COMMENT

PRIVATE RIGHTS OF ACTION
UNDER AMTRAK AND ASH:
SOME IMPLICATIONS FOR IMPLICATION

In 1916, the Supreme Court announced the doctrine of implying private actions in the absence of specific statutory authorization in Texas & Pacific Railway Co. v. Rigsby. Rigsby, a railroad employee, sought damages for injuries resulting from his employer's violation of the Federal Safety Appliance Act. The Court upheld his recovery while recognizing that the Act did not expressly confer a private right of action: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." The relatively novel question whether a court can and should imply an action for an injured party who has no express statutory remedy has sparked a great deal of judicial commentary, the volume of which reflects the courts' inability to fashion workable and generally applicable standards of implication.

Two recent cases, National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak) and Ash v. Cort, are manifestations of the problems in this area. Rather than attempting to reconcile the inconsistencies in earlier decisions, these cases preserve and, to some extent, increase the difficulty of determining when a private action should be implied. Through an analysis of these two cases and the precedents upon which they rely, this Comment will attempt first to show where the courts have erred in formulating standards for implication, and then to propose reasonable and consistent alternative standards.

1 241 U.S. 33 (1916).
3 241 U.S. at 39.
I. Introduction

Although the existence of the doctrine of implying a private action is so widely accepted that its underlying justification is rarely discussed by the courts, an analysis of the rationale behind implication is an appropriate starting point for evaluating the considerations that are or should be central to the implication decision.

As a basic proposition, it may be asserted that when Congress enacts legislation it does so in order to accomplish particular goals. Congress may achieve its purpose by regulating or prohibiting actions that offend those goals, but generally such regulations or prohibitions are only as effective as the statutory sanctions behind them. Unfortunately, Congress must often decide upon penal and remedial schemes without a prior opportunity to evaluate their practical effectiveness. What on paper appears to be an efficient and complete system of enforcement may in fact do little to curb the practices that offend an act's purposes.

Courts, on the other hand, are able to observe a statute in operation and to determine the actual effectiveness of the enforcement mechanism. Recognizing this ability, courts have acknowledged both the propriety and the wisdom of implying private actions to fill the lacunae left by Congress.6

This reasoning suggests that there are two essential elements in a test for implication. First, an implied private action must be consistent with the goals of the act in question. Second, an action should be implied only when the enforcement scheme adopted by Congress is found to be inadequate to attain Congress' goals, and when a private action is thus needed to correct the inadequacy.

The history of the doctrine of implication has been notably discordant. Courts have created private actions for violations of many types of federal statutes, including an act making it a crime to intercept telephone conversations,7 an act designed to assure to every eligible citizen the right to vote,8 and a statute proscribing false and deceptive practices in the solicitation of proxies.9

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7 Communications Act of 1934 § 605, 47 U.S.C. § 605 (1970); see Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).
The test most favored in the early history of implication was a standard much like that used by courts in determining the relationship between statutory violations and the common law of torts: Disregard of a statutory command which damages an intended beneficiary of that statute creates a cause of action in the injured party.\(^{10}\) Because the vast majority of acts are intended to protect a specific group, this early test, if literally applied, would support implication in almost every federal statute. But these statutes often have other goals. Such a test does not consider whether an implied action would disparage potentially conflicting goals,\(^{11}\) nor does it require a court to examine the effectiveness of the existing enforcement scheme and, therefore, the need for private actions.\(^{12}\)

This early standard fell into disfavor during the 1950's when, perhaps because they sensed the unworkable breadth of the test, courts became less willing to imply private actions. Rather than meeting the challenge of formulating a narrower test which would more precisely serve the underlying rationale of implication, some courts fashioned rules of construction which limited the situations in which an implied action could be found consistent with the underlying statute. One lower court, for example, said that if a statute creates "new rights . . . new remedies must be found within the statute."\(^{13}\) Another court stated that if an act primarily benefits the public at large and no equivalent private action exists at common law, implication is inappropriate.\(^{14}\) Still other courts limited implication by narrowly defining the class of a statute's intended beneficiaries\(^{15}\) or by circumscribing the remedies available to a plaintiff in an implied action.\(^{16}\) The Supreme Court itself sought to limit the doctrine in *Montana-Dakota Utilities Co. v. Northwestern Public Service*
Co.\(^\text{17}\) and *T.I.M.E. Inc. v. United States*.\(^\text{18}\) These cases suggest rigid rules for determining the necessity of implied actions, thus significantly qualifying the liberal test of damage to an intended beneficiary.

The Court held in *Montana-Dakota* that where a federal agency is in the first instance entrusted with the enforcement of a statute, but is limited to affording only prospective relief, a court may not imply an action granting retroactive relief, even though primary jurisdiction problems could be largely eliminated by the court's referral to the agency of questions within the agency's expertise.\(^\text{19}\) The *T.I.M.E.* Court grafted still another qualification onto the doctrine of implication. When a statute is divided into parts, each of which is intended to govern the same basic conduct (albeit of different groups or persons), and one part of the act provides an express private remedy for a violation, implication is not available for violation of a part of the act that contains no express private remedy.\(^\text{20}\) In *T.I.M.E.*, motor carriers were thus denied a private action challenging tariff charges in the absence of a specific grant because shippers by rail and water were expressly granted such rights in other parts of the Interstate Commerce Act.\(^\text{21}\)

This panoply of standards and presumptions, although formulated in reaction to an overly broad test for implication, confused the implication process by failing to state a generally applicable test in accordance with the underlying implication theory. Furthermore, the *T.I.M.E.* and *Montana-Dakota* tests are too narrow. They would preclude implication even if a private cause of action in a given situation would be consistent with the statutory goals, and even if the enforcement scheme would be inadequate without it.

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\(^\text{17}\) 341 U.S. 246 (1951).
\(^\text{21}\) 359 U.S. at 470-72.
The tide turned dramatically in favor of implication in 1964 when the Supreme Court decided *J.J. Case Co. v. Borak.* In finding an implied action for a violation of the proxy solicitation rules promulgated pursuant to section 14(a) of the Securities Exchange Act of 1934, the Court held that a private action may be fairly implied when: (1) the plaintiff is within the zone of interest intended to be protected by the statute; (2) the harm is of the type that the statute was intended to forestall; and (3) the penalty is inadequate to effectuate Congress' purpose in passing the statute.

This formulation was dominant for a number of years as the federal courts liberally construed rights of action in many federal statutes. The test does cure one defect in the earlier formulation, which focused solely on the intended beneficiaries of the act in question, by requiring a full investigation of the express enforcement and remedial provisions as a means of assessing the need for private actions. In focusing on the beneficiary, however, a court may imply a remedy when it deems the enforcement scheme inadequate, even though such implication is inconsistent with the multiple and potentially conflicting statutory goals. This test is therefore too broad.

Some federal courts have recently revealed a sense of dissatisfaction with the imprecision of the *Borak* test. But rather than dealing head on with that test's weaknesses, they have chosen to limit implication by way of statutory construction. This has created a situation most notable for its confusion. A court required to make an implication decision has no single reasonable test to apply, but rather is confronted with two conflicting but equally valid lines of precedent—one line seeking to limit

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24 This three-part test is never explicitly stated in the *Borak* opinion. The rule has been extracted from the opinion by later decisions, but it has been treated as the *Borak* test. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967); cases cited note 25 infra. To avoid confusion, and for the sake of consistency, the test will be referred to as the *Borak* test throughout this Comment.
implication, and the other, beneficiary-oriented line favoring implication. This state of affairs is especially undesirable; it invites judges to make decisions based upon their predilections and permits them to justify their results by choosing between the lines of precedent, thus foreclosing all hope of predictability and consistency.

II. RECENT APPROACHES TO IMPLICATION: AMTRAK AND ASH

Two recent cases, National Railroad Passenger Corp. v. National Association of Railroad Passengers27 (Amtrak) and Ash v. Cort,28 have emerged from the inconsistent lines of precedent. These cases are benchmarks in the evolution of the implication doctrine not because they provide a solution to the confusion, but rather because they tend to accentuate it. An examination of the approaches taken in Amtrak and Ash must precede a discussion of the relationship of these two cases to a general theory of implication.

A. The Amtrak Litigation

1. The Court of Appeals

In Amtrak, a national organization of railroad passengers alleged that the discontinuance of certain passenger trains violated the Rail Passenger Service Act of 197029 (the Amtrak Act). The district court, in an unreported opinion, dismissed the organization's suit to enjoin the discontinuance,30 holding that the plaintiff lacked standing to bring the action. This decision was reversed in a lengthy opinion by Judge Skelly Wright.31 Like the district court, the court of appeals decided the case on the basis of standing, but, the court noted, "analyzing the case under the doctrines of . . . private causes of action achieves an identical result."32

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32 Id. at 329.
Although Amtrak is a private-for-profit corporation, the court found it sufficiently "quasi-public" to warrant the use of the standing test developed by the Supreme Court in Association of Data Processing Service Organizations v. Camp (Data Processing) for parties who wish to challenge administrative action. This test consists of three parts: "(1) whether the plaintiff has alleged that he suffered injury in fact, economic or otherwise . . . ; (2) whether the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question . . . ; and (3) whether judicial review has been precluded by the legislature." For two reasons, employing this standing test greatly simplified the solution to the problem whether to imply a private action. As with the early liberal tests for implication, the first two prongs of this test focus on the intended beneficiaries of the act, essentially eliminating the need to look for possibly countervailing goals of the statute. The court found these prongs easily satisfied, as the appellant had alleged that some of its membership would suffer from discontinuance, and as the Amtrak Act clearly was intended to protect railroad passengers. Also, in applying the third prong of the test, the court was able to avail itself of a strong presumption in favor of reviewability.

Having expressed this presumption, the court proceeded to find a legislative intent to permit judicial review in the terms of the Act itself. Section 307 of the Amtrak Act provides that federal district courts shall have jurisdiction upon petition of the Attorney General to grant equitable relief for any action by Amtrak or a member railroad inconsistent with the Act, or, in a labor dispute, upon petition of an employee or his authorized representative. The court rejected the expressio unius est exclusio
"alterius" maxim of statutory construction, which would seem to have been controlling because Congress had specifically granted the right to bring civil actions to a carefully defined group. As the court noted, however, the rule has been limited and, to some extent, discredited by the Supreme Court as being "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . ." The court further noted:

It seems reasonable to us that the express provision of standing for the Attorney General was not an attempt to bar other injured and aggrieved parties from bringing suit, but rather an attempt to authorize the Attorney General to bring suit to enforce what otherwise might be viewed as private rights.

This proposition received the court's support for several reasons. First, because the Attorney General can seek equitable relief for threatened violations, his powers are broader than would be those of a private litigant. In order to assure judicial recognition of these broad powers, therefore, Congress specifically enunciated them. Additionally, said the court, if this section were read to limit the initiation of actions to the Attorney General only, then member railroads and Amtrak would themselves be unable to sue one another for damages caused by a violation of the Act—a result that the court believed was not intended. Regarding the action accorded employees and unions, the court felt that such a specific grant was necessary because "[C]ongress might well have feared that under the Data Processing standing test employees and their representatives would not have been considered members of the class intended to be protected by the legislation . . . ."

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employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

40 Expression of one thing is the exclusion of another.

41 For a general discussion of this maxim and its application to implication, see notes 145-60 infra & accompanying text.

42 475 F.2d at 332 (quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943)).


44 475 F.2d at 333.

45 Id.

46 Id.
In striking contrast with the Supreme Court's ultimate decision, the court of appeals found the legislative history of the Amtrak Act inconclusive at best. Despite the House Interstate and Foreign Commerce Committee's rejection of an amendment to section 307 which would have expressly permitted private actions, and despite the comments of organized labor and the Secretary of Transportation that the section as enacted did not provide private actions, the court could find no positive intent to preclude private actions. Because the rejected amendment never had been debated, the court felt justified in maintaining that "[t]he Committee might well have believed . . . that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties." Finally, the court observed that if Congress had wished to preclude private actions, it easily could have done so by inserting the word "only" before "upon petition of the Attorney General" in the same way that it explicitly denied judicial review under section 202 of the Act.

The court of appeals also found support in the Act's purpose for its decision to permit the association to bring an action. While recognizing the congressional intent to enact a scheme that would allow the expeditious discontinuance of uneconomical passenger trains, the court stressed the primary purpose of revitalizing rail passenger service, that is, preserving currently economical routes and protecting passengers on those routes. The court saw private actions as furthering this goal without sacrificing administrative efficiency, noting that suits under the Act cannot challenge the discontinuance of passenger lines where there is a mere assertion of "public convenience and necessity," as under the old law, but only where the discontinuance violates the specific provisions of the Act. The need for private actions was made even more compelling by the Attorney General's definition of his role under the Act as exclud-

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47 See notes 67-68 infra & accompanying text.
48 475 F.2d at 335.
49 Id. at 334-35.
50 Id. at 335.
51 Id. at 336.
54 475 F.2d at 337; see H.R. Rep. No. 91-1580, supra note 53, at 1-2.
56 475 F.2d at 337-38 n.13.
ing the power "to sue for a construction of the Act or to enjoin a purely technical violation." Finding no inconsistency with the statutory purpose, the court determined that this potential inadequacy of enforcement was sufficient to warrant standing for private litigants, lest those subject to the Act achieve effective immunity in its violation.58

Having determined that the appellants had standing, the court easily dispensed with the problem of implication. Because the Act was intended to protect the interests of railroad passengers, and because those interests were arguably involved in this case, the court adopted the Borak rationale59 and recognized an implied private action.

By deciding Amtrak on the basis of standing, the court was able to use the presumption in favor of reviewability to dispense more easily with factors such as legislative history which, at least in part, argued against implication. Additionally, the standing test, by focusing solely on the plaintiff and his relationship to the statutory purpose, did not require a deeper analysis of those other congressional goals that might not be served by implication.60 This use of the standing test provides at least one explanation for the Supreme Court's dramatic reversal of the court of appeals' decision.61

2. The Supreme Court

The Supreme Court, like the court of appeals, began its opinion in Amtrak with an analysis of the language of section 307 of the Amtrak Act.62 The Court, speaking through Mr. Justice Stewart, found no evidence in this language to support a cause of action in the association. When no such support for a private action can be found, the majority indicated, reliance must be placed on the maxim expressio unius est exclusio alterius absent "clear contrary evidence of legislative intent."63 Unlike the court of appeals,64 the Supreme Court did not cite those cases that recommend that only limited reliance can be placed on the

57 Id. at 338 (quoting Letter from Assistant Attorney General L. Patrick Gray, III, to Congressman John Slack, Nov. 19, 1971).
59 See notes 24-25 supra & accompanying text.
60 The use of standing tests to imply actions is discussed generally at notes 101-21 infra & accompanying text.
63 414 U.S. at 458.
64 See note 42 supra.
maxim;\textsuperscript{65} instead, the Court ignored this earlier criticism and invested the rule with a new vitality. The Court literally said that when Congress has enacted a remedial scheme (which is usually the case), a strong presumption against implication arises which can be rebutted only by Congress' positive indication that it did in fact intend private actions to coexist with the statutory scheme. This approach was thus directly opposed to the lower court's application of a presumption favoring reviewability and, ultimately, implication.\textsuperscript{66} Not surprisingly, the two courts reached opposite results.

Having raised this presumption against implication, the Court searched unsuccessfully for positive evidence of legislative intent to rebut it. Rather than minimizing the importance of the legislative history, the majority interpreted congressional silence and inaction as positive evidence of an intent to deny a private remedy, completely rejecting the court of appeals' analysis that such evidence was inconclusive: \textsuperscript{67} "Although the transcript of the House Committee hearings does not indicate that any Committee member voiced explicit affirmative agreement with this interpretation, it is surely most unlikely that the members of the Committee would have stood mute if they had disagreed with it." \textsuperscript{68} If the lack of positive evidence of an intent to permit private actions, despite a silent record, were sufficient in itself to defeat an implied action there would be little life left in the implication doctrine.

Having found that the language of the statute and the legislative history weighed heavily against an implied action, the Court went on to read the purpose of the Act in the same light. Stressing the Act's goal of creating an expeditious and efficient process to eliminate uneconomical passenger routes, the majority concluded that limiting the right of action to the Attorney General would most effectively promote that purpose.\textsuperscript{69} The Court pointed out that a private litigant had no recourse to the courts under prior law if the Interstate Commerce Commission determined that it was unnecessary to conduct an investigation prior to a discontinuance under section 13a of the Interstate Commerce Act.\textsuperscript{70} Certainly, the Court reasoned, Congress could not

\textsuperscript{65} See notes 40-43 supra & accompanying text.
\textsuperscript{66} See note 38 supra & accompanying text.
\textsuperscript{67} See notes 48-49 supra & accompanying text.
\textsuperscript{68} 414 U.S. at 460.
\textsuperscript{69} See text accompanying note 54 supra.
\textsuperscript{70} 414 U.S. at 462 n.9.
have intended to make the streamlined procedures under the Amtrak Act less efficient in this respect than the cumbersome administrative procedures it intended to replace.

Further, the Court suggested that Congress had provided adequate protection for rail passengers. The opinion quoted the conclusion of a House of Representatives report that "a rational reduction of present service will be required in order to save any passenger service." The Court later stated, "In light of the substantial scrutiny to which Amtrak operations are subject by both Congress and the Executive, Congress could quite rationally suppose that this remedy will effectively prevent and correct any Amtrak breaches of obligations under the Act." In these two statements the Court appears to have said that although a private litigant may indeed feel harmed by a discontinuance and therefore desire a private action, in reality such an action would jeopardize the continued availability of any rail passenger service by prolonging the lifetime of uneconomical routes through long court battles. Thus, it may be said that Congress substituted as one of its purposes the overall public interest in passenger service for the private interest in a single route when it designated the Attorney General, with his national perspective, as the enforcement agent. Denying an implied action under this analysis would do more than serve the administrative efficiency goal; it would also advance the ultimate purpose of the Act to protect all railroad passengers through the creation of a viable, profitable network of rail passenger service.

By looking no further than the Act itself, however, the Court never determined whether, in retrospect, the statutory structure as implemented was sufficient to protect the interests of rail passengers. The majority did not mention the Attorney General's failure, up to that time, to bring suit against either Amtrak or a member railroad because of his limited view of his role in the Act's enforcement.

In contrast, Mr. Justice Douglas relied heavily on this apparent inadequacy of enforcement in his dissent. He dismissed the majority's statutory construction by saying, "The most I think that can be drawn from the words of 45 U.S.C. § 547(a) and the legislative history is that Congress wanted to make sure that some federal agency had some oversight over the public activity

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71 414 U.S. at 461 (quoting H.R. Rep. No. 91-1580, supra note 53, at 3.)
72 414 U.S. at 464 (footnote omitted).
73 The relationship of adequacy of enforcement to implication is discussed generally at notes 204-63 infra & accompanying text.
of this private-for-profit corporation."74 He supported this reading by quoting from Allen v. State Board of Elections,75 in which the Court found a similar grant to the Attorney General of authority to bring suit not preclusive of private actions. His fear that a denial of private actions would "make nonreviewable most of Amtrak's decisions"76 convinced him of the need for implication. If the Attorney General is unwilling or unable to act when a violation of the statute is alleged, reasoned Mr. Justice Douglas, the courts have an obligation to allow private parties to take up the slack. By using the Borak test,77 he found this inadequacy sufficient to justify implication in this case in light of his view of the purpose of the Act—"to protect the people who ride the trains."78

In rejecting both the Data Processing standing approach of the court of appeals and the Borak beneficiary approach of Mr. Justice Douglas, the Amtrak majority appears to have limited severely the liberal trend of the 1960's toward implication, and indirectly may have rejected it entirely. The apparent presumption against implication raised in the Court's opinion, if literally applied by the lower courts, is almost irrebuttable, because a positive legislative intent to imply private actions will rarely be found. How the lower courts will interpret this decision remains speculative. But despite the apparent narrowness of the Amtrak opinion, at least one court of appeals was able to avoid its harshness and continue along the line of precedent relying on Borak.

B. Ash v. Cort

The litigation in Ash v. Cort79 began on the eve of the 1972 presidential election. An owner of fifty shares of Bethlehem Steel Corporation common stock filed a derivative action against the corporation's directors to enjoin the publication of an allegedly partisan campaign advertisement and to recover advertising expenditures80 allegedly made in violation of the Federal Corrupt Practices Act as amended by the Federal Election Cam-

74 414 U.S. at 468.
76 414 U.S. at 471. Even if implication were permitted, however, many decisions of Amtrak would remain unreviewable by the terms of the Act itself. See, e.g., Amtrak Act § 202, 45 U.S.C. § 522 (1970) (decision as to "basic system" not reviewable).
77 See notes 24-25 supra & accompanying text.
78 414 U.S. at 471.
80 The request for injunctive relief was mooted by the passing of the 1972 election.
The gravamen of the complaint was that an advertisement sponsored by Bethlehem and containing excerpts from a speech by Stewart S. Cort, Chairman of the Board of Bethlehem, amounted to a partisan expenditure sufficient to violate the Act, which by its terms provides only criminal sanctions. The district court, deciding the case before Amtrak had been handed down, had no difficulty denying an implied action; the court held that shareholders were only secondary beneficiaries of the Act and not, therefore, entitled to an action absent an express indication of legislative intent so to provide.

On appeal, the oral argument before the Third Circuit panel occurred only eight days after the Supreme Court's Amtrak decision had been filed, but that case was argued before the court and was considered in its decision. Despite the forceful directive of the Supreme Court, Chief Judge Seitz easily sidestepped Amtrak's negative effect on the implication doctrine. Writing for a majority of the panel, he cited Amtrak merely as a case "where the legislature clearly has indicated its intent to ... withhold a cause of action ..." This analysis is only partially correct because it ignores the apparent presumption against implication raised by the use of expressio unius. The court of appeals justified its conclusion by holding that although expressio unius was properly applied in Amtrak, it was not available in this suit:

For the Amtrak rule to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. . . . In the instant case no express civil action is provided to remedy plaintiff's, or any other, alleged injury. Only a criminal sanction is expressly provided for violation of § 610. Courts have consistently held that statutes providing for criminal liability do not preclude assertion of private causes of action.

By eliminating the rationale that supported the presumption against implication in Amtrak, the court of appeals felt justified in

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83 Ash was argued on January 17, 1974. 496 F.2d at 416. Amtrak was decided on January 9, 1974. 414 U.S. at 453.
85 496 F.2d at 421.
86 See notes 63-66 supra & accompanying text.
eliminating the presumption itself. In doing so, however, the Ash court did not consider whether the granting of an implied action might violate the spirit of the Amtrak opinion.\footnote{88} 88

Having thus disposed of Amtrak, the court relied on the Borak rationale\footnote{89} 89 to justify implication. The court found that the Act was intended to protect the individual voter by assuring his ability to elect a government responsive to his wishes and not to those of big business; the plaintiff, as a voting citizen, was an intended beneficiary of the Act. But the court went on to state, "As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors."\footnote{90} 90 The expenditure of corporate funds in violation of the Act, the court held, would harm the plaintiff in the ways intended to be prevented by the statute. The court rejected the contention that because the class to be protected by the Act was the entire American public, and therefore indefinable, no private action could be implied. For this proposition the court relied on Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,\footnote{91} 91 in which a private right of action was implied for injuries suffered by an individual as a result of a violation of the fourth amendment, even though that amendment was intended to protect the whole citizenry. The court also found a shareholder's derivative action proper, despite the secondary nature of the protection afforded this class. The secondary protection was considered to be important protection nonetheless and not preclusive of implication\footnote{92} 92—notwithstanding the opinion of the district court.\footnote{93} 93

Having satisfied the first two prongs of the Borak test by finding that the plaintiff was within the zone of interest and that the harm caused was of the type intended to be prevented by the Act, the court proceeded to find private action consistent with the purpose of the Act. Two main considerations supported this holding. First, the covert nature of unlawful contributions generally makes their detection difficult, hindering effective governmental prosecution and limiting the adequacy of the criminal sanction.\footnote{94} 94 A shareholder with an economic stake in the action

\footnotesize{\textsuperscript{88} 496 F.2d at 428 (Aldisert, J., dissenting).  
\textsuperscript{89} See notes 22-26 supra & accompanying text.  
\textsuperscript{90} 496 F.2d at 422.  
\textsuperscript{91} 403 U.S. 388 (1971).  
\textsuperscript{92} 496 F.2d at 423.  
\textsuperscript{94} 496 F.2d at 423.}
could provide a vigilant supplement to enforcement by the Justice Department. Secondly, and this seems to be the real reason behind the court's action, the same Executive who allegedly had benefited from the expenditures in question was in charge of the Act's enforcement through his duly appointed Attorney General. While not deciding that a conflict of interest actually existed, the court did say that the potential for partisan enforcement was sufficient to warrant implication.

Judge Aldisert, convinced that the majority had violated the clear command of Amtrak, vehemently dissented. He read the literal language of the Amtrak majority to "consciously and deliberately appl[y] the brakes" to the use of implication by changing the test from the liberal Borak rule to the more conservative rule that Congress' provision of an explicit enforcement scheme creates a presumption against implication that can be rebutted only by clear evidence of legislative intent to the contrary. He viewed Congress' failure expressly to include a private action in the Federal Election Campaign Act of 1971 as a significant indication that Congress did not intend private actions to exist under this Act. Finding no positive evidence to rebut the presumption, Judge Aldisert determined that section 610 could not support a private action, derivative or otherwise.

Judge Aldisert obviously welcomed the narrow construction of implication announced by the Amtrak majority: "The Supreme Court's entreaty for restraint in Amtrak is justified. Otherwise a reasoned case for an implied private right of action could be constructed within the framework of every federal criminal statute simply by showing that plaintiff is 'within the class Congress sought to protect by prohibiting' certain conduct." Although this may be an accurate observation, the particular formulation advocated by Amtrak, as interpreted by Judge Aldisert, may go too far in the other direction. If the presumption against implication is raised at the outset, the whole doctrine may lose its vitality.

The doctrine of implication has reached an important crossroad; federal courts deciding whether to imply are now faced with three choices: (1) construing Amtrak strictly, as did Judge Aldisert, to limit implication severely; (2) attempting to narrow

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95 Id.
96 Id. at n.7.
97 Id. at 429.
98 Id. at 427.
99 Id. at 428.
or avoid Amtrak and to continue to apply the earlier, more liberal precedents which in effect implied a damage action whenever the violation of a statute harmed an intended beneficiary of that statute; or (3) attempting to use Amtrak to arrive at workable standards of implication which avoid the extreme positions represented by the Ash dissent and the beneficiary-oriented precedents. Clearly the third course would do the most to draw rationality and consistency from the current confusion of implication. Through an analysis of the elements that courts traditionally have employed in making the implication decision, the remainder of this Comment will attempt to sift out those considerations that are truly central to implication.

III. STANDING AND ITS RELATION TO THE IMPLICATION DECISION

A. The Rationale of the Standing Requirement

The court of appeals in Amtrak remarked that "[t]he fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law." This is so principally because courts have confused the elements of these doctrines.

In the determination of standing, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." The rationale behind this rule is to assure that the claim as presented to the court constitutes a "case or controversy" within the meaning of Article III of the Constitution. Where a statute provides the remedy sought by the plaintiff for an alleged violation, the question of standing becomes merely whether the plaintiff has alleged injury in fact or sufficient threat of actual injury to ensure that the issues will be fully elucidated—that is, whether the plaintiff has "a personal stake in the outcome of the controversy." Federal courts have held, however, that when the plaintiff is asserting a challenge to an action for which he has no clear statutory author-

100 See text accompanying notes 10-12 supra.
104 Id. at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
ity, more than just an allegation of injury is required to confer standing. Because the plaintiff in an implication case is asserting the right to a remedy beyond the ones granted by the statute in question, it might appear initially that the decision should be based on the doctrine of standing; but a closer analysis of the relationship of standing and implication reveals the distinctiveness of the two doctrines.

The standing doctrine is used frequently where a plaintiff is challenging the authority of a particular action by the legislative or executive branches on the ground that such an action allegedly violates the constitutional or statutory rights of the plaintiff. The question of standing focuses on whether the challenging party is the proper one. The implication question, on the other hand, arises when a party, relying upon a statute, seeks affirmative recovery for harm caused by the violation of the statute. Certainly the standing doctrine is important for the purpose of assuring that the party seeking implication is the proper party to do so, but the essential inquiry in the implication context is whether the action itself is a proper action. The significance of this difference will emerge more clearly upon examination of the Data Processing test and its use by the Amtrak court of appeals.

In Association of Data Processing Service Organizations, Inc. v. Camp, the plaintiff challenged a ruling by the Comptroller of the Currency that allowed banks to provide data processing services. The ruling allegedly violated section 4 of the Bank Service Corporation Act, which states that banks may provide only banking services. This case was not one in which the plaintiff was asking the court to create a private right of action; it was brought under the authority of the Administrative Procedure Act, which allows private parties to challenge administrative rulings when allegedly aggrieved by such action. Because the Court recognized its own limited ability to judge the interpretation given a statute by the executive charged with the statute's enforcement

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108 See text accompanying note 35 supra.
and application, it laid down a three-part test: that plaintiff allege injury in fact, that he be within the "zone of interests" created by the statute, and also that the legislature not have precluded judicial review.112 The Court was not attempting to solve an implication question; rather, it was attempting to find a way to screen potential plaintiffs early in the suit so that challenges to administrative actions would be brought by plaintiffs with sufficient interest to ensure a complete, adversary presentation of the issues.

The prongs of the Data Processing test may be viewed as requiring only a limited inquiry into the purpose of a statute to satisfy a court that the statute is intended to protect the plaintiff and that the administrative action is reviewable. In determining standing, a court need not delve into the broader goals that the act is intended to serve; that inquiry comes with an adjudication on the merits.113 It is precisely this failure to consider the broad statutory goals that renders the Data Processing test untenable as a basis for implication.

B. Standing in the Implication Context

If the Data Processing test were applied to implication cases, the courts' investigation would be at once too broad and too narrow. The Third Circuit panel in Amtrak had no difficulty in concluding that an organization of railroad passengers was clearly within the relevant zone of interest because the statute was intended to revitalize and protect the continued existence of rail passenger service,114 thus satisfying the second prong of the Data Processing test. Although this is undoubtedly an accurate assessment, in the context of the implication decision it too broadly favors the granting of a cause of action. If a court were narrowly to apply the first and third prongs of this test (allegation of injury in fact and judicial reviewability), the "zone of interest" inquiry would provide the sole opportunity to consider the overall purpose of the act in question.115 Because the second prong of the test is phrased purely in terms of intended ben-

112 See note 25 supra & accompanying text.
114 475 F.2d at 331 (quoting the declaration of purpose in the Rail Passenger Service Act of 1970 (Amtrak Act) § 101, 45 U.S.C. § 501 (1970)).
115 Indeed it seems likely that the first and third prongs of the Data Processing test would be viewed strictly. The question of reviewability obviously requires an investigation of the statutory purpose only as it relates to reviewability and the inquiry into harm is itself extraneous to the statutory analysis.
eficiaries, it is unlikely that a court's analysis of statutory purpose would extend beyond that consideration.\textsuperscript{116}

Even if a court is willing to consider the broader purposes of an act in its analysis of reviewability, as did the \textit{Amtrak} court of appeals,\textsuperscript{117} such an analysis is still likely to be heavily influenced by the concern for intended beneficiaries: "When Congress seeks to protect a group such as railroad passengers, we may reasonably imply, absent express and definite indications to the contrary, that Congress intended this group to have judicial relief to achieve the protection Congress intended."\textsuperscript{118} And quite apart from the effect of the intended beneficiary concept, a court is yet faced with a strong presumption in favor of reviewability.\textsuperscript{119} Although this presumption may be appropriate for a liberal standing test, it serves only to obscure the underlying rationale in the implication area.\textsuperscript{120} Judicial review and implication are two distinct questions and should remain so.\textsuperscript{121}

A determination that an implied action is both consistent with a statute's purposes and needed to correct the inadequacy of Congress' enforcement scheme for effectuating the statute's goals cannot be satisfactorily based on a test that is concerned primarily with the attributes of a particular plaintiff's allegations. Although it is quite possible that a plaintiff seeking to imply an action will fail to meet the standing test, that decision must be recognized as different from and preliminary to an implication decision.

\textbf{IV. THE IMPLICATION DECISION: CONSISTENCY AND NECESSITY}

\textbf{A. Consistency: Ascertaining Legislative Intent}

Once the question of standing is resolved, courts can proceed to deal with the complexities of the implication decision itself. The first inquiry in resolving this problem involves a search for legislative intent. Because implication is invariably beyond the explicit scope of the congressional enactment, courts

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\textsuperscript{116} See text accompanying note 35 \textit{supra}.
\textsuperscript{117} 475 F.2d at 336-38.
\textsuperscript{118} Id. at 340.
\textsuperscript{119} Id. at 331 (citing \textit{Barlow v. Collins,} 397 U.S. 159, 166 (1970)).
\textsuperscript{120} See notes 62-66 \textit{supra} & accompanying text.
\textsuperscript{121} If the literal language of the Supreme Court in \textit{Amtrak} is followed, however, the presumption may go the other way.
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are careful to insist that an implied action be consistent with the statutory scheme lest the courts usurp legislative power. But implication itself is a form of judicial legislation, inasmuch as it cannot accurately be said that Congress has created the action permitted by the courts; nevertheless, courts have recognized the need for implied private actions.

Perhaps this tension between the limitations of a federal court's power and the perceived need for implied actions accounts for the somewhat schizophrenic attitude toward implication among the courts. Whatever the cause, this schizophrenia appears most frequently in the analysis of relevant legislative intent. Some courts say the search for intent is an attempt to divine a specific desire on the part of Congress to permit or preclude private actions;\(^\text{122}\) other courts claim that the purpose of this analysis is to determine what Congress' overall goals were in enacting the statute and whether implication comports with those goals.\(^\text{123}\) Occasionally these competing formulations appear in the same opinion.\(^\text{124}\) Whichever approach is taken, the inquiry basically involves analysis of three component parts: (1) legislative history; (2) statutory construction; and (3) statutory purpose.

1. Legislative History

The search for relevant legislative history to determine whether Congress contemplated resort to private actions without specifically providing for such actions in the statute has proven futile. Given the nature of implication, this is not surprising. If Congress had considered the matter of private actions to such an extent that it appeared in the history of the statute, this consideration would probably be reflected in the statute itself by a declaration that stated remedies are exclusive or that private actions do or do not exist. The question of implication would then never arise. Commentators have found this search into legislative history for specific intent to imply to be of "little assistance."\(^\text{125}\) One author has said that "the process of deciding whether to imply a cause of action is more likely to be hindered


\(^{125}\) 61 Harv. L. Rev. 858, 860 (1948).
In addition to being futile, the scouring of reports and hearings is irrelevant to the essential criteria and underlying rationale of an implication test. Insofar as the central rationale for the implication doctrine is that it serves to fill significant gaps in the enforcement scheme created by Congress, it would be illogical to expect Congress to have contemplated the existence of those lacunae at a time when it thought it was creating an enforcement system extensive enough to ensure an act's vitality. Implying a private cause of action assumes that Congress did not perceive the need for this remedy; efforts to discover such perceptions are therefore misdirected.

For the most part, interpretation of legislative history in this narrow context has been an exercise in interpreting congressional silence—a questionable enterprise at best. Some courts have held that a silent legislative history indicates that private actions were not intended, while other courts have viewed silence merely as an indication that Congress failed to consider the issue and not as a bar to implication. If a test for implication that fully considers the broader issues is desired, then the second approach is preferable because it avoids the digressions that doom the implication process from the start. Indeed, the logic of the assertion that silence precludes implication is no more convincing than the assertion that "[i]f Congress wishes to preclude judicial consideration of issues concerning the implication of a private action under a statute, it needs only to say so expressly in the act itself or in the legislative record."

Occasionally, though the statute itself remains silent, the legislative history deals explicitly with implication through its converse—exclusivity. This does not usually take the form of a clear directive, but rather provides an indication that the question of the existence of private actions received some

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126 Note, supra note 6, at 291.
127 See text accompanying note 6 supra.
129 Stewart v. Travelers Corp., 503 F.2d 108, 111 n.7 (9th Cir. 1974).
consideration.\textsuperscript{131} This was the situation in \textit{Amtrak}. Confronted with the same legislative record, however, the court of appeals and the Supreme Court arrived at strikingly different conclusions.\textsuperscript{132} This disparity indicates the unreliability of legislative history that is less than unequivocal on the question of private actions. Neither court necessarily erred in the weight it gave to the testimony or to the committee's failure to adopt an amendment permitting private actions, but in devoting so much energy to an analysis of these isolated statements and actions, both courts risked losing sight of the more vital criteria of implication. Although neither court seems to have ended its analysis here, because both considered the broader question of statutory purpose, a court of lesser stature might be tempted to resolve the whole implication issue on tidbits of legislative history.\textsuperscript{133}

The disparity in interpretation in \textit{Amtrak} also illustrates that inconclusive legislative history can be used to support almost any position. If a court with a particular disposition toward the implication question elevates legislative history to a conclusive level, the court may arrive at a judgment in agreement with its view of implication without considering the more important questions of statutory consistency and need.\textsuperscript{134} The warning of the \textit{Amtrak} court of appeals is well taken: "Courts should avoid delving into 'legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'"\textsuperscript{135}

This is not to say that the legislative record does not have a function in the implication process. Indeed, it is of great significance, but this significance stems from its value as a tool in determining the overall purpose of the act in question—one of the crucial elements of the implication decision. The majority and dissenting opinions in \textit{Ash} demonstrate the contrast between this

\textsuperscript{131} This is so because if the legislative history is unequivocal in its denial of private actions, the statute will probably reflect this firm stance.

\textsuperscript{132} See text accompanying notes 47-52 & 67-68 supra.

\textsuperscript{133} Cf. \textit{Ash} v. Cort, 496 F.2d 416, 428 (3d Cir.) (Aldisert, J., dissenting), cert. granted, 95 S. Ct. 302 (1974).

\textsuperscript{134} The Supreme Court almost committed this error in \textit{Amtrak}. By attributing substantial weight to the legislative history against implication, however, the Court was able to avoid a clash with the \textit{Borak} rationale. But the Court enunciated a standard which could severely limit the \textit{Borak} test. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 457 (1974).

positive use of legislative history and the dubious use outlined above. The court of appeals majority analyzed the remarks of various Congressmen to determine whom Congress intended to protect and why this protection was considered important. In doing so, the court progressed toward a logical development of the purpose of the Act and a rational decision on the question of implication. In contrast, Judge Aldisert concluded that "the Congressional history is devoid of any reference to a private civil remedy." This short-sighted view of legislative history led the judge to the very "deduction from events of wholly ambiguous significance" warned against by the court of appeals in Amtrak.

2. Statutory Construction

The second area of inquiry in divining the purpose behind a statute involves a study of the statutory language itself. As with legislative history, the nature of implication is such that courts should not expect to find specific, positive indications that Congress intended the remedies provided to be exclusive. Occasionally a statute states that the remedies provided are exclusive or indicates clearly that private actions are not available by denying the courts jurisdiction. Even when evidence of exclusivity is fairly strong, however, some courts have looked beyond the enforcement scheme itself to decide whether implication would serve the overall goals of the act.

When exclusivity is not clearly indicated, the federal courts are torn between conflicting positions. Certainly it must be said that the primary responsibility for enacting an enforcement system rests with Congress, and courts are loath to invade this area of legislative prerogative. At least one court has determined that when a federal statute creates new rights not existing at common law, the only available remedies are those found within the statute itself. Other cases have held that implication is inap-

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137 See 496 F.2d at 428.

138 See text accompanying note 135 supra.


propriate unless Congress has created a right without a corresponding remedy or a right with a remedy so inadequate that it must have intended private enforcement.\footnote{See generally Taussig v. Wellington Fund, Inc., 313 F.2d 472, 482 (3d Cir. 1963) (Smith, J., dissenting).}

In contrast to these somewhat extreme lines of reasoning is the position that recognizes the deference to be paid to the congressional formulation but also recognizes the limitations upon Congress imposed by its necessarily limited perspective when enacting legislation. Courts that adopt this position view the enactment of an enforcement scheme by Congress as an expression of a desire to protect fully the rights it has created in the statute. Implication effectuates that desire by providing a remedy needed to accomplish that protection.\footnote{See, e.g., Breitwieser v. KMS Indus., Inc., 467 F.2d 1391, 1392-94 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973).}

As with legislative history, the better approach for courts to take is to recognize that only limited reliance can be placed on congressional silence about exclusivity. Such an approach allows courts to avoid being sidetracked from a full analysis of the statutory purpose.

Some courts have not been so willing to accord a limited role to statutory construction and instead have created a set of rules that tends to enhance the significance of the express remedial provisions of a statute to the detriment of implication. Perhaps the most heavily criticized and yet most enduring of these rules is the maxim \textit{expressio unius est exclusio alterius}.\footnote{See, e.g., Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Ash v. Cort, 496 F.2d 416 (3d Cir.), cert. granted, 95 S. Ct. 302 (1974).} The exact scope of the rule has troubled courts for many years. On the one hand, some courts give it the broadest possible construction by saying that it may be invoked when any scheme of enforcement is specifically provided.\footnote{See generally National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); Ash v. Cort, 496 F.2d 416, 428 (3d Cir.) (Aldisert, J., dissenting), cert. granted, 95 S. Ct. 302 (1974); People for Environmental Progress v. Leisz, 373 F. Supp. 589, 591-92 (C.D. Cal. 1974).} This formulation, if carried to its logical conclusion, would eliminate implication because almost every federal statute contains some specific enforcement provisions. In contrast to this broad view are those cases that apply the maxim only to statutes containing a remedy similar to that sought by the plaintiff but specifically granted only to another class of plaintiffs. As the \textit{Ash} court said: "For the \textit{Amtrak} rule [relying on
to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. . . . In the instant case no express civil action is provided to remedy plaintiff's, or any other, alleged injury.147 Under this formulation, statutes containing only criminal penalties would not be subject to the maxim, thus leaving room for implication.148 Whatever restrictions are placed on the expressio unius rule, it remains subject to criticism by courts149 and commentators.150 As one court has said, in a context unrelated to implication:

The doctrine . . . is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman.151 This criticism is particularly relevant in the context of implication, where private remedies may be justified because at the time of enactment Congress was unable to foresee the need for such remedies. Expressio unius destroys this rationale by attributing to Congress an unrealistic omniscience.

A maxim that is relied upon to mean so many different things in effect means very little, and courts should eliminate it entirely to render the implication process reasonable. The reliance on the rule by the Supreme Court in Amtrak,152 however, has apparently invested the rule with a new vitality. Courts may therefore feel constrained to follow the maxim restrictively in future implication cases. Three possible alternatives may be suggested. The first, pointed out by Judge Aldisert in his Ash dissent, would be the least desirable because it would effectively end implication: allow the maxim its broadest application to raise an

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152 See notes 62-66 supra & accompanying text.
almost irrebuttable presumption against implication. Even the Amtrak Court did not suggest that it intended to overrule the large body of precedent which has recognized the value and propriety of the implication doctrine.

The second alternative is that taken by the Ash majority, described above. The disadvantage of this approach is that in cases involving statutes that provide the remedy sought by the plaintiff, but for another class of plaintiffs, a court may feel unable to avoid the maxim, thus thwarting a proper investigation of the appropriateness of implication.

The third approach to the problem is suggested by the Court of Appeals for the Ninth Circuit in Stewart v. Travelers Corp. In implying a private cause of action for a violation of the Consumer Credit Protection Act, which forbids the discharge of an employee because of wage garnishment for one indebtedness, the court distinguished cases employing expressio unius to preclude implication, and added that “the utilization of the expressio unius rule to construe congressional intent in each case was but one argument supporting the court's holding.” This suggests that courts do not use the maxim to arrive at the implication decision, but rather employ expressio unius merely to support their conclusion after having decided on other grounds that implication is not appropriate.

A comparison of the Supreme Court's opinion in Amtrak with its decision in Allen v. State Board of Elections provides additional support for the proposition that courts use expressio unius as a makeweight. In Allen, the Court was confronted with a remedial scheme under the Voting Rights Act of 1965 which resembled that established under the Amtrak Act, whereby the Attorney General was authorized to bring civil suits to enforce the Act. The Court found that the Act's purpose was to make the guarantees of the fifteenth amendment a reality for all citizens and that the achievement of the Act's goals would be "severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney

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153 See notes 147-48 supra & accompanying text.
154 503 F.2d 108 (9th Cir. 1974).
156 Id. § 1674(a).
157 503 F.2d at 111 n.8.
160 Id. § 1973j(d) (1970).
General." The court implied a private cause of action and found no need to discuss expressio unius. The Amtrak court, on the other hand, found no need to discuss Allen. It may well be that expressio unius was not central to the Amtrak decision, but simply buttressed the Court's view that implication under the Amtrak Act would interfere with the statutory purpose. If courts would accept even this characterization of expressio unius, they could better consider the implication issue on its own terms.

Another technique of statutory construction which fits under the expressio unius heading has developed from the Supreme Court's opinion in T.I.M.E. Inc. v. United States. There the Court refused to imply a cause of action under section 216 of the Motor Carrier Act, which requires motor carriers to charge reasonable rates and declares unreasonable rates unlawful, but which provides no damage remedy to a shipper once unlawful rates have been assessed and paid. Part of the Court's argument for refusing a damage action to an injured shipper was that those parts of the Interstate Commerce Act that apply to railroads (Part I) and to water carriers (Part III) establish a similar duty to charge reasonable tariffs but provide express damage actions to the shipper injured by a violation of this duty. Because all three parts of the Act were so similarly structured on this point, the Court found a congressional intent to withhold the damage remedy from shippers by truck.

It must be stressed that the Court in T.I.M.E. was not trying to circumvent an analysis of the Act's purpose by establishing a convenient rule of statutory construction; rather, it was using statutory construction properly as an aid in divining that purpose. Some judges, however, have decided that T.I.M.E. stands for the proposition that implication is unavailable when any section of an act other than the one under which plaintiff has brought suit provides an express private action. This interpretation suffers all the weaknesses of the expressio unius maxim. First, as the Ash court of appeals stated, it is often mere

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161 393 U.S. at 556.
164 359 U.S. at 470-71.
165 This becomes more apparent in a later decision by the Supreme Court in which an action was implied under this section. Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962); see notes 211-16 infra & accompanying text.
coincidence that two particular sections are joined in one statute, making it totally inappropriate to compare their respective remedial provisions. Second, special considerations not applicable to the relevant section may have caused Congress to provide an express civil remedy in another section of the act.

This has been the interpretation of the Securities Exchange Act of 1934, which provides explicitly for private rights of action in some sections, but nevertheless has been held to support implied actions under other sections. As one commentator has said, those sections of the Act that provide expressly for civil liability

establish special rules of damages, rules affecting burden of proof, and statutes of limitations. They may merely reflect an intention to modify the remedies which might otherwise be implied. Failure expressly to authorize liability in other sections may therefore indicate only that Congress did not intend to qualify the liability arising from their violation.

For these reasons, expressio unius as a supposed rule of statutory construction should be firmly rejected, not only because it raises questionable presumptions which hamper the ability of courts to decide the implication question rationally, but also because the doctrinal underpinnings of the rule are dubious at best.

Just as courts should not use the expressio unius maxim to erect presumptions against implication, neither should they use statutory construction to raise presumptions in favor of implied actions. In his vigorous dissent in T.I.M.E., Mr. Justice Black, joined by three of his brethren, suggested that the existence of a saving clause, which preserves preexisting remedies not inconsistent with the Act, might support a decision to imply a federal cause of action in that case. Such an approach is questionable because a saving clause, as its name suggests, does not purport to

167 See Ash v. Cort, 496 F.2d 416, 421 n.4 (3d Cir.), cert. granted, 95 S. Ct. 302 (1974); Respondent's Brief in Opposition to Certiorari at 7-8, Ash v. Cort, id.
171 61 Harv. L. Rev. 858, 861 (1948).
create new remedies. Only two conclusions may be drawn from the existence of a saving clause: First, the clause applies only to preexisting remedies, and second, it applies only to those remedies that are not inconsistent with the act.\(^{174}\)

If saving clauses were found to be germane to implication, courts would still have to determine whether implied actions were consistent with a particular statute. In essence, a court would, in part, be doing what it should do when it makes the implication decision. Despite the parallelism, however, the two standards may not involve exactly the same considerations. It is probably the wiser course to keep the tests separate, as courts have done for the most part, in order to avoid the kind of confusion that has already resulted from multiple tests for implication. In addition, even with an inquiry into statutory consistency, reliance upon a saving clause for implication would ignore the question whether a particular private action were needed in order to correct inadequacy in the provided enforcement scheme.

As far as implication is concerned, the most that can be said for the existence of a saving clause is that it evinces a congressional view that a private action is not necessarily inconsistent with the act in question.\(^{175}\) Although this does not ultimately decide the issue of implication, it may reassure some courts of their power to imply and assuage any feelings that they are usurping a legislative function. Even this use of such clauses demands a cautionary note, however, because if courts express their dependency on this as a justification for implication, they may create a presumption that in statutes without saving clauses, implication is inappropriate—just the type of presumption that should be avoided in this context.

Like legislative history,\(^{176}\) statutory construction does play an important role in the implication process, but that role is not one of establishing presumptions which divert a court from the underlying rationale of implication. A court asked to imply a private action should look to the whole act in order to determine Congress' purpose and not merely to the sections involving remedies and enforcement.

\(\text{\cite{174} See generally O'Neil, Public Regulation and Private Rights of Action, 52 Calif. L. Rev. 231, 247-48 & n.70 (1964). The article presents a good discussion of the problem of survival of previously existing remedies, a question closely related to implication.}\)

\(\text{\cite{175} 61 Harv. L. Rev. 858, 864 (1948).}\)

\(\text{\cite{176} See notes 136-38 supra & accompanying text.}\)
3. Statutory Purpose

Although the search for statutory purpose in order to determine congressional intent is the most important process in making the implication decision, it is the least capable of definition. Perhaps the necessary elements of this procedure can best be illustrated by first determining what the objects of this investigation are not.

In the first place, a court should not look for evidence of a specific legislative intent to imply a private action. As was pointed out in the discussion of legislative history and statutory construction, this search is unproductive because it ignores the underlying implication rationale that there may well be a need to supplement Congress' enforcement scheme if it has proven inadequate to accomplish the statute's goals. Requiring a search for legislative intent to imply a private action essentially creates a presumption against implication. This presumption led Judge Aldisert to conclude in his Ash dissent "that a discussion of the necessity for destroying the influence over elections which corporations exercise through financial contributions and the recognition that corporate officials have no right to use corporate funds improperly . . . is simply irrelevant to the narrow issue posed by this appeal . . . ." This analysis is incorrect because implication does concern itself with the broad goals of a statute.

By the same token, however, it is no more correct for a court to raise a presumption favoring implication by conducting a limited investigation for a specific intent to imply, concluding in the absence of such specific intent that exclusivity was not intended and then assuming that such non-exclusion itself justifies implication.

An investigation of statutory purpose is not complete merely because a court determines that the plaintiff is within the zone of interest to be protected by the statute. Although this finding should precede the implication of a private action, it is not

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180 See Goodall v. Columbia Ventures, Inc., 374 F. Supp. 1392, 1328-29 (S.D.N.Y. 1974) (Investment Company Act § 17(a), 15 U.S.C. § 80a-17(a) (1970), is intended to protect only those persons with ownership interests in investment companies and not shareholders of a corporation in which an investment company has invested; therefore, such shareholders do not have an implied action).
sufficient to justify implication. That courts might find this determination to be sufficient is the most dangerous legacy of the *Borak* test.\(^{181}\) In that case the Supreme Court found that the broad purpose of the Securities Exchange Act\(^{182}\) in general and section 14(a)\(^{183}\) in particular would support a private action, but the failure of courts subsequently to stress the need for such a finding in applying the *Borak* test renders that test defective.\(^{184}\)

The second prong of the *Borak* test—whether the harm is of the type that the statute was intended to forestall—suggests another question to be answered by an investigation of statutory purpose. This second consideration, although necessary for implication, is not by itself or in combination with the first prong sufficient to justify it. Given that the rationale for implication is the achievement of the goals for which Congress enacted the legislation,\(^{185}\) however, determining whether the alleged harm is of the type to be eliminated goes a long way toward determining what those goals are. But because the prevention of a particular type of harm may be only one goal of a statute, investigation of statutory purpose must go still further.

This is aptly illustrated by the Supreme Court's opinion in *Amtrak*. The Court recognized that the goal of the Amtrak Act is to preserve passenger service, which necessarily means that railroad passengers are the intended beneficiaries of the Act. The discontinuance of a passenger route in violation of the Act thus would be the type of harm to be forestalled by this enactment of unified and detailed procedures for such a discontinuance. The Supreme Court could have ended its analysis for statutory consistency here, in agreement with the *Borak* test.\(^{186}\) The Court went further, however, to recognize a second goal in the Amtrak Act—namely, the replacement of the cumbersome and time-consuming procedures previously in effect for the discontinuance of passenger service with a streamlined process to preserve efficient and viable passenger service.\(^{187}\) The Court held

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181 See notes 24-25 supra & accompanying text.
183 Id. § 78n(a).
185 See text accompanying note 6 supra.
that this goal would be thwarted by implied actions; in addition to prolonging the existence of uneconomical routes,\textsuperscript{188} said the Court, such actions would destroy the unified approach of the Act's procedures because several suits brought in various district courts to enjoin the discontinuance of a single route could result in multifarious decisions.\textsuperscript{189} Although the wisdom of this analysis may be subject to criticism,\textsuperscript{190} it exemplifies the importance of considering not only the harm to be prevented and the persons to be benefited by a given statute, but also all the other reasons which led to the enactment of the statute.

In \textit{Ash} the court of appeals recognized the need to determine "whether any 'collateral' considerations counsel withholding [a private] remedy."\textsuperscript{191} Although, as the court said, "the breadth of § 610's coverage favors enforcement solely by criminal sanctions,"\textsuperscript{192} it "note[d] no countervailing reason for denying private remedies here."\textsuperscript{193} There do seem to be reasons that might counsel against implication, however. The statute itself has been attacked as an unconstitutional limitation upon the freedom of expression guaranteed by the first amendment.\textsuperscript{194} Although the statute has not been declared unconstitutional in the criminal context,\textsuperscript{195} an expansion of the remedies under the Act, which might chill freedom of expression, should be undertaken with the utmost caution.\textsuperscript{196} This is particularly so because in a civil suit burdens of proof and procedural safeguards are less stringent, so that a person who allegedly violates the statute may be held accountable on less than the beyond-a-reasonable-doubt standard. The \textit{Ash} court might have decided that, in addition to desiring to prevent undue influence over elections by corporations, Congress had as a goal the enactment of a statute that would withstand constitutional scrutiny, and, therefore, limited the enforcement of the Act to criminal provisions to ensure sufficient narrowness. Implication would thwart such a goal.

\textsuperscript{188} \textit{Id.} at 463.

\textsuperscript{189} \textit{Id.} at 463-64.


\textsuperscript{191} \textit{Ash v. Cort}, 496 F.2d 416, 423 (3d Cir.), \textit{cert. granted}, 95 S. Ct. 302 (1974).

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.} at 424.


\textsuperscript{195} \textit{See} Pipefitters Local 562 v. United States, 407 U.S. 385 (1972).

This is not to say the result reached by the Third Circuit is necessarily wrong. Had the court fully dealt with this issue, it still might have decided that the support which an implied action would give to the goal of removing corporate influence over elections would offset any negative considerations regarding the goal of constitutionality. This analysis is offered to show the broad range of considerations that a court is obligated to investigate before it determines that an implied action is consistent with the statutory purpose. It is, of course, impossible to list exhaustively the goals that must be considered in determining statutory purpose; because every statute is different in scope and intent, these considerations will vary from case to case.

In addition to determinations of who the intended beneficiaries are and what harm is intended to be prevented, one other consideration is of sufficient importance in the implication process to merit discussion. The major purpose behind enacting an enforcement scheme is to deter those who would otherwise violate the substantive provisions of an act. An implied private remedy usually will further that aim by providing an additional penalty to discourage would-be violators. This is one reason why implication is often a valuable tool, but the analysis cannot end here. Implication may prove to be too effective a tool in some instances; it may subject a party to a penalty much too great in proportion to his culpability. In discussing this potential result in the analogous situation where violations of state statutes are held to constitute negligence per se, Professor Morris stated that "if relatively unimportant wrongs are regarded as sufficient fault to subject defendants to large losses, the results may be tremendous overpunishment which may be less desirable than no civil liability, particularly when it is remembered that there is criminal liability to discourage breaches." When implication produces such a burdensome penalty, it can hardly be said to be consistent with the statutory purpose.

It is necessary for a court to determine why Congress chose a limited remedial scheme before determining whether implica-

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197 See Note, supra note 6, at 291.
199 It may also be said that when implication would advance the enforcement effort beyond the level that the statute contemplates, there can be no showing of need, in that the enforcement scheme is adequate without the implied remedy. It is at this point that the criteria of consistency and need overlap somewhat. See text accompanying notes 204-30 infra.
tion is consistent with that scheme. If it appears to a court that Congress enacted an enforcement system which it thought sufficient at the time of passage, but which has proven ineffective, implication may well be appropriate. But when it appears that Congress intentionally limited the available remedies to accomplish a specific purpose, the scales tip against implication. This consideration influenced the Supreme Court's decision in *T.I.M.E. Inc. v. United States*; the Court noted that the absence of express private remedies in the Motor Carrier Act reflected Congress' desire to shelter the fledgling motor carrier industry from debilitating litigation, thus rendering implication inappropriate. An analysis of statutory purpose, therefore, must include an examination of the goals intended to be served by the statute's express enforcement scheme in order to determine if implication thwarts those goals by providing a remedy which punishes the violator too severely.

The attempt to ascertain statutory purpose, then, demands the close examination of a wide range of elements, the ultimate aim being to determine whether an implied action is consistent with and therefore appropriate to the statutory scheme. In determining whether implication is appropriate, a court must look beyond the injured party and the harm he has allegedly suffered to the multitude of reasons that prompted Congress to structure the act as it did and the various goals that it sought to accomplish. Only after this investigation has been completed is a court properly in a position to balance those aspects that favor implication against those that oppose it. If this balancing favors implication, a court must then be ready to take the next major step in the implication process—determining whether there is a need to supplement Congress' enforcement mechanism.

**B. The Need for an Implied Action: Evaluating the Adequacy of the Enforcement Scheme**

Mr. Justice Harlan has phrased this second major step in the implication process in terms of whether implication is necessary to achieve the goals established by Congress. Determining the

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necessity of a private right of action is peculiarly within the power of the courts because they have the opportunity to witness the effectiveness of the enforcement scheme in operation. It is through this assessment of existing remedies that a court is able to determine if lacunae exist which require filling in order to fulfill an act's purposes. As the Supreme Court said in *Wyandotte Transportation Co. v. United States*, inadequacy is a particularly important reason to imply a private action lest the wrongdoer be able to shift the burden of his violation onto the innocent plaintiff. Although inadequacy is a prerequisite to implication, it is not sufficient to justify it. Only after a court has determined that a right to relief is consistent with the purposes of an act does the question of adequacy arise.

Ironically, when this right has been found, it has generally been assumed that "courts may use any available remedy to make good the wrong done." Once courts have acknowledged their ability to imply actions and have recognized as a justification for that ability the need to provide remedies that Congress did not contemplate, it does not seem surprising that they might end their inquiry and imply a remedy upon finding that implication does not contradict the purposes of an act. The implication of any consistent remedy, however, renders useless the criterion that there be a need for such a remedy to accomplish the act's goals adequately. If Congress designs an enforcement system that proves effective in accomplishing the statutory goals, there is no reason to supplement that system simply because the supplemental remedy is consistent with the statute. The implication rationale puts the courts in the role of aiding Congress in the achievement of its stated aims.

1. Statutory Inadequacy

Perhaps a grasp of what constitutes inadequacy in the enforcement of a statute can best be obtained through a compari-

205 See Note, supra note 6, at 291.
207 Id. at 204.
son of two cases virtually identical except for the question of adequacy—T.I.M.E. Inc. v. United States211 and Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.212 Both cases were brought under section 216 of the Interstate Commerce Act,213 which makes it unlawful for motor carriers to charge unreasonable rates or to ship goods via unreasonably circuitous routes. The Act does not explicitly authorize a damage action by a shipper who has paid an illegally excessive tariff to a carrier.

In T.I.M.E. a damage action was sought by a shipper who had been assessed allegedly excessive rates, but the Supreme Court dismissed the action to recover these past unreasonable charges. It based this decision in part on the fact that the shipper could have applied to the Interstate Commerce Commission before the goods had been shipped for a determination of the reasonableness of the rates to be charged. The plaintiff thus had failed to take advantage of the available enforcement device which might have satisfied his claim.214

In Hewitt-Robins, on the other hand, the Court implied a damage remedy in a suit by a shipper who allegedly suffered excessive costs because the carrier had shipped the goods via an unreasonably circuitous route. The Court justified the result on the ground that without the implied action the plaintiff would be without a remedy, past or present. Although the ICC has primary jurisdiction over routes,215 it would be impossible for a shipper to apply to the Commission for a determination before the goods were shipped because he could not be sure just what route the carrier would choose. Only after the shipment was made could the shipper determine whether a potential cause of action existed.216

212 371 U.S. 84 (1962).
214 359 U.S. at 478-80. The Court did not deal with the issue whether an application to the ICC would have been an adequate remedy in fact. For a discussion of that issue, see notes 231-63 infra & accompanying text. Such a determination was unnecessary to a disposition of the case, however, because the plaintiff's failure to utilize this remedial path prevented him from complaining of its inadequacy.
215 371 U.S. at 87.
216 Id. The Court further stated:
A misrouting claim does not jeopardize the stability of tariffs or of certificated routes, the sole issue being whether the carrier routed the shipment over the cheapest available route, or made a showing of adequate justification for not doing so. Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize "cease and desist" proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial
Adequacy is not necessarily to be measured solely at the time at which suit is brought, nor is it to be measured solely by whether a court can at some point provide the kind of relief requested. In deciding whether a statute provides for sufficient enforcement to prevent a court from implying an action, the court must look to the total statutory scheme. The court must determine whether at another time or in another forum the plaintiff could have secured a remedy which would have prevented or redressed the injury alleged before the court, and whether the lack of a private remedy would matter when viewed in the context of nonremedial enforcement devices. The burden is on the plaintiff to show the court that he has no remedy under the act and that the conduct complained of is not otherwise addressed in the enforcement scheme; this burden cannot be satisfied merely by showing that as of the time of suit he is without an action. He must show that he is without an action because none is provided by the statute and not because he has failed to pursue avenues open to him.

In those cases involving statutes that provide criminal remedies which are strictly enforced, but no corresponding civil remedy for those injured by a violation, more complex adequacy problems arise. The nature of these problems is highlighted by the majority and dissenting opinions in *Breitwieser v. KMS Industries, Inc.* The plaintiffs in this case attempted to bring a wrongful death action based upon a violation of the child labor provisions of the Fair Labor Standards Act, which contains only penal sanctions. In refusing to imply a private action, the majority found the criminal enforcement scheme adequate to punish violations of the Act and thus to deter violative conduct. Judge Wisdom, dissenting, challenged the reasoning of the majority, saying that although the criminal provisions may be sufficient to insure the public interest in the enforcement of

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remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act.

*Id.* at 88.

217 Once the court determines a remedial scheme to be inadequate on its face, it must still look to the implementation of that scheme to see if it is adequate in fact. See notes 231-63 infra & accompanying text.


219 467 F.2d 1391 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973).


221 The plaintiff was also entitled to recover $750 in benefits from the state workmen’s compensation bureau. 467 F.2d at 1394.

222 *Id.* at 1393-94.
the statute's purpose, such criminal sanctions do nothing to compensate the victim of the violation, who is, after all, the intended beneficiary of the Act. He therefore found this enforcement scheme inadequate and implication necessary.

Judge Wisdom's reasoning reflects a rule that has existed for as long as the doctrine of implication itself—"[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." In other words, when a statute is enacted for the protection of a discernible class, it creates rights in that class under civil law even if the only express sanctions are criminal. This rule resembles the common law tort rule that the violation of a criminal statute constitutes negligence per se or evidence of negligence, and so aids an injured party to recover. The development of such a rule in the federal courts might be justified if a federal general common law existed, but if this were so the whole doctrine of implication would be unnecessary because courts could deal with private rights of action through tort law, as state courts do. In the absence of federal general common law, however, we are left with the doctrine of implication. The rule proposed by Judge Wisdom allows a court to make the implication decision without considering the broader rationale. If the rule were employed as stated, a court would need only to determine whether the plaintiff is an intended beneficiary. Although relevant, this consideration is not sufficient to support implication.

Inadequacy must be determined by measuring the difference between the goals of an act and the actual effects. If a statute intended the creation of personal rights, then certainly a purely penal enforcement would be inadequate to achieve its aims. If a statute cannot be said to have intended the granting of personal rights, then implication may not be justified solely be-

\footnotesize{223} Id. at 1394-95.
\footnotesize{225} Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499, 501 (2d Cir. 1956); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).
\footnotesize{226} See, e.g., Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932); Morris, supra note 198.
\footnotesize{227} In fact one federal court has said, "The disregard of the command of a statute is a wrongful act and a tort." Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).
\footnotesize{229} See note 226 supra.
cause the plaintiff has suffered some loss. On the other hand, if Congress' penal scheme has proved a failure in accomplishing the intended effects, the implication of a private remedial action may well be necessary in order to correct that failure. Inadequacy must be defined with respect to the accomplishment of a statute's aims rather than with respect to a bare desire to grant a victim recovery. 230

2. Inadequacy in Fact

The determination whether the enforcement scheme is adequate as implemented is a delicate operation in the search for statutory adequacy; it often involves a judgment whether the governmental unit entrusted with enforcement is performing its obligations satisfactorily. Courts are understandably wary of making such evaluations of the performance of a coequal branch of the federal government charged with interpreting and applying an act after its passage. Resolution of this adequacy issue requires answers to two questions: Why did the executive unit entrusted with enforcement fail to take action? Would the implication of a private action interfere with that unit's ability to offer effective relief in the future?

Sometimes agency or executive department action is not related to the merits of an individual case. A mere lack of resources, for example, may preclude consideration of many cases that deserve attention. In J.I. Case Co. v. Borak 231 the Supreme Court noted that the Securities and Exchange Commission is a busy agency; 232 if an implied right of action were denied, the burden of enforcement on the Commission would be crushing. The Court found, therefore, that a private action would enhance the efficient operation of the Commission and the Act. 233


Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 383, 392 (1971), the granting of an implied damages action for the violation of the fourth amendment by federal narcotics agents stemmed from the Supreme Court's assertion that "citizens of the United States [have] the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority."

To the extent that the constitutional aim was to protect personal rights, and to the extent that the exclusionary rule was inadequate to accomplish the intended protection, a damages remedy which was not inconsistent with the amendment was properly implied. Cf. 53 Texas L. Rev. 168, 170 (1974).


Other instances of inadequate enforcement might be traced to the enforcer’s view that the statute limits the enforcement role, whether or not such is actually the case. In Amtrak, for example, the Attorney General, although specifically granted a right of action to seek “such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat,” believed that he had no authority “to sue for a construction of the Act or to enjoin a purely technical violation,” but only to bring suits “to protect and enhance the legislative purpose.” When the enforcing agency takes a narrow view of its authority, it clearly will fail to treat on its merits a case which is outside the perceived scope of that authority. If a right is provided by the statute, it will therefore go unremedied unless an action is implied in those situations deemed purely “technical violations.”

A third possible reason the enforcement agency might fail to act is lack of enthusiasm for or, even worse, active opposition to the provisions in question. The failure of the Civil Aeronautics Board to take action on a complaint alleging discrimination by an airline apparently prompted one court not only to imply an action but also to award the plaintiff punitive damages. Similarly, in Ash v. Cort, the majority was influenced by the conflict of interest that might have prompted the Justice Department to be less than diligent in prosecuting contribution violations. Because the Attorney General had been appointed by the very official whose election was allegedly facilitated by the challenged expenditures, the court found his motives subject to question.

This speculation into the motive behind agency inaction, if engaged in at all, must be done with utmost care. A mere allegation that such inaction is the result of impropriety should not be sufficient to warrant a finding of inadequacy. If the plaintiff

236 The Supreme Court did not have to address this question because it determined that no private rights existed. See notes 69-72 supra & accompanying text.
239 Id. at 423 & n.7.
wishes to assert such impropriety he should be required to demonstrate it with proper evidence at the implication stage of the litigation. A court cannot wait until the trial on the merits to decide this issue because once an action is implied, the actual reason for the agency inaction becomes immaterial. When courts begin to imply causes of action because of potential impropriety, as the court did in Ash,\(^2\)\(^4\)\(^1\) they introduce into the implication process an element of suspiciousness which seems highly inappropriate where one branch of the federal government is asked to review the decisions of a coequal branch. The mere possibility of impropriety is not in fact tantamount to inadequacy.

In approaching the adequacy-in-fact question, courts should presume that inaction on the part of the enforcement agency or department is a result of a reasoned, objective application of the relevant statute. Only a positive showing that such is not the case can rebut this presumption.\(^2\)\(^4\)\(^2\) A contrary presumption would trammel agency discretion and nullify the congressional enforcement scheme. Implication is a supplement to that enforcement scheme, not a means of subverting it.\(^2\)\(^4\)\(^3\)

The need for this presumption is further supported by the broader considerations present in an implication case. A court asked to imply a cause of action must look beyond the case at bar, for its decision will not merely interpret a statute or apply or extend existing common law rules, but will create a totally new cause of action. If a court finds an allegation of improper motive sufficient to warrant implication in one case, it may have implied an action absent true inadequacy in enforcement, thus encouraging future litigants to resort to the courts in situations where agency proceedings would have been wholly effective to resolve the dispute in question.

A second consideration in determining adequacy-in-fact follows from the above discussion: Will implication of a private cause of action interfere with the ability of the agency to enforce the statute effectively in the future? Determining whether a private action would interfere with agency enforcement is a balancing process. Weighing against implication are considerations such as whether a private action would disrupt the agency's operations or dull the incentive to seek administrative action, whether the uniformity that an agency can provide is necessary

\(^2\)\(^4\)\(^1\) 496 F.2d at 423 n.7.
\(^2\)\(^4\)\(^2\) Cf. Stewart v. Travelers Corp., 503 F.2d 108, 113 n.15 (9th Cir. 1974).
for effective enforcement, and whether a private action would destroy that uniformity.\textsuperscript{244} Favoring implication are the potential deterrent value of such a supplementary action and the inability of the agency to offer completely effective relief.\textsuperscript{245}

An excellent example of how this balancing occurs is Holloway \textit{v.} Bristol-Myers Corp.\textsuperscript{246} In that case the court was urged to imply a private action under section 12(a)(1) of the Federal Trade Commission Act, which prohibits "any false advertisement . . . which is likely to induce, directly or indirectly the purchase of . . . drugs . . . ."\textsuperscript{247} The court determined that the FTC was created by Congress to provide a consistent and flexible enforcement scheme which requires the Commission to exercise discretion in applying the Act. After listing the considerations that guide the exercise of that discretion, the court concluded: "Above all, there is need to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC."\textsuperscript{248} Private actions would seriously impede the ability of the FTC to exercise this discretion. Moreover, the various federal courts that would be deciding the cases might not always render consistent judgments. This result would negate the Commission's ability to develop orderly precedent and to fulfill its important enforcement role of offering competent advice to advertisers.\textsuperscript{249}

Additionally, the FTC had been granted a broad range of remedial devices in contrast to the limited and often blunt remedies available to a court. In fashioning relief in an individual suit, a court might not fully consider the broad public goals central to the FTC's discretion.\textsuperscript{250} Thus, despite the countervailing considerations that without implication plaintiff would not have a federal damage remedy, that an implied action would indeed have a deterrent effect, and that the Commission allegedly lacked sufficient resources to provide effective enforcement,\textsuperscript{251} the court held that a private action would be inappropriate.

Potential conflicts between judicial and administrative action occur quite frequently when implication of a private action

\textsuperscript{244} For a broader discussion of these considerations in connection with the related problem of when pre-existing remedies survive the passage of an act, see O'Neil, \textit{supra} note 174, at 258-70 (1964).

\textsuperscript{245} See \textit{Stewart v. Travelers Corp.}, 503 F.2d 108, 112-14 (9th Cir. 1974).

\textsuperscript{246} 485 F.2d 986 (D.C. Cir. 1973).


\textsuperscript{248} 485 F.2d at 997.

\textsuperscript{249} \textit{Id.} at 997-98.

\textsuperscript{250} \textit{Id.} at 998.
would require a court to decide an issue that would normally be decided in the first instance by an agency. This is the problem of primary jurisdiction. If courts were to make such decisions, an agency could no longer be master in its own house and courts would be faced with unfamiliar problems requiring the application of unusual standards. Such an undesirable result need not bar implication, however, because a court confronted with issues falling within the primary jurisdiction of an agency can refer those issues to the appropriate agency for initial determination, and then resolve the remaining issues consistently with that determination. "[T]he attitude of the court should remain flexible toward the question of referral, and the requirements of primary jurisdiction, however onerous, should rarely justify turning away the aggrieved party without a remedy that would otherwise be available."

Nevertheless, courts have used the doctrine of primary jurisdiction to prevent implication, saying that if an issue is within the primary jurisdiction of an agency and that agency could not offer the requested relief, neither may a court grant relief. This is a rather curious result in that the primary reason for implication in such a situation would be the inability of the agency to offer adequate enforcement in the first place. The extent to which the primary jurisdiction bar is to be relied upon is questionable, because in those cases which have invoked it other grounds have existed to prevent implication. Additionally, the Supreme Court has chosen not to apply the rule where to do so would leave the plaintiff without a sorely needed remedy. This rule is thus doubtful not only on policy grounds, but on precedential grounds as well. Whatever its vitality, the primary jurisdiction doctrine should not be sufficient, standing by itself, to bar implication where it is otherwise appropriate.

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251 Id. at 999-1001.
252 See Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 500-01 (1st Cir. 1950).
253 Note, supra note 6, at 295.
254 O'Neil, supra note 174, at 274.
256 E.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 254-55 (1951) (because plaintiff could pass on excessive costs to ultimate consumer, it is questionable whether he was damaged at all).
One final question of adequacy must be answered: Are the state remedies that survive adoption of the federal statute sufficiently adequate to defeat implication? In answering this question it must first be noted that if Congress has designed an act so as to balance federal and state enforcement, it would be inconsistent with the statutory purpose to imply an action which would disrupt that intended balance.\textsuperscript{258} Where statutory inconsistency is not raised, courts have generally recognized that although the availability of a state action should be considered, there are strong policies favoring a federal cause of action.\textsuperscript{259} Perhaps the primary justification for a federal remedy, regardless of the availability of state relief, is lack of uniformity. Although the jurisdiction whose law would apply in a given case may indeed provide a sufficient remedy, other jurisdictions may not be so liberal. If a court rules out implication because of the adequacy of a particular state remedy, it may have set a precedent that will put plaintiffs in other jurisdictions in the position of having no forum.\textsuperscript{260} State common law remedies, if they exist, are not automatically available for a violation of the federal act; although the state cause of action may remedy a fairly analogous injury, the similarity will rarely be complete.\textsuperscript{261} Notions of uniformity\textsuperscript{262} and the feeling that federal rights should be accompanied by federal remedies\textsuperscript{263} further support implication even where state remedies are available. Surviving state remedies therefore must be considered in assessing adequacy, but before refusing to imply an action, a court must be sure that the surviving state remedies are in fact generally available and are of the same or broader scope as the proposed federal private action.

Whereas the investigation into statutory purpose focuses upon the act itself and upon the intention of Congress in passing that act, the inquiry into adequacy focuses upon the reality of the act’s effect. After implication has been found consistent with a statute, the adequacy test determines if implication is necessary

\textsuperscript{259} See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 434-35 (1964); Stewart v. Travelers Corp., 503 F.2d 108, 112 n.12 (9th Cir. 1974).
\textsuperscript{260} See Note, supra note 6, at 292-93.
\textsuperscript{261} This is dramatically illustrated by the growth of actions under rule 10b-5 of the regulations promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), which has provided a far broader basis for suit than its state law analogue—deceit.
\textsuperscript{262} See Note, supra note 6, at 292-93.
\textsuperscript{263} See Bell v. Hood, 327 U.S. 678, 684 (1946).
to realize the act's purpose. This is not simply a determination whether the present plaintiff has a remedy for the alleged injury; rather, a court must examine the whole enforcement scheme, remedial or penal, to see whether an implied action would help to bring about what Congress has intended but failed to achieve.

V. Conclusion

A court requested to find an implied private right of action in a federal statute must recognize not only what inquiries are appropriate, but also what inquiries are inappropriate. In deciding the question of implication a court should determine, first, whether an implied action would be inconsistent with Congress' goals in enacting the legislation and, second, whether the enforcement scheme provided has proven inadequate to accomplish those goals—that is, whether there is a need for the action sought to be implied. It is important that a court not focus exclusively upon the beneficiaries of an act but instead fully examine the act's broad purposes. Such an examination should not include a search for a congressional intent to permit implication, because the underlying rationale of implication presumes an enforcement inadequacy which has arisen after the passage of an act. Similarly, reliance upon the maxim expressio unius est exclusio alterius is unwise in that it unrealistically assumes that Congress was able at the time of a statute's enactment to envision the effects of the provided enforcement scheme and thus to intend the rejection of certain remedies by failing to speak to them.

For the nearly sixty years since the doctrine of implication was enunciated in Texas & Pacific Railway Co. v. Rigsby, federal courts have bounded from overly broad tests which would support implication in almost every federal statute to narrow rules of construction which would threaten the continued existence of implied actions. It is time for courts to face this undesirable situation and to fashion a single, unified test for implication which eliminates per se rules and ill-founded presumptions, adopting instead standards which more accurately reflect the rationale for implication.

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