Respecting Congress's Express Intent: Correcting the Split
Allowing Unions an Implied Private Right of Action Under LMRDA
Section 501

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COMMENT

RESPECTING CONGRESS’S EXPRESS INTENT: CORRECTING THE SPLIT ALLOWING UNIONS AN IMPLIED PRIVATE RIGHT OF ACTION UNDER LMRDA SECTION 501

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Colorful, televised exchanges between senators and labor union leaders detailing the misdeeds of a handful of unions left Americans in the late-1950s with the impression that unions were merely organized crime syndicates. Congress responded to America’s dissatisfaction with the state of unions by enacting the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Congress’s goal was to empower union members and thereby place pressure on union leadership to clean up its act without overbearing federal involvement. Section 501 of the LMRDA imposes fiduciary duties on union officers and expressly enables union members to sue, for the benefit of the union, officers who breach their fiduciary duties if the union fails to take action. This enforcement mechanism functions similar to a shareholder’s derivative suit in corporate law.

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5. See Phillips, 403 F.2d at 831. A shareholder’s derivative suit is the mechanism by which a corporate shareholder may bring a claim on behalf of the corporation, and any award is for the benefit of the corporation. DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW & PRACTICE §§ 1.1, 2.2 (2003). The derivative suit must be a claim on which the corporation could have sued independently, and the shareholder often must request that the corporation pursue the claim first. Id.
In 1974, unions started to sue their current and former officers under section 501 for breaching fiduciary duties they owed to the unions even though the LMRDA does not expressly provide for a union-initiated right of action. To overcome this minor detail, unions asserted that the statute contained an implied private right of action. Suing under section 501 would give a federal court subject-matter jurisdiction over a union’s suit that otherwise would not be available. Since the late-1970s in federal district courts, and since the mid-1990s in federal circuit courts, a split has emerged over whether unions could sue under section 501. Courts that hold no implied right of action exists have pointed to the express language in section 501 that provides union members with a right of action as evidence that Congress did not also intend a right of action for unions. On the other hand, courts finding that an implied right of action exists have focused on the requirement that union members must first demand that their unions take action before those union members can sue, arguing that this requirement is evidence that Congress intended for unions to sue under section 501.

Recent Supreme Court jurisprudence permitting implied rights of action has been increasingly restrictive, and the Court has found few implied rights of action.
action in recent years. The Court has limited its inquiry to discerning congressional intent to provide an implied right of action from the statutory text, structure, and circumstances of enactment. Despite this direction from the Court, lower courts interpreting section 501 have reached opposite conclusions.

This Comment examines the circuit split among the United States Courts of Appeals for the Seventh, Ninth, and Eleventh Circuits, and district courts in undecided circuits. First, this Comment introduces the LMRDA and its disputed provisions. Next, it discusses the evolution and current state of the Supreme Court's implied right of action jurisprudence. It then evaluates the conflicting rationales and conclusions of the Seventh, Ninth, and Eleventh Circuits and the federal district courts in other circuits. This Comment then sides with the Ninth Circuit and argues that the Seventh and Eleventh Circuits erred in finding that Congress intended to provide an implied right of action for unions. This Comment also points to the constitutional separation of powers and Article III limitations that must restrain a court's search for an implied right of action. Finally, this Comment recommends that undecided district courts, circuit courts, and the Supreme Court follow the Ninth Circuit's lead. This Comment also proposes that the Supreme Court should adopt a mandatory presumption that Congress does not intend to create an implied right of action when the statute already includes an alternative express right of action.

I. DEFINING THE LIMITS OF LMRDA SECTION 501 AND IMPLIED RIGHTS OF ACTION

A. The LMRDA: A Statute for Protecting Workers from Corrupt Unions

1. Congress Enacted the LMRDA at the Height of Labor Union Corruption Awareness

In 1957, the Senate formed the Select Committee on Improper Activities in the Labor or Management Field, known as the McClellan Committee, which conducted numerous hearings exposing corruption in labor unions. The hearings captured the nation's attention and uncovered the lurid details of

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13. See Alexander v. Sandoval, 532 U.S. 275, 286–88, 293 (2001); Ward, 563 F.3d at 285 (highlighting the importance the Supreme Court places on congressional intent in determining whether an implied private right of action exists); see also FALLON ET AL., supra note 7, at 781–82 (outlining the Supreme Court's implied private right of action jurisprudence).


15. Compare Traweek, 867 F.2d 506–07 (concluding that there is no implied right of action for unions under section 501), with Ward, 563 F.3d at 289 (finding an implied right of action for unions under section 501), and Statham, 97 F.3d at 1421 (same).

16. See Phillips v. Osborne, 403 F.2d 826, 828–29 (9th Cir. 1968); Nelson, supra note 1, at 532–33.
union misdoings, including the actions of Jimmy Hoffa and the Teamsters.\textsuperscript{17} These improprieties included violence, racketeering, misappropriation of union funds, and union officers profiting at the expense of union members.\textsuperscript{18} In response, the political pressure to enact federal legislation to regulate the internal affairs of labor unions became overwhelming.\textsuperscript{19}

In 1959, Congress enacted the LMRDA,\textsuperscript{20} also known as the Landrum-Griffin Act.\textsuperscript{21} The reform was aimed at democratizing labor unions so that union officers would be held accountable for their misdeeds, thereby eliminating corruption without inordinate federal involvement in the internal affairs of unions.\textsuperscript{22} Congress's stated purpose in enacting the LMRDA was to continue "to protect employees' rights to organize,"\textsuperscript{23} and to implement "legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations."\textsuperscript{24} The broad goal of the LMRDA was to protect the rights of individual union members from unscrupulous union leaders.\textsuperscript{25}

2. \textit{Section 501: Defining Fiduciary Duties and a Right of Action for Union Members}

Section 501(a) of the LMRDA defines in detail the general fiduciary duties union officers owe to union members.\textsuperscript{26} Union officers must use union money

\begin{itemize}
\item \textsuperscript{17} See Nelson, supra note 1, at 533-37 (describing the McClellan Committee's pursuit of Jimmy Hoffa and the Teamsters).
\item \textsuperscript{18} Phillips, 403 F.2d at 828.
\item \textsuperscript{19} See Nelson, supra note 1, at 536-38 (detailing early attempts at labor reform following the McClellan Committee hearings).
\item \textsuperscript{21} Nelson, supra note 1, at 528.
\item \textsuperscript{22} See S. REP. NO. 85-1417, at 452 (1958); see also Phillips, 403 F.2d at 828-29; Mallick v. Int'l Bhd. of Elec. Workers, 749 F.2d 771, 776-77 (D.C. Cir. 1984) ("By ensuring that members could assert practical control over union policies, Congress attempted to prevent corruption with a minimum of direct federal intervention in union decisionmaking.").
\item \textsuperscript{23} 29 U.S.C. § 401(a) (2006).
\item \textsuperscript{24} Id. § 401(b).
\item \textsuperscript{26} 29 U.S.C. § 501(a) (2006). Subsection (a) provides in full:
The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group.
for the benefit of the union, not act adversely to or have a conflicting interest with the union, and must submit to the union any profit gained while acting on behalf of the union. In addition, this subsection voids exculpatory provisions in union bylaws or constitutions and exculpatory resolutions enacted by union bodies that absolve a union officer of any breach. Section 501(b) provides that when a union officer breaches his section 501(a) fiduciary duty and the union "refuse[s] or fail[s] to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after" a member demands that the union take action, the union member may sue the breaching officer in federal court to recover damages on behalf of the union. A union member must, however, seek leave of the court before the suit can proceed.

3. Scraps of Legislative History Concerning Section 501

Senate Bill 1555, which became the LMRDA, did not include the general fiduciary duty and enforcement provisions when it was reported out of

is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Id.

27. Id.
28. Id.
29. Id. § 501(b). Subsection (b) provides in full:

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Id. Subsection (c) criminalizes embezzlement of union funds by union officers. Id. § 501(c).
30. Id. § 501(b).
committee. However, Senate bills that were not reported out of committee included such provisions, including one bill that expressly allowed unions to sue along with union members. The committee report included a minority statement by Senators Barry Goldwater and Everett McKinley Dirksen that decried the failure to establish a general fiduciary duty. The senators argued that enacting a general fiduciary duty was necessary because union officers held money for the benefit of union members and state law provided inadequate remedies for union members to hold union officers accountable for misappropriating funds. The senators reasoned that the lack of a general fiduciary duty “constitute[d] a failure to provide what could be the most effective possible device for enabling rank-and-file union members themselves to control financial misconduct on the part of their officials.” In the committee report, the senators proposed an amendment to “[i]mpose[] fiduciary obligations, enforceable by union members, on the officials of labor unions.” When Senate Bill 1555 reached the Senate floor, Senator John Little McClellan introduced an amendment that imposed fiduciary duties on union officers for handling union money and property. The Senate adopted the amendment. The bill, before the McClellan amendment, allowed union members to sue union officers on behalf of the union if the officers were convicted of embezzling, and the McClellan amendment used this enforcement


33. S. 748, 86th Cong. § 301 (1959) (providing that action against a union officer for breach of fiduciary duty may be brought “by one or more of the principal officers of such labor organization” or “by any one or more of the members of the labor organization”), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 109–10.


35. Id.; see also H.R. REP. No. 86-741, at 7 (1959) (“The members of a labor organization are the real owners of the money and property of such organizations and are entitled to a full accounting of all transactions involving such money and property.”), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 765.


The language that is now section 501 existed in the House version of the bill when it was reported out of committee.\footnote{See H.R. 8342, 86th Cong. § 501 (1959) (as reported by H.R. Comm. on Educ. & Labor, July 30, 1959), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 730–32. The Senate passed Senate Bill 1555 before House Bill 8342 was introduced. Compare S. 1555, 86th Cong. (1959) (as passed by Senate, Apr. 25, 1959), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 516, with H.R. 8342, 86th Cong. (1959) (as reported by H.R. Comm. on Educ. & Labor, July 30, 1959), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 687. During the House subcommittee hearings, discussion of union officers’ statutory fiduciary duties focused on whether the fiduciary duties in Senate Bill 1555 were inadequate or too harsh. See, e.g., Labor-Management Reform Legislation: Hearing on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 Before a J. Subcomm. of the H. Comm. on Educ. & Labor, 86th Cong. 1604 (1959) [hereinafter House Hearings] (statement of Sen. Barry Goldwater) (criticizing the Senate bill’s fiduciary-duty enforcement measures as “grant[ing] the union member so little in the way of an effective remedy that he would be better off, in most cases, in bringing his suit under State law”); id. at 1489–91 (statement of George Meany, President, AFL-CIO) (attacking the fiduciary provisions in the Senate bill “as among its most objectionable” because such a broad fiduciary duty would expose a union to suits by union members who simply disagree with how the union legitimately chooses to spend its money).} In the House committee report, the committee emphasized the importance of fiduciary duties, noting that “[a]lthough the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation.”\footnote{H.R. REP. No. 86-741, at 81 (1959) (“The general principles stated in the bill are familiar to the courts, both State and Federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents.”), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 839.} Concerning the enforcement mechanism for the fiduciary duty, the committee report only restated the language of the bill permitting union members to sue for breaches of fiduciary duties when the union declined to sue.\footnote{See H.R. REP. No. 86-741, at 82 (1959) (“The bill also authorizes a union member to bring an action against any official or agent who violates his fiduciary obligations, if the union refuses to sue—and again such member may recover counsel fees and costs if he prevails.”), reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 839.} The House also passed its bill.\footnote{105 CONG. REC. at 15,891–92.}

Both the Senate and House passed the legislation, which became the LMRDA.  

B. The Supreme Court's Restrictive Implied Private Right of Action Jurisprudence

Implying private rights of action in statutes is a relatively modern phenomenon. The Supreme Court first implied rights of action under provisions of the Railway Labor Act of 1926 because the statute did not have any judicial enforcement mechanism, and the Court found that Congress intended the statute to be more potent. The Supreme Court has evolved through three analytical approaches with respect to implied rights of action over the past half-century. The Supreme Court began with expansive approaches, queuing lower courts to find many implied rights of action in the 1960s and 1970s, but the Supreme Court has cemented a restrictive approach in the past three decades and has found fewer implied rights of action.

1. J.I. Case v. Borak: As Long as an Implied Right of Action Effectuates Congress's Purpose

In 1964, the Supreme Court announced the first, most expansive, and subsequently abandoned approach used to decide whether a statute contained an implied right of action. In *J.I. Case v. Borak*, the Court permitted a shareholder to sue for damages under section 14(a) of the Securities Exchange

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51. See Cannon, 441 U.S. at 741–42 (Powell, J., dissenting) (showing that lower federal courts found numerous implied rights of action in the few years following *Cort v. Ash*).

52. See FALLON ET AL., supra note 7, at 781–82.

53. See id. at 781; see also J.I. Case v. Borak, 377 U.S. 426, 433 (1964) ("It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded.").
Act of 1934—alleging that the company circulated a false proxy statement that facilitated a merger—even though the statute itself did not mention a private right of action. The statute did expressly ban the distribution of false proxy statements. Holding that courts have a “duty . . . to be alert to provide such remedies as are necessary to make effective the congressional purpose,” the Supreme Court reasoned that judicial remedies were necessary to effectuate Congress’s purpose of protecting investors under the statute.

2. Toward Reining In Implied Rights of Action: The Cort v. Ash Four-Factor Test

In deciding Cort v. Ash in 1975, the Supreme Court enumerated several factors to consider when determining whether Congress intended an implied right of action in a particular statute: (1) Is the statute meant to benefit this type of plaintiff? (2) Did Congress intend, explicitly or implicitly, to grant or withhold the remedy sought? (3) Does implying a remedy comport with the purposes of the statute? (4) Is the remedy traditionally a matter of state law, rendering a federal remedy inappropriate? After applying these factors, the Court found no implied private right of action in the statute before it—a criminal statute that prohibited corporations from contributing to political campaigns.

Four years later, in Cannon v. University of Chicago, the Supreme Court applied the Cort factors and reached the opposite conclusion, finding an implied right of action under Title IX of the Education Amendments of 1972. Justice Louis F. Powell, Jr., vigorously dissented, arguing that congressional intent is the only permissible inquiry. He denounced the other three Cort factors as “invit[ing] independent judicial lawmaking” and giving courts a
justification "to substitute [their] own views as to the desirability of private enforcement." He implored that inferring a right of action where Congress in fact did not intend one has dire constitutional implications. Because Article I of the Constitution grants Congress the exclusive power to legislate, allowing Congress to shirk its responsibilities or permitting courts to legislate from the bench without accountability "denigrates the democratic process." Justice Powell further emphasized that Article III vests Congress with the sole power to define the jurisdiction of lower federal courts, yet implying private rights of actions into statutes in which Congress did not provide such rights effectively gives to courts the power to create their own jurisdiction. Justice Powell’s concerns foreshadowed the Court’s current restrictive jurisprudence.

3. Modern Restrictive Approach: Congressional Intent for an Implied Right of Action Is Determinative

One month after Cannon, the Court effectively overruled the Cort four-factor approach in Touche Ross & Co. v. Redington. Concluding that the "central inquiry" is congressional intent, the Court declined to apply the other three factors. The Court held that a statute requiring brokerage firms to file reports with the Securities and Exchange Commission (SEC) did not include an implied right of action for clients to sue a brokerage firm accountant for misstatements in the reports because the statutory language lacked any evidence of legislative intent to create a private right of action.

65. Id. at 740 (Powell, J., dissenting).
66. Id. at 742 ("'[T]he unconstitutionality of the course pursued has now been made clear' and compels us to abandon the implication doctrine of Cort." (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938))).
67. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
69. Id. at 746-47; see also U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
70. See Cannon, 441 U.S. at 730-31 (Powell, J., dissenting); see also George D. Brown, Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts, 69 IOWA L. REV. 617, 636 (1984) (arguing that the Supreme Court’s acceptance of Justice Powell’s critiques in Cannon led to its current restrictive jurisprudence); Richard W. Creswell, The Separation of Powers Implications of Implied Rights of Action, 34 MERCER L. REV. 973, 987-89 (1983) (suggesting that the Court’s congressional intent test allows it to avoid the difficulties raised by Justice Powell’s constitutional arguments).
72. Touche Ross, 442 U.S. at 568, 575-76.
73. Id. at 562, 569-71, 575-76 (emphasizing that statutory reporting provisions are intended to enable federal regulatory agencies to perform their oversight functions and do not impose private liability). In his dissent, Justice Thurgood Marshall applied all four Cort factors and concluded that there was an implied right of action. Id. at 580-83 (Marshall, J., dissenting).
A few months later, the Supreme Court confirmed the new direction of its implied right of action jurisprudence in Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis. In TAMA, the Court held that the ultimate question in an implied right of action analysis is whether Congress intended to create a private right of action even though it did not expressly provide one. The TAMA Court specifically articulated the proper inquiry: "Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." The Court warned: "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Applying the restrictive inquiry, the Court refused to imply a private right of action for damages into a section of the Investment Advisers Act of 1940, which imposed "federal fiduciary standards" on investment advisors. The Court reasoned that the statute already provided for criminal and administrative enforcement and that Congress had provided express private rights of action elsewhere in the Act.

Since Touche Ross and TAMA, the Supreme Court has rejected almost every invitation to imply a right of action into federal statutes, with the exception of

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74. TAMA, 444 U.S. at 23–24. Justice Powell concurred that TAMA was compatible with his dissent in Cannon. Id. at 25 (Powell, J., concurring); see also Cannon, 441 U.S. at 730–31, 749 (Powell, J., dissenting).

75. TAMA, 444 U.S. at 15–16.

76. Id. at 18; see also Thompson v. Thompson, 484 U.S. 174, 179 (1988) ("[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." (quoting Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 94 (1981))).

77. TAMA, 444 U.S. at 19. This statement is also consistent with the pre-Borak jurisprudence, under which the Court would find an implied right of action only when the whole statute was devoid of any enforcement mechanism. See, e.g., Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 568–69 (1930) (holding that an injunction was lawful because Congress clearly intended the prohibition in the Railway Labor Act to be enforceable even though Congress provided no express statutory remedy). The statutory canon of expressio unius est exclusio alterius provides: "[T]o express or include one thing implies the exclusion of the other, or of the alternative." Black’s Law Dictionary 661 (9th ed. 2009); see 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:23 (7th ed. 2007). This canon derives from common sense and "expresses the learning of common experience that when people say one thing they do not mean something else." Singer & Singer, supra, § 47:24.

78. TAMA, 444 U.S. at 17–19, 24. Justice Byron White’s dissenting opinion—joined by Justices William Brennan, Marshall, and John Paul Stevens—thoroughly analyzed the case using the Cort factors and concluded that the Court should imply a right of action into the Act. Id. at 25–36 (White, J., dissenting).

79. Id. at 20–21 (majority opinion). Focusing on the language of the statute, the Court found that an implied equitable remedy for rescission and restitution existed in federal court because a different section of the statute declared certain contracts void. Id. at 18–19. The Court reasoned that Congress must have intended a mechanism to void a contract, including the traditional remedies of rescission and restitution. Id. at 19.
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran. In Curran, the Court found an implied right of action for violations of the Commodity Exchange Act. The Court reasoned that Congress intended for private rights of action to continue to be implied under the statute because federal courts routinely implied a right of action in the statute before Congress amended it. The Court observed that Congress would have amended the provisions used to imply private rights of action if it opposed creating them.

The Supreme Court also suggested another caveat to the restrictive approach by indicating that it might treat statutes enacted before 1975 more leniently. In Karahalios v. National Federation of Federal Employees, Local 1263, the Court, in finding no private right of action for federal employees to enforce their statutory right to fair representation by their union, reasoned that Congress was aware when it enacted the 1978 statute that the Court no longer was implying rights of action freely, but instead was conducting a "straightforward inquiry" into congressional intent. The Court's reasoning left open the possibility that it might more readily imply a private right of action into a pre-1975 statute because Congress was not yet on notice of the Court's more restrictive approach to implying private rights of action.

In its 2001 Alexander v. Sandoval decision, the Supreme Court reaffirmed the restrictive approach it first adopted in Touche Ross and perhaps further restricted its implied private right of action inquiry. The Alexander Court refused to find an implied right of action in a disparate-impact regulation promulgated pursuant to Title VI of the Civil Rights Act of 1964. Writing for the majority, Justice Antonin Scalia clarified that a court must find that Congress intended "to create not just a private right but also a private remedy" for a right of action to be implied. Justice Scalia reiterated that Congress's

82. Id. at 381–82 (majority opinion).
83. Id.
85. Id. at 529, 536.
86. See id. at 536. But see Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) (finding that the statutory text is the central inquiry and that "contemporary legal context" has never had dispositive weight). Therefore, the Curran ratification exception is likely no longer viable. See Alexander, 532 U.S. at 287–88.
87. See Alexander, 532 U.S. at 286–93; see also Larry W. Yackle, Federal Courts 249 (3d ed. 2009) (suggesting that Justice Scalia's opinion "demands express statutory language" as evidence of congressional intent in order to find an implied right of action).
88. Alexander, 532 U.S. at 293.
89. Id. at 286.
intent is determinative in interpreting the statute because Congress must create
the private right of action. Absent clear congressional intent, courts may not
imply a right of action “no matter how desirable that might be as a policy
matter, or how compatible with the statute.” Justice Scalia reiterated the
traditional canon of statutory interpretation that “[t]he express provision of one
method of enforcing a substantive rule suggests that Congress intended to
preclude others.” He further noted that the suggestion can be strong enough
to “preclude[] a finding of congressional intent,” even when other statutory
language might imply otherwise or where the statute engenders “substantive
private rights.” In addition, the Court recently revived Justice Powell’s
Article III and separation-of-powers concerns in its Stoneridge Investment
Partners, LLC v. Scientific-Atlanta, Inc. decision, declining to find an implied
right of action under section 10(b) of the Securities Exchange Act of 1934.

C. The Circuit Split on Whether Unions May Sue Their Own Officers Under
LMRDA Section 501

Despite the consistency and clarity of the Supreme Court’s restrictive
implied right of action jurisprudence over the last three decades, federal
courts have reached opposite conclusions on whether section 501 of the
LMRDA includes an implied right of action. In two dozen cases, unions
have argued that they have the right to bring a section 501 action against their
own officers or former officers to hold the officers accountable in federal court
for breaching their fiduciary duty as defined in LMRDA section 501. A
majority of district courts and the Ninth Circuit have found that unions may not
sue under section 501, holding that only union members can sue under
section 501. Conversely, a minority of district courts and the Seventh and

90. Id. at 286-87 (“Having sworn off the habit of venturing beyond Congress’s intent, we
will not accept respondents’ invitation to have one last drink.”).
91. Id.
92. Id. at 290.
93. Id.
(quoting Justice Powell’s dissent in Cannon and stating that “[t]he determination of who can seek
a remedy has significant consequences for the reach of federal power”).
95. See supra notes 71-94 and accompanying text.
96. Compare Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500,
506-07 (9th Cir. 1989) (finding no implied right of action for unions), with Int’l Union of
Operating Eng’rs, Local 150 v. Ward, 563 F.3d 276, 289 (7th Cir. 2009) (finding an implied right
of action for unions), cert. denied, 130 S. Ct. 442 (2009), and Int’l Union of Elec. Workers v.
Statham, 97 F.3d 1416, 1421 (11th Cir. 1996) (same).
97. See cases cited infra notes 112 and 154.
98. Compare cases cited infra note 112, with cases cited infra note 154.
99. Traweek, 867 F.2d at 506-07.
100. Compare cases cited infra note 154, with cases cited infra note 112.
Eleventh Circuits have found that unions may sue under section 501. Even the Supreme Court has noted the conflict in interpretations, but has declined the opportunity to resolve it.

1. No Implied Right of Action: An Express Remedy for Union Members Means Congress Did Not Intend One for Unions

a. The Ninth Circuit

The Ninth Circuit’s 1989 decision in Building Material & Dump Truck Drivers, Local 420 v. Traweek was the first decision from a United States court of appeals to consider whether a union could sue under section 501. In Traweek, two union officers used union funds to pay for the legal defense of a union organizer who was indicted on arson charges. The local union expelled the union officers and then sued them in federal court pursuant to section 501, adding state fraud claims through supplemental jurisdiction. The district court allowed the suit without any discussion of whether the union could sue under section 501.

101. Ward, 563 F.3d at 289; Statham, 97 F.3d at 1421.
103. See id; see also Int’l Union of Operating Eng’rs, Local 150 v. Ward, 130 S. Ct. 442 (Oct. 13, 2009) (No. 09-196) (denying certiorari).
104. Traweek, 867 F.2d at 506 (determining that Congress did not intend for unions to sue under section 501); see also Ward, 563 F.3d at 283–84.
105. Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek, No. CV 81-4226-RMT, 1986 WL 426, at *1–3 (C.D. Cal. Oct. 31, 1986), aff’d in part, rev’d in part, 867 F.2d 500 (9th Cir. 1989). The parties vigorously disputed whether using union funds to pay for the legal defense was improper. See id. at *2. The expelled officers thought paying for the legal defense was consistent with the union’s constitution and bylaws, and thought an outside legal opinion supported their position, but the other local union leadership disagreed. Id.
106. Traweek, 867 F.2d at 505.
107. Traweek, 1986 WL 426, at *1 (limiting the action to the issues raised by the parties, which did not include jurisdiction under section 501).
Reversing in part, the Ninth Circuit held that the district court lacked jurisdiction because a union could not sue under section 501. The Ninth Circuit reasoned that “[t]he clear language of the statute does not contemplate a suit brought by a union,” instead it contemplates an individual union member being able to sue “if a union refuses or fails to sue” upon the union member’s request. The court determined that the statutory language requiring a party to request the court’s permission to sue evidenced Congress’s intent that only union members have a right to sue because a union recovering its own funds would not need consent. The Ninth Circuit emphasized that section 501 should be construed narrowly given the “federal policy of noninterference in the internal affairs of union and labor matters.”

b. Selected District Court Decisions from Undecided Circuits

Several district courts in the undecided circuits have concluded that section 501 of the LMRDA does not contain an implied private right of action for unions. In International Longshoremen’s Ass’n v. Spear, Wilderman,

108. Traweek, 867 F.2d at 507.
109. Id. at 506.
110. See id.
111. Id.
112. These cases present the most fully developed arguments advanced against finding an implied right of action in section 501. It is worth noting that in 1974, the Southern District of Ohio, located in the Sixth Circuit, was the first court to decide whether unions could sue under section 501, but it never considered the Supreme Court’s implied right of action jurisprudence. See Safe Workers’ Org., Chapter No. 2 v. Ballinger, 389 F. Supp. 903, 906–08 (S.D. Ohio 1974) (failing to discuss implied right of action jurisprudence in reaching its holding); Int’l Union of Elec. Workers v. Statham, 97 F.3d 1416, 1418 n.2 (11th Cir. 1996) (listing Ballinger as the earliest case to decide the issue). In Ballinger, the Safe Workers’ Organization sued its own officers because the officers, without certification, operated the union as an affiliate of the UAW, closed the Safe Workers’ bank account, and commingled Safe Workers’ funds with the UAW local’s funds. Ballinger, 389 F. Supp. at 905–06. The court held that the union could not sue because it was not the proper plaintiff given that section 501 only authorizes suits by union members against officers and therefore requires unions to pursue remedies under state law. Id. at 907–08.

Borish, Endy, Spear & Runckel, the Eastern District of Pennsylvania, located in the United States Court of Appeals for the Third Circuit, relied heavily on the legislative history, purpose, and statutory text to conclude that section 501 does not grant unions a right of action. The court concluded that the legislative history of section 501 did not evince any intent to allow unions access to federal court. Rather, the court reasoned that the purpose of the LMRDA was to establish rights for union members and provide “access to federal court to vindicate those rights as against their union leadership.” Further, the legislative history, if anything, demonstrated that Congress intentionally excluded unions from being able to sue under section 501. The court also found that the language requiring unions to act first did not indicate a congressional preference for unions to act instead of union members. Rather, the language effectuated Congress’s intent to prevent union-member-initiated suits that were “frivolous or harassing.” Finally, the court explained that unions have satisfactory causes of action under state law, such as “fraud, breach of contract, breach of fiduciary duty, and unjust enrichment,” which were all raised in the suit through supplemental jurisdiction.

Two district courts in the United States Court of Appeals for the Second Circuit provide the most recent published opinions finding no implied right of action under section 501. The District Court for the Southern District of New York in United Transportation Union v. Bottalico employed the presumption that Congress did not intend to include an unmentioned remedy

113. Int’l Longshoremen’s Ass’n v. Spear, Wilderman, Borish, Endy, Spear & Runckel, 995 F. Supp. 564, 567–68 (E.D. Pa. 1998). To the extent the judge implied that the Supreme Court’s footnote in Guidry v. Sheet Metal Workers National Pension Fund supported his argument, the judge was misguided. See Guidry v. Sheet Metal Workers Nat’l Pension Fund, 493 U.S. 365, 374 n.16 (1990). Rather, the footnote illustrated the Court’s neutral position in finding that the statute does not expressly provide a right of action for unions, which is not disputed. See id.

114. Spear, 995 F. Supp. at 570. International Longshoremen’s Association, a union, sued a former union officer, the officer’s attorney, and the attorney’s law firm, for breach of fiduciary duty because the law firm was paid out of the local’s treasury for a case challenging the international’s revocation of the local’s charter. Id. at 565.

115. Id. at 570. The court also noted that the statute itself was a compromise between the policies of “noninterference in the internal affairs of unions and labor matters, and empowerment of individual union members within their unions.” Id. As a result, the court reasoned that providing unions access to courts would be wholly inconsistent with the policies of the statute. Id.

116. See id. at 572.

117. Id. at 570–71.

118. Id.

119. Id. at 573. The Eastern District of Pennsylvania’s analysis was not consistent with current Supreme Court precedent because it relied more on legislative history than the text of the statute and applied the Cort factors without acknowledging that the Supreme Court had made the second factor, legislative intent, the determinative inquiry. Compare Alexander v. Sandoval, 532 U.S. 275, 286–93 (2001), with Spear, 995 F. Supp. at 570–73.

because it provided an express remedy in the statute. The court then weighed other factors to ascertain whether the presumption could be overcome and concluded that it could not. Specifically, the court emphasized that: (1) the “demand requirement” was not “futile” because of state remedies; (2) union members were the LMRDA’s intended beneficiaries; and (3) the legislative history did not support anything more than Congress’s intent to create a fiduciary duty and enable union members to sue.

In Local 1150 International Brotherhood of Teamsters v. Santamaria, the District Court for the District of Connecticut undertook an extensive examination of section 501’s legislative history. The court rejected the argument that Congress must have intended for unions to be able to sue because union members have to demand that the union sue first. Specifically, the court concluded that the legislative history demonstrated that Congress intended for unions to invoke state causes of action for an officer’s breach of fiduciary duties, but the court was concerned about the lack of state causes of action for union members. The district court further noted that Congress intended subsection (b) to be the remedy for subsection (a), which established the fiduciary rights. The court summarized its findings of Congress’s intent for section 501 as follows:

Congress anticipated that unions often would be able to resolve problems internally or through state common law remedies, but, based on Congressional findings of widespread corruption in union leadership, granted members a federal remedy in those situations

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121. Bottalico, 120 F. Supp. 2d at 409. United Transportation Union sued officers of union subsidiaries alleging that the officers breached their fiduciary duties. Id. at 407–08.

122. Id. at 409.

123. Id. at 409–10. The Southern District of New York exposed the Eleventh Circuit’s faulty reasoning in mischaracterizing two pieces of legislative history used to support its holding. Id.; see also Santamaria, 162 F. Supp. 2d at 78–79 (finding that the Eleventh Circuit’s reading of the legislative history was incorrect); Spear, 995 F. Supp. at 570 (same). This case illustrates that lower courts still use the Cort factors in their analyses to determine legislative intent, even though the Supreme Court has rejected three of them. See Santamaria, 162 F. Supp. 2d at 76; Bottalico, 120 F. Supp. 2d at 408; see also Alexander, 532 U.S. at 286–88 (inquiring only into congressional intent).

124. See Santamaria, 162 F. Supp. 2d at 77–79. Teamsters Local 1150 sued former officers of the local who were voted out of office for breaching their fiduciary duties. Id. at 70–71. Before leaving office, the former officers allegedly arranged for three full-time clerical staff members of the local, who were members of Local 1150 and fiercely loyal to the former officers, to withdraw from Local 1150 and become members of a different union. Id. at 72. The former officers then signed a collective bargaining agreement making the clerical staff members impossible to replace and giving the staff members generous compensation. Id. at 72. The officers signed this agreement only after they lost the election, and it was fixed to last for the term of the incoming officers. Id.

125. Id. at 76–77.

126. Id. at 77–79.

127. Id. at 79.
where the union failed to act to protect its interests and the interests of its members.\textsuperscript{128}

As in \textit{Bottalico}, the court also reasoned that an express remedy provided by the statute weighed against finding a remedy implicitly.\textsuperscript{129} The district court held that Congress did not intend unions to have a right of action under section 501.\textsuperscript{130}

2. Implied Right of Action: Resisting the Supreme Court’s Restrictive Jurisprudence

a. The Eleventh Circuit

In \textit{International Union of Electronic Workers v. Statham}, a local union disbanded because the brewery where the union members worked closed.\textsuperscript{131} When the former local’s officers attempted to sell the old union hall, the local’s affiliated international union sued, claiming breach of fiduciary duty under section 501 because the international union’s constitution required disbanded unions to hand over all property to the international union.\textsuperscript{132} The district court dismissed the claim for lack of subject-matter jurisdiction, concluding that unions could not sue under section 501.\textsuperscript{133} The Eleventh Circuit reversed.\textsuperscript{134}

The Eleventh Circuit advanced several reasons for its conclusion. First, the statutory requirement that members must ask the union to sue first shows that Congress preferred that the union sue and therefore intended that unions have access to federal courts.\textsuperscript{135} Second, the court found that the legislative history demonstrated that Congress created federally defined fiduciary duties because state-law causes of action were insufficient.\textsuperscript{136} Third, the court dismissed the argument that the explicit expression of one remedy excludes other implicit remedies.\textsuperscript{137} In rejecting this well-established principle, the court reasoned that Congress thought a right of action for unions would be implicit in defining a fiduciary duty, but that allowing individuals to have derivative rights of action “was more extraordinary and therefore had to be spelled out.”\textsuperscript{138} Fourth, allowing individuals, but not unions, to sue in federal court would “encourage

\begin{thebibliography}{138}
\bibitem{128} Id. at 80.
\bibitem{129} Id.
\bibitem{130} Id. at 81.
\bibitem{131} \textit{Int’l Union of Elec. Workers v. Statham}, 97 F.3d 1416, 1418 (11th Cir. 1996).
\bibitem{132} Id. The international union also asserted a breach of contract claim pursuant to 29 U.S.C. § 185(a) (2006). \textit{Id.}
\bibitem{133} Id.
\bibitem{134} Id. at 1421–22.
\bibitem{135} Id. at 1419–20.
\bibitem{136} Id. at 1420.
\bibitem{137} Id. at 1420–21.
\bibitem{138} Id. at 1421.
\end{thebibliography}
the unions to refuse their members’ requests to sue offending officials” so that the union could secure federal jurisdiction derivatively through the union member. Alternatively, the court continued, if unions could sue in federal court, then “the demand requirement [would] function[] properly, to give the union a chance to sue first, if it will.”

b. The Seventh Circuit

Breaking the circuit-split tie, the Seventh Circuit in *International Union of Operating Engineers, Local 150 v. Ward* held unions could sue former officers under section 501. The union, Local 150, sued Ward, its former treasurer, for purchasing a property he knew the union wanted to purchase. Ward falsely told the seller that the union was not interested in buying the property and told the union president that it had been sold to someone else. The district court dismissed the lawsuit for lack of subject-matter jurisdiction, concluding that unions had no right to sue under section 501.

The Seventh Circuit began its analysis by establishing that section 501(a) creates federal rights for unions by defining the fiduciary duty union officers owe. Carefully mirroring the Supreme Court’s method of analysis in *Alexander v. Sandoval*, the court commenced its search for Congress’s implicit intent to create a right of action for unions in the text of the statute. The court found that the officer’s duty “to account to” the union for improperly attained money hints at a federal remedy. Next, it found that the provision prohibiting general exculpatory clauses would not make sense unless the union could sue union officers who could then invoke the exculpatory clause as a defense.

Turning to section 501(b), the court decided that the express right of action for union members strengthened the case that Congress intended an implied right of action for unions. The court remarked that the statute was structured

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139. *Id.*

140. *Id.*


142. *Id.* at 277.

143. *Id.* at 277–78.

144. *Id.* at 278.

145. *Id.* at 286.


147. *Ward*, 563 F.3d at 287 (internal quotation marks omitted); see also 29 U.S.C. § 501(a) (2006) (requiring officers to account to the union for profits earned).


149. *Ward*, 563 F.3d at 288; see also 29 U.S.C. § 501(b) (bestowing union members with an express right of action). Like the court in *Statham*, the Seventh Circuit noted that the express provision granting union members a right of action was necessary because subsection (a) did not suggest such an action. *Ward*, 563 F.3d at 288.
to operate like a shareholder's derivative suit, whereby shareholders can sue based on a claim "'on which the corporation could have sued.'" Therefore, the court concluded that the union had the right to sue in federal court. The Seventh Circuit reached this conclusion by characterizing the union's right to sue as the "primary" right from which the union members' right was derived. It then concluded that it would be "anomalous" to relegate the union's primary right to state court while permitting members to sue in federal court to enforce their subordinate right. The Seventh Circuit ended its inquiry without considering the legislative history of section 501, satisfied that it found Congress's intent to create an implied right of action from the statutory language alone.

151. Id.
152. Id.
153. Id. The Seventh Circuit also recognized that this system would encourage unions to deny demands by union members to sue in order to achieve federal jurisdiction. Id. (citing Operative Plasterers & Cement Masons Int'l Ass'n v. Benjamin, 776 F. Supp. 1360, 1366 (N.D. Ind. 1991)).
154. Id. at 288 & n.9, 289. The district court opinions finding an implied right of action under section 501 offer no new arguments or insights, unlike the district court opinions finding that no implied right of action exists. See, e.g., Int'l Longshoremen's Ass'n, S.S. Clerks Local 1624 v. Va. Int'l Terminals, Inc., 914 F. Supp. 1335, 1339–40 (E.D. Va. 1996) (reaching the same conclusion as the circuit courts). However, the District Court for the Northern District of California did attempt to distinguish itself from the Ninth Circuit's opinion in Traweek because the Traweek Court only considered section 501(b) and did not address implying a right of action in section 501(a). Serv. Employees Int'l Union v. Roselli, No. C 09-00404 WHA, 2009 WL 1382259, at *2 (N.D. Cal. May 14, 2009). In Roselli, the judge made a distinction without a difference, and the Ninth Circuit should therefore reverse that decision. See id. The court in Traweek identified the issue before the court as "whether a union standing alone can bring a § 501 suit as an initial matter." Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500, 506 (9th Cir. 1989). The Traweek court thus never specified that it was considering only section 501(b). See id. The District Court for the Central District of California acknowledged as much, just one year before its Roselli decision:

Although Plaintiff argues that the Ninth Circuit only precluded a union suit under section 501(b), and not under section 501(a), the Court disagrees. The Ninth Circuit clearly meant to preclude suit under section 501 in its entirety. Moreover, the Supreme Court has interpreted the Ninth Circuit's opinion in Traweek, as precluding a union from bringing a suit under § 501.

Serv. Employees Int'l Union v. Rosselli, No. CV 08-2777-JFW (PLAx), 2008 WL 3342721, at *3 (C.D. Cal. July 22, 2008) (citations omitted) (holding that the court was bound by the Traweek decision and could not allow a union to sue under section 501).

II. CONGRESS DID NOT CLEARLY INTEND TO CREATE AN IMPLIED RIGHT OF ACTION ALLOWING UNIONS TO SUE UNDER LMRDA SECTION 501

Although every court that has addressed whether section 501 provides an implied private right of action for unions purports to conduct a straightforward analysis of Congress’s intent by examining the statute’s language, structure, and circumstances of enactment, several of the courts—those that find an implied private right—are in error.\textsuperscript{155} The Ninth Circuit’s analysis—and the analysis of the concurring district courts—exposes the Seventh and Eleventh Circuits’ misguided resistance to the Supreme Court’s restrictive implied right of action jurisprudence.\textsuperscript{156} In the past thirty years, the Supreme Court almost never has found an implied right of action.\textsuperscript{157}

In light of this trend, the more tenable reading of the statute is that Congress did not intend to provide an implied private right of action for unions to sue their officers under section 501.\textsuperscript{158} Examining the three aspects of section 501 that have divided the courts supports this conclusion. They are: (1) the provision of an express right of action for union members; (2) the requirement that a union member demand the union take action against the breaching officer before a union member can sue; and (3) the meaning of section 501(a)’s standards governing a union officer’s federal fiduciary duties.\textsuperscript{159} Further, even if the statute is ambiguous, constitutional principles command that courts be hesitant to find an implied right of action.\textsuperscript{160}

A. LMRDA Section 501’s Language and Structure Do Not Prove that Congress Intended an Implied Right of Action

1. Express Right of Action for Union Members

Section 501(b) expressly provides union members a private right of action to sue union officers who breach the fiduciary duties described in section 501(a).\textsuperscript{161} The Ninth Circuit found this plain language to be conclusive evidence that Congress did not intend an implied right of action,\textsuperscript{162} while both the Eleventh and Seventh Circuits cited the express remedy as evidence that

\textsuperscript{155} See supra Part I.C.2.
\textsuperscript{156} See supra Part I.C.1.
\textsuperscript{157} See FALLON ET AL., supra note 7, at 781–82.
\textsuperscript{158} See, e.g., Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 20–22 (1979) (stating that a right of action should not be implied by courts in most cases); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1978) ("[W]hen Congress wishe[s] to provide a private damages remedy, it kn[ows] how to do so and [does] so expressly.").
\textsuperscript{159} See 29 U.S.C. § 501 (2006); see also supra Part I.C. (discussing cases that have resulted in opposing interpretations of section 501).
\textsuperscript{161} 29 U.S.C. § 501.
\textsuperscript{162} See Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500, 506 (9th Cir. 1989).
Congress intended to create an implied right of action. The Supreme Court has long admonished courts to be wary of finding congressional intent to create an implied right of action. Accordingly, the Court has repeatedly rejected claims that additional implied rights of action should be read into statutes that expressly include other enforcement mechanisms. The Court in Alexander v. Sandoval even suggested that an express remedy may preclude finding an implied right of action in a statute even if other aspects of the statute support a finding of congressional intent to imply a private right of action. Thus, the Supreme Court, in effect, has established that an express right of action is the strongest evidence of Congress’s intent.

The Eleventh and Seventh Circuits’ reasoning represents a departure from clear Supreme Court precedent. Instead of restricting the implied right of action inquiry when the statute contained an express right of action, these courts did just the opposite, using it as evidence to find an implied private right of action. There were two instances in which the Eleventh and Seventh Circuits used the express right of action as evidence of an implied right of action. In the first instance, both the Eleventh and Seventh Circuits reasoned that it was natural that the union’s right of action was implicit because a derivative remedy for union members was more extraordinary and thus required express statutory language. Aside from departing from precedent, this argument is a weak indicator of congressional intent because it begs the

164. Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19–20 (1979); see also FALLON ET AL., supra note 7, at 781–83 (noting the Supreme Court’s thirty-year history of limiting claims of implied federal remedies).
165. See, e.g., TAMA, 444 U.S. at 20–21 (reasoning that the statute’s criminal and administrative remedies and other express public rights of action demonstrated that Congress did not intend a private right under the statute).
168. Ward, 563 F.3d at 287 (“The derivative action created in subsection (b) for individual union members reinforces rather than undermines the implication arising from the text of subsection (a).”); Statham, 97 F.3d at 1421 (“We should not infer from the mention of individual suits that Congress did not intend to give unions a cause of action.”).
169. Ward, 563 F.3d at 287 (“It was necessary for Congress to make this derivative cause of action explicit because there is nothing in subsection (a) to suggest that union members themselves could sue for fiduciary violations committed against the union.”); Statham, 97 F.3d at 1421 (“It is far more in keeping with the statute as a whole to conclude that... Congress thought it implicit that the unions could enforce those rights in court. Allowing the individuals to assert the unions’ claims was more extraordinary and therefore had to be spelled out.”).
question: Congress intended the union right of action because it was implicit in the statute; therefore, Congress intended an implied right of action.\textsuperscript{170}

In the second instance, the Seventh Circuit held that the LMRDA’s express remedy evidenced congressional intent to create an implied right of action for unions because the express remedy for members was a derivative of the union’s right of action.\textsuperscript{171} Just like a shareholder’s derivative suit in corporate law, the court reasoned, the union member’s suit must be based on a claim the union could have brought, which suggests that the union could sue in its own right.\textsuperscript{172} However, section 501 is a statutory claim unique from a shareholder’s derivative suit,\textsuperscript{173} and even if a union member is required to sue based on a claim the union could have pursued, section 501 does not require that the union’s action and the member’s action be litigated in the same forum.\textsuperscript{174} For example, a union may have a state-law cause of action that a member could enforce in federal court under section 501, but the union would not be able to invoke federal jurisdiction based on the same claim.\textsuperscript{175} The parallel remedies for unions and union members are not necessarily anomalous; this is the framework Congress expressly created and thus most likely intended.

Looking to the context of the statute to illuminate the text,\textsuperscript{176} the legislative history also makes clear that the general purpose of the entire LMRDA was to protect the rights of union members and to empower them in dealing with

\textsuperscript{170} See Ward, 563 F.3d at 287; Statham, 97 F.3d at 1421. The extraordinariness argument presented by the Seventh and Eleventh Circuits is also weak because by 1959, derivative remedies were a common method of enforcing fiduciary duties in the form of shareholder derivative suits against breaching corporate officers. See Ward, 563 F.3d at 287; Statham, 97 F.3d at 1421; see also Ross v. Bernhard, 396 U.S. 531, 534–35 & nn.4–5 (1970) (noting that the first shareholder’s derivate-type suit was decided in 1856 and that such suits have continued successfully since then). Thus, by analogy, union member suits were not out of the ordinary.

\textsuperscript{171} Ward, 563 F.3d at 288.

\textsuperscript{172} See id.; DEMOTT, supra note 5, at §§ 1.1, 2.2.

\textsuperscript{173} See 29 U.S.C. § 501. In both the House and Senate subcommittee hearings on their respective bills, some members of Congress and all testifying union leaders attempted to distinguish union officers from corporate officers or bankers in assessing the fiduciary duty provisions. See, e.g., Labor-Management Reform Legislation: Hearing on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, 86th Cong. 240 (1959) [hereinafter Senate Hearings] (statement of Sen. Cooper) (urging the U.S. Chamber of Commerce representative to acknowledge a difference between the fiduciary duty of corporate officers and the fiduciary duty of union officers because corporate officers are driven by securing profit and union officers are striving “to gain certain advantages for its members”); House Hearings, supra note 41, at 1490 (statement of George Meany, President, AFL-CIO) (“There is no proper analogy between a labor union and a corporation or bank.”). Given the differences between corporate and union fiduciary duties, Congress likely did not intend section 501 to be analogized strictly with corporate law. See House Hearings, supra note 41, at 1490; Senate Hearings, supra, at 240.

\textsuperscript{174} See 29 U.S.C. § 501(b) (2006) (acknowledging the union’s right to sue union officers, but declining to specify how relief may be sought).


Giving power to union members was the mechanism of Congress’s choice to halt union corruption with limited federal involvement. Providing union members with a right of action against union officers for breach of fiduciary duties, but not providing a right of action for the union itself, is therefore consistent with the premise of the LMRDA. Further, members of Congress spoke of union member suits as the method of enforcing the fiduciary duty. Congress never spoke of union suits in federal court, and a Senate bill allowing union suits never escaped committee.

2. Requirement that the Union Refuse to Act First

Section 501 requires a union member to demand that the union take action against its malfeasant officer before the union member can sue. The Eleventh Circuit concluded that this language showed Congress’s preference that the union sue; therefore, Congress must have intended that the union be able to sue in federal court. While this argument has logical appeal, the

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179. See House Hearings, supra note 41, at 1614 (statement of Sen. Barry Goldwater) (“All 209(b) does, however, is to permit a union member to sue, for the benefit of the union, any union officer or employee who, it is alleged, has embezzled, stolen, or unlawfully and willfully abstracted or converted any of the union’s property or funds.”); id. at 2431 (statement of James Carbray, International Representative, United Steelworkers of America) (“Now, Mr. Chairman, dealing with section 209(b), this authorizes suit in Federal district court by a member of the union, against any officer or employee of the union for alleged embezzlement, theft, and so on.”); S. REP. No. 86-187, at 87 (1959) (“The committee bill would become an effective labor reform measure if it . . . imposed fiduciary obligations, enforceable by union members, on the officials of labor unions.”). reprinted in LEGISLATIVE HISTORY OF THE LMRDA, supra note 31, at 483; 105 CONG. REC. 6527–29 (1959). During the subcommittee hearings, A.J. Hayes, International President of the International Association of Machinists, interpreted the Senate bill’s fiduciary-duty enforcement provision to require that unions sue in state courts. See House Hearings, supra note 41, at 1400–01. Mr. Hayes commented, “It is one thing to require a union governing board to institute a restitution suit within 4 months of the request to do so if the union officer was convicted of a crime, but another thing to initiate suit on unfounded allegations. Id. at 1401 (emphasis added). Restitution, or a suit for unjust enrichment, is a state common-law cause of action. J. Daniel Plants, Note, Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment, 89 MICH. L. REV. 2000, 2014 (1991).


inquiry mandated by the Supreme Court is to ascertain what Congress intended, not what the reviewing court believes the law should be. As reasoned by a majority of the district courts that have considered this issue, Congress likely intended for unions to avail themselves of other remedies, either internally or in state court, while permitting only union members to sue in federal court. The Eleventh Circuit rested its conclusion on the House committee report and the minority view in the Senate committee report. The Eleventh Circuit, however, misread both. The Senate minority view expressed concern about union members’ inability to sue union officers because the LMRDA does not preempt state law, except as explicitly provided in the statute:

Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer . . . [or] take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

29 U.S.C. § 523(a) (2006); see also Paul v. Winco Foods, Inc., 156 F. App’x 958, 959 (9th Cir. 2005) (holding that a state breach-of-fiduciary-duty claim was not preempted by section 501 of the LMRDA).

The Statham court cited Glenn favorably. Statham, 97 F.3d at 1420. Notably, the Ward court refused to consider legislative history. Int’l Union of Operating Eng’rs, Local 150 v. Ward, 563 F.3d 276, 288 n.9 (7th Cir. 2009), cert. denied, 130 S. Ct. 442 (2009).

The committee bill professes to recognize the fiduciary nature of the union official’s relation to his union and its members, but makes no provision to establish such relationship, to impose the duties of a fiduciary on union officials, or to give union members any remedy for a breach of the fiduciary obligation.

In virtually every State in the Nation, the officers and directors of a corporation are made fiduciaries by statute . . . . Under these statutes, stockholders are given the right to enforce the fiduciary obligation through a suit in the courts . . . .
the House report stated that it chose to define a fiduciary duty in federal law even though state common law already did. The legislative history shows that Congress believed that unions had adequate state remedies. In fact, in

Only one State has enacted a statute imposing fiduciary obligations on union officials and giving union members a right to sue in the event of any breach thereof. . . . [T]he omission of any enforceable fiduciary provision from the committee bill constitutes a failure to provide what could be the most effective possible device for enabling rank-and-file union members themselves to control financial misconduct on the part of their officials.

Both the McClellan Bill (S. 1137) and S. 748 contain provisions designed to impose fiduciary obligations on union officials and to give union members a right to sue in the federal courts for breach thereof. It is our intention to offer on the floor of the Senate, amendments designed to fill this unjustifiable vacuum.

Id. (emphasis added).


We affirm that the committee bill is broader and stronger than the provisions of S. 1555 which relate to fiduciary responsibilities. S. 1555 applied the fiduciary principle to union officials only in their handling of “money or other property” (see S. 1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation. . . .

The general principles stated in the bill are familiar to the courts, both State and Federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents. . . .

Id. (emphasis added).

191. See id. (“Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into federal labor legislation.”). Senator John F. Kennedy commented that state law remedies for unions were adequate:

Traditionally, questions of fiduciary relationships have been decided in State courts under the common law. . . .

. . . . It is proposed to add a Federal remedy, even though, as I understand the amendment of the Senator from Arkansas, he would continue the State remedy.

. . . .

In my opinion, the State laws, as the Senator from North Dakota said last year, are adequate.

105 CONG. REC. 6525, 6527 (1959) (statement of Sen. John F. Kennedy) (remarks of other senators omitted); see also id. at 6526 (statement of Sen. Sam Ervin) (“So far as my personal experience is concerned, I believe this matter is already covered by law in all the States.”); cf. House Hearings, supra note 41, at 1604 (statement of Sen. Barry Goldwater) (stating that the Senate bill was so inadequate that a union member would be better off bringing suit in state court under the broader fiduciary duties provided by state law). But see Senate Hearings, supra note 176, at 810 (article submitted by the U.S. Chamber of Commerce) (conceding that all states have laws dealing with fiduciary duties, but that union officers might not be considered fiduciaries by all states).

During floor debate in the Senate, Senator Barry Goldwater said that “while [my lawyers advised me] State laws are adequate, they are not specific”; they do not address labor unions directly. 105 CONG. REC. 6527 (statement of Sen. Barry Goldwater) (alteration in original). He continued,

I know of no existing law which makes possible the recovery of funds which are improperly taken from a labor organization by one of its leaders. For instance, the vast
most section 501 cases, the union also asserts state-law claims, such as fraud, conversion, breach of contract, breach of fiduciary duty, and unjust enrichment, by invoking the federal court’s supplemental jurisdiction.\textsuperscript{192}

The Seventh and Eleventh Circuits concluded that allowing only union members to sue in federal court only after the union refused to sue created a strong incentive for unions to refuse in order to invoke federal jurisdiction.\textsuperscript{193} Assuming there is any merit to this, the argument that the demand requirement functions less effectively if unions cannot sue in federal court is more probative of determining which approach is better policy than determining Congress’s intent.\textsuperscript{194} And the Supreme Court has made it clear that policy is an improper basis for finding an implied right of action.\textsuperscript{195}

3. Defining a Fiduciary Duty Under Federal Law

The Eleventh Circuit expressly, and the Seventh Circuit implicitly, relied partially on section 501(a)—the definition of the federal fiduciary duty—in finding that unions should have access to federal courts to enforce that federal duty.\textsuperscript{196} The Supreme Court in Alexander v. Sandoval, however, stressed that congressional intent to create a substantive private right—for example, obligating union officers to act in accord with a defined fiduciary duty for the benefit of union members—is not a sufficient basis upon which a court may

\textsuperscript{192} See, e.g., Spear, 995 F. Supp. at 573 (“[T]he union has adequate remedies under state law (notably the supplemental state claims brought in this action, for fraud, breach of contract, breach of fiduciary duty, and unjust enrichment).”).

\textsuperscript{193} See Ward, 563 F.3d at 286; Statham, 97 F.3d at 1421.

\textsuperscript{194} See Int’l Bhd. of Teamsters v. Santamaria, 162 F. Supp. 2d 68, 76–77 (D. Conn. 2001) (recognizing that the demand argument has “logical appeal,” but that it ultimately fails because Congress identified the availability of state remedies).


\textsuperscript{196} See Ward, 563 F.3d at 286–87; Statham, 97 F.3d at 1420; see also 29 U.S.C. § 501(a) (2006).
imply a private right of action.\textsuperscript{197} Rather, Congress must have intended to create a private right of action, a right to bring a case to court.\textsuperscript{198} For example, the Supreme Court in TAMA declined to find an implied right of action for trust shareholders even though the statute placed "federal fiduciary standards" on investment advisors.\textsuperscript{199} Similarly, in Karahalios v. National Federation of Federal Employees, Local 1263, the Court refrained from finding an implied right of action even though federal law created a statutory right to fair representation for federal employees.\textsuperscript{200} In addition, Congress did not find it necessary to extend to unions a cause of action under section 501 because state law remedies already were available to unions.\textsuperscript{201}

The Seventh Circuit’s reliance on the language in section 501(a), which provides that union officers must “account to” the union for profits received and bans exculpatory clauses, reveals that the Seventh Circuit read into the statute more than is there.\textsuperscript{202} The “account to” language in section 501(a) is part of the definition of the fiduciary duty, which is directed at limiting officers’ misappropriation of union funds.\textsuperscript{203} It is logical that the “account to” language is only definitional and does not grant the union a right of action against an officer failing to account to the union.\textsuperscript{204} Section 501(b), the enforcement provision, specifically provides for union members to “secure an accounting,” among other relief.\textsuperscript{205} The exculpatory clause argument is also weak. The provision voiding exculpatory clauses is not superfluous, nor must it refer to union-initiated suits in federal court.\textsuperscript{206} Rather, banning an exculpatory clause ensures a breaching officer does not assert the exculpatory clause as a defense in an action initiated by a union member.\textsuperscript{207}

\textsuperscript{197} Alexander, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." (emphasis added)).
\textsuperscript{198} Id. at 286–88 (emphasizing that only the statute itself can create a private right of action).
\textsuperscript{199} Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 17–19, 24 (1979) (concluding that the statute in question only provided trust shareholders with a private cause of action to void applicable contract provisions).
\textsuperscript{201} See supra note 192 and accompanying text.
\textsuperscript{203} See Int’l Union of Operating Eng’rs, Local 150 v. Ward, 563 F.3d 276, 287–89 (7th Cir. 2009) (showing the court’s purported strict interpretation of section 501), cert. denied, 130 S. Ct. 442 (2009).
\textsuperscript{204} See 29 U.S.C. § 501(a).
\textsuperscript{205} See id.
\textsuperscript{206} See id. § 501(b).
\textsuperscript{207} See id. § 501(a).
\textsuperscript{208} See id.
B. Finding an Implied Right of Action in Section 501 that Congress Did Not Intend Violates the Constitution

If a court is too eager to find an implied right of action, it runs the risk of providing a right of action that Congress did not intend to allow, violating constitutional principles. Such a violation is not harmless. As Justice Powell eloquently stated in his dissent in *Cannon v. University of Chicago*, improperly implying a right of action violates Article III and the separation of powers. Because Article III requires that Congress define the jurisdiction of the lower federal courts, courts that erroneously entertain an implied right of action not intended by Congress aggrandize the judicial branch’s power beyond constitutional limitations. In addition, the judiciary would be legislating and thus usurping or allowing Congress to shirk its responsibilities under Article I by creating a right of action not authorized by Congress. These constitutional considerations likely underlie the Supreme Court’s

209. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 742–43 (1979) (Powell, J., dissenting) (asserting that the Court should “develop more refined criteria which more accurately reflect congressional intent”). Professor James D. Gordon also contends that it is unconstitutional for the judiciary to allow a statutory private right of action in the absence of congressional intent, stating:

Adding a private right of action to a statutory section in which Congress did not provide one is not an act of interpretation; rather, it is an amendment. The Constitution does not authorize Article III judges to amend statutes, no matter how defective the statute or how brilliant the amendment.


210. *Cannon*, 441 U.S. at 743–44 (Powell, J., dissenting) (noting that there are negative effects on the federal system and the democratic process when the judiciary permits causes of action in the absence of congressional intent).

211. *Id. at 740–47; see also Brown*, supra note 70, at 647–49, 654; *Gordon*, supra note 209, at 66–67. *But see Creswell*, supra note 70, at 992–93, 996–97 (discounting separation of powers as a rationale for the restrictive legislative-intent jurisprudence, but noting that federalism and Article III’s limited jurisdiction support discerning legislative intent); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 879–82 (1996) (arguing that the Court no longer follows a literal interpretation of the separation of powers and that federal courts may imply rights of action when “necessary to protect uniquely federal interests”).

212. *U.S. CONST.* art. III, § 1; *see also Cannon*, 441 U.S. at 730 (Powell, J., dissenting).

213. *See Cannon*, 441 U.S. at 746–47 (Powell, J., dissenting); *see also U.S. CONST.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *U.S. CONST.* art. I, § 8 (“The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court.”).

214. *See Cannon*, 441 U.S. at 743–45, 747 (Powell, J., dissenting); *see also U.S. CONST.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); Kline v. Burk Constr. Co., 260 U.S. 226, 234 (1922) (“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress.”).
restrictive implied right of action jurisprudence. As recently as the 2008 case of Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., the Court expressed Article III concerns and urged restraint in ascertaining implied rights of action. In analyzing section 501, the Ninth Circuit and concurring district courts have demonstrated the proper restraint required by the Constitution, but the Eleventh and Seventh Circuits have not.

III. REMEDYING THE CIRCUIT SPLIT BY ESTABLISHING A MANDATORY EXPRESS RIGHT OF ACTION PRESUMPTION

A. Courts Should Not Recognize an Implied Right of Action Under Section 501 Because the Requisite Congressional Intent Is Lacking

As established above, Congress did not clearly intend to create an implied right of action for unions under section 501. Given the constitutional implications of encroaching on Congress’s powers and expanding the judiciary’s powers beyond Article III’s limitations, courts must interpret the scope of statutes narrowly or haphazardly risk an unconstitutional result. This resolution does not harm unions. Unions may still avail themselves of state-law remedies, and there is no evidence that federal courts provide any substantial advantage.

215. See Cannon, 441 U.S. at 743–44 (Powell, J., dissenting); see also Brown, supra note 70, at 636 (arguing that the “most plausible explanation” for the restrictive shift in implied right of action jurisprudence is that “the Court has, in varying degrees, accepted the doctrinal validity of the criticisms set forth in Justice Powell’s Cannon dissent”); Creswell, supra note 70, at 987–89 (suggesting that the Court avoided addressing its constitutional power to imply statutory rights of action in any majority opinion by restricting its inquiry to congressional intent).


217. See supra Part I.C.1.

218. See supra Part I.C.2.

219. See supra Part II.


221. See supra notes 187, 192 and accompanying text.

222. However, because most labor and employment law is federal, and many unions transcend state borders, union lawyers likely are more familiar and comfortable with federal law and federal courts. See Int’l Longshoremen’s Ass’n v. Spear, Wilderman, Borish, Endy, Spear & Runckel, 995 F. Supp. 564, 573 (E.D. Pa. 1998) (“Labor law is, in most respects, an area of exclusive federal concern . . . .”); Chester S. Chuang, Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable Is Your Right to a Jury Trial?, 10 EMP. RTS. & EMP. POL’LY J. 205, 212 n.38 (2006) (noting that most employment-law claims are federal and that most state employment-law claims tend to be litigated with federal claims in federal court under federal courts’ supplemental jurisdiction).

Further, there may be tactical considerations to litigate in federal court. See, e.g., House Hearings, supra note 41, at 1898–99 (statement of Martin F. O’Donoghue, General Counsel, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada) (explaining the advantages of filing a diversity suit in federal court under Illinois common law for a breach of a union officer’s fiduciary duty “because of the
The Supreme Court declined an opportunity to decide the section 501 implied right of action issue this term, leaving the lower courts free to apply their own interpretations. Therefore, circuit courts and district courts that have yet to decide the issue should hold that congressional intent does not support providing unions an implied right of action.

B. The Supreme Court Should Establish a Mandatory Presumption when a Statute Contains an Express Right of Action

The circuit split demonstrates that the Supreme Court’s implied right of action jurisprudence is not sufficiently concrete. Federal courts may find an implied right of action even when there is strong evidence that Congress did not intend to create a right of action. The Seventh Circuit in particular took great pains to stay within the prescribed analysis of Alexander v. Sandoval by looking only at the text and structure of the statute, but ultimately declined to follow the Supreme Court’s restrictive approach. Both the Seventh and Eleventh Circuits dismissed the importance of an express right of action and relied on weaker reasoning to find what the courts presumably thought was better law. The Supreme Court should adopt a better rule in order to prevent courts from engaging in judicial activism, especially when the result is expanding judicial power beyond constitutional bounds.

The Supreme Court has cautioned courts to be reluctant to find an implied right of action when Congress already has provided for another remedy expressly. Recently, in Alexander, the Court alluded to a presumption that provides that an express right of action “precludes a finding of congressional intent” to create an implied right of action, even when other statutory language might suggest otherwise. Despite the Supreme Court’s warnings, several
courts considering implied rights of action under section 501 have not heeded the Court’s command. The Seventh and Eleventh Circuits, for example, failed to consider that the express right of action in section 501 might have a limiting effect.

If the Supreme Court does hear this issue, it will have the opportunity to clearly establish an express right of action presumption, finally resolving the circuit split in interpreting section 501 that has lasted for over thirty years. If a statute contains an express private right of action for one class of plaintiffs to enforce a certain statutory right, a right of action will not be implied for a different class of plaintiffs without, in Justice Powell’s words, “the most compelling evidence” that Congress intended otherwise. Applying this rule to section 501 of the LMRDA, there is no strong evidence indicating that Congress intended to create an implied right of action in the statute; the presumption cannot be overcome.

Establishing this presumption provides much needed certainty in implied rights of action jurisprudence and does not appreciably harm any

232. See, e.g., Ward, 563 F.3d at 287; Statham, 97 F.3d at 1421; see also cases cited supra note 154.

233. See Ward, 563 F.3d at 287 (“The derivative action created in subsection (b) for individual union members reinforces rather than undermines the implication arising from the text of subsection (a).”); Statham, 97 F.3d at 1421 (“We should not infer from the mention of individual suits that Congress did not intend to give unions a cause of action.”). Although Statham was decided after Alexander, since 1979 the Supreme Court has cautioned courts to be more skeptical in finding an implied right of action when the statute provides an express right of action. TAMA, 444 U.S. at 19.

234. See supra notes 9–10 and accompanying text (illustrating that district courts have split over their interpretations of section 501 for over thirty years and federal circuit courts have split over their interpretations of section 501 for fourteen years).


236. See supra Part II.A.

237. The definite presumption provides three beneficial effects aside from constitutional power. First, parties will have a better idea before litigation whether federal courts have jurisdiction over their claims. See Caprice L. Roberts, In Search of Judicial Activism: Dangers in Quantifying the Qualitative, 74 TENN. L. REV. 567, 591 (2007) (noting that the judiciary should strive to maintain consistency and predictability in rendering opinions). Second, judicial economy will be served by cutting down on the number of federal lawsuits and appeals filed each year. See supra notes 112, 154 (discussing federal lawsuits filed under section 501). Third, reining in judicial activism, aside from constitutional issues, creates consistency among federal courts and enhances the credibility of federal law. See Roberts, supra, at 591. Professor Caprice Roberts discusses how judicial activism promotes disrespect for the rule of law, stating:

Charges of institutional internal activism arise from underlying concerns about the judiciary’s abilities to garner respect for the rule of law and maintain a coherent body of law. These goals are served by opinions that exhibit common law gradualism, reliability, predictive value, and certainty. Over time, these traits are strengthened through a tradition of restraint and respect for the judiciary as an institution. Opinions that depart from precedent, however, weaken these traditions and erode public trust in the judiciary, even though they may result in fair outcomes.

Id.
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party. More importantly, this approach properly balances federal power. This presumption puts Congress on notice that it must fulfill its legislative responsibilities by expressly creating a right of action if it intends for one to exist. Ultimately, this presumption provides federal courts with a much-needed definitive standard that restrains federal judicial power within constitutional boundaries.

IV. CONCLUSION

Section 501 of the Labor-Management Reporting and Disclosure Act has created a long-running divide in federal courts. The statute provides an express right of action allowing union members to sue union officers who breach their fiduciary duty. Many courts have found this express remedy to be the best evidence that Congress did not intend to create an implied private right of action for unions. Other courts, however, have found an implied right of action in the statute permitting unions to sue. The foregoing analysis indicates that this latter interpretation likely misconstrues Congress’s intent. Even if section 501 of the LMRDA were ambiguous, constitutional principles require courts to be cautious and err on the side of not finding an implied right of action. To bring certainty to the Supreme Court’s implied right of action jurisprudence and remedy the circuit split on the meaning of section 501, the Court should adopt a mandatory presumption that only the most compelling evidence will enable a court to find an implied private right of action when a statute already contains an express right of action.

238. In any express right of action situation, the federal substantive right may still be asserted by the proper class of plaintiffs for whom Congress created the express right of action. See, e.g., 29 U.S.C. § 501(b) (2006) (providing federal jurisdiction for union members to sue union officers who breach the fiduciary duty defined under federal law). For section 501 certainly, and likely for other circumstances as well, other parties not granted federal jurisdiction may seek redress in state courts. See supra note 186 and accompanying text.

239. See Cannon, 441 U.S. at 743–44 (Powell, J., dissenting) (discussing the danger of granting the judiciary too much power).

240. See id. at 749 (discussing the need to restrain the power of the courts).