Implied Rights of Action*: Transamerica Advisers, Inc. v. Lewis, 21 B.C. L. REV. 1143, 1152 (1980) [hereinafter cited as *Implied Rights of Action*] (recent decisions severely limit future inference of implied rights); Note, *Implied Private Causes of Action Under the Investment Advisers Act*, 94 HARV. L. REV. 279, 285 (1980) [hereinafter cited as *Private Causes of Action*] (principle applied in recent cases leaves almost no room for recognition of implied private rights of action). *But see* Cannon v. University of Chicago, 441 U.S. 677, 688-94 (1979) (inference of private remedy in Title IX sex discrimination case).

trine of implied private rights of action by creating private remedies that would effectuate federal statutory purposes.[11] In 1974, however, the Supreme Court initiated a trend toward limitation of the Court's prior

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[11] *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 430 (1964); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916). The Supreme Court initiated the federal doctrine of implied private rights of action in *Texas & Pac. Ry. Co. v. Rigsby*. 241 U.S. at 39-40. In *Rigsby*, the Court found that an employee of a railroad company had a cause of action for damages sustained because of a violation of the Federal Safety Appliance Act (Safety Act). *Id.* at 37-38; *see* 27 Stat. 531, c. 196 (1893) *as amended*, 32 Stat. 943, c. 976 (1903). The Court found that Congress intended the Safety Act to promote the safety of employees and travelers. 241 U.S. at 39. The plaintiff sustained personal injuries while performing duties as defendant's employee. *Id.* at 36. The plaintiff's injuries resulted from faulty equipment on defendant's railroad car which violated the Safety Act. *Id.* at 36-37. The Court found that the Act's language was broad enough to include all employees irrespective of interstate commerce power limitations. *Id.* at 39. The *Rigsby* Court concluded that because the statute created a right in favor of the plaintiff, the Court should infer a remedy for that right. *Id.* at 39-40. The Court stated that whenever a statute prohibits an activity for the "especial benefit" of a class of persons, the common law allows a court to fashion a remedy under the statute for the benefit of the injured class member. *Id.* The *Rigsby* decision was the Supreme Court's first step toward establishing criteria for the inference of private rights. Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 555 (1981) [hereinafter cited as Frankel]. The Court has recognized judicial power to enforce the rights created by the legislature even in the absence of an express statutory remedy. *Id.*; *see* J. I. Case Co. v. Borak, 377 U.S. 426, 430 (1964).

In *J. I. Case Co. v. Borak*, a shareholder contested a merger on the grounds that SEC approval resulted from the use of misleading proxy statements. 377 U.S. at 427. The plaintiff alleged violations of § 14(a) of the '34 Act. *Id.*; *see* 15 U.S.C. § 78n(a) (1976) (prohibiting non-complying proxies). The Court recognized the inherent judicial power to create common law remedies for statutory violations. 377 U.S. at 430. Accordingly, the Court concluded that the broad remedial purposes of § 14(a) of the '34 Act and the intent of the statute to protect investors implied the availability of judicial relief. *Id.* at 431-32; *cf.* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (section 17 creates no cause of action of own force and effect). The Court further reasoned that an inferred remedy not only would provide a necessary supplement to SEC enforcement activities, but also would help effectuate the protective purpose of the statute. 377 U.S. at 432.

The *Borak* decision reaffirmed the concept initiated in the early case of Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916) that the judiciary has the power to create remedies for the enforcement of statutory rights. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402-03 n.4 (1971) (Harlan, J., concurring) (federal judiciary chooses traditionally available judicial remedies according to substantive social policy of statute); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (judicial function to interpret congressional enactments to determine how to enforce statute). Decisions following *Rigsby* focused on the plaintiff's right to compensation for violation of a statute. *See* Frankel, *supra*, at 555-56 (indicating traditional compensation rationale). The emphasis of the *Borak* Court, however, was on deterrence. 377 U.S. at 432-33. The Court created a cause of action to serve the public purpose of deterring securities violations. *Id.* Thus, the *Borak* court instituted the "private attorneys general" concept for the enforcement of the '34 Act. *Id.*; *see* Cannon v. University of Chicago, 441 U.S. 677, 736 (1979) (Powell, J., dissenting) (*Borak* held that private enforcement provides necessary supplement to SEC action). Under the *Borak* rationale, a court will award damages to the plaintiff, acting as a private attorney general, as a public service award for deterring securities violations. 377 U.S. at 432-33.

expansive implication doctrine.[12] In *Cort v. Ash*,[13] the Court established a restrictive four-part test for the inference of private rights of action. In *Cort*, a corporate stockholder argued for the inference of a private right of action under a criminal statute forbidding corporate contributions or expenditures in connection with certain elections.[14] The Court concluded that neither the legislative history nor the purpose of the statute allowed the finding of an implied private right of action.[15] In denying the inference of a private cause of action, the Court enumerated four principles for the determination of whether a private right is implicit in a statute.[16] First, a court must determine if the statute creates a federal right in favor of the plaintiff by asking whether the plaintiff is a member of the class that especially benefits from the statute.[17] Second, a court should investigate the legislative history to determine the existence of

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[12] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453, 458 (1974). In *National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers (Amtrak)*, the plaintiff complained that the discontinuance of certain train routes was a violation of § 404(a) of the Amtrak Act. *Id.* at 455; *see* 45 U.S.C. § 564(a) (1976). The Supreme Court addressed the issue of whether the Amtrak Act provided a private remedy for violation of duties created by the Act. 414 U.S. at 456. The Court held that the plaintiff did not have a private right of action under the statute. *Id.* at 457; *see* 45 U.S.C. § 561 (1976). The Court rejected the old principle of "where there is a right there is a remedy" and instead relied upon the ancient maxim of *expressio unius est exclusio alterius*. *Id.* at 457-58. The *expressio* principle provides that when legislation expressly dictates a remedy, a court should not expand the coverage of the statute to include other remedies. *Id.* at 458; *see* Botany Mills v. United States, 278 U.S. 282, 289 (1929) (statutory limitation of activity includes negative of any other mode). The *Amtrak* court used the *expressio* maxim to find that, absent a showing of contrary legislative intent, the limited nature of the remedies provided by § 307(a) of the Amtrak Act compelled the conclusion that the express remedies were the exclusive means of enforcing the duties of the Act. 414 U.S. at 457. The Court found that when Congress creates a remedy a court can expand or augment that remedy only upon a showing of legislative intent supporting an addition to the statutory scheme. *Id.* at 457-58.

[13] 422 U.S. 66, 78 (1975).

[14] *Id.* at 68-69; *see* Act of June 25, 1948, c. 645, 62 Stat. 723 (repealed 1976) (prohibiting corporate contributions or expenditures in connection with election involving voting for Presidential and Vice Presidential electors).

[15] 422 U.S. at 69.

[16] *Id.* at 78.

[17] *Id.*; *see* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (plaintiff must be one of class for whose especial benefit legislature enacted statute); note 11 *supra* (discussion of Rigsby). In *Cort*, the Court noted that if a plaintiff is the primary beneficiary of the statute, he need not show express legislative intent to create a cause of action. 422 U.S. at 82. An explicit legislative intent to deny a cause of action, however, is controlling. *Id.*; *see Implied Rights of Action, supra* note 10, at 1158-59. The *Cort* case concerned the violation of a criminal statute. *See* Act of June 25, 1848, c. 645, 62 Stat. 723 (repealed 1976). The Court found that the criminal statute did not concern the internal relations between corporations and stockholders and gave no indication of the availability of civil enforcement. 422 U.S. at 80-82. The Court explicitly rejected the concept that a criminal statute can never create a special group of protected individuals. *Id.* at 80. The criminal statute in *Cort*, however, did not create a special group of protected stockholders. *Id.* Therefore, the Court held that the statute created no clearly articulated right in the plaintiff. *Id.* at 82.

explicit or implicit congressional intent to create or deny a remedy.[18] Third, a court should examine the legislative scheme to determine whether the inference of a remedy is consistent with the primary statutory purpose.[19] Finally, a court must ascertain whether the cause of action is one traditionally within the concern of the states.[20] If the action falls within a state's sphere of influence, the finding of a cause of action based solely on federal law is inappropriate.[21] The Court recognized other factors that courts should consider in conjunction with application of the four basic principles. First, a clearly articulated federal right in favor of the plaintiff should exist to construe a private remedy.[22] In the case where no clear right exists, a pervasive legislative scheme controlling the activities of both plaintiff and defendant classes will allow the inference of a remedy.[23] Second, plaintiff's failure to prove congressional intent to create a remedy will not prevent the finding of an implied remedy where federal law clearly gives the plaintiff substantive rights.[24] However, an express congressional intent to deny a remedy controls.[25] Third, state law will govern corporate disputes except when federal law governs the duties that directors owe to shareholders.[26]

In decisions subsequent to *Cort*, the Supreme Court has generally applied the four-part *Cort* test to deny the existence of implied private rights of action.[27] In *Cannon v. University of*

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[18] 422 U.S. at 78; *see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (general principles of statutory construction must yield to clear contrary evidence of legislative intent).

[19] 422 U.S. at 78.

[20] *Id.*

[21] *Id.* at 84.

[22] *Id.* at 82; *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1974) (clearly articulated federal right in plaintiff to be free from unreasonable search and seizure carried out by virtue of federal authority).

[23] 422 U.S. at 82; *see* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (pervasive legislative scene regulating conduct of plaintiff and defendant classes).

[24] 422 U.S. at 82-84.

[25] *Id.* at 82.

[26] *Id.* at 84-85; *see* J. I. Case Co. v. Borak, 377 U.S. 426, 434-35 (1964) ('34 Act requires federal, rather than state, enforcement because federally created rights under statute).

[27] *See* Chrysler v. Brown, 441 U.S. 281, 316 (1979) (Court applied *Cort* in denying private right of action under Trade Secrets Act); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (*Cort* analysis used to find no private remedy under Indian Civil Rights Act); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24 (1977). In *Piper v. Chris-Craft Indus., Inc.*, the Supreme Court examined the relevant statute and found no express language creating a private remedy. 430 U.S. at 24; *accord*, Cannon v. University of Chicago, 441 U.S. 677, 688 (1979). The *Piper* court next considered, as a general proposition, whether the inference of a private remedy was necessary to effectuate the congressional purpose underlying the statute. 430 U.S. at 25-26. The Court subsequently employed the *Cort* analysis to deny the finding of an implied private right of action. *Id.* at 38-41. The preliminary inquiry concerning the necessity of inferring a remedy was distinct from the third *Cort* principle concerning consistency with the underlying purpose of the statute. *Id.* at 26; *see* Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 49 (1979)

Chicago,[28] however, the Court found an implied right of action,[29] and recognized several considerations to supplement the *Cort* test principles.[30] Under the second *Cort* principle, the *Cannon* Court recognized that ambiguous or silent legislative history does not preclude the finding of an implied remedy, although an explicit showing of intent to deny a remedy would control.[31] In the consideration of the third *Cort* principle, the *Cannon* Court noted that the Court is receptive to the inference of a remedy that is necessary or beneficial to fulfillment of the statutory purpose.[32] Finally, the Court indicated that the existence of express statutory remedies does not necessarily foreclose the inference of appropriate remedies under a separate section.[33] The most significant aspect of the *Cannon* decision, however, is the Court's emphasis on the determination of congressional intent.[34] The Court stated that the question of the existence of a private right of action is one of statutory construction.[35] The Court applied and analyzed the four *Cort* factors as a means to determine the intent of Congress to create a private remedy for a special class of litigants.[36] The Court indicated that only under certain limited circumstances would congressional failure to create an express cause of action permit the inference of a private remedy.[37] In *Cannon*, the Court found sufficient congressional intent to imply a remedy

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[hereinafter cited as Steinberg]. In *International Bhd. of Teamsters v. Daniel*, however, the Court declined to address the issue of whether *Cort* is the proper analysis for the implication inquiry for § 17(a) of the '33 Act. 439 U.S. 551, 557 n.9 (1979). The *Daniel* Court found that the Securities Act did not cover the plaintiff's claim. *Id.* at 570. Thus, the Court expressed no views concerning the propriety of a § 17(a) private remedy. *Id.* at 557 n.9.

[28] 441 U.S. 677 (1979). In *Cannon v. University of Chicago*, the plaintiff claimed sex discrimination in the admissions practices of several medical schools in violation of Title IX of the Education Amendments of 1972. *Id.* at 680-83; *see* 20 U.S.C. § 1681 (1976) (Title IX). Plaintiff further asserted that Title IX allowed a private cause of action for one in the plaintiff's class. 441 U.S. at 680-84.

[29] 441 U.S. at 717.

[30] *Id.* at 694-711; Steinberg, *supra* note 27, at 37.

[31] 441 U.S. at 694.

[32] *Id.* at 703. The *Cannon* Court's use of the terms "necessary" or "beneficial to fulfillment" in reference to statutory purpose highlights a notable distinction that arose subsequent to the *Cort* and *Piper* decisions. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S 1, 25-26 (1977); Cort v. Ash, 422 U.S. 66, 78 (1975). In *Cort*, the third principle used by the Supreme Court requires consistency between the implied remedy and the primary statutory purpose. 422 U.S. at 78; *Implied Rights of Action*, *supra* note 10, at 1159. *Piper*, on the other hand, established a stricter standard for the inference of a remedy. 420 U.S. at 25-26. The *Piper* standard allowed a remedy only if necessary to implementation of congressional purpose. *Id.* The *Cannon* standard of "necessary" or "beneficial" indicates an easing of the *Piper* standards. *See* Cannon v. University of Chicago, 441 U.S. at 703.

[33] 441 U.S. at 711; *see* text accompanying notes 72-79 *infra* (*expressio* principle forecloses implication of remedies when statute provides express remedies).

[34] Frankel, *supra* note 11, at 560.

[35] 441 U.S. at 717-18 (Rehnquist, J., concurring); *see* 441 U.S. at 688.

[36] *Id.* at 688.

[37] *Id.* at 717.

only because the implied remedy satisfied all the principles of the *Cort* test.[38] The Court recognized that the absence of an express remedy is consistent with congressional intent to allow an available remedy only when the implied remedy passes the four-part *Cort* test.[39]

The *Cannon* dissenters were even more restrictive than the majority in their interpretation of the relevance of the *Cort* test to the implication inquiry.[40] The dissenters suggested that the *Cort* factors are mere guidelines to the determination of whether Congress intended to provide a private cause of action.[41] Justice Powell indicated that only one *Cort* factor expressly refers to legislative intent.[42] The remaining segments of the *Cort* analysis deflect a court's focus away from inquiry into congressional intent to independent judicial lawmaking.[43] The substitution of judicial opinion for congressional legislation violates the separation of powers doctrine and denigrates the democratic process.[44] Justice Powell indicated, therefore, that the Court should refuse to find private remedies absent compelling evidence that Congress intended the existence of a remedy.[45] The subsequent Supreme Court decision of *Touche Ross Co. v. Redington*[46] reflected the views found in Justice Powell's *Cannon* dissent.[47]

In *Redington*, the Court reemphasized the role of congressional intent as the sole consideration in deciding upon the existence of an implied right of action.[48] The Court significantly altered the *Cort* test,[49] however, thereby limiting the federal implication doctrine. The Supreme

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[38] *See id.*

[39] *See id.*

[40] *Id.* at 688-717; 441 U.S. at 718, 725-30 (White, J., and Blackmun, J., dissenting); 441 U.S. at 730, 742-49 (Powell, J., dissenting); Frankel, *supra* note 11, at 561.

[41] *See* 441 U.S. at 718-19, 740 (White, J., Blackmun, J., and Powell, J., dissenting).

[42] *Id.* at 740 (Powell, J., dissenting). The second *Cort* factor concerns congressional intent. 422 U.S. at 78.

[43] 441 U.S. at 740 (Powell, J., dissenting). In Justice Powell's *Cannon* dissent, he argued that the *Cort* four factor analysis is not faithful to the principles found in article III of the United States Constitution. *Id.* at 743; *see* U.S. CONST. art. III. Justice Powell asserted that the judicial implication of remedies allows a court of limited jurisdiction to extend its authority without congressional authorization. 441 U.S. at 746. Justice Powell emphasized that while article III gives Congress the authority to limit federal court jurisdiction, implication of a private remedy allows the federal judiciary to set the limits of jurisdiction. *Id.* at 746. *But see* Steinberg, *supra* note 27, at 40-41 (indicating extreme nature of Justice Powell's *Cannon* dissent).

[44] 441 U.S. at 745-49 (Powell, J., dissenting).

[45] *Id.* at 749.

[46] 442 U.S. 560 (1979).

[47] *Id.* at 568-75; *see* Cannon v. University of Chicago, 441 U.S. 677, 742-49 (1979) (Powell, J., dissenting); Frankel, *supra* note 11, at 561.

[48] 442 U.S. at 568; *see* Cannon v. University of Chicago, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring) (existence of private right of action is question of statutory construction).

[49] *Compare* Touche Ross & Co. v. Redington, 442 U.S. at 568-79 *with* Cort v. Ash, 422 U.S. 66, 78 (1975); *see '33 Act after* Naftalin *and* Redington, *supra* note 6, at 174.

Court rejected the concept that each of the four *Cort* principles were of equal weight.[50] Instead, the Court indicated that the first three *Cort* factors are the relevant indicia in determining whether Congress intended to provide a private remedy.[51] The Court found that the statute granted no private rights to an identifiable class nor proscribed any conduct as unlawful.[52] Furthermore, the Court noted that the legislative history did not reveal a congressional intent to create a remedy.[53] The Court concluded from an analysis of only the first two *Cort* factors that Congress did not intend to imply a private remedy.[54] Therefore, the *Redington* Court declined to address the third and fourth *Cort* factors because of the clear absence of the requisite congressional intent.[55] Although the Supreme Court indicated the importance of a three part *Cort* analysis, the Court relied only on the first two *Cort* factors to deny the existence of an implied private remedy in section 17(a) of the '34 Act.[56]

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[50] 442 U.S. at 575.

[51] *Id.* The *Redington* Court changed the *Cort* analysis from a four-part test that consisted of equally weighted factors. *Id.*; *see* Cort v. Ash, 422 U.S. 66, 78 (1975). The modified *Cort* test adopted in *Redington* consists of a two-tier inquiry. 442 U.S. at 575. The first level is primarily a determination of legislative intent. *Id.* The second level consists of an analysis of whether federal or state concerns control the issue. *Id.* Since the Court did not reach a positive conclusion on the first level of inquiry, the Court did not proceed to the second level of analysis. *Id.*

[52] *Id.* at 576; *see* 15 U.S.C. § 78q (1976).

[53] 442 U.S. at 571, 576; *see* S. REP. No. 792, 73d Cong., 2d Sess., 13, 21 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess., 25 (1934) (indicating § 17(a) of '34 Act does not provide remedies to customers for losses after liquidation).

[54] 442 U.S. at 575-76.

[55] 442 U.S. at 576; *see* Cort v. Ash, 422 U.S. 66, 78 (1975) (third and fourth *Cort* factors concern underlying legislative purpose and state sovereignty considerations).

[56] 442 U.S. at 576. One commentator has interpreted the *Redington* decision as establishing a three-prong test for the judicial inference of a private remedy. Steinberg, *supra* note 27, at 42-43. Under the three-prong test, if the plaintiff fails to show that he is a primary beneficiary or that the statute proscribed the disputed conduct, and the legislative history is silent, the court concludes that Congress did not intend a private remedy under the statute. *Id.* Once the three-prong inquiry shows a lack of congressional intent to create a private remedy, a court need not proceed further with the implication analysis. *Id.* The third and fourth *Cort* factors are relevant under the three-prong test only if the plaintiff first satisfies at least one of the prerequisites of the test. *Id.* When legislative history is ambiguous, the Court requires a clear showing that Congress granted a party in the plaintiff's position certain rights. *Id.* at 43. If the plaintiff has identifiable rights, the Court may infer a private remedy when the remedy meets the requirements of the third and fourth *Cort* principles. *Id.* When the plaintiff is within the special class protected by the statute or the statute prohibits the defendant's conduct, the Court assumes a congressional intent to give the plaintiff rights and can infer a private cause of action to uphold those rights. *Id.*; *see* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (Supreme Court has never refused to imply cause of action when language of statute explicitly conferred a right directly on class of persons including plaintiff). If the plaintiff does not satisfy the three-part inquiry, however, the implication analysis is at an end. 442 U.S. at 575-76.

The *Redington* modification of the four-part implication test developed in *Cort* is somewhat similar to elements of the pre-*Cort* implication doctrine. *See* note 11 *supra*. The *Redington* Court may allow the inference of a private cause of action if Congress gave the

The *Redington* Court introduced additional factual considerations that further restricted the *Cort* implication doctrine.[57] First, judicial inference of a private right is likely if the statute's primary focus is retrospective rather than prospective.[58] Second, the existence of express causes of action within the relevant statute creates an inference against finding an implied remedy.[59] Third, the Court rarely will construe a remedy covering the same conduct that an express remedy proscribes in another section of the statute.[60] Fourth, the Court should not inquire into policy reasons for or against inference of a private remedy because the critical inquiry concerns congressional intent.[61] Finally, the absence of lower court holdings implying causes of action under the given statute may hinder the Supreme Court in finding that a private remedy exists.[62]

The Supreme Court completed the retreat from the liberal federal doctrine of implication to effectuate statutory purpose, and continued the trend toward the statutory construction approach in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*.[63] The *Transamerica* Court clearly stated that the ultimate question is whether Congress intended to create the private remedy asserted.[64] The Court applied the general guidelines established in *Redington* to conclude that the antifraud section of the Investment Advisers Act of 1940 created only a limited private remedy.[65] The *Transamerica* Court initially analyzed the

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plaintiff rights or prohibited the disputed conduct. *See* Steinberg, *supra* note 27, at 42-43. The initial *Redington* inquiry is startlingly similar to the *Texas & Pac. Ry. Co. v. Rigsby* implication theory. 241 U.S. 33, 39-40 (1916). *Rigsby* allowed the inference of remedies based on the old maxim of "where there is a right, there is a remedy." *Id. Redington*, however, requires the satisfaction of the fourth *Cort* principle in addition to the intent inquiry. 442 U.S. at 575-76; *see* text accompanying notes 13-21 *supra* (discussion of *Cort* principles).

[57] *'33 Act after* Naftalin *and* Redington, *supra* note 6, at 174.

[58] 442 U.S. at 570-71. In *Redington*, the Court indicated that if the primary focus of a statute is to prevent or inhibit future harm, a court will not construe an implied private remedy. *Id.* If, on the other hand, the statute provides recompense for a past violation, a court will be amenable to an inference of a private remedy. Steinberg, *supra* note 27, at 43. The *Redington* Court found that § 17(a) of the '34 Act is a prospective statute that seeks to forestall insolvency, rather than provide recompense. 442 U.S. at 570-71.

[59] 442 U.S. at 572. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (1975) (Congress knows how to provide private remedies for damages, and did so expressly). *But see* Cannon v. University of Chicago, 441 U.S. 677, 711 (1979) (provision of express remedies does not foreclose judicial inference of additional remedies).

[60] 442 U.S. at 574. The *Redington* Court stated that when the legislature creates a right without a remedy contemporaneously with the creation of express remedies for the same conduct elsewhere in the statute, the Court is extremely reluctant to broaden the provided remedy. *Id.*

[61] *Id.* at 575; *see* text accompanying notes 40-45 *supra* (discussing *Cannon* dissenter's judicial legislating concerns).

[62] 442 U.S. at 577-78 n.19; *see* Steinberg, *supra* note 27, at 43-44.

[63] 444 U.S. 11 (1979); *see Private Causes of Action*, *supra* note 10, at 279-85 (ramifications of *Transamerica* decision on judicial power to infer private remedies).

[64] 444 U.S. at 15; *see* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (ultimate question one of congressional intent).

[65] 444 U.S. at 24.

statutory language to determine whether the statute granted rights to an identifiable class or proscribed certain activities.[66] The Court determined that the statute created enforceable fiduciary obligations.[67] The Court subsequently sought to determine whether Congress intended enforcement of the statutory rights through private litigation.[68] The Court reiterated the *Cannon* position that the absence of express congressional consideration of a private remedy is not inconsistent with the finding of an implied private remedy.[69] The Court stated, however, that where a statute expressly provides a remedy for the particular proscribed conduct, a court must be "chary" of engrafting other remedies onto the statute.[70] Because the statute in question contained express authorization for certain private actions, the Court concluded that Congress was unwilling to allow private enforcement of statutory sections not expressly creating private causes of action.[71]

The *Transamerica* Court heavily relied upon an elemental principle of statutory construction in finding that Congress did not intend to create a private remedy in the Investment Advisers Act's antifraud section.[72] The Court concluded that the mere existence of express private remedies in other sections of the statute indicates congressional intent not to create an implied private remedy under the antifraud section.[73] The inference of congressional intent from the presence of express remedies results from the ancient maxim of *expressio unius est exclusio alterius*.[74] The effect of the *expressio* principle is that when legislation expressly provides a remedy, a court should not expand the coverage of the statute to include other remedies.[75] The *Redington* Court interpreted the *expressio* maxim as foreclosing inference of a remedy only when an express remedy is directed at essentially the same type of misconduct as

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[66] *Id.* at 16-17.

[67] *Id.* at 17.

[68] *Id.* at 18, 24.

[69] *Id.* at 18; *see* Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

[70] 444 U.S. at 19-20.

[71] *Id.* at 20-21. The *Transamerica* Court found that the absence of express private remedies in the Investment Advisers Act indicated that Congress did not intend to allow private suits. *Id.* at 21. The Court examined the remedies provided by earlier securities laws along with companion legislation to conclude that if Congress had meant to create a private remedy, the statute would have contained an express private remedy. *Id.* at 20-21. The Court did not restrict itself to an examination of the Investment Advisers Act. *Id.* The Court examined a variety of other legislation to ascertain congressional intent. *Id.*

[72] *Id.* at 19-21.

[73] *Id.* at 19.

[74] National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 452, 458 (1974). *Expressio unius est exclusio alterius* means that the expression of one thing is the exclusion of the other. BLACK'S LAW DICTIONARY 521 (5th ed. 1979). The specification of certain persons or things in a law, contract, or will creates the inference of an intention to exclude all others from its operation. *Id.*

[75] National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *see* note 12 *supra*.

the implied remedy.[76] The *Redington* interpretation of the *expressio* maxim permitted the inference of remedies that did not expand the scope of the express remedies in the statute.[77] *Transamerica*, however, requires a stricter interpretation of the *expressio* principle which severely limits the federal implication doctrine.[78] In effect, the *Transamerica* Court held that when persuasive legislative intent to the contrary is absent and a statute contains express remedies, Congress intended those express remedies to be exclusive.[79]

The most recent Supreme Court implication cases follow the *Transamerica* and *Redington* approach of analyzing congressional intent.[80] In *Universities Research Association, Inc. v. Coutu*,[81] The Court reiterated that the primary question is one of congressional intent, not whether a court can improve upon the express statutory scheme.[82] The Supreme Court relied on the three *Cort* factors emphasized in *Redington* to determine legislative intent.[83] From examination of the language and the focus of the Davis-Bacon Act, the legislative history, and its purpose, the Court determined that Congress did not intend to create a private remedy.[84] Furthermore, the Court emphasized that the statutory protection of a specified class that includes the plaintiff does not mandate a finding of an implied remedy.[85] The Court found little reason for inference of a private remedy when a statute contains only a general prohibitory structure.[86] On the other hand, the *Coutu* Court noted that the Court consistently infers a cause of action where the statutory language explicitly confers a right on a class of which plaintiff is a member.[87]

In another recent implication case, *Northwest Airlines, Inc. v. Transport Workers Union of America*[88] the Supreme Court indicated that all of the four *Cort* factors are relevant to the determination of

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[76] Touche Ross & Co. v. Redington, 442 U.S. 560, 574 (1979); *see '33 Act after* Naftalin *and* Redington, *supra* note 6, at 175-77.

[77] *See '33 Act after* Naftalin *and* Redington, *supra* note 6, at 178 (outlining § 17(a) remedy narrower than express remedies of '33 Act).

[78] *See Private Causes of Action*, *supra* note 10, at 284-85.

[79] *See Implied Rights of Action*, *supra* note 10, at 1167.

[80] *See* text accompanying notes 48-79 *supra*.

[81] 450 U.S. 754 (1981).

[82] *Id.* at 770.

[83] *Id.*

[84] *Id.*; *see* 40 U.S.C. § 276a(a) (1976).

[85] 450 U.S. at 771; *see* Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 17-18 (1979) (once court finds specific statutory right, court must determine whether Congress intended to create private remedy).

[86] 450 U.S. at 772. Section 1 of the Davis-Bacon Act requires certain federal construction contract benefits for mechanics and laborers, but does not confer rights directly on those individuals. *Id.*; *see* 40 U.S.C. § 276a(a) (1976). The statutory language provides no support for the inference of a private remedy. 450 U.S. at 773; *see* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979).

[87] 450 U.S. at 771-72; *see* note 56 *supra*.

[88] 451 U.S. 77 (1981).

whether Congress intended to create a private remedy.[89] The Court examined the structure, language and legislative history of the relevant statutes to find that Congress did not intend to create a remedy for the plaintiff.[90] The Court emphasized that Congress did not provide express rights or especial statutory consideration to individuals in the plaintiff's position.[91] Thus, the Court concluded that the comprehensive enforcement scheme of the statutes evidenced a congressional intent not to authorize additional remedies.[92] Furthermore, the Court noted that the legislative history provided no support for inference of a private remedy.[93] Finally, the Court distinguished between judicial interpretation of a statute and the exercise of judicial power to create a remedy.[94] The Court stated that judicial power to interpret statutes is limited to the determination of congressional intent.[95] Similarly, the Court indicated that the fashioning of remedies is not an open-ended judicial power.[96] In the absence of legislation, the Court can create a remedy only in cases involving uniquely federal issues.[97]

The Supreme Court's most recent implication decision, *California v. Sierra Club*,[98] emphasized the importance of the first two *Cort* principles in the determination of legislative intent.[99] The Court indicated that a negative finding on the first two *Cort* factors obviates the need for continued analysis.[100] The Court maintained that a court should not engraft a remedy that fulfills the purpose of a statute unless the first two *Cort* factors indicate a congressional intent to create a private remedy.[101] The

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[89] *Id.* at 91.

[90] *Id.* at 91-92.

[91] *Id.* at 92.

[92] *Id.* at 93-94.

[93] *Id.* at 94-95.

[94] *Id.* A notable aspect of the *Northwest Airlines* decision was the Court's recognition of the common law judicial power to fashion appropriate remedies for unlawful conduct. *Id.* at 90, 95. Although the Court refused to fashion a new remedy that might alter the carefully balanced legislative scheme, the Court gave limited support to the old pre-*Cort* common law method of judicial inference of remedies. *Id.* at 95-96. The pre-*Cort* inference cases recognized a judicial power to create remedies in favor of individuals injured by violations of federal statutes. *See* note 11 *supra.*

[95] 451 U.S. at 94.

[96] *Id.* at 95.

[97] *Id.* In Maine v. Thiboutot, 448 U.S. 1, 4-11 (1980), the Supreme Court construed 42 U.S.C. § 1983 (1976) as authorizing private suits to redress violations by state officials of rights created by federal statutes. Section 1983 provides that every person who deprives another, under color of any statute, of rights secured by the Constitution or laws is liable to the injured party in an action at law. 42 U.S.C. § 1983 (1976). The *Thiboutot* Court found that § 1983 suits are not limited to the violation of constitutional rights. 448 U.S. at 4. Section 1983 thus provides an alternative remedial avenue in addition to the judicial inference of private remedies.

[98] 451 U.S. 287 (1981).

[99] *Id.* at 293-94.

[100] *Id.* at 497-98; *see* text accompanying notes 13-21 *supra* (discussion of *Cort* factors).

[101] 451 U.S. at 297.

Sierra Club Court interpreted the first *Cort* inquiry as not simply a determination of who benefits from the relevant statute, but rather an investigation into whether Congress intended to confer federal rights upon the statutory beneficiaries.[102] The Court found that the statute proscribed certain activities to benefit the public in general and could not support any inference of congressional intent to confer rights on the plaintiff.[103] Similarly, the Court found that legislative history foreclosed the finding of a private remedy.[104] The Court indicated that congressional silence with respect to remedies confirmed the absence of congressional concern for the protection of private rights.[105] Failure of the first half of the *Cort* test negated the need for consideration of the second two *Cort* factors.[106]

The dramatic, confusing and occasionally contradictory evolution of the current restrictive federal inference policy has resulted in inconsistent lower court decisions over whether section 17(a) of the '33 Act implies a private right of action.[107] Lower federal courts have developed alternative approaches to the question of whether section 17(a) implies a private remedy.[108] The alternative analytical approaches conflict with

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[102] *Id.* at 294. The *Sierra Club* Court commented that the victim of a crime is not necessarily the especial beneficiary of a criminal statute. *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 296. The *Sierra Club* Court indicated for the first time that congressional silence concerning remedies could support a finding of no intent to create a private cause of action. *Id.* Earlier inference decisions recognized that ambiguous or silent legislative history is not inconsistent with the finding of an implied private remedy. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

[106] 451 U.S. at 297; *see* text accompanying notes 13-21 *supra* (*Cort* discussion).

[107] *Compare* Stephenson v. Calpine Conifers II, Ltd. [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,631-32 (9th Cir. 1981) (private right of action implied under § 17(a)); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (same), *cert. denied*, 442 U.S. 909 (1979); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1244-45 (7th Cir. 1977) (same), *rev'd on other grounds*, 439 U.S. 551 (1979); *and* Newman v. Prior, 518 F.2d 97, 99 (4th Cir. 1975) (same) *with* Schull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, 155 (8th Cir. 1977) (private right of action not implied), *cert. denied*, 434 U.S. 1086 (1978); *and* Ingram Indus., Inc. v. Nowicki, 502 F. Supp. 1060, 1069 (E.D. Ky. 1980) (same).

[108] *See, e.g.*, Stephenson v. Calpine Conifers II, Ltd., [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,632 (9th Cir. 1981) (relying on minimal difference between §§ 17(a) and 10(b)); Wachovia Bank & Trust Co. v. National Student Marketing, 650 F.2d 342, 352 (D.C. Cir. 1980) (altering implication inquiry to whether Congress intended to deny, rather than create, private remedy), *cert. denied*, 101 S. Ct. 3098 (1981); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (relying on broad language of § 17(a)), *cert. denied*, 442 U.S. 909 (1979); Roth v. Bank of the Commonwealth [1981] FED. SEC. L. REP. (CCH) ¶ 98,267, 91,717 (W.D.N.Y. 1981) (inferring § 17(a) private remedy based on similarities between § 17(a) and § 10(b) of '34 Act rather than *Cort* factors); Automatic Catering, Inc. v. First Multifund for Daily Income, Inc. [1981] FED. SEC. L. REP. (CCH) ¶ 98,254, 91,662 (S.D.N.Y. 1981) (relying on *Kirshner*); Note, *Section 17(a) of the '33 Act: Defining the Scope of Antifraud Protection*, 37 WASH. & LEE L. REV. 859, 866 n.57 (1980) [hereinafter cited as *Scope of Antifraud Protection*] (suggesting differing approaches to inference of § 17(a) private remedy).

the recent Supreme Court decisions concerning the inference of private causes of action.[109] Some lower courts have adopted an approach that involves the fashioning of a private remedy in order to assist in the enforcement of the '33 Act.[110] The courts reason that an implied remedy provides a necessary supplement to SEC enforcement activities and helps effectuate the deterrence purpose of the statute.[111] The enforcement provisions of the '33 Act do not provide private remedies for all possible violations of section 17(a).[112] Furthermore, because of the huge number of pursuable cases, the SEC cannot enforce all violations of the securities acts. Therefore, some lower courts have concluded that the deterrence of fraud in securities transactions requires the inference of a section 17(a) private remedy.[113]

The Supreme Court, however, currently rejects the proposition that the judiciary has the power to create remedies to improve the statutory enforcement scheme.[114] Furthermore, the inference of a remedy under section 17(a) conflicts with the strict *expressio* maxim emphasized in *Transamerica.*[115] The *Redington* and *Transamerica* decisions stress the impropriety of conferring a remedy against contrary congressional intent.[116] Therefore, the existence of express remedies in the '33 Act should foreclose the inference of a section 17(a) private remedy.[117]

An alternative analytical approach used by the Court of Appeals for the District of Columbia indicated that the proper implication inquiry is

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[109] *See* text accompanying notes 110-185 *infra.*

[110] *See* Woods v. Homes & Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1270, 1288 (D. Kansas 1980) (suggesting that lack of any § 17(a) remedies may allow inference of private right of action); Demoe v. Dean Witter & Co., 476 F. Supp. 275, 281 (D. Alaska 1979) (private cause of action under § 17(a)(3) clearly would assist enforcement of SEC rules). *But see* Gunter v. Hutcheson, 433 F. Supp. 42, 47 (N.D. Ga. 1977) (denying inference of § 17(a) remedy because inferred remedy would allow circumvention of express civil remedies of Securities Acts).

[111] *See* Woods v. Homes and Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1270, 1288 (D. Kansas 1980); Demoe v. Dean Witter & Co., 476 F. Supp. 275, 281 (D. Alaska 1979); note 11 *supra* (*Borak* decision allowed inference of remedy to facilitate SEC enforcement of statute).

[112] *See* notes 3-6 *supra.*

[113] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 430 (1964) (Supreme Court created "private attorney's general" to effectuate statutory purpose and aid SEC enforcement); note 11 *supra.*

[114] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); text accompanying notes 80-105 *supra* (discussion of most recent Supreme Court implication cases).

[115] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); *see Private Causes of Action, supra* note 10, at 283-84 (*expressio* maxim leaves almost no room for recognition of implied rights of action); text accompanying notes 72-79 *supra* (discussing *expressio* maxim).

[116] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

[117] *See* Hill v. Der, [1981] FED. SEC. L. REP. (CCH) ¶ 98,311, 91,947 (D. Del. 1981). In *Hill,* the court declined to infer a § 17(a) private remedy. *Id.* The court noted that the existing remedial provisions foreclosed the finding of an implied remedy. *Id.* The court mentioned

not whether Congress intended to imply a private right of action, but whether Congress denied a private remedy.[118] The court found that since the legislative history expressly did not negative inference of a remedy, consideration of the third *Cort* factor was appropriate.[119] The court concluded that a private remedy is necessary or at least helpful to the accomplishment of the statutory purposes and thus found an implied private remedy.[120] In addition, the circuit court proceeded to interpret the *expressio* principle very narrowly.[121] The court indicated that the existence of an express remedy does not alleviate the need for implied remedies in other sections of the statute.[122] The court further stated that the legislative process militates against the likelihood of a complete self-contained statute.[123] The Court concluded, therefore, that the *expressio* maxim prevented the inference of remedies only if the implied remedies would nullify the express remedies.[124]

The District of Columbia Circuit's approach is inconsistent with the Supreme Court's *Redington* and *Transamerica* decisions, which clearly indicate that the proper inquiry is whether Congress intended to create a private remedy.[125] Furthermore, the *expressio* maxim creates a presumption against finding an implied private remedy that yields only to persuasive evidence of legislative intent to create a private remedy.[126] The circuit court, in effect, adopted a presumption in favor of the judicial inference of an implied remedy. The *Transamerica* decision clearly indicates that whenever a statute contains express remedies a court must

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the unlikelihood of Congress' absentmindedly omitting an intended private remedy. *Id.* The court also noted the similarities between § 17(a) of the '33 Act and § 206 of the Investment Advisers Act for which the *Transamerica* Court denied the existence of a private remedy. *Id.*; *see* 444 U.S. 11, 19 (1979). The *Hill* Court employed the *Transamerica* analysis to find that the existence of express civil remedies in §§ 11 and 12 as well as the criminal penalties and injunctive relief available for § 17(a) violations prohibited the inference of a private remedy. *Id.*

[118] *See* Wachovia Bank & Trust Co. v. National Student Marketing, 650 F.2d 342, 352 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 3098 (1981).

[119] *Id.*

[120] *Id.* In *Wachovia Bank & Trust Co. v. National Student Marketing*, the court applied the third *Cort* factor in indicating that a private remedy would effectuate the broad purposes of the Act. *Id.*; *see* text accompanying note 19 *supra* (third *Cort* factor). A proper *Cort* analysis requires a court to determine whether the inferred remedy is consistent with the primary purpose of a statute. *Implied Rights of Action*, *supra* note 10, at 1159.

[121] Wachovia Bank & Trust Co. v. National Student Marketing, 650 F.2d 342, 352-53 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 3098 (1981).

[122] *Id.* at 354-55.

[123] *Id.*

[124] *Id.* at 355-56.

[125] *See* California v. Sierra Club, 451 U.S. 287, 293 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

[126] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979); text accompanying notes 72-79 *supra*.

be "chary" of creating other remedies.[127] In addition, the recent Supreme Court cases concerning inference of private remedies uniformly reject judicial extrapolation of congressional intent from the legislative process or consideration of the need for additional private remedies.[128] Therefore, the District of Columbia Circuit improperly analyzed the congressional intent question and mistakenly limited the *expressio* doctrine.

Several courts have suggested that the judicial activism existing at the time of enactment of the statute is a factor courts should consider in an implied private cause of action analysis.[129] The underlying rationale for the approach is that courts liberally inferred private rights of action prior to the *Cort* decision.[130] A pre-*Cort* Congress may have relied on the judiciary to fashion a remedy, rather than enacting an express remedy.[131] The Supreme Court's current implication theory allows past judicial activism to influence the findings of a remedy only in the face of proof of legislative reliance on judicial activism.[132] The modified *Cort* test emphasizes the importance of congressional intent.[133] The modified *Cort* test, however, does not allow the presumption of congressional intent from past judicial tendencies.[134] Judicial activism does not rise to the level of a "canon of statutory construction," as does the *expressio* maxim, from which a court can imply statutory intent.[135] The Supreme Court requires that the foundation of the inference of private remedies be on current judicial standards rather than the assumed effects of past trends.[136]

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[127] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

[128] *See* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981) (not within federal judiciary's competence to amend congressionally authorized comprehensive enforcement schemes); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (question is one of congressional intent, not whether Court can improve statutory scheme); Cannon v. University of Chicago, 441 U.S. 677, 740, 745-49 (1979) (Powell, J., dissenting) (inference of private remedies is judicial legislation violative of separation of powers).

[129] *See* Leist v. Simplot, 638 F.2d 283, 317 (2d Cir. 1980), *aff'd sub nom*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 50 U.S.L.W. 4457 (1982); Rivers v. Rosenthal & Co., 634 F.2d 774, 789 (5th Cir. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416, 421 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871, 876-77 (D.N.J. 1980).

[130] *See* note 11 *supra*.

[131] *See* Rivers v. Rosenthal & Co., 634 F.2d 774, 789 (5th Cir. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc. 487 F. Supp. 416, 421 (S.D.N.Y. 1980).

[132] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) (focus of inquiry is determination of legislative intent).

[133] *See* text accompanying notes 48-56, 64-76 & 82 *supra*.

[134] *See* Cannon v. University of Chicago, 441 U.S. 677, 710-11 (1979) (indicating that Court should not presume congressional intent to create private remedy from past judicial activism in finding implied causes of action).

[135] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

[136] California v. Sierra Club, 451 U.S. 287, 301 (1981) (Stevens, J., concurring) (Court should adhere to intent analysis rather than base decision on opinion of what Congress probably assumed at time of legislation); *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 50 U.S.L.W. 4457, 4464 (1982). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, the Supreme Court re-emphasized that the congressional intent at the time of enact-

Several federal court decisions have found a section 17(a) implied private right of action under a variety of analytical approaches premised on the similarities between section 17(a) of the '33 Act and section 10(b) of the '34 Act.[137] Cases relying on the parallels between section 10(b), rule 10b-5 promulgated thereunder, and section 17(a) emphasize the nearly identical language of the two sections, the similar purposes behind the '33 and '34 securities acts, and judicial findings of private causes of action under section 10(b).[138] One line of cases proceeded under the assump-

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ment of a statute determines the existence of a private remedy. *Id.* The Court indicated that a determination of congressional intent requires an examination of the contemporary legal context in which Congress enacted a given bill. *Id.* In *Curran*, the Court recognized that amendment of the Commodity Exchange Act (CEA) in 1974 occurred with congressional understanding that courts previously had recognized an implied private remedy under the CEA. *Id.*; *see* Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir. 1973). The Supreme Court examined the legislative history of the CEA amendments and found that Congress intended to adopt a private remedy. *Id.* The Court did not speculate on the intent of Congress in light of the judicial implication doctrine at the time of the amendments. *See* text accompanying notes 129-134 *supra*. The Court examined proof of legislative reliance on judicial activism and found clear congressional intent to adopt a private remedy. *See* 50 U.S.L.W. at 4463-64.

[137] *See, e.g.*, Stephenson v. Calpine Conifers II, Ltd., [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,632 (9th Cir. 1981) (section 17(a) private remedy because of minimal differences between § 17(a) and § 10(b) which has implied private remedy); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (once aggrieved buyer has established § 10(b) cause of action, he acquires § 17(a) private cause of action since language of § 17(a) broad enough to imply private right of action), *cert. denied*, 442 U.S. 909 (1979); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1245 (7th Cir. 1977) (similarities between § 17(a) and § 10(b) require finding of implied private remedy under § 17(a)), *rev'd on other grounds*, 439 U.S. 551 (1979); Roth v. Bank of Commonwealth [1981] FED. SEC. L. REP. (CCH) ¶ 98,267, 91,717 (W.D.N.Y. 1981) (inferring § 17(a) private right of action based on impracticability of denying private action under § 17(a) once plaintiff has established § 10(b) cause of action and existence of § 10(b) implied remedy); Automatic Catering, Inc. v. First Multifund for Daily Income, Inc. [1981] FED. SEC. L. REP. (CCH) ¶ 98,254, 91,662 (S.D.N.Y. 1981) (inferring § 17(a) remedy based on *Kirshner*).

Section 10(b) of the '34 Act provides that it shall be unlawful:

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j (1976); *see* note 3 *supra* (text of § 17(a)).

[138] *See* Stephenson v. Calpine Conifers II, Ltd. [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,632 (9th Cir. 1981) (minimal differences between §§ 17(a) and 10(b)); Lincoln Nat'l Bank v. Herber, 604 F.2d 1038, 1041 (7th Cir. 1979) ('33 and '34 Acts share same purpose and courts should consider two acts together as one body of law). Courts consistently have found an implied private cause of action under § 10(b) of '34 Act. *See* Aaron v. SEC, 446 U.S. 680, 689 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196-97 (1977); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1245 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 551 (1979); note 144 *infra*. Sections 10(b) and 17(a) address the very similar concerns of the protection of the public from fraudulent practices in the securities market. *See* notes 2 and 137 *supra*. The language of

tion that the antifraud sections of the '33 and '34 Acts are identical.[139] Since courts consistently infer a section 10(b) private remedy,[140] the reasoning follows that courts should infer a section 17(a) private right of action. Furthermore, courts have relied on the broad language of section 17(a) to support inference of a private remedy.[141] A court may conclude that the relatively narrow scope of the '33 Act's enforcement provisions and the broad prohibitory language of section 17(a) evidence congressional intent to imply a private remedy.[142] Another line of decisions finding implied remedies relies upon Judge Friendly's concurring opinion in *SEC v. Texas Gulf Sulphur Co.*[143] in which he asserted the impracticability of denying the existence of a private action under section 17(a) once the plaintiff establishes a section 10(b) cause of action alleging fraud.[144]

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the two sections is similar, and rule 10b-5, promulgated under § 10(b), is an almost verbatim copy of § 17(a). *Compare* 17 C.F.R. § 240.10b-5 *with* note 3 (text of § 17(a)).

[139] *See* Stephenson v. Calpine Conifers II, Ltd. [1981] FED. SEC. L. REP. (CCH) ¶ 98,249, 91,632 (9th Cir. 1981) (relying on *Kirshner* analysis and minimal § 10(b) and § 17(a) differences); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (relying on broad § 17(a) language and *Daniel*), *cert. denied*, 441 U.S. 995 (1979); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1245 (7th Cir. 1977) (operative provisions of '33 and '34 Acts' antifraud sections are identical for purposes of lawsuit), *rev'd on other grounds*, 439 U.S. 551 (1979); Automatic Catering, Inc. v. First Multifund for Daily Income, Inc. [1981] FED. SEC. L. REP. (CCH) ¶ 98,254, 91,662 (S.D.N.Y. 1981) (relying on *Kirshner*).

[140] *See* Aaron v. SEC, 446 U.S. 680, 689 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.19 (1979) (recognizing longstanding history of lower court influence of private causes of action under § 10(b) of '34 Act); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (acquiescing in 25 year lower court practice of finding implied remedies under § 10(b) of '34 Act).

[141] *See* Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1245 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 551 (1979). *See also* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916) (broad language of statute allows inference of implied remedy to protect statutory right).

[142] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 573 (1979). The *Redington* Court rejected the argument that Congress intended to imply a remedy because the express remedy gave redress to only a limited class. *Id.* The Court rejected this argument on two grounds. *Id.* at 573-74. First, legislative history supported the view that Congress intended the express remedy to be the exclusive remedy. *Id.* Second, the Court indicated that when the express remedy is limited in scope and Congress created the violated section contemporaneously with the express remedy, the Court should not decide whether Congress intended the express remedy to be exclusive. *Id.* at 574. The Court is extremely reluctant to infer a remedy that broadens the express remedy of a statute. *Id.* When a statutory provision has a limited scope and a contemporaneously created remedy the Court assumes that an inferred remedy would expand the scope of an express remedy. *Id.*

[143] 401 F.2d 833 (2d Cir. 1968) (Friendly, J., concurring *en banc*), *cert. denied sub nom*, Coates v. SEC, 404 U.S. 1005 (1969), *rehearing den.*, 404 U.S. 1064 (1972).

[144] *Id.* at 867. Judge Friendly's *Texas Gulf Sulphur* concurring opinion examines the similarities between § 10b of the '34 Act, rule 10b-5 promulgated thereunder, and § 17(a) of the '33 Act. *Id.* Judge Friendly noted that paragraphs one and three of § 17(a) are clearly within the civil liability scope of § 10(b). *Id.* Paragraph two of § 17(a), on the other hand, is unique to both the '33 and '34 Acts in that § 17(a)(2) imposes liability for damages caused by negligent misrepresentation without restrictions as to kinds of plaintiffs, due diligence

Several courts have expanded the impracticability approach by allowing a section 17(a) implied remedy independent of a section 10(b) fraud claim.[145]

Several important distinctions force the failure of the comparison between section 17(a) of the '33 Act and section 10(b) of the '34 Act as the basis for the inference of a section 17(a) private remedy. Although sections 17(a) and 10(b) are the respective antifraud provisions of the '33 and '34 Acts, the two provisions are not identical.[146] The '33 Act is a more narrow statute that deals only with the fraudulent activities of a limited range of individuals in the offer or sale of securities.[147] The '34 Act encompasses negligence in any way connected with the purchase or sale of securities.[148] Furthermore, the '33 Act provides remedies for violations of its substantive provisions under sections 11 and 12.[149] The '33 statute provides a logical, well-balanced enforcement scheme that may not provide a remedy for every claimant, but allows enforcement of each of the specifically prohibited activities.[150] The 1934 Act, on the other hand, has very limited enforcement provisions that do not embrace all the activities the Act prohibits.[151] Thus, the same justification for implication of a remedy under the '33 Act does not apply to the '34 Act.[152] Additionally, courts incorrectly interpret Judge Friendly's comments in *Texas Gulf Sulphur* as a holding in favor of a section 17(a) implied right of action.[153]

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defenses, or a short statute of limitations. *Id.* Judge Friendly indicated, however, that commentators strongly disfavored the existence of either a § 17(a) or § 17(a)(2) private remedy as a supplement to § 11 and § 12 remedies. *Id.* Judge Friendly concluded the analysis by pointing out that once the plaintiff establishes a § 10(b) action there is little sense in denying a § 17(a) action provided the plaintiff alleges fraud rather than mere negligence. *Id.* To allow a § 17(a) remedy in the absence of a § 10(b) cause of action for fraud undermines the carefully framed limitations imposed on buyers by §§ 11 and 12. *Id.* at 867-68.

[145] *See* Demoe v. Dean Witter & Co., 476 F. Supp. 275, 278-79 (D. Alaska 1979) (implied right of action under § 17(a)(3), but not §§ 17(a)(1) or 17(a)(2) independent of 10(b) remedy); Felts v. National Account Sys. Ass'n, 469 F. Supp. 54, 64 (N.D. Miss. 1978) (section 17(a) private remedy independent of § 10(b) remedy); DeMarco v. Security Planning Serv., Inc., 462 F. Supp. 1066, 1070 (D. Ariz. 1978) (same).

[146] *See* notes 3-6, 137 & 138 *supra.*

[147] 15 U.S.C. § 77q(a) (1976); *see* Loss, *supra* note 5, at 1785-86.

[148] 15 U.S.C. § 78j (1976).

[149] *See* notes 5 & 6 *supra.*

[150] Loss, *supra* note 5, at 1785.

[151] *Id.* Section 17(a) of the '33 Act and § 10(b) of the '34 Act are markedly different in enforcement capabilities. *Id.* The '34 Act creates remedies under §§ 9(e), 16(b) and 18. 15 U.S.C. §§ 78i(e), 78p(b), & 78r (1976). The enforcement provisions of the '34 Act do not supply remedies for the multifarious substantive rights created by the Act. *See* Loss, *supra* note 5, at 1785. Section 9(e) provides a remedy only for illegal manipulation of security prices. 15 U.S.C. § 78i(e) (1976). Section 16(b) allows recovery only of profit earned from the unfair use of insider information. 15 U.S.C. § 78p(b) (1976). Finally, § 18 allows a court to grant damages for a purchaser's reliance on a false or misleading statement, subject, however, to a good faith defense. 15 U.S.C. § 78r (1976).

[152] Loss, *supra* note 5, at 1785.

[153] *See* Stephenson v. Calpine Conifers II, Ltd. [1981] Fed. Sec. L. Rep. (CCH) ¶ 98,249,

Judge Friendly's comments were merely a judicial aside found in an opinion denying the inference of a private cause of action under section 17(a).[154] Therefore, inference of a section 17(a) remedy based upon a comparison with the '34 Act's antifraud provision ignores important differences in scope and purpose between the two Acts.

Finally, one commentator has indicated that the recent Supreme Court decision of *United States v. Naftalin*[155] may allow the finding of an implied section 17(a) private remedy.[156] Prior to *Naftalin*, the antifraud protection of section 17(a) did not extend to agents of purchasers.[157] The *Naftalin* Court found that Congress enacted section 17(a) for the protection of investors and the enforcement of ethical business practices.[158] Accordingly, the Court expanded the reach of section 17(a) by increasing the class of persons entitled to antifraud protection and by applying section 17(a) to fraud in the aftermarket.[159] One commentator argues that

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91,632 (9th Cir. 1981) (indicating Friendly's *Texas Gulf Sulphur* reasoning persuasive in finding existence of § 17(a) private right of action); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (same), *cert. denied*, 444 U.S. 995 (1979); Roth v. Bank of the Commonwealth, [1981] FED. SEC. L. REP. (CCH) ¶ 98,267, 91,717 (W.D.N.Y. 1981) (relying on *Kirshner* and *Texas Gulf Sulphur* to allow inference of § 17(a) private remedy); Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890, 904 (D. Me. 1971) (relying on Friendly's concurrence).

[154] *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring *en banc*), *cert. denied sub nom.*, Coates v. SEC, 404 U.S. 1005 (1969), *rehearing den.*, 404 U.S. 1064 (1972); L. LOSS, 6 SECURITIES REGULATION 3913 (Supp. to 2d ed. Vol. III 1969) [hereinafter cited as SECURITIES]. Judge Friendly indicated that a court should not deny a § 17(a) remedy once the plaintiff establishes a § 10(b) claim alleging fraud rather than mere negligence. SEC v. Texas Gulf Sulphur, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring *en banc*), *cert. denied*, 404 U.S. 1005 (1969), *rehearing den.*, 404 U.S. 1064 (1972). Thus, Judge Friendly clearly did not intend to indicate that a § 17(a) private cause of action is available whenever the plaintiff proves a § 10(b) cause of action. *See id.* To allow a § 17(a) remedy in the absence of fraud would undermine the carefully framed limitations imposed on the buyer's right to recover granted by § 12(2) of the '33 Act. *Id.*; *see* SECURITIES, *supra*, at 3913. Friendly's decision, however, clearly does not support the inference of a § 17(a) remedy in the absence of a § 10(b) claim. *See* 401 F.2d at 867. Friendly's concurrence cannot support the finding of an implied § 17(a) private remedy. *See id.*

[155] 441 U.S. 768 (1979).

[156] *See '33 Act after* Naftalin *and* Redington, *supra* note 6, at 179.

[157] 15 U.S.C. § 77q(a) (1976); *see Scope of Antifraud Protection*, *supra* note 108, at 860-61 (section 17(a) does not cover persons acting as agents for purchasers).

[158] United States v. Naftalin, 441 U.S. 768, 775 (1979). *Naftalin* involved a criminal prosecution of a violation of § 17(a)(1) of the '33 Act. *Id.* at 770; *see* 15 U.S.C. § 77x (1976) (section 24 of '33 Act provides criminal sanctions for willful violations of any '33 Act provision). The Court reversed the Eighth Circuit and held that § 17(a) protects brokers as well as investors from fraud in the offer or sale of securities. 441 U.S. at 771-72; *see* United States v. Naftalin, 579 F.2d 444, 445 (8th Cir. 1978). Furthermore, the Court concluded that § 17(a) applies to the offer and sale of securities regardless of whether the sale is an initial offering or in aftermarket trading. 441 U.S. at 777-78; *see* 15 U.S.C. § 77q(a) (1976); *Scope of Antifraud Protection*, *supra* note 108, at 860-64.

[159] *Scope of Antifraud Protection*, *supra* note 108, at 865. Aftermarket trading refers to ordinary market trading after the initial public offering of a security. *Id.* at 862 n.24. Several commentators limit the scope of § 17(a) to frauds occurring in the initial public offering of the security. *See, e.g.*, Hazen, *A Look beyond the Pruning of Rule 10b-5; Implied Remedies*

the *Naftalin* Court's recognition of a broad congressional intent to deter fraud in the securities markets and to protect a wide group of investors requires the inference of a section 17(a) private remedy.[160] Furthermore, an expansive reading of *Redington* yields the interpretation of the *expressio* principle that a court may not engraft onto a statute a cause of action that is significantly broader than the express remedy provided by Congress.[161] The *Redington* Court indicated that a court should neither expand the scope of express remedies nor fashion a remedy for conduct that is addressed by an existing remedy.[162] Under an expansive *expressio* approach, a court may infer, after finding the proper congressional intent, a section 17(a) remedy that does not increase the remedial limitations of section 12(2).[163] Therefore, a court could allow a section 17(a) remedy for conduct that is more culpable and more narrow than the conduct prohibited by the section 12(2) express remedy.[164] Thus, according to the argument, the finding of congressional intent and the construction of a remedy within the scope of existing remedies may permit the finding of a private cause of action.

Inference of a private remedy under the *Naftalin* approach ignores the Supreme Court's guidelines in finding congressional intent. The mere fact that Congress enacted a statute protecting a certain class does not necessarily mean that Congress intended enforcement through private litigation.[165] A showing of congressional intent to create a remedy is necessary for judicial inference of a private remedy.[166] The legislative history surrounding section 17(a) shows no congressional intent to create a private remedy.[167] In the absence of relevant legislative

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and Section 17(a) of the Securities Act of 1933, 64 VA. L. REV. 641, 645, 657-58 (1978); Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 GEO. WASH. L. REV. 214, 246 (1959); Note, *Nonpurchaser Plaintiff Given Standing To Bring An Action Under Section 17(a) of the Securities Act of 1933: Another Threat to the* Birnbaum *Doctrine*, 51 TEMP. L.Q. 912, 921-22 (1978).

[160] *'33 Act after* Naftalin *and* Redington, *supra* note 6, at 178.

[161] *Id.*; *see* Touche Ross & Co. v. Redington, 442 U.S. 560, 574, 577-78 (1979); text accompanying notes 48-62 *supra* (*Redington* discussion).

[162] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 572-74 (1979).

[163] *Id.* at 574, 577-78.

[164] *See '33 Act after* Naftalin *and* Redington, *supra* note 6, at 179.

[165] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 574, 577-78 (1979). In *Redington*, the Supreme Court indicated that the Court is extremely reluctant to infer a cause of action that is significantly broader than the remedy Congress chose to provide. *Id.* at 574. The Court modified its stance by stating that the remedial purposes of a statute will not justify reading a statutory provision more broadly than the language and statutory scheme permit. *Id.* at 578. The Court would not read the Securities Acts so that every provision gives rise to an implied private cause of action. *Id.* at 577.

[166] *See* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981); Hill v. Der, [1981] FED. SEC. L. REP. (CCH) ¶ 98, 311, 91,946 (D. Del. 1981).

[167] *See* H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-10 (1933) (since §§ 11 and 12 create civil remedies for violation of duties imposed by Act, imposition of greater responsibility would unnecessarily restrain conscientious administration of honest business with no compen-

history, the Court examines statutory structure to determine whether Congress intended a private remedy.[168] The *Naftalin* approach argues that the *expressio* maxim allows the inference of remedies more narrow than the express remedies.[169] The clear meaning of the *Transamerica* and *Coutu* cases, which are subsequent to *Redington*, prevents a broad reading of the *expressio* doctrine.[170] The Court presumes congressional intent not to create a private remedy from the existence of express remedies.[171] Therefore, the existence of the section 12(2) remedies blocks a private remedy under section 17(a).[172] Furthermore, the marked differences between sections 12(2) and 17(a) foreclose the finding of any implied private remedy even with a broad *expressio* doctrine. Differences between sections 17(a) and 12(2) include the scope of the sections, requirements of privity for liability, and burdens of proof.[173] Inference of a section 17(a) remedy narrower than section 12(2) would require a court to engage in the type of judicial legislation Justice Powell decried in his *Cannon* dissent.[174] A court clearly cannot impose a new remedy on a legislative scheme based on judicial initiative to supplement the

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sating advantage to public); McFarland v. Memorex Corp., 493 F. Supp. 631, 650-53 (N.D. Cal. 1980) (same); Gunter v. Hutcheson, 433 F. Supp. 42, 45 (N.D. Ga. 1977) (same).

[168] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (congressional intent may appear implicitly in language or structure of statute).

[169] *See* text accompanying notes 161-164 *supra*.

[170] Universities Research Ass'n v. Coutu, 450 U.S. 754, 772 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979); *see* text accompanying notes 72-79 *supra* (*expressio* maxim discussion).

[171] *See* text accompanying notes 72-79 *supra*.

[172] *See* McFarland v. Memorex Corp., 493 F. Supp. 631, 653 (N.D. Cal. 1980) (court can presume Congress considered merit of private remedies for violations of Act, and court cannot use language of § 17 to extend liability to others or circumvent existing procedural limitations).

[173] *'33 Act after* Naftalin *and* Redington, *supra* note 6, at 179. Section 12(2) requires privity and imposes liability for negligence. 15 U.S.C. § 77l(2) (1976). Section 17(a) requires no privity, and a court can impose liability only for intentional or reckless misconduct. 15 U.S.C. § 77q(a) (1976). *See '33 Act after* Naftalin *and Redington, supra* note 6, at 179. Liability for negligent misconduct would broaden the § 12(2) remedy contrary to *Redington*. 442 U.S. 560, 577-78; *see* Dorfman v. First Boston Corp., 336 F. Supp. 1089, 1095 (E.D. Pa. 1972) (section 17(a) negligence action would circumvent express civil remedies of '33 Act). Furthermore, under § 12(2) the defendant has the burden of proving reasonable care, while under § 17(a), the plaintiff must prove defendant's negligence. 15 U.S.C. §§ 77l(2) & 77q(a) (1976). Finally, § 17(a) applies to both after market trading and initial distribution. 15 U.S.C. §§ 77l(2) & 77a(2) (1976). The broader coverage of § 17(a)'s and § 12(2)'s privity requirement could allow an offeree to bring suit under § 17(a) even if a § 12(2) remedy is foreclosed because of the absence of privity. *See '33 Act after* Naftalin *and Redington, supra* note 6, at 179-80. *See also* Douglas, *supra* note 2, at 181 (section 17(a) probably does not enlarge civil remedies available in '33 Act since §§ 11 and 12 expressly state available remedies); Horton, *supra* note 2, at 46 n.6 (elaborate scheme of express private remedies lends considerable force to argument that congress explicitly rejected private remedies for violations of § 17).

[174] 441 U.S. at 745-49 (Powell, J., dissenting); *see* note 43 *supra*.

remedial scheme of the statute.[175] The *Naftalin* approach would require such judicial legislation.[176]

The conflicting lower court decisions concerning section 17(a) implied remedies result from the absence of a Supreme Court decision on the issue.[177] The Supreme Court's recent trend away from the pre-*Cort* principles favoring strong judicial powers to create common law remedies severely restricts the finding of implied private causes of action.[178] Recent cases concerning the inference of a section 17(a) private remedy have disregarded and misapplied the Court's modified *Cort* test.[179] Application of the modified *Cort* test clearly indicates that courts should not construe a section 17(a) private remedy for the protection of defrauded investors.[180] The section does give rights to a specified class of individuals.[181] In addition, no evidence exists of congressional intent to create a private remedy.[182] The scant legislative history available concerning section 17(a) indicates that Congress intended sections 11 and 12 as

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[175] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

[176] *See* note 174 *supra.*

[177] *See* note 8 *supra.*

[178] *See* note 10 *supra.*

[179] *See* text accompanying notes 107-174 *supra.*

[180] *See* Hill v. Der, [1981] FED. SEC. L. REP. (CCH) ¶ 98,311, 91,496 (D. Del. 1981). *Hill* indicates that Congress designed § 17(a) to protect the victims of fraud in the offer or sale of securities and thus to benefit a particular class. *Id.* 91,496-97; *see* 15 U.S.C. § 77q(a) (1976). Although Congress created rights in the plaintiff, Congress may not have intended to create a private cause of action. Hill v. Der, [1981] FED. SEC. L. REP. (CCH) ¶ 98,311, 91,496 (D. Del. 1981). The *Transamerica* decision, however, found that § 206 of the Investment Advisers Act does not provide private remedies. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979); 15 U.S.C. § 80b-15 (1976). The language of § 17a(1) and (3) is identical with the language of § 206(1) and (2) of the Investment Advisers Act. *Scope of Antifraud Protection, supra* note 108, at 872; *see* 15 U.S.C. § 80b-15 (1976). Because of the similarity between § 206 and § 17(a) and the *Transamerica* decision, one commentator has suggested that § 17(a) creates no private rights. *Scope of Antifraud Protection, supra* note 108, at 871. At least one court has argued that since only § 17(a)(3) makes specific reference to a special class of protected individuals, § 17(a) does not create private rights. Demoe v. Dean Witter & Co., 476 F. Supp. 275, 279 (D. Alaska 1979); *see* 15 U.S.C. § 77q(a) (1976); *Scope of Antifraud Protection, supra* note 108, at 871. *Transamerica*, in fact, holds that § 206 imposes enforceable fiduciary obligations. 444 U.S. at 17. The *Transamerica* Court concluded, however, that an injured party may not enforce the rights created by § 206 in a private action. *Id.* at 24. Using a § 206 and § 17(a) comparison, § 17(a) appears to create rights in a special class, even absent specific language to that effect, but does not provide a private remedy for enforcement of the statutory rights. *See* Hill v. Der [1981] FED. SEC. L. REP. (CCH) ¶ 98,311, 91,496 (D. Del. 1981).

[181] S. REP. No. 47, 73d Cong., 1st Sess. (1933); H.R. REP. No. 85, 73d Cong., 1st Sess. (1933); 77 CONG. REC. 2983 (1933); *see* Lincoln Nat'l Bank v. Herber, 604 F.2d 1038, 1041 (7th Cir. 1979).

[182] H.R. REP. No. 85, 73d Cong., 1st Sess. 9-10 (1933); *see* Lincoln Nat'l Bank v. Herber, 604 F.2d 1038, 1041 (7th Cir. 1979) (review of legislative history); McFarland v. Memorex Corp., 493 F. Supp. 631, 652 (N.D. Cal. 1980) (legislative history of '33 Act contains no language suggesting congressional intent to confer private right).

the exclusive enforcement provisions of the '33 Act.[183] Furthermore, the *expressio* maxim creates the presumption that Congress would have created express remedies had it intended to create a section 17(a) remedy.[184] The *Transamerica* Court used a similar analysis in finding that an antifraud provision remarkably similar to section 17(a) did not support the finding of an implied private remedy.[185] Therefore, the recent Supreme Court implication decisions indicate that courts should not create a section 17(a) private cause of action.

THOMAS J. EGAN, JR.

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[183] *See* Woods v. Homes and Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1270, 1288 (D. Kan. 1980) (Congress intended aggrieved purchasers to have right of action only under §§ 11 & 12 of '33 Act); Mendelsohn v. Capital Underwriters, Inc., 490 F. Supp. 1069, 1079-80 (N.D. Cal. 1979) (legislative history indicates enforcement of § 17(a) only by injunction or criminal sanction and unanimity among commentators that § 17(a) never intended to supplement other remedies of '33 Act); Loss, *supra* note 5, at 1785 (arguing that inference of private remedy under § 17(a) would upset carefully framed limitations to recovery imposed by § 12(2) of '33 Act). *But see* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring *en banc*), *cert. denied*, 404 U.S. 1005 (1969) *reh. den.* 404 U.S. 1064 (1972). In *Texas Gulf Sulphur*, Judge Friendly indicated that § 17(a) of the '33 Act does not imply a private right of action. *Id.* Judge Friendly recognized, however, the lack of sense in denying a § 17(a) remedy when a plaintiff established a cause of action for fraud under § 10(b) of the '34 Act. *Id.*

[184] *See* text accompanying notes 72-79 *supra*.

[185] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979); note 180 *supra*. *See also* Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring). Justice Rehnquist's concurring opinion in *Cannon* indicates a growing sentiment in the Court against the inference of private rights absent specific legislation creating a right. *Id.* Justice Rehnquist indicates that Congress has the responsibility expressly to create desired remedies. *Id.* Nevertheless, the concurring opinion advocates the position of allowing private causes of action. *Id.* Rehnquist suggests abandonment of the judiciary's common law remedy creating powers. *See id.*; note 11 *supra*. *See also Private Causes of Action*, *supra* note 10, at 286 (presumptive refusal to recognize private liability not appropriate response to congressional ambiguity).