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The Evolving Doctrine of Implication: The Export Administration Act and Private Rights of Action

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COMMENTS

The Evolving Doctrine of Implication: The Export Administration Act and Private Rights of Action

I. INTRODUCTION

Two recent United States District Court opinions examine the question of when a federal court may invoke the "implication" doctrine which permits them "to create a private right of action from a federal statute that does not expressly provide for [a] private remed[y]. . . ."[1] Both of the cases raise the issue of implication as it applies to the antiboycott provision of the Export Administration Act (EAA).[2] Plaintiffs in both *Bulk Oil (Zug) A.G. v. Sun Co.*,[3] and *Abrams v. Baylor College of Medicine*,[4] claimed an implied private right to bring an action for damages and in addition, alleged substantive violations of the statute's antiboycott provisions. In *Abrams v. Baylor College*, the court ruled that the EAA did create an implied private right of action.[5] This conclusion seemed to contradict the *Bulk Oil* decision handed down seven months earlier which held that no private remedy exists under the statute.[6]

This Note attempts to provide some guidelines for courts in determining whether a federal statute contains an implied private right of action, using the EAA as an example. Part I provides an overview of the statute's legislative history and its main provisions.[7] In Part II, the Note

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[1] Note, *Implication of Private Actions from Federal Statutes: from* Borak *to* Ash, 1 J. CORP. L. 371, 371 (1976).

[2] 50 U.S.C. app. § 2407 (1982).

[3] 583 F. Supp. 1134 (S.D.N.Y. 1983).

[4] 581 F. Supp. 1570 (S.D. Tex. 1984).

[5] *Id.* at 1581.

[6] 583 F. Supp. at 1138.

[7] *See* text accompanying notes 11-56.

examines the analysis used by the courts in *Bulk Oil* and *Abrams* in determining whether a private right of action is implied under the EAA.[8] Parts III and IV put these cases in perspective by providing a brief history of the doctrine of implication, and go on to apply this implication analysis to the two principle cases.[9] Finally, to assure proper application of the implication doctrine to particular statutes, this Note concludes that courts should recognize that in the absence of clear and substantial evidence that the legislature intended to create or deny private actions, the most compelling consideration must be whether the implication of such rights is consistent with and necessary to the purposes for which the statute was enacted.[10] This consideration avoids the artificial exercise of constructing legislative intent out of a silent or incomplete record, and focuses instead on an analysis of the kind of remedies that are needed to give the statute its intended effect.

II. THE EXPORT ADMINISTRATION ACT

The Export Administration Act is aimed at restricting exports that are determined to be detrimental to United States national security or foreign policy.[11] The EAA sets out the types of goods and the varying situations in which United States exports are subject to governmental control.[12] Five general substantive areas are included within the Act. Section 2403-1 addresses the export of technology and goods developed by the United States Department of Defense.[13] Section 2404 gives the President the right to restrict or prohibit the export of specified goods. The President may also restrict or prohibit exports of such goods to specified countries following a determination that such trade would significantly enhance the military strength of a nation which would prove harmful to the national security of the United States.[14] Section 2405 enables the Executive to curtail exports to the extent necessary to significantly further United States foreign policy or to meet international obligations.[15] In addition, controls may be imposed on the export of goods which are in short supply under section 2406.[16] Finally, section 2407 contains the provisions in controversy here which relate to foreign

8 *See* text accompanying notes 57-97.
9 *See* text accompanying notes 98-187.
10 *See* text accompanying notes 188-252.
11 50 U.S.C. app. § 2401(5),(8) (1982).
12 *Id.* §§ 2401-2420.
13 *Id.* § 2403-1.
14 *Id.* § 2402(2)(A).
15 *Id.* § 2405(a)(1).
16 *Id.* § 2406.

boycotts.[17]

Section 2407 prohibits any United States person from refusing to do business with any country friendly to the United States which is the subject of a foreign boycott, or from complying with a foreign boycott by refusing to do business with a nation friendly to the United States, or by discriminating against individuals on the basis of race, religion or national origin.[18] These antiboycott provisions explicitly preempt state law on this subject.[19] Furthermore, they state that "[n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States."[20]

The remedies available in the event of a violation do not appear as part of the antiboycott provisions themselves, but instead are contained in a separate section of the statute.[21] The statute specifies three types of penalties for violation of the Act: 1) fines may be levied by the Department of Commerce; 2) the offender may be imprisoned; or 3) other administrative sanctions may be imposed, including the revocation of export licenses.[22] Subsection (g) of the violations provision further clarifies that "[n]othing in subsection (c),(d), or (f) limits-. . . the availability of other administrative or judicial remedies with respect to violations of this Act. . . ."[23]

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17 *Id.* § 2407. Section 2407 seeks to implement the stated congressional policy:

> (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;
> (B) to encourage and, in specified cases, require United States persons engaged in the export of goods . . . to refuse to take actions . . . which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person . . . .

Id. § 2402(5)(A)-(B).

18 The substantive portions of the antiboycott provisions at issue in *Abrams* and *Bulk Oil* prohibit any United States person from taking any action:

> with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:
> (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country . . . .
> (B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

Id. § 2407(a)(1), (a)(1)(A), (a)(1)(B).

19 *Id.* § 2407(c).

20 *Id.* § 2407(a)(4).

21 *Id.* § 2410.

22 *Id.* § 2410(a)-(c).

23 *Id.* § 2410(g). Sections 2410(c), (d), and (f) were added in 1965 and specifically describe civil penalties and administrative sanctions. Subsection (g) clarifies that this list is not exhaustive, although just what other remedies are available remains unclear.

A. History of the Export Administration Act

Much of the present text of the Export Administration Act was first enacted in 1949 as the Export Control Act.[24] Originally intended to control the export of scarce goods and goods with potential military importance, the Act's sanctions were limited to fines and/or imprisonment.[25] Although at this point the statute included the beginning stages of the present violations provisions, the antiboycott portions of the Act did not yet exist. In the debates prior to passage of the law in 1949 there was no discussion of a right to private action in either house of Congress.[26]

Amendments in 1965 changed the title to the Export Administration Act, and added the first expression of the antiboycott policy to the statute. The EAA included a policy statement that the United States would oppose restrictive trade practices and boycotts imposed by foreign countries against nations friendly to the United States.[27] The purpose of this addition was to "furnish the administration with clear legal authority to protect American business firms from competitive pressures to become involved in foreign trade conspiracies against countries friendly to the United States."[28] The effectiveness of this policy was wholly dependent upon the initiative of the executive branch to assure compliance with its directives since there was no statutorily imposed sanction for violations. The 1965 Amendments also added civil penalties to the existing penal sanction of the original Act.[29] In addition, Congress clarified that "the availability of other administrative or judicial remedies with respect to violations of this Act . . ."[30] is not limited to the particular sanctions spelled out in the preceding sections.

After its passage in 1965, the antiboycott policy "languished in the bureaucracy" due to failure of the executive branch actively to imple-

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24 Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949).

25 *Id.* at 8.

26 *See* S. REP. NO. 31, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 1094; H.R. REP. NO. 8, 81st Cong., 1st Sess. (1949).

27 Export Administration Act, Pub. L. No. 89-63, § 3, 79 Stat. 209, 209-10 (1965). The text of this added section read:

> The Congress further declares that it is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States.

28 S. REP. NO. 363, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1826, 1826.

29 Export Control Act of 1949, Pub. L. No. 89-63, § 2, 79 Stat. 209, 209 (1965).

30 *Id.*

ment the policy.[31] According to a Senate report, "as late as the summer of 1975, Commerce Department report forms volunteered the advice that 'U.S. firms are not legally prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.' "[32] While this was a literal reading of the law, it displays a lax administrative attitude toward enforcement of the policy.

In addition to minimal enforcement of the antiboycott policy, the increasing impact of the Arab boycott of Israel on the United States during the 1970s was another factor contributing to congressional attention on this matter.[33] Arab countries began to buy more goods imported from the United States with their newly acquired oil revenues, and as sales to the Arab world increased so did the force of the Arab demands on American business.[34] Reports filed with the Department of Commerce show a drastic increase in the number of Arab boycott demands, which rose from 785 in the full year 1974 to 72,781 during a six-month period in 1976.[35] During the same period in 1976, "U.S. firms indicated that they intended to comply with Arab boycott demands in over 90 percent of their export transactions."[36]

As a result of increasing Arab pressures and frustration with the lack of administrative enforcement, further amendments were proposed in 1976 that replaced the discretionary antiboycott policy with a clear prohibition of this activity. The House of Representatives approved a bill allowing recovery of treble damages and attorney's fees in a private action for violation of the statute, including the antiboycott sections.[37] The Senate bill did not contain such a provision, however, and Congress adjourned without voting on either measure.[38] In the next session of Congress, neither bill was brought up again. Instead, a new bill was passed by both houses which empowered the administrative agency to revoke export licenses for violations, but omitted the provisions calling for treble damages in private actions.[39]

This 1977 version of the EAA put some teeth into the antiboycott

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31 123 CONG. REC. 11,424 (1977) (statement of Mr. Fascell).

32 S. REP. NO. 104, 95th Cong., 1st Sess. 19 (1977).

33 *See Arab Boycott: Hearings on S. 69 and S. 92 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. (1977).

34 123 CONG. REC. 11,424 (1977) (statement of Mr. Fascell).

35 S. REP. NO. 104, 95th Cong., 1st Sess. 17 (1977).

36 *Id.*

37 H.R. 15377, 94th Cong., 2d Sess., 122 CONG. REC. 31,952 (1976).

38 *See* S. 3084, 94th Cong., 2d Sess. (1976).

39 Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977). The antiboycott portions were reenacted and incorporated into the 1979 version of the EAA. Export

policy of the prior law. The new amendment prohibited compliance with foreign boycotts on nations friendly to the United States, where the 1965 law had simply declared it a United States policy to oppose such compliance.[40] The President was given the authority to issue regulations implementing the Act[41] which expressly preempted all state foreign boycott laws.[42] In addition, the amendments provided that nothing in the above antiboycott sections "may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States."[43]

Discussion in the House and Senate, as well as resulting reports, are quite illuminating as to the motivation behind these changes.[44] On a general level, the Senate explicitly balanced two competing interests in formulating the bill. On one side was the Senate committee's belief that the United States "should not acquiesce in attempts by foreign governments to use secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions."[45] The discriminatory effects against American Jews were described as the most offensive aspect of the Arab boycott demands.[46]

On the other side, however, the committee acknowledged the "political sensitivities of the Arab States themselves,"[47] and sought "to defend American principles without unnecessarily interfering with the rights of others and without creating conditions which undermine U.S. influence or a settlement in the Middle East."[48] The report further recognized

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Administration Act of 1979, Pub. L. No. 96-72, § 8, 93 Stat. 503, 521-524 (codified at 50 U.S.C. app. § 2407 (1982)).

40 *Compare* Export Administration Amendments of 1977, Pub. L. No. 95-52, § 201(a), 91 Stat. 235, 244-246 (current version at 50 U.S.C. app. § 2407 (1982)) *with* Export Control Act of 1949, Pub. L. No. 89-63, § 3(a), 79 Stat. 209, 209-210 (1965).

41 50 U.S.C. app. § 2407(a)(1).

42 *Id.* § 2407(c).

43 Export Administration Amendments of 1977, Pub. L. No. 95-52, § 205, 91 Stat. 235, 248 (current version at 50 U.S.C. app. § 2407(c) (1982)). Changes were also made in the separate violations and enforcement portions of the Act. Administrative penalties for violations of the statute were increased from $1,000 to $10,000, *id.* § 112(c), 91 Stat. 235, 240 (current version at 50 U.S.C. app. § 2410(c)(1) (1982)), and Congress clarified "that existing law authorizes the suspension of export privileges for violations of the antiboycott provisions of the act as well as any other provisions of the act." S. REP. No. 104, 95th Cong., 1st Sess. (1977). These additions plus several others including the procedural requirement of notice and hearing before imposition of an administrative sanction, 50 U.S.C. app. § 2410(c)(2)(B) (1982), were incorporated without change into the EAA in 1979. *See* H.R. REP. No. 200, 96th Cong., 1st Sess. 3 (1979); Export Administration Act of 1979, Pub. L. No. 96-72, § 8, 93 Stat. 503, 521-524 (1979).

44 *See, e.g.*, S. REP. No. 104, 95th Cong., 1st Sess. (1977).

45 *Id.* at 21.

46 122 CONG. REC. 31,930 (1976) (statement of Mr. Burke).

47 S. REP. No. 104, 95th Cong., 1st Sess. 21 (1977).

48 *Id.*

"the difficulty of enforcing prohibitions on refusals to deal. . . . The danger of unwarranted allegations in this highly sensitive area has prompted the committee to *leave enforcement in the hands of the Executive branch instead of creating a private right of action.*"[49] In all of the legislative history of the EAA, this is the only statement which directly addresses the issue of the existence of private rights of action under the statute.

The 1979 EAA expired on March 30, 1984.[50] In order to give Congress time either to approve a new export statute or reauthorize the 1979 EAA, President Reagan extended the effective date of the statute for an additional year until March 30, 1985.[51] Congress failed to take any action on the matter before the extension lapsed,[52] so the President extended his Executive Order which continued the EAA in effect beyond the Order's originally stated expiration date.[53] It was not until July 12, 1985 that Congress approved amendments to the EAA.[54] Aside from a few minor changes, the 1985 Amendments essentially reauthorized the provisions of the 1979 EAA, including the antiboycott section and the applicable portions of the enforcement section.[55] As a result, the statutory language of the newly enacted EAA, remains ambiguous as to the existence of a private right of action. In addition, the subject was not discussed in either house of Congress during their consideration of the amendment.[56]

III. THE CASES

Abrams v. Baylor College of Medicine and *Bulk Oil (Zug) A.G. v. Sun Co.* both confronted the courts with the question of whether private rights of action were available under the EAA. Despite the fact that *Bulk Oil* involved allegations of a refusal to deal and that *Abrams* dealt with alleged employment discrimination, the issue in both cases was the same. Both were actions allegedly taken in compliance with foreign boycotts and both types of action were allegedly prohibited by the antiboycott provisions of the EAA.

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49 *Id.* at 22 (emphasis added).

50 50 U.S.C.A. app. § 2419 (1981).

51 Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984).

52 *Congress Clears Bill to Renew Main Law Regulating Exports*, 43 CONG. Q. 1302 (1985).

53 Exec. Notice of March 28, 1985, 50 Fed. Reg. 12,513 (1985).

54 Export Administration Amendments of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985). These amendments authorize the statute to remain in effect until September 30, 1989. *Id.*

55 *Id.*

56 *See* 131 CONG. REC. 1991, 3995, 5059 (1985).

A. *Bulk Oil v. Sun*

The facts on which the New York court denied Bulk Oil a private right of action are as follows. Bulk Oil and Sun were parties in a long-term oil contract whereby Sun agreed to deliver specified amounts of North Sea crude oil to Bulk Oil in thirteen shipments.[57] The destination clause in the contract stipulated that the "destination [is] free but always in line with [the] exporting country's Government policy."[58] In this transaction the exporting country was the United Kingdom which had a policy which restricted the export of North Sea oil only to specified countries, of which Israel was not one.[59] Bulk Oil designated Haifa, Israel as the site of Sun's first delivery, whereupon Sun refused to make the delivery.[60]

Sun then instituted an arbitration proceeding for damages incurred as a result of what it believed to be a breach of contract by Bulk Oil.[61] The Arbitrator rejected Bulk Oil's defenses,[62] finding a violation of the United Kingdom's governmental policy and a resulting breach of contract when Bulk Oil selected Haifa, Israel as the place of delivery.[63] Bulk Oil then brought this suit on several grounds, including section 2407(a)(1)(A) of the Export Administration Act.[64]

The threshold issue with regard to the EAA claims was whether Bulk Oil could bring a private suit under the statute.[65] All of the remedies expressly created under the statute must be initiated by the government,[66] and, as noted earlier, there is no explicit language in the statute which provides for a private right of action. In this suit, Bulk Oil was seeking to assert its own right to sue without having to convince the

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57 *Bulk Oil*, 583 F. Supp. at 1137.

58 *Id.* at 1136.

59 *Id.* at 1138. The policy of the United Kingdom restricted the sale of North Sea crude oil to those countries who were members of the International Energy Agency or of the European Economic Community. Exports were also permitted to nations who had an existing pattern of trade in the oil. Israel did not fall into any of these categories. *Id.*

60 *Id.* at 1136.

61 Complaint for Plaintiff at ¶ 38, Bulk Oil v. Sun Co., 583 F. Supp. 1134 (S.D.N.Y. 1983).

62 Bulk Oil defended on the grounds that United Kingdom policy in fact did allow the export of North Sea oil to Israel and that if it did not, the prohibition was illegal. In addition, Bulk Oil claimed that it had mistakenly been led to believe that an Israeli designation would be permissible, and due to the doctrine of estoppel, Sun no longer could enforce the destination clause of the contract. Arbitrator's Interim Award at ¶¶ 40-60, 127-40.

63 583 F. Supp. at 1136.

64 Bulk Oil also alleged violations of the antitrust laws, section 1 of the Sherman Act, 15 U.S.C. §§ 1-7 (1982), and the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982). In addition, Bulk Oil filed a claim of wrongful attachment. 583 F. Supp. at 1136.

65 583 F. Supp. at 1138.

66 50 U.S.C. app. § 2410 (1982).

Commerce Department to pursue its claim. When private rights of action are not mentioned in the language of the statute itself, courts have established a doctrine of "implication" which permits a judge to read such a right into a statute in certain situations.[67]

Initially, the court cited the four factors identified in *Cort v. Ash*[68] which are to be considered in deciding when a private right of action may be implied:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[69]

After setting out this multi-faceted test, however, the court interpreted the post-*Cort* cases as having collapsed the four-pronged test into the single inquiry of congressional intent.[70] More precisely, the inquiry focuses on Congress' understanding of the law it intended to restructure.[71]

Having concluded that the legislative intent is of foremost importance in determining implied rights of action, the court in *Bulk Oil* embarked on a detailed examination of the legislative history of the EAA from the time of its original passage in 1949 to the addition of the antiboycott provisions in 1979.[72] Two aspects of the legislative process struck the New York court as "significant [to the question of private rights] in the mass of otherwise unenlightening legislative history. . . ."[73] First, the claim of a private right of action under the EAA had never been raised prior to this suit. As a result, no private action had ever been recognized under the EAA.[74] Second, the court considered Congress' failure to approve the 1976 bill providing for treble damages and attor-

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67 As Justice Stevens stated:

> When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation.

Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

68 Cort v. Ash, 422 U.S. 66 (1975).

69 *Id.* at 78 (citations omitted).

70 *Bulk Oil*, 583 F. Supp. at 1139.

71 Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378 (1982).

72 *Bulk Oil*, 583 F. Supp. at 1139-40.

73 *Id.* at 1140.

74 *Id.*

ney's fees as indicative of its intent not to create such an action.[75] The court concluded that the legislative history revealed "a keen desire on the part of Congress to spell out precisely those powers granted by the amendments, and a reluctance to leave important matters to 'implication.' "[76] Noting that several rights of lesser importance to the statutory scheme than a private right of action were explicitly provided for because they were "too important . . . to be left to implication," the court further concluded that if Congress had meant to create such a right it would have expressly stated so.[77]

The court went on to apply the rule of statutory construction *expressio unius est exclusio alterius* to the statute.[78] This maxim dictates that explicit congressional provision for enforcement through civil and criminal penalties as well as administrative sanctions, proves that the omission of a private action provision was intentional and therefore precludes judicial implication of such an action.[79] Based on these considerations, the court denied Bulk Oil the right to bring a private suit under the EAA.

B. *Abrams v. Baylor College of Medicine*

In contrast to *Bulk Oil*, the court in *Abrams v. Baylor College of Medicine* concluded that the EAA does provide a private right of action.[80] The plaintiffs, Lawrence Abrams and Stuart Linde, were anesthesiologists employed by defendant Baylor College of Medicine. Abrams alleged that Baylor discriminated against Jews in its hiring for a special rotation program to Saudi Arabia.[81] Baylor participated in a program whereby cardiovascular surgical teams from the medical school were sent to work in the nationally owned King Faisal Specialist Hospital in Riyadh, Saudi Arabia. According to the terms of the agreement, the Saudis provided the funding for the exchange which sent its first team of Baylor doctors to Saudi Arabia in 1978.[82] The plaintiff doctors brought suit

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75 *Id.* at 1140-41.

76 *Id.* at 1142.

77 *Id.* at 1142-43. S. REP. No. 363, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1826, 1831.

78 583 F. Supp. at 1142. According to this maxim, if a statute specifies the effects of a particular provision, effects other than those listed are excluded. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

79 *Bulk Oil*, 583 F. Supp. at 1142.

80 *Abrams*, 581 F. Supp. at 1570.

81 *Id.*

82 Each surgical team included two anesthesiologists, one senior and one assistant, among its doctors and staff. Doctors selected for the program traveled to Saudi Arabia and remained there for a minimum of three consecutive months. As a result, participants were required to obtain visas for entrance and exit of the country from the Saudi government. *Id.* at 1573.

claiming that Baylor had wrongfully discriminated against Jewish doctors in its selection of candidates for inclusion in the program in violation of Title VII of the Civil Rights Act of 1964.[83] In addition, they alleged that Baylor had discriminated in furtherance of the Saudi boycott of Israel in contravention of the Export Administration Act.[84] The doctors stated that upon learning of the program they each approached the medical school administration expressing their interest in participating in the exchange. Both were informed that since they were Jewish they were considered ineligible for the program.[85]

Although the suit was decided on Title VII grounds,[86] the Texas court went on to address the EAA claim, stating that an application of the *Cort* factors to the circumstances of the suit "weigh[ed] heavily in favor of implying a private cause of action under the EAA for Jewish persons who have been injured by acts made illegal by the EAA."[87] The court predictably turned first to the legislative history of the statute, citing *Bulk Oil* as correctly relying most heavily on congressional intent.[88] However, whereas the New York court in *Bulk Oil* determined that the nonpassage of the 1976 House bill providing for treble damages and attorney's fees for victims of EAA violations was a clear indication of an

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83 42 U.S.C. § 2000e.

84 50 U.S.C. app. § 2407(a)(1)(B).

85 *Abrams*, 581 F. Supp. at 1575-76.

86 The Texas court first analyzed the Title VII claim, determining that the plaintiffs had established a *prima facie* case of discrimination. The evidence supporting the *prima facie* case was that "(1) they sought positions in the King Faisal program; (2) they were fully qualified to participate in the program; (3) their requests to participate in the program were denied because they are Jews; and (4) that following these denials, Baylor persisted in designating non-Jewish participants." *Id.* at 1579.

Baylor's reasons for barring Jews from the program did not rest on either a legitimate business necessity or a bona fide occupational qualification, therefore the court held Baylor in violation of Title VII. There is no evidence that Saudi Arabia actually required Jews to be excluded from participating in the exchange program. Nor did Baylor ever have "any express agreement or understanding with the Saudis to th[is] effect." *Id.* at 1575. In fact, both the University of Colorado Medical College and University of Washington Medical School successfully insisted that nondiscrimination clauses be included in their agreements to set up similar programs. *Id.* at 1576.

The court awarded the doctors $156,840 and $248,982 each in compensatory damages for lost pay and benefits under the Civil Rights Act. *Id.* at 1577-78. The Saudi Arabian rotation was an attractive opportunity for doctors at Baylor for several reasons. First, the salaries paid the visiting Americans were intended to compensate at levels that created an incentive for participation in the program. As a result, the salary levels were at least twice as high as those of the doctors who remained in the domestic Baylor affiliated hospital. Second, greater clinical experience could be gained through this rotation than was typically available in the United States. This is so because the Saudi hospital dealt with a greater variety of ailments than were found in most U.S. hospitals. *Id.* at 1573.

87 *Id.* at 1581.

88 *Id.* at 1580.

intent not to create private rights under the statute, the court in *Abrams* did not find this factor dispositive for several reasons:

> First, the 1976 provision provided for treble damages rather than actual damages. Second, the 94th Congress, which expired in 1976, never expressly rejected the 1976 House bill but rather simply adjourned without taking final action on that bill. Third, the bills that directly led to the 1977 act never contained any language which would have either "created" or "denied" a private cause of action.[89]

Finding that the legislative history was not determinative of the question, the court considered the remaining three *Cort* factors.[90] According to the court's interpretation, the purpose of the antiboycott sections of the EAA was to counteract "efforts by Arab countries to pressure American companies into furthering their boycotts of Israeli interests."[91] Reading the language of the EAA and its regulations[92] in light of this goal, this court concluded "that the 'especial' class of persons to be protected by the EAA is comprised not only of Israelis but of American Jews as well."[93] Finally, the court summarily concluded that the type of right created by an implied private action under the EAA was not traditionally governed by state law.[94] In this case the *Abrams* court applied the *Cort* factors to the EAA, and found that a private cause of action existed under the antiboycott provisions of the statute.[95]

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89 *Id.* at 1580-81.

90 *Id.* at 1581. These three factors are: 1) the purposes of the statute; 2) the statute's intended beneficiaries; and 3) the existence of governing state law.

91 *Id.*

92 Exec. Order No. 12,214, 15 C.F.R. §§ 369.1-369.8 (1980), *reprinted in* 50 U.S.C. app. § 2407 (1982).

93 *Abrams*, 581 F. Supp. at 1581.

94 *Id.*

95 *Id.* Having determined that plaintiffs may bring a private action, the court then concluded that Baylor violated the substantive prohibitions of the EAA. To a great extent, the court was convinced by the close similarity between the following example of conduct which violates the EAA contained in the Code of Federal Regulations, and the facts of the case before them. 15 C.F.R. § 369.2(b) states:

> The following examples are intended to give guidance in determining the circumstances in which the taking of particular discriminatory actions is prohibited. . . .
>
> (1) U.S. construction company A is awarded a contract to build an office complex in boycotting country Y. A believing that employees of a particular religion will not be permitted to work in Y because of Y's boycott against country X, excluded U.S. persons of that religion from consideration for employment on the project.
>
> A's refusal to consider qualified U.S. persons of a particular religion for work on the project in Y constitutes a prohibited boycott-based discriminatory action against U.S. persons on the basis of religion.

Based on this example, the underlying policies of the EAA, and a finding of the necessary intent, the court found Baylor to have violated the EAA. 581 F. Supp. at 1582.

The portion of the opinion which addressed the EAA with regard to both the implied action and substantive violations was dicta. The case was decided on Title VII grounds and it is under that statute that the plaintiffs' awards were given. *Id.* at 1579-80, 1582. After stating that the type of

Both the Texas court in *Abrams* and the New York court in *Bulk Oil* used the same method of analyzing whether a private cause of action may be judicially implied under the antiboycott provisions of the EAA. In both, the four part test of *Cort v. Ash* was cited as the criteria to be followed, yet the factor of legislative intent was viewed as the central issue.[96] Similarly, both courts relied entirely upon the statute's legislative history in discerning that intent and uncovered virtually the same data in congressional records on the subject.[97] Yet the two courts reached inconsistent conclusions; the court in *Abrams* granted a private right of recovery and the court in *Bulk Oil* denied a similar right under the same statute. This inconsistency stems in large part from the inadequate analytical approach used by both courts. Before exploring the shortcomings of their approach in detail and suggesting an alternative method of analysis, it is first necessary to examine a short history of the implication doctrine, as well as the present state of its evolution.

IV. IMPLICATION DOCTRINE

The four part test set out in *Cort v. Ash*[98] for the implication of private rights represented a change in judicial attitudes toward implication. It reflected the first step in a shift away from an activist bench that was inclined to assert its independent judgement when evaluating the implication of private rights, toward a more deferential court that has shown a greater reluctance to find such a right without a clear mandate from Congress.[99] In the earliest stages of the development of this doctrine, private rights were implied when the plaintiff was a member of the class which the statute was intended to benefit.[100] A showing that the statute operated to protect a specific class of people, rather than the public at large, was sufficient to satisfy the requirement.[101] This broad stan-

discriminatory harm suffered by the plaintiffs entitled them to compensatory, though not punitive, damages "the Court conclude[d] that these losses [would] be fully compensated by the awards . . . granted . . . as part of [the] Title VII remedies. To duplicate recovery . . . here would be an unjust windfall to the Plaintiffs." *Id.* at 1582.

96 *Abrams*, 581 F. Supp. at 1580; *Bulk Oil*, 583 F. Supp. at 1139.

97 *Abrams*, 581 F. Supp. at 1580-81; *Bulk Oil*, 583 F. Supp. at 1139-40.

98 *Cort*, 422 U.S. at 78. For the language of the four part test see text accompanying note 69.

99 Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981).

100 *See* Texas Pacific Railway Co. v. Rigsby, 241 U.S. 33 (1916). This case involved an action for damages by a railroad employee who was injured in a switching accident. His suit was upheld despite the absence of express language in the Federal Safety Appliance Acts. 27 Stat. 531 (1893) *amended by* 45 U.S.C. §§ 1-16 (1970). "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 damages from the party in default is implied, according to a doctrine of the common law. . . ." 241 U.S. at 39.

101 *Rigsby*, 241 U.S. at 39. *Rigsby* is generally viewed as the first case to establish the doctrine of

dard was reinforced in *J.I. Case Co. v. Borak*,[102] where a corporate shareholder challenging a merger alleged to have resulted from false and misleading proxy statements was held to have a private right of action under § 14(a) of the Securities Exchange Act. To imply a private right of action it was sufficient for the Court to find that protection of investors was "among [the] chief purposes" of the statute.[103]

The lenient standard used in *Borak* rests in part on the conception that federal courts have inherent power to imply private rights for statutory violations.[104] According to this theory, the proper role of the court is to engage in "a process whereby [it] exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law."[105] This gives the courts license to create private rights on their own unless Congress has clearly indicated an intent to the contrary.

Beginning with *Cort*, however, this activist conception of the judicial role was replaced with a more restrictive view.[106] In *Cort* the Supreme Court rejected such an expansive reading of the intended beneficiary requirement. The Court determined that the plaintiff fell outside the class of intended beneficiaries even though he had a financial interest in the dispute and "was at least an incidental beneficiary of the legislation in the sense that misuse of shareholder's funds was a side concern of Congress in enacting the . . . law."[107] In addition, the Court expressly added the issue of legislative intent to the consideration of when to imply private actions.[108] *Cort* represents the first indication of what was to become an increasing emphasis on a traditional separation of powers rationale in defining the judicial role as predominantly one of discerning legislative intent, rather than a more independent application of equity as perceived from the bench.

By 1979, the most recent Supreme Court decisions suggested that the Court was relying on a different theory to justify judicial implica-

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judicially implied private rights of action. *See* Note, *Implied Private Rights of Action—the* Cort v. Ash *Test—Interaction of "Especial Beneficiary" and Legislative Intent*, 24 WAYNE L. REV. 1173 (1978); Note, *supra* note 1, at 373. Prior to *Rigsby*, the implication doctrine had existed at common law in England since 1854. Couch v. Steel, 118 ENG. REP. 1193, 1196-97 (Q.B. 1854).

102 J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

103 *Id.* at 432.

104 *See, e.g.*, Frankel, *supra* note 99.

105 Bivens v. Six Unknown Named Narcotics Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring).

106 *See, e.g.*, Transamerica Mortgage Investors, Inc. v. Lewis, 444 U.S. 11 (1979); Cannon v. University of Chicago, 442 U.S. 677 (1978); Cort v. Ash, 422 U.S. 66 (1975).

107 Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L. L. REV. 425 (1978).

108 *Cort*, 422 U.S. 66.

tion.[109] In these cases, the implication of private actions had become simply a "question of statutory construction."[110] This approach places greater limitations on the role of the judiciary in fashioning remedies than the inherent rights rationale had imposed, and the change represented a movement away from anything resembling outright judicial legislation.[111] According to this new conception, a court may imply a private remedy only insofar as it can find evidence that Congress intended such a right to exist.[112] As a result, congressional intent, the second factor in the traditional *Cort* test,[113] has become the main focus of judicial inquiry in cases of implied private actions.[114] Three years after *Cort*, the Supreme Court, in the case of *Touche Ross & Co. v. Redington*,[115] explained that while:

> [i]t is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing for one[,] . . . the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent.[116]

In fact, these are the "criteria through which this intent [can] be discerned."[117] The role of the courts is thus to determine congressional intent, not to engage in activist leadership to "improve upon the statutory scheme that Congress enacted into law."[118]

Not only did this increased reliance on legislative intent reduce the importance of the other parts of the *Cort* analysis, but it changed the Court's view of the content of the remaining factors as well. Whereas earlier cases merely instructed courts to examine the nature of the rights protected by the statute to determine whether the plaintiff was an in-

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109 *See, e.g., Transamerica*, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1978); Cannon v. University of Chicago, 441 U.S. 677 (1978). See also Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984), and California v. Sierra Club, 451 U.S. 287 (1981), which seem to reflect the same theoretical basis.

110 *Cannon*, 441 U.S. at 688.

111 *See supra* note 98 and accompanying text.

112 Frankel, *supra* note 99, at 557.

113 *Cort*, 422 U.S. at 78.

114 *See Sierra Club*, 451 U.S. at 293; *Transamerica*, 444 U.S. at 23-24 (White, J., dissenting).

115 *Touche Ross*, 442 U.S. at 560.

116 *Id.* at 575-76.

117 Davis v. Passman, 442 U.S. 228, 241 (1979).

118 *Touche Ross*, 442 U.S. at 578.

tended beneficiary,[119] more recent cases indicate that in addition the language of the statute itself must also "expressly identif[y] the class Congress intended to benefit. . . ."[120]

The Supreme Court in *Cannon v. University of Chicago*[121] distinguished between statutes which use the language of rights and those which speak in terms of duties. The latter are generally "enacted for the protection of the general public" and do not permit the implication of private rights, while the former are intended to focus on a particular group of individuals and may include an implied private right of action.[122] In *Cannon*, the plaintiff was allegedly rejected from the medical program at the University of Chicago because she was a woman, in violation of Title IX of the Education Amendments of 1972. The Court found that the operative statutory language clearly conferred benefits on those individuals subjected to gender discrimination,[123] and that the plaintiff was within the class to be benefited. Since the stringent requirement for establishing a statutory beneficiary was satisfied, the Court held that a private right existed under the statute.[124] If Congress had drafted the statute "simply as a ban on discriminatory conduct" rather than with an "unmistakable focus on the benefited class . . . there would be far less reason to infer a private remedy in favor of an individual person."[125] In addition, "because the right to be free of discrimination is a 'personal' one, a statute conferring such a [civil] right will almost have to be phrased in terms of the persons benefited."[126] At a minimum, "the statute in question [must] at least prohibit certain conduct."[127]

If a court finds that the statute in question does not grant private rights to an identifiable class of persons and that the legislative history does not suggest an intent to create a private remedy, the failure to meet

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119 *See Borak*, 377 U.S. 426; Wyandotte Co. v. United States, 389 U.S. 191 (1967). *See also* text accompanying notes 100-103.

120 *Cannon*, 441 U.S. at 690. *See id.* at 690 n.13 (drawing a distinction between constitutional and other rights in the implication of private actions).

121 *Cannon*, 441 U.S. 677.

122 *Id.* at 689-90. *See id.* at 690 n.13 for a discussion of the cases upholding this distinction as well as the exceptions.

123 The key language in the statute was as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681 (1972).

124 *Cannon*, 441 U.S. at 693-94.

125 *Id.* at 690-91. *See Sierra Club*, 451 U.S. at 294.

126 *Cannon*, 441 U.S. at 692 n.13.

127 *Touche Ross*, 442 U.S. at 569. *But see Sierra Club*, 451 U.S. at 294 (no private right since "the statute states no more than a general proscription of certain activities").

these first two *Cort* factors is definitive and the judicial inquiry ends.[128] The court need not "trudge through all four of the factors when the dispositive question of legislative intent has been resolved."[129] Thus, the elements of statutory purpose and the traditional applicability of state as opposed to federal law are frequently not considered in "implication" decisions.[130] Consequently, the specific guidelines for conducting an inquiry into the element of statutory purpose are less defined than the guidelines used to determine legislative intent, which through frequent use has taken on somewhat clearer dimensions.

Cannon provides some insight into the type of considerations involved in evaluating statutory purpose in the context of the implication of private rights of action. The Court analyzed statutory purpose from two perspectives, the statute's substantive goals, and its enforcement objectives.[131] In *Cannon*, the substantive goal was to end federal funding to educational institutions which discriminated on the basis of sex, and the enforcement goal was to provide individuals with effective protection against such discrimination.[132] The Court searched the documented legislative history for evidence of legislative intent regarding the narrow question of the availability of private rights under the statute, as well as for evidence of the more broad issue of legislative intent regarding the purposes of the act.[133] Such an approach often leads courts to lump the two issues together in their analysis of legislative history, the narrow question of specific intent to create a private right of action subsuming that of general statutory purpose.[134]

The final consideration under *Cort*, the extent to which state rather than federal law traditionally governed the subject matter at issue, is often omitted entirely from a court's evaluation of implication.[135] Since this factor alone is not enough to warrant the implication of private rights, courts have usually already decided whether or not implication is appropriate without addressing this question.[136]

V. Implication and the EAA Cases

Following the trend of recent "implication" cases, the courts in

128 *Touche Ross*, 442 U.S. at 576.
129 *Sierra Club*, 451 U.S. at 302 (Rehnquist, J., concurring).
130 *Id.* at 298. *See supra* notes 128-29.
131 *Cannon*, 441 U.S. at 704.
132 *Id.*
133 *Id.* at 704 n.36. *See* Daily Income Fund v. Fox, 464 U.S. at 539.
134 *See, e.g., Merrill Lynch*, 456 U.S. at 383-87.
135 *See Transamerica*, 444 U.S. at 23-24; *Sierra Club*, 451 U.S. at 298.
136 *Touche Ross*, 442 U.S. at 580 (Brennan, J., concurring).

Bulk Oil and *Abrams* concentrated on interpreting congressional intent through the legislative history of the EAA, in an attempt to find congressional authorization for the court to imply the remedy demanded.[137] In *Bulk Oil*, no consideration was given to whether the EAA's antiboycott provisions were clearly aimed at a benefited class or whether the statute was simply a prohibition on discriminatory conduct. In contrast, the court in *Abrams* was convinced by the background and language of the Act that the antiboycott provisions of the EAA were intended to protect both Israelis and American Jews.[138] The court drew this conclusion despite the absence of an explicit indication in the language of the statute itself that this group was to be protected, and despite the fact that under a *Cannon* type of analysis the statute appears to fall within the category of laws which prohibit discriminatory conduct in general.[139]

Essentially, the courts in *Bulk Oil* and in *Abrams* were in agreement as to the content of the EAA's legislative history, but they differed in their reading of what that history meant. Where the *Bulk Oil* judge placed great importance on the fact that the 1976 House bill providing for treble damages in private actions never passed both houses of Congress, the court in *Abrams* did not view the incident as dispositive of legislative intent.[140] In their view, "non-passage" of the bill did not "foreclose" a private cause of action because the proposal called for treble damages instead of actual damages, the bill was never explicitly rejected as Congress simply adjourned without a final vote, and the bill that was drafted and passed by the following Congress, which became the 1977 Act, made no mention of private damages at all.[141]

Interestingly, neither court cited the only comments directly on point in the whole body of legislative history.[142] In describing the legislative response to Arab pressures embodied in section 2407 of the proposed EAA amendments, the Senate Subcommittee on International Finance acknowledged its "sensitiv[ity] to the difficulty of enforcing prohibitions

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137 *Bulk Oil*, 583 F. Supp. at 1139; *Abrams*, 581 F. Supp. at 1580-81.

138 *Abrams*, 581 F. Supp. at 1581.

139 *See supra* text accompanying notes 120-27.

140 *Abrams*, 581 F. Supp. at 1580-81.

141 *Id.*

142 While the Senate's characterization of the purpose of the 1965 antiboycott policy as providing the Administration with the authority to protect U.S. companies from boycott pressures arguably deals specifically with the availability of private remedies, it is unclear what conclusion should be drawn from the statement. Although the Administration was given authority, the exclusivity of this authority is not established. In addition, it is possible that even if the power to enforce the antiboycott policy was intended in 1965 to be exclusively administrative, given the government's failure to use this power effectively, the 1977 amendment may have been intended to eliminate this exclusivity.

on refusals to deal. . . . The danger of unwarranted allegations in this highly sensitive area has prompted the committee to *leave enforcement in the hands of the Executive branch instead of creating a private right of action.*"[143] The Committee viewed the continued availability of private redress under the civil rights and antitrust laws as standing independent of the exclusively administrative remedial scheme of the Act.[144]

Although the House reports do not contain any similar mention of the exclusivity of administrative remedies,[145] the Conference Committee adopted the Senate's version of the provisions for nearly every section of the antiboycott portion of the statute.[146] Given the lack of evidence regarding the House of Representatives' position on this issue, a clear intent by the Senate to exclude private actions, and the adoption of the Senate version of the amendments, what little evidence can be gathered from the EAA's legislative history points to the creation of solely administrative remedies.

A literal reading of the statement contained in the Senate report suggests that this administrative exclusivity may have been intended to apply only to refusals to deal under section 2407(a)(1)(A). The report repeatedly refers to that section only, stating that *"[t]he refusal to deal provisions of the bill . . .* would neither substitute for nor limit the operation of the antitrust or civil rights laws of the United States."[147] Such an interpretation is not supported by the actual wording and structure of the EAA provisions themselves, however. The language of section 2407(a)(4) is inclusive: "[n]othing in this subsection" is to affect the operation of civil rights or antitrust laws.[148] Both the ban on refusals to deal under section 2407(a)(1)(A) and the prohibition on discrimination in employment under section 2407(a)(1)(B) clearly fall equally within the meaning of the phrase "this subsection."

The relationship between the antiboycott measures of the EAA and other pre-existing statutes may provide some help in discerning legislative intent. Just as the *Cannon* Court, in deciding whether Title IX of the Education Amendments of 1972 supported a private cause of action, looked to comparable language in Title VI of the Civil Rights Act to see

143 S. REP. No. 104, 95th Cong., 1st Sess. 22 (1977) (emphasis added).

144 *Id. See* 50 U.S.C. app. § 2407(a)(4) (1982).

145 H.R. REP. No. 190, 95th Cong., 1st Sess. (1977).

146 H.R. REP. No. 354, 95th Cong., 1st Sess. 27 (1977). Differences between Senate and House versions in all but the last section were in the language not the substance of the law. The House version of § 2407(a)(4) mentioned only the antitrust laws while the Senate version, which was adopted, added the civil rights laws as well. *Id.*

147 S. REP. No. 104, 95th Cong., 1st Sess. 22 (1977) (emphasis added).

148 50 U.S.C. app. § 2407(a)(4) (1982).

whether that statute had been interpreted to include such remedies,[149] a comparison between section 2407 of the EAA and other overlapping and related statutes should be made. Both the Sherman Antitrust Act[150] and Title VII of the Civil Rights Act of 1964[151] address the same or similar problems as do sections 2407(a)(1)(A) and (B) of the EAA respectively. In fact, Bulk Oil sued on several counts, including both the Sherman Antitrust Act and section 2407(a)(1)(A) of the EAA. Similarly, in *Abrams*, the plaintiff doctors brought suit alleging violations of not only section 2407(a)(1)(B) of the EAA, but also of Title VII.

The Sherman Act does not adequately deal with the problem of secondary and tertiary boycotts which section 2407 of the EAA is designed to prevent.[152] According to testimony by the Justice Department, several impediments to its use for this purpose exist, including among them: 1) "the 'distinctive purpose' of the boycott, which exists for political reasons rather than for the purpose of securing commercial advantage;" and 2) "the uncertainty of the economic impact and hence whether it is 'so certain or severe as to justify application of the per se rule of illegality applied domestically.' "[153] Foreign boycotts imposed for political reasons have never been held to constitute a violation of the Sherman Act.[154]

The difficulties in using the Sherman Act to combat the effects of a boycott are apparent in the *Bulk Oil* opinion where the defendant's refusal to deliver oil to Israel was held to be neither a "refusal to deal" nor a boycott.[155] Furthermore, the court said that even if the defendant's actions had been a refusal to deal or a boycott, the Act of State doctrine would bar the court from evaluating the legality of the acts of a sovereign state inside their own territory.[156] Consequently, even though a private right of action is conferred by the Sherman Act, the statute's inability to reach the problems of the secondary and tertiary boycott to which the

149 *Cannon*, 441 U.S. at 677.

150 15 U.S.C. §§ 1-7 (1982).

151 42 U.S.C. § 2000e (1982).

152 123 CONG. REC. 11,424 (1977) (statement of Mr. Fascell); H.R. REP. No. 190, 95th Cong., 1st Sess. 5 (1977); S. REP. No. 104, 95th Cong., 1st Sess. 21 (1977).

153 S. REP. No. 104, 95th Cong., 1st Sess. 19-20 (1977), quoting *Hearings before the Subcommittee on International Finance on S.425* at 166. Another inadequacy is the doctrine which bars a sovereign state from being made a defendant in the courts of another sovereign state.

154 S. REP. No. 104, 95th Cong., 1st Sess. 20 (1977).

155 *Bulk Oil*, 583 F. Supp. at 1136. Even if the failure to deliver was deemed a boycott or refusal to deal under the antitrust laws, the plaintiffs failed to establish subject matter jurisdiction because there was no allegation of anticompetitive effects on U.S. commerce. *Id.* at 1136-37.

156 *Bulk Oil*, 583 F. Supp. at 1139. *See*, S. REP. No. 104, 95th Cong., 1st Sess. 20 (1977); *Bulk Oil*, 583 F. Supp. at 1137-38 (addressing the Act of State Doctrine).

EAA is addressed, suggests that duplication of legislation would not occur if such a right were implied under the EAA.

Title VII bears an even greater resemblence to section 2407(a)(1)(B) of the EAA than the Sherman Act does to section 2307(a)(1)(A). Both Title VII and section 2407(a)(1)(B) prohibit discrimination in employment on the basis of race, sex, religion or national origin, in language that is extremely similar.[157] Under Title VII, however, a private cause of action is expressly included in the statute.[158] If a private right of action also exists under the EAA, these similarities would result in duplication of statutory coverage. Any employment discrimination stemming from foreign boycott pressures would give rise to a private action under Title VII, nullifying the impact of private rights under section 2407(a)(1)(B) of the EAA.

A clear example of this problem is provided in *Abrams*, where plaintiffs' suit alleged violations and claimed a private right to recover damages under both statutes. The Texas court found that Baylor violated both Title VII and the EAA. Since the court found that a private right existed under the EAA, the plaintiffs were technically entitled to recover damages under each of the two statutes. To grant recovery under both statutes would compensate the doctors twice; thus the court limited their award to recovery under Title VII.[159] Such an outcome seems to render superfluous the private right of action provided under the EAA since the same rights can be vindicated by private individuals under the express provisions of Title VII.[160]

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157 Title VII, 42 U.S.C. § 2000e-2(a) (1982) states in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

For the comparable section of the EAA, see text accompanying note 18.

158 42 U.S.C. § 2000e-5(f).

159 *Abrams*, 581 F. Supp. at 1582.

160 Although in the securities area, courts have recognized such overlapping provisions, at least one Supreme Court decision suggests that this is due to the long-standing judicial implication of private rights which overlap with an express remedy in other sections, and the interpretation of congressional inaction as a ratification of the Court's decision. Herman & Mac Lean v. Huddleston, 459 U.S. 375, 380 (1983). In the case of the EAA, however, neither of these circumstances exist.

While implication provides one basis for asserting a private right of action under a federal statute which does not expressly provide for such a remedy, § 1983 may provide another basis. 42 U.S.C. § 1983 (1982). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. The Supreme Court has held § 1983 to apply to all federal statutes, Maine v. Thiboutot, 448 U.S.

This problem of duplication would be eliminated if a private right were available for a violation of any of the sections of the antiboycott provision, not only for the part dealing with discrimination in employment. In that case, the private remedies provided for in the EAA would give broader coverage than those included under Title VII. Although direct overlap would still be present between section 2407(a)(1)(B) of the EAA and Title VII, the other sections of the EAA would go on to confer private rights of action in related suits which could not be brought under Title VII.

There is some indication from the outcome of recent cases that the Supreme Court may be differentiating between private actions claimed under civil rights statutes and those alleged under other types of laws.[161] Courts appear to imply private rights of action more readily in civil rights cases than in other areas.[162] The majority opinion in *Cannon* makes a somewhat similar distinction when it contrasts "laws enacted for the protection of the general public" which are not likely to support an implied private action, with those that confer a right on a benefited class of individuals which more easily support implication.[163] This differentiation is reminiscent of an earlier distinction set out by the Supreme Court in *Bivens v. Six Unnamed Fed. Narcotics Agents.*[164] According to that decision, courts should be reluctant to imply private rights under statutes which regulate federal economic policy, but "may use any available remedy to make good the wrong done," where legal rights were impinged upon and a general right to sue is provided by the statute.[165] Since section 2407(a)(1)(B) provides civil rights-type protection, it is possible that it presents a more favorable situation for the implication of private rights than does section 2407(a)(1)(A) which addresses the more economic subject of refusals to deal.

One possible way to reconcile the outcomes in these two cases is to admit of a private right of action under subsection (B) of the antiboycott

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1, 4-8 (1979), with two exceptions. It does not apply to statutes where "Congress had foreclosed private enforcement of the statute in the enactment itself," or where the statute in question did not create enforceable rights under § 1983. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981). In *Bulk Oil* and in *Abrams*, however, the plaintiffs did not raise this issue.

161 Note, *Private Right of Action*, California v. Sierra Club, 22 SANTA CLARA L. REV. 949, 954-55 & nn. 40-43 (1982).

162 Frankel, *supra* note 99, at 563 n.59; Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978). *See also Bivens*, 403 U.S. at 396 (drawing a distinction between statutes regulating "federal fiscal policy" and those establishing individual rights in the implication of private rights of action).

163 *Cannon*, 441 U.S. at 690-91.

164 403 U.S. 388.

165 *Id.* at 396. This suit, however, involved constitutional, not statutory rights.

provision on which the *Abrams* suit was brought, but to deny one under subsection (A) on which the *Bulk Oil* plaintiffs sued. Implication of private rights of action for some parts of a statute but not for other parts has previously been upheld in the securities field.[166] The Securities Exchange Act of 1934,[167] for example, permits implied private rights of action for individuals harmed by violations of section 14(a) but does not allow the implication of such rights under section 14(e).[168] The distinction between these two sections of the same statute lies in the differing purposes for which they were enacted, and the separate and distinct evils which they were intended to combat. The Supreme Court found that while section 14(a) was designed to protect potential investors for whom a private right was essential, section 14(e) was not intended to protect the plaintiff tender offeror in a takeover bid.[169]

A similar case can be made for differentiating between subsection (A) and subsection (B) of the EAA's antiboycott provision on the grounds that each was designed to address a different, though related, problem. Arguably, subsection (A) presents a weaker case for the implication of private rights since the prohibition on refusals to deal has a lesser effect on third parties than does the ban on boycott-based employment discrimination in subsection (B). Courts have generally been more willing to imply a cause of action when the statute confers a benefit on a well-defined group of individuals.[170] Under these circumstances, the third parties are not the United States corporations themselves, but rather the United States persons who would be harmed by the companies' boycott compliance in the absence of this statute. Thus, it is possible that subsection (A) was intended to effectuate certain foreign policy goals and therefore to benefit United States citizens in general, while subsection (B) was aimed specifically at protecting United States employees from boycott-based discrimination.

This distinction does not find support in the text and structure of the EAA, however, which seems to suggest that whatever explicit or implied remedies exist, they are available equally to all sections. The fact that all of the violations and penalty provisions are contained within a separate section of the statute indicates their applicability to "any provision of this

166 *See infra* text accompanying note 169.

167 15 U.S.C. § 78 (1982).

168 *See* Piper v. Chris-Craft, 430 U.S. 1 (1977) (holding no implied private right of action under § 14(e) of the 1934 Act); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (holding that such a right exists under § 14(a) of the 1934 Act); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (holding implied private rights available under § 10(b) of the 1934 Act).

169 *Piper*, 430 U.S. at 34.

170 *See supra* text accompanying notes 122-25.

Act. . . ."[171] These facts suggest that if a private cause of action exists for any part of the EAA, it must exist for every part of the statute.

The amount of proof courts have required in implication cases has ranged from a showing of "the most compelling evidence that Congress intended such an action to exist,"[172] to a rebuttable presumption in favor of implying a private right of action where explicit remedies were "inadequate to ensure full effectiveness of the statute."[173] The rigor of the proof requirement may in many instances affect the outcome of the decision. It is unclear, however, whether the differences in evidentiary requirements stem from the nature of the rights involved in each case, or simply reflect shifting judicial approaches to implication generally.

Any comparison of the EAA and Title VII with regard to private rights of action must include the violations sections of the two statutes as well as the substantive provisions. Here, the analogy between the two statutes becomes more problematic. Title VII expressly provides for private suits, while the EAA does not. It is possible to speculate that had Congress written the substantive provisions of the EAA to resemble Title VII, it would have constructed the enforcement provisions similarly as well. Even though Congress departed from the Title VII model in drafting the violations section of the EAA, inclusion of section 2410(g) may have been intended to act as a rough equivalent of Title VII. This section states that the enumerated enforcement actions are not exclusive and that "the availability of other administrative or *judicial remedies*" are preserved.[174]

The plaintiff in *Bulk Oil* contended that this phrase should be interpreted to confer a private right under the statute. Although the court in *Bulk Oil* agreed that such a reading was "literally possible," it held that this interpretation did not follow consistently from the "history and structure" of the EAA.[175] The purpose of this part of the statute, according to the court, was to increase the regulatory flexibility of the scheme by clearly not limiting "the *government's* choice of sanctions to enforce the Act."[176] In *Abrams*, the court did not address this provision in its opinion even though the plaintiffs discussed the issue in a supplemental memorandum of law to the court.[177] In that memorandum the

171 50 U.S.C. app. § 2410 (1982).

172 *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

173 Wyandotte Co. v. United States, 389 U.S. at 202. *See also Borak*, 377 U.S. at 426.

174 50 U.S.C. app. § 2410(g) (1982).

175 *Bulk Oil*, 583 F. Supp. at 1141.

176 *Id.* at 1142.

177 Plaintiff's Supplemental Memorandum of Law, Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984).

plaintiffs argued that the purpose of the provision was clearly to permit a broad range of remedies not explicitly set out in the statute, including the right of private action.[178]

Bulk Oil further emphasized in its discussion of legislative history and congressional intent, that the plaintiffs' claim for a right of private action under the EAA was one of first impression. That fact created a presumption against the existence of such a right.[179] In contrast, *Abrams* took a more neutral approach to the absence of precedent.[180] *Abrams* follows a more reasonable approach since it is somewhat illogical to suppose that courts were making an affirmative statement regarding the absence of a private remedy when they are limited to deciding disputes brought before them, and no suit raising the question under the EAA had been presented to the bench.

The state of the law prior to the passage of the EAA amendments is part of the "contemporary legal context" in which the statute must be interpreted.[181] *Merrill Lynch, Pierce, Fenner & Smith v. Curran* instructed that "when the statute by its terms is silent on th[e] issue [of private rights of action], the initial focus must be on the state of the law at the time the legislation was enacted. . . . [The court] must examine Congress' perception of the law that it was shaping or reshaping."[182]

At the time that the antiboycott provisions were added to the EAA, no clear pattern of either judicial implication of private rights under the statute or denial of those rights had been established.[183] As the court in *Bulk Oil* pointed out, there was no history of judicial action on the subject at all.[184] This distinguishes the EAA from the Commodities Exchange Act that was interpreted in *Merrill Lynch*.[185] In *Merrill Lynch*, the Court discerned a clear pattern of judicial implication of the rights claimed by the plaintiff, coupled with congressional acquiescence to this position.[186] The state of the law at the time the antiboycott amendments were added to the EAA, however, was unsettled and unclear. The issue had never before been the subject of litigation, therefore "Congress *was* 'operating on a *tabula rasa*. . . .' "[187] Thus, in light of the absence of a

178 *Id.* at 3.
179 *Bulk Oil*, 583 F. Supp. at 1140.
180 581 F. Supp. at 1580-81.
181 *Cannon*, 441 U.S. at 698-99.
182 456 U.S. 353, 378 (1981).
183 583 F. Supp. at 1141.
184 *Id.*
185 456 U.S. at 379-82.
186 *Id.* at 379.
187 *Bulk Oil*, 583 F. Supp. at 1141 (quoting Leist v. Simplot, 638 F.2d 282, 313 (2d Cir. 1980) (emphasis in original)).

history of either implication or non-implication under the EAA, congressional silence should not be interpreted as acquiescence to existing practice.

VI. Implying Private Rights under the EAA

This overview of the recent development of the implication doctrine suggests that while many aspects of a court's inquiry remain undefined, it is well settled that the central issue to be determined by a court is whether Congress intended to create a private right of action under the statute in question.[188] Courts have relied quite heavily, if not exclusively, on the statute's legislative history to find evidence of this intent.[189] In most instances, extensive reliance on legislative history is misplaced and perpetuates the "somewhat schizophrenic" posture toward implication of private rights evidenced by the courts.[190] This is particularly so since "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question."[191] In light of the inconclusive nature of the information available, the reliability of a court finding which rests too heavily on legislative intent drawn from this legislative history is questionable. The danger in relying on ambiguous information to draw concrete conclusions is that "inconclusive legislative history can be used to support almost any position."[192]

The truth of this observation is clearly illustrated by the opposite readings of the same legislative documents in *Abrams* and *Bulk Oil*. The *Bulk Oil* decision is an example of how incomplete legislative history can be misused to create presumptions against implication. In contrast, *Abrams* correctly concluded that the legislative history was unclear and did not foreclose private damage actions. Despite the hazards of relying on legislative history in implication cases, maintaining necessary limits on the scope of judicial legislation requires some kind of an inquiry into congressional intent.[193] Courts should be careful, however, not to accord this typically ambiguous evidence too much weight. Only in unusual circumstances, where clear and substantial indications of an intent to create

188 *Sierra Club*, 451 U.S. at 293; Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1980).

189 *See Abrams*, 581 F. Supp. 1570; *Bulk Oil*, 583 F. Supp. 1134.

190 Comment, *Private Rights of Action Under* Amtrack *and* Ash*: Some Implications For Implication*, 123 U. Pa. L. Rev. 1392, 1412 (1975).

191 *Cannon*, 441 U.S. at 694.

192 Comment, *supra* note 190, at 1414.

193 At least one commentator has disagreed, calling the search for legislative intent through legislative history "futile" and "irrelevant." *Id.* at 1413.

or exclude private suits are found, should such a reading of legislative intent be determinative.[194] Where the evidence is inconclusive, courts should not invoke *expressio unius* nor equate congressional silence with rejection of private rights.[195] The absence of explicit provisions for private rights of action and the inclusion of an administrative scheme for enforcement in a statute can be explained in a variety of ways, only one of which is that Congress intentionally excluded the availability of private actions under the act in question. Alternatively, Congress may never have considered the issue, and the outcome, had it in fact done so, should not be predicted in favor of a rejection of those rights. The court in *Bulk Oil* erred when it invoked *expressio unius* as a post hoc presumption against private rights to bolster its conclusion.[196] In *Abrams* this trap was successfully avoided.

This Author's independent review of the legislative history of the EAA on the issue of implication revealed more evidence on the subject than either court discovered in their research. The Senate Committee report, not mentioned in either *Bulk Oil* or *Abrams*, clearly rejects private rights of action under the antiboycott provisions of the EAA.[197] While this statement is sufficiently unambiguous, a single indication by one committee is too incomplete to constitute substantial evidence.[198] In total, the majority of the evidence of congressional intent gathered by the reviewing courts is open to differing interpretations as to its impact on implication. This Senate report tips the balance away from finding an intent to create a private right of action, yet because it stands alone as an isolated indication in a mass of ambiguous evidence, it should not be determinative.

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194 The circumstances in which such a determinative finding can be made from the legislative history will be quite rare due to the nature of the inquiry itself which is necessary only because the statute is unclear on its face regarding private rights of action. If Congress had recognized the issue as an important one and given it due consideration, it is extremely likely that their conclusions would be embodied in the statute in a clear expression of Congress' position of private rights. *Id.*

This is not to say that legislative history should be ignored, but just that the instances when its use will clarify an ambiguous statute will be infrequent. It is possible, for example, that after a debate on this question, Congress arrived at a decision one way or the other and believed at the time of passage that its decision was unmistakably incorporated into the language of the statute. In retrospect, while the law may not convey this intent, the legislative history will.

195 Use of the maxim *expressio unius* and the presumption against implication in the face of congressional silence may appear to be identical. But this is not necessarily correct as *expressio unius* has been used in a variety of different ways, each to a different effect. *Id.* at 1416-17.

196 583 F. Supp. at 1143.

197 *See supra* text accompanying notes 49, 143-44.

198 This is a close case, however, and the Senate report is arguably substantial enough. On balance, the absence of any discussion in the Conference Committee leaves sufficient doubt regarding the House position on the matter of private rights to justify a finding that this does not meet the substantiality requirement.

Unless a court is presented with a rare case of clear legislative intent on the question of implication, it should go on to consider the third *Cort* factor, whether implication is consistent with the purposes of the statute.[199] In determining what the statutory purposes are, a court must look to a variety of factors which fall generally into two categories: substantive goals and enforcement objectives.[200] Under the heading of substantive goals are considerations of the class of persons that the legislation is intended to protect, the type of harm the law sought to prevent, and all other collateral considerations which motivated the passage of the statute.[201]

In the category of enforcement objectives, a court should determine whether "Congress intentionally limited the available remedies to accomplish a specified purpose," and, if so, private rights should not be implied.[202] More precisely, this inquiry involves questions such as: 1) whether there is a particular need for discretionary enforcement of the statute; 2) if centralized control is necessary to the efficient enforcement of the act and; 3) if the nature of the regulated activity is such that its efficacy depends upon consistent, uniform enforcement of the prohibitions.[203]

The court in *Bulk Oil* erroneously interpreted congressional inaction in an undeveloped area of the law, as acquiescence to a history of non-implication. The court viewed this as clear legislative intent, and treated it as dispositive. Thus it never considered implication in light of the purposes the EAA was to serve. The court in *Abrams* on the other hand, recognized the need for this inquiry but did not adequately take into account all of the purposes behind the EAA. This court found that the purpose of the antiboycott amendments was to alleviate Arab pressure on American companies to advance the Arab boycott of Israel.[204] Determining that American Jews as well as Israelis were the intended beneficiaries,[205] and that such discrimination was the type of harm sought to be prevented by the EAA, the court prematurely ended its search, concluding that private actions were consistent with the aims of the legislation

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199 *Cort*, 422 U.S. at 78.

200 *See Cannon*, 441 U.S. at 704.

201 The need to look at collateral factors was recognized in Ash v. Cort, 496 F.2d 416, 423 (3d Cir. 1974) and also in *Amtrack*, where a finding that the plaintiff was an intended beneficiary of the Amtrack Act and the harm was the type the law sought to prevent, was outweighed by the overriding goal of facilitating a more efficient passenger railroad service. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 461-64 (1974).

202 Comment, *supra* note 190, at 1426.

203 *See* Note, *supra* note 1, at 378-79.

204 *Abrams*, 581 F. Supp. at 1581.

205 *Id.*

and, therefore, that such actions should be implied.[206] The court should have gone on to examine the impact of any collateral considerations on the question of implication.

Collateral issues involved in the passage of the EAA include the concern that United States foreign policy was being shaped by American businesses succumbing to foreign economic pressures,[207] and a desire to minimize the loss of domestic jobs resulting from the operation of the antiboycott provisions.[208] Both of these factors tend to counteract the conclusion that private actions should be implied. Considerations in the enforcement area serve to reinforce the conclusion that while *Abrams* more closely approximated the correct method of implication analysis, the *Bulk Oil* result is the correct one. Due to the business nature of EAA-regulated activities and the complying companies' fear that non-complying companies would gain a competitive edge, enforcement must be consistent and uniform for the law to work.[209] This result is best achieved through the centralized control and discretionary enforcement that results from exclusive administrative remedies.

The conclusion that the purposes of the EAA are best served by exclusively government-enforced remedies is not barred by the presence of section 11(g) of the Act. Bulk argued that section 11(g) of the EAA eliminated any doubt that Congress intended to make private actions available under the statute. While the language on its face may suggest this conclusion, it does not compel it. As the district court in *Bulk Oil* noted, the legislative history of the civil penalty sections, of which subsection (g) is a part, analyzed it solely in terms of increased regulatory flexibility.[210] From this premise, the court concluded that subsection (g) "confirms that the presence of civil penalties in subsections (c),(d), or (f) in no way limited the *government's* choice of sanctions or actions to enforce the Act,"[211] but that subsection (g) did not create an entirely new remedy.

The legislative history of the EAA contains sufficient evidence to suggest that section 11(g) was included in order to maintain the government's remedial flexibility, not to throw open the statute to any type of

206 *Id.*

207 *Extension of the Export Administration Act of 1969: Hearings and Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 196 (1977) [hereinafter cited as *Hearings*].

208 123 CONG. REC. 11,426 (1977) (statement of Mr. Michel).

209 *See* 123 CONG. REC. 11,426 (1977) (statement of Mr. Solarz).

210 *Bulk Oil*, 583 F. Supp. at 1141-42. *See Continuation of Authority for Regulation of Exports: Hearings Before the Comm. on Banking & Currency*, 89th Cong., 1st Sess. 5 (1965); H.R. REP. No. 434, 89th Cong., 1st Sess. (1965).

211 *Bulk Oil*, 583 F. Supp. at 1141-42 (emphasis in original).

remedy imaginable. All of these aspects of the legislative purpose, which both the *Abrams* and *Bulk Oil* decisions overlook, appear to be inconsistent with the implication of private rights.

The third *Cort* factor, whether a private remedy is consistent with the underlying purposes of the legislative scheme, involves an examination of the whole act, not just the remedies and enforcement sections.[212] In determining what purposes the act was intended to serve, it is best to begin with the language of the statute itself.[213]

Incorporated into the EAA is a declaration of policy which sets out the purpose of the Act in general terms.[214] This policy statement recognizes that the Arab boycott of Israel has effects on several different levels, and indicates that this legislation was intended to combat the impact of only some of them. The core of the Arab states' policy is their refusal to conduct economic relations with Israel. This "primary" boycott, in effect since the founding of the State of Israel in 1948, is recognized as a legitimate form of economic warfare and lies beyond the scope of these provisions.[215] The second manifestation of Arab policy is the "secondary" boycott where Arab nations attempt to interfere with the economic relationship between third party countries, such as the United States, and Israel. This is accomplished through the requirement that in order to do business with Arab firms, United States companies must refuse to do business with Israel. The last level is the "tertiary" boycott in which one United States company is required not to do business with another United States firm who continues to deal with Israel or employ Jews. The latter two practices "impinge on U.S. domestic policy"[216] and it is the effects of these boycotts that the EAA amendments sought to eradicate.[217]

According to a Senate report, the bill was designed to "prevent *most* forms of compliance with foreign boycotts . . . and otherwise to strengthen U.S. law against foreign boycotts and reduce their economic impact."[218] The less than absolute prohibition refers to a compromise in the legislation which enumerates the exceptional circumstances where compliance is permitted.[219]

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212 Comment, *supra* note 190, at 1421.

213 *Cannon*, 441 U.S. at 689.

214 50 U.S.C. app. § 2402. For the text of the statement, see *supra* note 17.

215 123 CONG. REC. at 11,422 (1977) (statement of Mr. Bingham).

216 *Id.* at 11,420 (statement of Mr. Whalen).

217 S. REP. No. 104, 95th Cong., 1st Sess. 20 (1977).

218 *Id.* at 2 (emphasis added).

219 50 U.S.C. app. § 2407(a)(2)(A)-(F). For a summary of these exceptions, see S. REP. No. 104, 95th Cong., 1st Sess. 22-27 (1977).

From the tenor of its discussions which emphasized the repugnant character of foreign imposed discriminatory practices, it is clear that, exceptions aside, Congress sought "vigorous enforcement" of the antiboycott provisions.[220] Discussion on the floor of the House as well as the Senate emphasized the central importance of the antiboycott provisions as a mechanism for deterring potential violators from disregarding fundamental American ideals in favor of business advantage.[221]

Congress amended the EAA in 1965 to include a statement of policy against such United States compliance.[222] Only the policy itself was incorporated into the law, however; enforcement was entirely dependent on the efforts of the Department of Commerce to police and assure compliance with this instruction.[223] Reports indicate that the agency displayed a "distressingly clear pattern of passivity to, promotion of and disinterest in enforcing antiboycott policy. . . ."[224] Seeking to "assure that this Nation would not compromise its basic values in the search for expanded trade opportunities throughout the world,"[225] Congress recast the statement of policy in terms of substantive statutory prohibitions carrying the force of law.[226] In broad terms the statute seeks first, to end Arab use of American business as a tool for their own foreign policy objectives which are in conflict with our own, and second, to create a statutory structure in which the substantive goals will be enforced.[227]

Use of the antiboycott provisions primarily as a deterrent to prevent potential violators from complying with Arab demands suggests an argument against judicial implication which is being raised with greater frequency at the present time.[228] According to this argument, when Congress enacted the antiboycott provisions, it selected the level of deterrence that, in its judgement, was the most appropriate for the activity involved, in terms of both morality and efficiency. Congress' decision as to how much deterrence is socially and economically optimal was embodied within the enforcement provisions of the act. When a court adds

220 S. REP. NO. 104, 95th Cong., 1st Sess. 21 (1977).

221 123 CONG. REC. 11,426 (1977) (statement of Mr. Solarz).

222 *See supra* note 27.

223 *See supra* text accompanying notes 28-29.

224 S. REP. NO. 104, 95th Cong., 1st Sess. (1977) quoting Committee on Interstate and Foreign Commerce, Subcomm. on Oversight and Investigations, Report, "The Arab Boycott and American Business," September 1977.

225 *Id., reprinted in* 123 CONG. REC. 11,430 (1977).

226 Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

227 *See* 123 CONG. REC. 11,420 (1977) (statement of Mr. Whalen); *id.* at 11,424 (statement of Mr. Fascell).

228 This argument was made in the securities context in Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1304 (1983).

a private cause of action to that enforcement scheme, it is substituting its own judgement for that of Congress, creating excessive deterrence from Congress' point of view.[229]

While this approach is appealing at first in its fusion of separation of powers and efficiency analysis, the argument assumes its own conclusion. It is based on the assumption that Congress did not intend to create a private action under the statute, because if Congress did in fact intend to do so, then judicial implication of these rights would simply bring reality into line with the legislated optimal level of deterrence.[230] Although this analysis is helpful in determining the purposes of the statute on a general level, attention to specific objectives is also necessary. On a more specific level, the problem of multiplicity of goals and conflicting aims makes the determination of statutory purpose more problematic.

In addition, it is not settled to what extent private rights of action must be consistent with the statutory purposes to warrant implication. When a statute seeks to achieve numerous, sometimes competing goals, it would be difficult, if not impossible, for private actions to serve every one of them. One commentator has noted that "[a]lthough the precedents appear to indicate that *inconsistency* might be sufficient to deny a private right, they do not make clear what degree of *consistency* would be enough to confer one."[231] In *Cannon*, the Supreme Court found that implication was justified because private rights were "fully consistent with—and in some cases even necessary to—the orderly enforcement of the [Education Amendments of 1972]."[232] Other courts have refused to imply private actions when they are not "necessary to . . . or capable of furthering the [statutory] purpose,"[233] or not "completely consistent with the Act as a whole."[234]

These decisions indicate that something less than absolute necessity is required before a court will imply a private right of action, yet the standard that must be met is not clear. In line with this, most commentators including this author, take the position that even though a private right of action might conflict with some of these statutory goals, it should still be implied if those purposes are insignificant compared to the central purposes of the act which such a remedy would facilitate.[235]

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229 *Id.*

230 For different theories of judicial power underlying the implication of private remedies, see Frankel, *supra* note 99.

231 Note, *supra* note 162, at 1387 n.54 (emphasis added).

232 *Cannon*, 441 U.S. at 706.

233 Securities Investor Protection v. Barbour, 421 U.S. 412, 421 (1974).

234 National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. at 461.

235 Note, *supra* note 1, at 390.

In the case of the EAA, the background of congressional debate, legislative hearings and reports reveals a spectrum of goals sought to be achieved by this legislation. Most broadly, Congress intended to end United States corporate compliance with the Arab boycott.[236] The desire to assert United States foreign policy independent of unwanted influence from foreign nations such as the Arab states played a central role.[237] At the same time, members of Congress were concerned that this be achieved with a minimum loss of jobs in this country.[238]

On one hand, the goal of freeing United States foreign policy from unwanted foreign influence seems to favor the implication of private rights. Individual suits tend to ensure that a larger percentage of violations are prosecuted than when the administration is solely responsible for bringing lawsuits, due to the government's limited funds and other resources.

On the other hand, the emphasis on harms to foreign policy rather than the personal injuries suffered implies a greater concern for the foreign policy effects of this practice, a sphere placed exclusively in the hands of the government, not the private citizen. Additionally, the strong interest in preserving jobs in this country indicates that Congress might not have wanted each and every violation to be punished, but instead to use the government's resources selectively to enforce the law to its best advantage.[239] In other words, concern for limiting the number of jobs lost as a result of the operation of this statute shows that the level of deterrence that Congress desired falls below the level which results from near total enforcement by private suit. Tied to the deterrence aspect was a congressional desire for administrative discretion.[240] This discretion would be severely limited under the *Abrams* view of the EAA, permitting private rights of action.

The final consideration under *Cort v. Ash* is whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the states. . . ."[241] This element has fallen into disuse since courts have taken the position that consideration of legislative intent is dispositive on the issue of implication. However, it nevertheless remains an important issue to address briefly. The court in *Bulk Oil* did not discuss the federalism question at all, and the court in *Abrams* summarily

236 123 CONG. REC. 11,424 (1977) (remarks of Mr. Fascell); *id.* at 11,481 (remarks of Mr. Drinan).

237 *Hearings*, *supra* note 207, at 196.

238 123 CONG. REC. 11,426 (1977) (statement of Mr. Michel).

239 *Id.* at 11,419, 11,426.

240 S. REP. NO. 104, 95th Cong., 1st Sess. 22 (1977).

241 Cort v. Ash, 422 U.S. at 78.

concluded that there was "no state law . . . govern[ing] the type of cause which would be implied from the EAA."[242]

Once again it is best to start with the language of the statute itself. Section 2407(c) of the EAA states that the antiboycott provisions preempt any state law which regulates the subject.[243] Although this plainly expresses the intent to control the problem of Arab boycott pressures solely within the federal forum, it does not settle the question of whether these federal rights were to be exclusively administrative or to be extended to the private individual as well. Congress could have carried the state preemption one step further by asserting the exclusivity of the EAA, which would preclude the implication of private rights, yet it did not do so.

The subject matter regulated by the antiboycott provisions of the EAA suggests that the boycott-related issues which were removed from the reach of state courts and legislatures should not be given out in new form under the guise of private rights of action. Foreign affairs and foreign policy are areas of particular sensitivity which demand centralized operation and command to assure their effectiveness. Because these issues are national in scope and derive their effectiveness from the singularity and clarity of the message that the policies convey to foreign countries, the policy must be uniform across all states and it must be consistently applied. Regional enforcement of the foreign policy objectives embodied in the antiboycott legislation would only serve to frustrate the purpose of presenting a coherent and consistent stance on foreign boycotts to nations with whom we trade. As a result of the heightened need for uniformity and centralization involved in the operation of foreign affairs, this area of law is one traditionally left to federal jurisdiction.[244]

Not only is foreign policy a federal concern, but it is also generally viewed as primarily a matter for executive control.[245] In *Bulk Oil*, Sun characterized the antiboycott provisions as "a grant of authority to the President to conduct the foreign policy of the United States. . . . Enforcement of the Act thus necessarily involves matters of judgement that can affect the foreign policy of the United States."[246] While this may be true, the fact that a statute has international ramifications should not

242 *Abrams*, 581 F. Supp. at 1581.

243 Comment, *supra* note 190, at 1413-14.

244 *See* Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981).

245 United States v. Curtiss-Wright, 299 U.S. 304, 319-21 (1936).

246 Defendant's Motion to Dismiss the Complaint, ¶ 35, Bulk Oil v. Sun, 583 F. Supp. 1134 (S.D.N.Y. 1983).

automatically stand as a bar to private suits. Both the international and domestic aspects of the legislation should be weighed.

Characterization of the EAA strictly as a regulation of foreign policy oversimplifies its purposes and effects. Although the general subject of foreign boycotts relates closely to foreign affairs, it is specifically the domestic impact of secondary and tertiary boycotts that the antiboycott sections attempt to limit. The prohibitions run to any "United States person" engaged in foreign or interstate commerce of the United States.[247] The prohibited behavior is particular domestic reactions to foreign actions, not the foreign actions themselves.[248] In fact, though the domestic and international facets of the law are tightly interwoven, the subject matter of section 2407 focuses on the regulation of American business operations which is more domestic than foreign.

Here, even though the regulation relates to both domestic and international affairs, the case for strict administrative exclusivity is stronger than in questions of purely domestic law which comprise nearly all of the implied private action cases heard by the Supreme Court to date.[249] On this basis, the EAA may be distinguished from laws such as the Commodities Exchange Act, Securities Exchange Act and Title IX, which have been considered on the question of implied private rights.[250] The EAA presents a stronger case against implication in this regard.

Aside from the foreign policy implications, the nature of the practices which the EAA seeks to regulate dictates that in order for the antiboycott provisions to work, they must affect all American businesses equally. It appears that United States companies feared that refusing to comply with the Arab demands would put them at a competitive disadvantage in relation to other firms who went along with the boycott and received Arab contracts as a result. This concern was discussed during the congressional debates in the House of Representatives.

> American firms desiring to do business with the Arab states are presently faced with the unpleasant choice of succumbing to discriminatory de-

247 50 U.S.C. app. § 2407 (1982).

248 122 CONG. REC. 31,930-31 (1976) (statement of Mr. Burke); 123 CONG. REC. 11,422 (1977) (statement of Mr. Bingham); *id.* at 11,420 (statement of Mr. Whalen).

249 A representative sample of the implied rights cases that have come before the Supreme Court in recent years includes: Daily Income Fund v. Fox, 464 U.S. 523 (1984) (denying private rights under the Investment Company Act); *Sierra Club*, 451 U.S. 287 (1981); Texas Indus. v. Radcliff Materials, 451 U.S. 630 (1981) (denying private right to sue for contribution among coconspirators in an antitrust violation under the Sherman and Clayton Acts); University Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1980) (denying a private right of action under the Davis-Bacon Act regulating government construction contracts).

250 Leist v. Simplot, 638 F.2d 282 (2d Cir. 1980), *aff'd sub nom.*, Merrill Lynch v. Curran, 456 U.S. 353 (1982); *Cannon*, 441 U.S. 677.

> mands or suffering a loss of business to other American companies. A *uniform ban* on compliance with boycott demands would end this dilemma and place all firms on equal competitive footing. . . .[251]

Uniform enforcement of the law can mean several things, however. It can mean that the maximum number of suits are brought to court, or that once instituted, these suits are resolved in a consistent manner according to clear standards. Allowing private suits may result in the prosecution of a greater number of cases,[252] but an exclusive administrative remedy is more likely to establish a clear cohesive standard of permissible and impermissible conduct due to coordination and centralization of control. At bottom, the issue of implication presents a choice between these two alternative types of "consistent" enforcement.

VII. CONCLUSION

Review of recent implication cases has revealed that this area of law is in a state of confusion. The conflicting outcomes in *Bulk Oil* and *Abrams* reinforce the suspicion that this confusion is a result of judicial opinions decided on the basis of visceral reactions rather than sound legal doctrine. While extensive use of legislative history and strong presumptions in support of the outcomes tends to mask this fact, the use of the same legislative evidence to arrive at opposite conclusions, as happened in the two principal cases here, indicates that there must be some other underlying grounds for decision which the presumption and legislative history are used to justify. The opinions in *Abrams* and *Bulk Oil* can be reconciled, but not on any basis contained within either opinion.

In order to rationalize the approach and assure some predictability and consistency in the implication of private rights, a court's determination of whether implication of private rights is appropriate under a federal statute should be a multilevel evaluation. First, a court should examine not only the legislative history of the statute, but also the language and structure of both the substantive and enforcement provisions of the act, to ascertain whether clear and substantial evidence of congressional intent to create or deny a private right of action exists. In order to satisfy the clear and substantial standard, the record must reflect direct consideration of the issue of private rights, by either the drafting committee or the entire Congress in floor debate of the bill. Discussion of peripheral questions, such as the exclusivity of the federal law, are insufficient, as is consideration of private rights by an unimportant or small number of individuals within the legislative process.

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251 123 CONG. REC. at 11,431, (1977) (statement of Mr. Drinan) (emphasis added).

252 *See Borak*, 377 U.S. at 432.

Few statutes will meet the standard set out above. But in light of the rationale behind the implication doctrine, namely the protection of statutory interests as Congress envisioned them, it is a necessary threshold inquiry for a court to make. For those statutes that do meet this standard, a clear and substantial showing of congressional intent brings the judicial inquiry to an end.

In the majority of cases, however, a court should continue its inquiry beyond the specific intention to create or deny private rights, to a more encompassing examination of statutory purpose. At this stage, a court should look broadly at the substantive and enforcement goals that Congress sought to achieve in passing this legislation.

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