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Antitrust Law: Contribution: Contribution Between Joint Tortfeasors Denied Under Federal Antitrust Laws. Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981).

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useless.[76] Employees who feel they have been subjected to sex-based wage discrimination and can meet the equal work standard should consider a claim under the EPA. An advantage of bringing a claim under the EPA is its two-year statute of limitations, or three years where there is a willful violation,[77] compared to Title VII's general 180-day limitation.[78] In addition, under the EPA an employee can proceed directly against the employer, whereas under Title VII the employee must go through the EEOC or a state agency charged with enforcing fair employment laws.[79]

III. Conclusion

As a result of the *Gunther* decision, plaintiffs can now establish a prima facie case of sex-based wage discrimination without showing that they performed work substantially equal to that performed by members of the opposite sex who received higher wages. The Court's narrow construction of the Bennett Amendment was consistent with its recognition of the broad remedial purpose of both the EPA and Title VII. Although it is uncertain how far courts will go in extending Title VII claims, based on the Court's reliance on the well-settled view that Title VII is aimed at negating all forms of discrimination, the courts have a clear rationale to extend those causes of action far beyond the defunct equal work standard.

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ANTITRUST LAW — Contribution — Contribution Between Joint Tortfeasors Denied Under Federal Antitrust Laws. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981). The United States Supreme Court recently attempted to resolve the con-

76. This position is contrary to that of the dissent. 101 S. Ct. at 2263.

77. 29 U.S.C. § 255 (1976).

78. 42 U.S.C. §§ 2000e-5(e) (1976).

79. 42 U.S.C. §§ 2000e-5(a-d) (1976). For a discussion of the procedures for bringing a sex discrimination suit, *see* B. Hall, P Horowitz & C. Dupree, *The Role of Federal Government in Eliminating Discrimination*, in Ninth National Conference on Women and the Law: Women and the Law: A Source Book 182 (1978); A. Babcock, Sex Discrimination and the Law, 368-75, 498-504 (1973).

troversy over when courts should allow contribution among tortfeasors jointly liable under federal regulatory statutes. This controversy has raged for years among commentators and the lower federal courts. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[1] the Court refused to allow contribution among violators of federal antitrust statutes. Instead of evaluating the broad policy considerations presented by opponents and proponents of contribution, the Court applied the principles of statutory construction and federal common law. Resolution of the conflicting policy arguments was expressly left to Congress.[2]

Before outlining the Supreme Court's process of analysis, this note will briefly discuss the controversy surrounding contribution among tortfeasors where not expressly provided for by federal statutes. Next follows an evaluation of how the Court applied statutory interpretation and federal common law standards. Finally, this note questions whether the Court should have considered the policy reasons, what result such considerations would have produced, and what impact this decision is likely to have upon future cases involving federal regulatory statutes which are silent regarding contribution.

I. THE CASE

The lawsuit in question began when the Wilson P Abraham Construction Corporation sued Texas Industries, Inc., alleging that Texas Industries and other unnamed companies engaged in a conspiracy to "fix" prices of ready-mix concrete in the New Orleans, Louisiana area,[3] in violation of the Sherman Act[4] and the Clayton Act.[5] Texas Industries learned that the alleged co-conspirators were Radcliff Materials, Inc., Jimco, Inc., and OKC Dredging, Inc.,[6] and filed a third-party

1. 101 S. Ct. 2061 (1981).
2. *Id.* at 2070.
3. Wilson P Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 899 (5th Cir. 1979).
4. 15 U.S.C. §§ 1-7 (1976).
5. 15 U.S.C. §§ 12-27 (1976).
6. 604 F.2d at 899.

complaint seeking contribution from the three firms if Texas Industries was ultimately found liable to the plaintiff.[7]

The United States District Court for the Eastern District of Louisiana dismissed the third-party complaint with prejudice, finding no right to contribution among violators of federal antitrust laws.[8] Texas Industries appealed, and the United States Court of Appeals for the Fifth Circuit affirmed.[9] The Supreme Court granted certiorari[10] "to resolve a conflict in the circuits."[11]

In unanimously affirming the circuit court's opinion,[12] the Supreme Court commented that the arguments favoring and opposing contribution[13] ignored "a very significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context."[14] Having found no express or implied statutory right to contribution, and no right to fashion federal common law, the Court deferred to Congress for evaluation of the broad policy factors involved.[15]

II. The Contribution Controversy

A. *The Conflict Among the Commentators*

Contribution allows "a tortfeasor against whom a judgment is rendered . . to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who are also liable to the plaintiff."[16] A number of arguments exist in support of and in opposition to contribution among tortfeasors.[17]

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7. *Id.*
8. *Id.*
9. *Id.*
10. Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351 (1980).
11. Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2062 (1981).
12. *Id.* at 2070.
13. *Id.* at 2064-65.
14. *Id.* at 2065-66.
15. *Id.* at 2066-70.
16. Dawson v. Contractors Transp. Corp., 467 F.2d 727, 729 (D.C. Cir. 1972). *See generally* 18 Am. Jur. 2d *Contribution* § 1 (1965). Thirty-four states have adopted contribution statutes. For a list of the states and the statute numbers, *see* Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1578 n.17 (1981).
17. Factors argued in support of allowing contribution include fairness, deterrence, better compliance and enforcement, and avoidance of coercive settlements.

Despite the large number of factors opposing contribution, the commentators generally agree that contribution should be allowed because it is the only method likely to provide fair treatment to all parties by ensuring that each culpable party will pay its fair share.[18] The suggestion that the courts wait for Congress to act is generally labeled as the weakest argument opposing contribution.[19] This is, however, precisely what the Supreme Court relied upon in *Texas Industries*.[20]

B. The Conflict Among the Courts

As early as 1799, courts denied contribution to joint tortfeasors.[21] That rule was modified slightly in 1905 in *Union Stock Yards Co. v. Chicago, B. & Q.R.R.*,[22] when the United States Supreme Court distinguished between tortfeasors equally at fault and tortfeasors jointly liable only because the misconduct or negligence of one party created liability in the

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Factors argued in opposition to allowing contribution include increased complexity of suits, undermining of plaintiff's control of the suit, assistance of wrongdoers, providing greater deterrence through fear of being liable for the entire amount, discouragement of settlements, and acting against congressional intent. *See, e.g.*, Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, U. FLA. L. REV. 217, 238 (1980) [hereinafter cited as Jacobson]; Rose, *Contribution in Antitrust: Some Policy Considerations*, 48 ANTITRUST L.J. 1605, 1609-10 (1980) [hereinafter cited as Rose]; Note, *Contribution Between Parties to a Discriminatory Collective Bargaining Agreement*, 79 MICH. L. REV. 173, 181 (1980). *See generally* W PROSSER, LAW OF TORTS § 50 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 886A (1979).

A discussion of the merits of each of these policy reasons, together with an analysis of the effect of each upon this case in particular and the law in general, is beyond the scope of this note. The cited commentators and secondary authorities provide extensive analysis for each reason.

For further discussion, *see, e.g.*, Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damages Suits*, 55 ST. JOHN'S L. REV. 42 (1980); Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980 B.Y.U. L. REV. 183; Landers & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); Note, *Contributions Among Antitrust Co-conspirators*, 48 GEO. WASH. L. REV. 749 (1980).

18. *E.g.*, Jacobson, *supra* note 17, *passim*; Rose, *supra* note 17, *passim*.

19. Jacobson, *supra* note 17, at 231 ("Probably the least substantial of the arguments against contribution is that the courts should wait for Congress to act."); Rose, *supra* note 17, at 1609 ("[I]t is difficult to entertain this argument with a great deal of seriousness.").

20. 101 S. Ct. at 2070. Many lower courts, however, also felt that Congress should be the branch of government to change the law. *See* nn.27-34 and 40-44 and accompanying text *infra*.

21. Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799).

22. 196 U.S. 217 (1905).

other.[23] The Court ruled that a tortfeasor in the latter category could recover both indemnity[24] and contribution from a tortfeasor in the former category.[25]

Lower court decisions addressing contribution in an antitrust context have evaluated the same policy considerations discussed by the commentators.[26] In the first case to directly address the antitrust contribution question, *Sabre Shipping Corp. v. American President Lines*,[27] the district court[28] found the Supreme Court's determination to abide by the common law rule against contribution significant.[29] The court commented that the inclusion of contribution provisions in

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23. This case was decided prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which held that there is to be no federal common law. *Id.* at 78.

24. "Indemnification, unlike contribution, permits a wrongdoer to escape loss by shifting his entire responsibility to another party." Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979). *See* W. PROSSER, LAW OF TORTS § 51 (4th ed. 1971).

25. 196 U.S. at 226-28.

The contribution question arose again in a 1952 admiralty decision, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). The United States Supreme Court recognized that contribution has been allowed since the 12th century in joint liability maritime collision cases, but refused to "attempt to fashion new judicial rules of contribution" in noncollision cases, deferring instead to congressional action. *Id.* at 285. The Court was concerned that all interested parties were not fully represented by the parties to a lawsuit, and stated that "legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run." *Id.* at 286.

A recent admiralty case, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974), limited *Halcyon Lines* to its facts and allowed contribution in a noncollision suit. Lower courts have interpreted the *Cooper* contribution decision as an indication that the Supreme Court will, in certain cases, allow contribution absent a legislative creation of the right. *E.g.*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1183; Glus v. G.C. Murphy Co., 629 F.2d 248, 253 (3rd Cir. 1980), *cert. granted sub nom.* AFL-CIO v. G.C. Murphy Co., 101 S. Ct. 2013 (1981) (judgment vacated and case remanded for further consideration in light of *Northwest Airlines, Inc.*). The Supreme Court, however, recently emphasized that *Cooper* was limited to admiralty cases, and did not establish a "general federal right to contribution." Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. at 1583.

26. *See* note 17 *supra.*

27. 298 F Supp. 1339 (S.D.N.Y. 1969).

28. The district court cited Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), and Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217 (1905).

29. The determination was significant because the Supreme Court has the power to develop new admiralty rules. 298 F Supp. at 1344.

the Securities Acts of 1933[30] and the Securities Exchange Act of 1934[31] was evidence that Congress was aware of the common law rule against contribution among joint tortfeasors and therefore made express allowance for contribution where desired. Absent such express provision in the antitrust acts,[32] the district court felt judicial departure from the common law rule would be presumptuous.[33]

Several other district courts subsequently denied contribution in antitrust cases,[34] but no appellate court addressed the issue until 1979. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[35] the Eighth Circuit Court of Appeals considered and rejected five reasons for opposing contribution.[36] The circuit court viewed the provisions for contribution under the security laws as indications that Congress would probably include similar provisions in the antitrust laws if those laws were being drafted today.[37] Additional arguments in opposition to contribution were rejected even more summarily The court held that fairness required that contribution be allowed so that all violators would be held liable. "We are convinced that the result of automatically prohibiting contribution among antitrust defendants in all circumstances would be to allow a significant number of antitrust violators to escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws."[38]

The next appellate court to consider the issue was the Fifth Circuit Court of Appeals in *Wilson P Abraham Con-*

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30. 15 U.S.C. §§ 77a-77aa (1976).

31. 15 U.S.C. §§ 77b-e, 77j, 77k, 77m, 77o, 77s, 78a-d, 78e-i, 78m-o, 78o-3 to 78hh (1976).

32. "Antitrust acts" is a generic term for congressional acts dealing with monoplies and combinations in restraint of trade. The term is often used to refer to the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27, jointly.

33. 298 F Supp. at 1345-46.

34. For a list of the other district court cases, *see* Jacobson, *supra* note 17, at 217 n.4.

35. 594 F.2d 1179 (8th Cir. 1979).

36. *Id.* at 1183-85 (These reasons were: (1) congressional intent and inaction; (2) plaintiff's control of the lawsuit; (3) deterrent to settlement; (4) greater complexity; and (5) elimination of deterrence.).

37. *Id.* at 1183-84. The dissent, however, argued that since Congress has had opportunity to counteract the lower court decisions against contribution, but has chosen not to do so, the courts should not act instead. *Id.* at 1190 (Hanson, J., dissenting in part).

38. *Id.* at 1185.

struction Corp. v. Texas Industries, Inc.[39] After reviewing and rejecting appellant Texas Industries' arguments in support of contribution,[40] the court decided that the policy reasons advanced by proponents of contribution were too inconclusive, and stated that "to forge a new rule with questionable benefits and such possible detriments is a bad practice."[41] The court felt that a no-contribution rule served the deterrence purpose of the antitrust laws,[42] and concluded by pointing out that Congress is "a forum better suited to evaluation of the competing interests and policies involved."[43]

Although commentators have discarded as insubstantial any suggestion of waiting for Congress to act,[44] the federal courts have generally decided that changing the common law rule would be inappropriate without a congressional evaluation of each of the policy reasons advanced. Even the Eighth Circuit's decision allowing contribution is grounded in what the court perceived Congress would do if considering the contribution question today.

C. The Attempt to Resolve the Conflict

The lower federal courts and various commentators have argued the policy reasons for and against allowing contribution where not expressly provided for in a regulatory federal statute. In *Northwest Airlines, Inc. v. Transport Workers Union,*[45] decided immediately prior to *Texas Industries,* the United States Supreme Court addressed the contribution issue in the context of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Like the antitrust laws, those statutes include no express provision for contribution when two or more parties have violated the statutes.[46] The Court rejected the equity and policy reasons advanced in support of contribution, noting that such considerations should be ad-

39. 604 F.2d 897 (5th Cir. 1979).
40. *Id.* at 901-05.
41. *Id.* at 906.
42. *Id.* at 901-05.
43. *Id.* at 906.
44. *See* note 19 and accompanying text *supra.*
45. 101 S. Ct. 1571 (1981).
46. *Id.* at 1580.

dressed to Congress rather than to the courts,[47] and decided that there was neither an implied right to contribution nor a right to fashion federal common law.[48]

In deciding *Texas Industries* one month later, the Supreme Court applied virtually the same pattern of analysis to decide the same question in an antitrust context. The Court affirmed the circuit court's denial of contribution without evaluating the policy reasons on each side, basing its decision upon statutory interpretation and common law principles.

1. Statutory Interpretation

As early as 1584, the Court of Exchequer set forth basic standards for statutory interpretation:

> [F]or the sure and true interpretation of all statutes ., four things are to be discerned and considered:
> 1st. What was the common law before the making of the Act.
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> 4th. The true reason of the remedy.
> And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to add force and life to the cure and remedy according to the true intent of the makers of the Act [49]

The United States Supreme Court reflected this common law when it listed standards for statutory interpretation in *Cort v. Ash*:[50]

> 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

47. *Id.* at 1578-80, 1584 n.41.

48. *Id.* at 1582, 1584.

49. Heydon's Case, 76 Eng. Rep. 637 (K.B. 1584), as cited in Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 757 (1940).

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

> 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?[51]

These four factors are to be addressed when determining congressional intent.[52]

Because neither Texas Industries nor the respondents alleged any express right to contribution,[53] the Court looked for an implied right to contribution,[54] focusing on the intent of Congress.[55] Considering the statute in its entirety,[56] the Court found the overall purpose to be "an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."[57]

The Court further ruled that not only did Congress' silence on the contribution issue fail to create in Texas Industries a right to a private cause of action,[58] but the activities of Texas Industries constituted precisely the behavior "Congress intended to regulate for the protection and benefit of an entirely distinct class."[59] Had Texas Industries been a member of the protected class, a private remedy may have been allowed.[60]

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51. *Id.* at 78 (emphasis and citations deleted).

52. *See* 101 S. Ct. at 2066, and *Northwest Airlines,* 101 S. Ct. at 15.

53. 101 S. Ct. at 2066.

54. For an analysis of recent Supreme Court trends in statutory interpretation regarding implied causes of action, *see* Note, *A New Direction for Implied Causes of Action,* 48 FORDHAM L. REV. 505 (1980).

55. 101 S. Ct. at 2066.

56. A statute should be construed as a whole, not in small sections. *See, e.g.,* NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); 2A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1973).

57. 101 S. Ct. at 2066.

58. "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979).

The *Texas Industries, Inc.* Court also noted a strong "presumption that a remedy was deliberately omitted," quoting Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1584 (1981), because, in over ninety years, the statute had not been amended to allow contribution. 101 S. Ct. at 2069. *Contra Professional Beauty Supply, Inc.,* 594 F.2d at 1183-84.

59. 101 S. Ct. at 2066 (quoting Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37 (1977), *reh. denied,* 430 U.S. 976 (1977) (emphasis deleted)).

60. *See, e.g.,* Cannon v. University of Chicago, 441 U.S. 677, 693-94 (1979), which cited Cort v. Ash, 422 U.S. 66 (1975), for its holding that a private remedy would be allowed when the statute was created to benefit a particular class, and the plaintiff is

Under the actual circumstances, however, there was no indication that Congress had any interest in "softening the blow" on violators of the protective statute.[61] From these findings, the Court concluded that no further statutory analysis was necessary for it to find neither an express nor an implied right to contribution in the antitrust laws.[62]

2. Federal Common Law

The Court next considered two areas in which federal courts have authority to develop federal common law: where there is a unique, overriding federal interest,[63] and where Congress has granted authority to the federal courts.[64]

Although federal courts generally apply state law in all matters,[65] certain situations require that federal law be applied.[66] When a desired remedy is "not within the precise scope of remedies prescribed by Congress,"[67] federal courts may fashion federal common law as long as the results are consistent with congressional acts.[68]

The *Texas Industries* Court distinguished between the federal interest in regulating interstate and international trade and the "private suit involving the rights and obligations of private parties."[69] While it recognized that there is a federal interest in the fulfillment of the objectives of the antitrust statutes, the Court felt that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law."[70] The Court also noted that Congress' constitutionally-granted authority to cre-

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a member of that class.

61. 101 S. Ct. at 2066. *See also Professional Beauty Supply, Inc.*, 594 F.2d at 1189 (Hanson, J., dissenting in part): "In making the decision whether contribution is to be permitted or rejected in antitrust actions, the primary inquiry must be which course best furthers the public policy in favor of competition, or least detracts from it."

62. 101 S. Ct. at 2066.

63. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91, 104 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

64. *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

65. *Erie R.R.*, 304 U.S. at 78.

66. 101 S. Ct. at 2067; Illinois v. Milwaukee, 406 U.S. at 103-05.

67. Illinois v. Milwaukee, 406 U.S. at 103.

68. *Id.* at 103-04.

69. 101 S. Ct. at 2068.

70. *Id.*

ate laws in an area does not also automatically give the courts power to develop common law in the absence of congressinal action in that area.[71]

In considering whether Congress authorized the federal courts to create governing rules of law to implement the statute, the Court drew another distinction: the power to shape the mandates of a statute enacted in broad, sweeping language versus the power to develop enforcement and relief remedies arising under the antitrust acts.[72] Although federal common law is sometimes created to determine the consequences of violations of federal statutes,[73] the Court did not feel that such powers had been granted the federal courts under the antitrust acts.[74] Citing *Northwest Airlines, Inc.*,[75] the Court stated that "[i]n almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has not decided to adopt."[76]

III. ANALYSIS

Initially, it appears that the Court simply chose not to deal with the extremely complicated and necessarily extensive evaluation of the broad policy reasons that must be considered before determining whether contribution should be allowed under the antitrust laws. Delegating that enormous task to Congress was entirely appropriate under federal common law, which provides that a harsh law is to be remedied by amendment or repeal, not by interpretation.[77] Moreover, "[n]o statute is to be construed as altering the common law, further

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71. The Court was referring here to Congress' authority under article I, § 8 of the United States Constitution to regulate interstate and international trade. 101 S. Ct. at 2068-69.

72. *Id.*

73. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516, 519 (1959); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942).

74. 101 S. Ct. at 2069-70.

75. 101 S. Ct. at 1583.

76. 101 S. Ct. at 2070 (quoting *Northwest Airlines, Inc.*, 101 S. Ct. at 1583).

77. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 336-37 (1950); United States v. Brown, 333 U.S. 18, 25-27 (1948). If this were not the case, the judicial branch would have lawmaking authority superior to that of the legislative branch.

than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."[78] The Court would have overstepped its bounds had it authorized a major change in the law without first deferring to Congress.

Whether the outcome of the case would have been different if the Court had, in fact, based its decision upon the broad policy considerations is impossible to ascertain. The Court carefully avoided any evaluation of the arguments, and neither expressly rejected the arguments favoring contribution nor adopted the arguments opposing contribution.[79] Giving no indication of its own sentiments, the Court stated it was "unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged "[80]

By firmly and clearly stating its intent to adhere to traditional standards of statutory interpretation and development of federal common law, the Court has established precedent for future litigants seeking remedies not expressly allowed by federal regulatory schemes. The Court clearly has no intention of becoming embroiled in a series of evaluations of equitable and policy considerations. It is more likely that the Court will analyze congressional intent and the scope of federal common law to determine whether changes should be made by Congress or the Court. In light of the federal courts' limited ability to fashion federal common law, and the results of the Court's analyses in *Texas Industries, Inc.* and *Northwest Airlines, Inc.*, it is probable that similar questions arising under other federal regulatory statutes will also be deferred to Congress for resolution.[81]

Rather than allowing courts and commentators to guess at congressional intent regarding contribution under federal regulatory statutes, Congress must now state its position clearly if any such right was, in fact, intended. The Court has expressly stated that it will not create a right to contribution

78. Shaw v. Merchants' Nat'l Bank of St. Louis, 101 U.S. 557, 565 (1880). *Accord* Scharfeld v. Richardson, 133 F.2d 340, 341-42 (D.C. Cir. 1942) (legislative purpose to make any changes in the common law must be clearly and plainly expressed).

79. 101 S. Ct. at 2070.

80. *Id.*

81. The impact of congressional action or inaction, and the possible direction of any legislative modifications, is beyond the scope of this note.

where none exists. Thus, if Congress intends to allow contribution, it must state its intent in definite terms before the Court will recognize that right.

IV. CONCLUSION

The Supreme Court has attempted to resolve the conflict as to whether contribution should be allowed under federal regulatory statutes which do not expressly provide for contribution. By deciding that it cannot imply a private right to contribution unless Congress explicitly provides for one, the Court has thrown the ball into Congress' court. Congress must now evaluate the equity and policy factors and determine whether violators of federal regulatory statutes should be entitled to contribution. Whatever the outcome when and if Congress makes that determination, it is unlikely that the Supreme Court, as presently composed, will interfere.

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CRIMINAL PROCEDURE — Fifth Amendment — Requested Instruction on Failure to Testify Required. *Carter v. Kentucky*, 101 S. Ct. 1112 (1981). The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[1] In *Carter v. Kentucky*,[2] the United States Supreme Court held that upon a defendant's request a trial judge must instruct the jury that it should not infer guilt from the defendant's failure to testify. The Court based its decision in part upon *Griffin v. California*,[3] in which it had held that the fifth amendment forbids adverse comment to the jury on a defendant's refusal to testify. The *Griffin* Court found that such adverse comment is an unacceptable "penalty imposed by courts for exercising a constitutional privilege."[4] In *Carter*, the Court held that failure to give a requested "no adverse inference" instruction is a

1. U.S. CONST. amend. V
2. 101 S. Ct. 1112 (1981).
3. 380 U.S. 609 (1965).
4. *Id.* at 614.